IN THE SUPREME COURT OF FLORIDA
CASE NO.: SC03-1856

Lower Tribunal Nos.: 3D00-3400, 3D00-3206, 3D-00-3207, 3D00-3208, 3D00-3210, 3D00-3212, 3D00-3215

HOWARD A. ENGLE, M.D., et al.,

Petitioners,

vs.

LIGGETT GROUP, INC., et al.,

Respondents.
_____/

PETITIONERS, FLORIDA ENGLE CLASS, BRIEF ON THE MERITS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Constitutional Provisions

Statutes

Rules

ISSUES PRESENTED ON APPEAL

I. Whether Post-judgment Decertification, Following a Two-year Trial, Violates Basic Principles of Class Action Law and Strips Floridians of Any Viable Remedy Against the Tobacco Industry, in Violation of Due Process of Law under the Florida and Federal Constitutions?

   A. Whether The Trial Court Did Not Abuse its Broad Discretion in Denying Tobacco's Post-trial Motion to Decertify the Class?

   B. Whether A Class Action Serves the Public Interest?

II. Whether Extinguishment of All Punitive Damages Claims for Floridians Is a Misapplication of Res Judicata and Violates Due Process?

   A. Whether The Trial Court Did Not Abuse its Broad Discretion in Instructing the Jury as to the Applicability of the Master Settlement Agreement and Florida Settlement Agreement? -- Whether The Instructions, as a Whole, Were Fair and Complete?

III. Whether The Trifurcated Trial Plan Was Within the Broad Discretion of the Trial Judge and Comports with Due Process? -- Whether Requiring Individual Compensatory Damages Awards as Predicates for Individual Punitive Damages Awards, Was Error?

IV. Whether The District Court Misapplied Florida and Federal Law Governing of Review of a Punitive Damages Award Challenged as Excessive?

   A. Whether The District Court Improperly Sat as the Seventh Juror on Contested Issues as to Each Tobacco Company's Financial Resources and Ability to Pay a Punitive Damages Award?

V. Whether The Three Verdicts and Judgment Against Liggett and Brooke are Fully Supported by the Evidence?

VI. Whether Post-judgment Narrowing of Class, and Ordering That Defense Judgments Be Entered in Favor of Defendants, Against the Three Class Representatives, Was Error?

VII. Whether Comments of Counsel Did Not Interfere with the Jury's Deliberations and Decisions?

INTRODUCTION

The district court decertified the Florida Class and reversed the final judgment entered pursuant to three jury verdicts in this two-year trifurcated trial in which the jury considered thousands of tobacco documents and the testimony of 157 witnesses.

The evidence presented during the trial portrayed decades of fraud and deceit by the tobacco industry, including the intentional targeting of children for tobacco use, deliberate engineering of its product to create life-long addictions, and its conspiracy of misinformation to undermine the work of public health officials. The evidence in the two-year trial was so compelling that the trial judge wrote:

> If one really examined the entire record in detail of the decades of abuses committed by the defendants upon an ill-informed and unsuspecting public, one could say it was *that concerted behavior on the part of the defendants, over so many years, affecting so many people, that* "shocks the conscience of the court," *not the award itself.*

Engle F.J. at *16 (A.3-4) (emphasis in original).[1]

The trial court, based on a "mountain of evidence" concluded: "[A]fter sitting for two solid years in trial, it is inconceivable that this jury ignored or misconceived the

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[1]*Engle v. R.J. Reynolds Tobacco*, 2000 WL 33534572 (Fla. Cir. Ct.) shall be referred to as *Engle F.J.* (the Final Judgment and Amended Omnibus Order of November 6, 2000) (A.3-4). *Liggett Group, Inc. v. Engle*, 853 So.2d 434 (Fla. 3d DCA 2003), shall be referred to as *Engle II* (A.1). *R.J. Reynolds Tobacco Co. v. Engle*, 672 So.2d 39 (Fla. 3d DCA 1996), shall be referred to as *Engle I* (A.2). The Appendix shall be referred to as "A."

evidence or the merits of the case." *Engle F.J.* at 31. The court below, however, disregarded the findings of the trial court and denigrated the jury's efforts, labeling them a "runaway jury" that "ran amuck", "obviously swept along in lemming-like fashion." *Engle II* at 466-67.

The district court disregarded the evidence and distorted the law. It granted immunity to an industry that "kill[s] more people in this country every year than AIDS, car accidents, alcohol, homicides, illegal drugs, suicides and fires *combined*." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 162 (2000) (Breyer, J. dissenting). The district court decertified the Class post-judgment, after seven years of litigation and after its own 1996 affirmance of a state-wide class. It also extinguished all punitive damages claims based on settlements of unrelated actions brought by Florida and other states for reimbursement of Medicaid expenditures, thereby stripping all Floridians of their claims for punitive damages. The district court opinion retroactively narrowed the *Engle* Class, and ordered that judgments be entered against class representatives whose causes of action arose after the new cut-off date, potentially barring the claims of thousands of Floridians who relied upon the class certification, *Engle I* and *Broin v. Philip Morris,* 641 So.2d 888 (Fla. 3d DCA 1994). The opinion should be quashed and the verdicts and judgment reinstated.

STATEMENT OF THE CASE AND FACTS

On May 5, 1994, Petitioners filed a class action on behalf of sick smokers and their survivors against the tobacco industry. A nationwide class was certified on October 31, 1994 as to all compensatory and punitive damages claims and the district court affirmed on January 31, 1996, but reduced the Class to Florida citizens and residents. *See Engle I* at 41, holding that "our recent decision in *Broin*, involving a similar products liability class action against various tobacco companies clearly compels this result." In reducing the national class action to a state class action, the district court held:

> [W]e conclude that the subject class should simply be reduced to manageable proportions, namely, that the class should be restricted to Florida citizens and residents, rather than United States citizens and residents. In our view, this restriction will drastically reduce the number of class members so that the Florida judiciary can efficiently manage the litigation without undue burden to the taxpayers. . . . [W]ith this modification, the order appealed from is Affirmed.

672 So.2d at 42. Relying on that opinion, legal notice was given to all Floridians, a two-year trial ensued and a final judgment was entered.

On appeal, the district court reversed its earlier decision, decertified the class, barred all punitive damages, found the trial plan "unconstitutional" and in violation of

the *Engle I* mandate[2], ordered that judgments be entered against three class representatives, and acknowledged that "the fate. . . of close to a million Florida residents" rests on these proceedings. *Engle II* at 470.

A. A Brief Summary of the Two-Year Evidentiary Record.[3]

1. <u>Tobacco's Continuing Fraud and Conspiracy to Deceive the American Public</u>. When faced with the growing evidence that tobacco was linked with cancer, each of the tobacco defendants[4] met in New York City in 1954, with their public relations consultant, Hill & Knowlton, and published a full page *Frank Statement to Cigarette Smokers* in January, 1954, in over 400 newspapers throughout the United States (T.27344; 32323; 32650; 32651; PX 3057); (A.55). *A Frank Statement to Cigarette Smokers* was, frankly, a lie (T.18751-55). The tobacco

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[2]But in 1999 this same court ruled the opposite, denying defendants' motion to enforce mandate, in *R.J. Reynolds Tobacco Co. v. Engle*, 784 So.2d 1124 (Fla. 3d DCA 1999), having *sua sponte* vacated its earlier order that the trial plan did violate the mandate. *R.J. Reynolds Tobacco v. Engle*, 806 So.2d 503 (Fla. 3d DCA 1999).

[3]The Class relies upon the trial court's detailed summary of the evidence in its Final Judgment and Amended Omnibus Order (A.3-4). Due to space constraints, the Class includes an abbreviated summary of the evidence during the two-year trial. A more detailed recitation of the facts is contained within the Class' Answer Brief in the district court (A.6).

[4]Although Liggett was not part of the meeting and the formation of the Tobacco Industry Research Committee, it joined in 1964 and its counsel, Frederick Haas, became a member of the Ad Hoc Committee of Special Projects of TIRC. (PX 1993; PM 400; R.65822).

industry falsely asserted that cigarettes "are not injurious to health" when their own pre-1954 research established that cigarettes presented serious health risks for lung cancer and other diseases (T.13477-78; 13526-27; 13565; 13575; PX 78).

The cover-up continued when the companies pledged to support independent scientific research through the Tobacco Industry Research Committee [TIRC], later known as the Council for Tobacco Research [CTR], to find answers for the American public as to whether smoking cigarettes causes disease. Instead, TIRC and later CTR functioned as a front for tobacco, reassuring the public that smoking was safe, and undermining the work of public health officials (T.16607; 16651-52; 27234-35; 27254-55; PX 3416; PM 445). CTR formed a Special Projects Division, run by private counsel for each tobacco company, whose purpose was to fund scientific research to defend litigation brought by smokers against tobacco companies, and to hide unfavorable scientific research under the attorney/client privilege (T.27210; PX 1993; 4559; PM 425). CTR pressured researchers to avoid implicating tobacco as a cause of disease or death (T.17926-27; 17947-48) and members of CTR became spokespersons for the Industry, appearing in public forums and challenging the growing scientific research linking tobacco to disease (T.10917-18).

Defendants formed the Tobacco Institute [TI] in 1958, to serve as an advocate for the Industry in civic programs and in the media, again denying that cigarettes

caused any diseases or were addictive, despite mounting evidence to the contrary (T.12592-94; 16446; 16753-56; 18582; PX 1071; PX-PI 213). Former U.S. Surgeon General Julius Richmond testified that the TI undermined the issuance of his 1979 Surgeon General's Report by ridiculing the Report at defendants' press conference scheduled the day prior to the Surgeon General's Report's release. TI published its own report, *Smoking and Health: The Continuing Controversy*. (T.11234-35).

The Tobacco Industry, in concert, nurtured a fraudulent debate about tobacco and health, although their own internal tobacco documents established that each defendant knew that cigarettes caused disease and death and that nicotine was highly addictive (T.488-89; 14890-91; 18249; 18341; 21279-80); (A.37-39). Bennett Lebow, the principal of Liggett and Brooke, testified about the "party line" on smoking and health issues -- that he and other tobacco company officials had conspired to lie to public health authorities and the American public for decades (T.13831-39; 13981). Each of the CEOs of the tobacco companies continued the "party line" through Phase I of the trial, testifying that nicotine is not addictive, that any smoker who wants to quit can quit cold turkey, and that cigarettes do not cause lung cancer or any other disease. (T.16246-47; 20798; 20284; 19987; 20901). An official at TI was asked "What percentage of lung cancer victims do you think are smokers?" and he responded "I don't know if any are." (T.20039). The CEO of R.J. Reynolds testified that "It has

never been proven that cigarette smoking has caused a single person to die." (T.16250). When asked if heavy smoking has ever been the cause of any lung cancer deaths, Andrew Tisch, the then Chairman/CEO of Lorillard Tobacco responded "I take the position it has not been proven in a single case." (T.14227) According to the Chairman of Liggett, "I don't believe a woman's health or 'offspring' are going to be affected one iota if she smoked up until the day she gave birth to her child." (T.20967) And according to the Chairman/CEO of CTR, "There is no scientific basis to say smoking causes certain diseases." (T.19863).[5]

Defendants conspired to replace dying smokers with children, systematically targeting children for decades and conspiring to interfere with the efforts of the public health communities in educating children about the dangers of smoking (T.12052-54; 12058; 12129-33; 16324; 16326-28; 17573-79; PX 3013; 4761; 4744; 3024; 3025; 3026; 3016; (A.36, 40). The majority of smokers start at approximately fourteen years of age and lack the maturity to understand the consequences of their actions. (T.22078-79; 12128-33; 12044-45; 12063-64; 12082; 13697-98; 11974-75; 16643-48; 17210; 22078-79; 20943; PX 3208). One R.J. Reynolds representative boasted "[T]he

[5]The Class presented testimony from public health officials, including former U.S. Surgeons General, that cigarette smoking resulted in the deaths of approximately 430,000 Americans and over 30,000 Floridians each year. (T.11192-95; 11200; 13289-90; 14201; 15277-78; 16639-40; 22075; PX 29, A.34-36).

base of our business is the high school student." (PX 947; A. 40).

Public health officials were decades behind the Tobacco Industry in recognizing that nicotine is a highly addictive drug, even more addictive than heroin and cocaine (T. 12283; 13747-48; 11495-96; 12015; 13560). The Industry's early knowledge of addiction was not shared with public health officials, despite the industry's promise in *A Frank Statement* (T. 11559; 12028-30; 13557-58; 13546-47).

Tobacco internal documents revealed that since the 1950's, the industry knew that nicotine is an addictive drug (T. 13546-47; 13557-59; 13477-78; 13505; 13562; PX 3198; 545; 835; 3172; 1950); that cigarettes are a nicotine delivery device (T. 11985-88; 12009-10; 12011; PX 1950; 3280; 3411), and a dispenser for a dose of nicotine (T.12403-04). The companies knew a cigarette pack is a day's supply of nicotine and a storage container for nicotine (T.16432; 18561-64; PX 9) and that people smoke for nicotine. (T.16375; 16480-81; 17727; PX 3262; 3217; 3182; 3198).

Internal tobacco documents further revealed that for decades the industry knew that nicotine addiction can be maintained and enhanced through cigarette design and the manipulation of levels of nicotine (T. 13471-72; 10893; 13475-76; PX 3128; 3383; 264; 249; 250; 3385; 252; 3152; 3084; 3220; CA 96). Defendants also knew for decades that health conscious smokers would be captured by low tar, low nicotine products, although the tobacco industry knew that these products were not safer and

could actually be more dangerous (T.13475-79; 13487; 13505; 13621-22; 13630; PX 3086; 3182; 3072; 3021; 514; 3413; 5323; 14970; 15402; 15411-12; 15992-93). There was technology to design a safer cigarette with less nicotine (T. 11988-89; 11989-90; 11996; 12092-93; PX 1817; 3217), or no nicotine (T. 17084).

Recognizing the need for replacement smokers for those smokers that had died or quit, defendants' lower yield cigarettes provided fraudulent health assurances to smokers and persuaded would-be quitters to keep smoking (T.16326; 16328; 11739-40; 12263; 12064-68; PX 481; 4473; 4530; 4593). Low tar/low nicotine cigarettes were designed to deliver the same amount of tar and nicotine as the high yield, although falsely promoted to do the opposite (T. 13239; PX 3185; 3164; 3140; 3017; 5199; 3215; 3286; 3288; 3213). The companies manipulated levels of nicotine and the dose of nicotine by altering the pH of the cigarettes, thereby converting the nicotine to the free form and creating a greater addictive effect on smokers (T.13612; 13613-14; 13617; 14926-28). For over thirty years the tobacco companies, unknown to the public health community, had researched and altered the chemical forms of nicotine in order to increase the percentage of free base nicotine delivered to smokers (T. 13477-78; PX 3080; 3017; 3385; 3433; 3215; 3056; 3293; 3062; 3213; 291).

Whenever internal tobacco research showed promise in developing a safer cigarette, the projects were either promptly terminated or shipped overseas to Germany

or Switzerland, to hide them (T.17745-54; 17776-80; 18258; 14879; 14897; 14909-13; 15426-27; 16011; 16016-17; 16024). Defendants systematically destroyed all tobacco research and documents that implicated cigarettes as a serious health risk and cause of disease (T.14913-14; 14929-30; 15386-88; 15389). There was a "gentlemen's agreement" among the companies that there would be no testing of *production cigarettes* (those cigarettes actually smoked) within the United States and all such testing must be conducted in Europe to keep it secret. (T.29404; 36705-06; 36712-13; 36741-43; 14913-14; PX 26; 4600). United States data and research were destroyed or shipped abroad and adverse surveys were hidden (T.15382; 15386-89; 15450-51; 15424; 14913-14; 14929-30; 25175). The tobacco industry confounded and obfuscated science in a fashion that was destructive and abusive to the scientific process. (T.23007; 22107; 23084; 23090-91). The industry attacked valid scientific studies linking tobacco with disease (T.23078) and deliberately misled the public health community (T.13547).

2. <u>The Phase I Verdict</u>. The Jury deliberated for seven days and answered ten questions with 242 subparts (A.3a). The jury found that 24 diseases, including subcategories, were caused from smoking cigarettes but that asthmatic bronchitis, infertility and bronchioloalveolar carcinoma (BAC), a type of lung cancer, were not. The jury further found that the defendants' cigarettes were "defective and

unreasonably dangerous"; that each of the defendants (i) made a false statement of material fact with the intention of misleading smokers; (ii) concealed or omitted material information or failed to disclose a material fact concerning or proving the health effects and/or addictive nature of smoking cigarettes; (iii) entered into an agreement to misrepresent information relating to the health effects of cigarette smoking or the addictive nature of smoking cigarettes with the intention that smokers and members of the public rely to their detriment; (iv) entered into an agreement to conceal or omit information regarding the health effects of cigarette smoking or the addictive nature of smoking cigarettes with the intention that smokers and members of the public rely to their detriment; (v) engaged in extreme and outrageous conduct or with reckless disregard relating to cigarettes sold or supplied to Florida smokers with the intent to inflict severe emotional distress; (vi) and that defendants' conduct rose to a level to permit an award of punitive damages (A.3b).

3. **Phases IIA and II B**. The jury considered the compensatory damages claims of class representatives Mary Farnan, Angie Della Vecchia and Frank Amodeo, three long-term heavy smokers. Farnan started smoking at age 10 and contracted lung cancer in 1995. Defendants asserted her lung cancer was BAC, a lung cancer the jury found in Phase I was not caused from smoking. (T.40224-25; 40240) Della Vecchia started smoking at age 11 and died in 1999 from lung cancer that

metastasized to her brain. Defendants asserted it was scar tissue rather than cigarettes that caused her lung cancer and death (T.42681-82). Amodeo was diagnosed with laryngeal cancer in 1987 and has had nothing to eat or drink by mouth since that time, receiving all nourishment through a feeding tube (T.41336; 41339; 41351). Defendants asserted that it was "wood dust" that caused his throat cancer. (T.38740; 41360). The jury awarded compensatory damages to each of the class representatives, tempered by findings of comparative fault (A.3b).

In the punitive damages phase defendants withdrew all financial experts as to the company's financial resources and ability to pay. The trial court noted:

> [N]one of the defendants produced an "expert" witness. The Court would have welcomed and. . . valued the opinions of defendants' financial experts, and/or corporate financial officers. This would have been a great help in resolving, not only for the Court, but also the jury, the financial condition of the various defendants' companies.

Engle F.J. at *22. The jury found each defendant liable in differing amounts for a total of $144,871,473,549.

STANDARD OF REVIEW

This Court should review *de novo* each of the rulings of the district court. *Escobar v. State*, 699 So.2d 988, 995 (Fla. 1997). All factual determinations by the trial court should have been subject to an abuse of discretion standard. The district court erroneously applied a *de novo* standard of review. This Court should apply an

abuse of discretion standard to the trial court's rulings on: class decertification (*W.S. Badcock Corp. v. Myers*, 696 So.2d 776 (Fla. 1st DCA 1997)); the MSA jury instruction (*Goldschmidt v. Holman*, 571 So.2d 422, 425 (Fla. 1990)); the trifurcated trial plan order (*Microclimate Sales v. Doherty*, 731 So.2d 856, 858 (Fla. 5th DCA 1999)); the motion for remittitur/ motion for new trial (*Cloud v. Fallis*, 110 So.2d 669 (Fla. 1969)); sufficiency of evidence as to Liggett/Brooke (*Castillo v. E.I. DuPont de Nemours & Co., Inc.*, 854 So.2d 1264, 1277 (Fla. 2003)); motion to strike punitive damages (*Thomas v. Thomas*, 589 So.2d 944, 947 (Fla. 1st DCA 1991)); motion for mistrial (*Murphy v. Int'l. Robotic Systems, Inc.*, 766 So.2d 1010, 1031 (Fla. 2000)); and standing of class representatives/scope of the class (*Arvida/JMB Partners v. Council of Villagers, Inc.*, 733 So.2d 1026, 1030 (Fla. 4th DCA 1998)). This Court should conduct a *de novo* review of the trial court's punitive damages analysis, except that this court should defer to the trial court's factual findings. *See Cooper Industries v. Leatherman Tool Group*, 532 U.S. 424, 440 n. 14 (2001).

SUMMARY OF THE ARGUMENT

In May, 2003, the district court decertified the *Engle* Class, holding that Floridians cannot sue Tobacco as a class; each victim must bring an individual suit for compensatory and punitive damages. *Engle II* was an about-face from *Engle I*, where the same court held in 1996 that class certification was "compelled" by its earlier

decision in *Broin v. Philip Morris.*[6] This eleventh hour decertification was unwarranted because it left thousands of Floridians without a remedy. *Tenney v. City of Miami Beach*. There were insufficient grounds for the departure from the *law of the case* (*Fla. Dept. of Transportation v. Juliano*), and the court erroneously applied a *de novo* rather than an abuse of discretion standard of review. *W.S. Badcock Corp. v. Myers.* The decertification of the class action, after close to a decade of litigation, including an appellate opinion certifying the class, and after a two-year trifurcated trial before one jury and entry of a final judgment, was erroneous. *Tenney; Broin.*

The district court improperly granted immunity to the tobacco industry by extinguishing all punitive damages claims in Florida against tobacco companies, holding that the State of Florida had "settled" all Floridians' punitive damages claims in 1997 through the settlement of its Medicaid recoupment lawsuit. This was a misapplication of *Young v. Miami Beach, res judicata* and a violation of due process. *See Young*; *Albrecht v. State* and *Key Citizens v. Florida Keys Aqueduct*.

The district court improperly extinguished the causes of action of thousands of Floridians by retroactively imposing a new 1994 cut-off date for class membership, and ordering that defense judgments be entered against two class representatives whose causes of action accrued after 1994. This was relief not even requested by

[6]Full citations are contained within the Argument section.

defendants and violated the due process rights and the right to a jury trial of the *Engle* Class. *See Diamond v. E.R. Squibb, Southland v. Smith* and *Lance v. Wade*.

The district court served as a seventh juror, re-weighing the evidence against *Liggett/Brooke,* in violation of *Castillo v. E.I. DuPont* and failed to give the trial court the deference due with respect to rulings on argument of counsel, viewing a handful of invited comments out of context. *Murphy v. Int'l. Robotic*; *State v. Jones*. The court below failed to follow *Ault v. Lohr*, erroneously requiring individual compensatory damage awards as a predicate for individual punitive damage awards.

The district court opinion disregards the findings of the trial court and the evidentiary record. It fails to give the requisite deference to the trial court, substitutes its judgment for that of the jury, reevaluates the credibility and weight of the evidence, ignores doctrines of harmless error, invited error, waiver, estoppel and the presumption of correctness of a verdict and misapplies *res judicata* law. It ignores the binding precedent of *Broin*, side-steps its earlier *Engle I* decision by holding that the *law of the case* does not apply to class actions, and reviews each issue *de novo*, although Florida law requires review by an abuse of discretion standard. The district court also fails to apply the U.S. Supreme Court *BMW v. Gore/State Farm* criteria for the review of a punitive damages award challenged as excessive under the U.S. constitution.

Disagreement with the size of the verdict did not give the district court the right to abandon long-established rules of substantive law and nearly every appellate review principle.

ARGUMENT

I. Post-judgment Decertification, Following a Two-year Trial, Violates Basic Principles of Class Action Law and Strips Floridians of Any Viable Remedy Against the Tobacco Industry, in Violation of Due Process of Law under the Florida and Federal Constitutions.

The district court's disagreement with the verdict did not justify post-judgment decertification. The trial court denied defendants' motion for decertification, finding:

> . . . [A]fter having sat through the enormous complexities involved in this trial, it is self-evident that any trial would have to involve similar proceedings. And if there were to be individual trials, it is inevitable that the common issues of defendants' conduct would become a predominant aspect of each trial, which could result in conflicting verdicts, thus proving that common issues become the most prominent aspect of this case. . . . [C]laimants' rights are preserved through this action which otherwise would have precluded tort claimants from their day in court and many claimants who would never live to see their cause litigated nor have the opportunity to receive compensation have had an opportunity for redress. *Engle F.J.* *11, 12.

A. The Trial Court Did Not Abuse its Broad Discretion in Denying Tobacco's Post-trial Motion to Decertify the Class.

The district court failed to apply the appropriate abuse of discretion standard and reviewed the denial of decertification without deference to the trial court. *See Florida Dep't. of Agric. and Consumer Servs. v. City of Pompano Beach*, 829 So.2d

928, 929 (Fla. 4th DCA 2002) ("[a]bsent an abuse of that discretion, the trial court's order must be affirmed"); *North Florida Women's Health & Counseling Services, Inc. v. State*, 866 So.2d 612, 626 (Fla. 2003) ("application of the wrong standard of review may tilt the playing field and irreparably prejudice a party's rights.")[7]

The criteria for decertification following a trial on common issues and entry of a final judgment is different from the criteria governing initial class certification proceedings. *See Langley v. Coughlin*, 715 F.Supp. 522, 552-53 (S.D. N.Y. 1989). Rule 1.220(d)(1) Fla.R.Civ.P. provides that "[a]n order under this subsection may be conditional and may be altered or amended before entry of a judgment on the merits of the action." Trial courts routinely decline to decertify cases at late stages of the proceedings, after legal notice has been disseminated to the class and class members relied to their detriment; late decertification has been reversed under far less compelling facts. See *Birmingham Steel Corp. v. Tennessee Valley Auth.*, 353 F.3d 1331, 1337

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[7]The district court further erred in finding that class certification violated Rule 1.220(a), and specifically "commonality" (*Engle II* at 445), where defendants failed to raise any points in *Engle I* "challenging the trial court's determination that the basic prerequisites for class representation under Fla.R.Civ.P. 1.220(a) have been satisfied in this case") *Engle I* at 40-41. Nor did the defendants in *Engle I* challenge class treatment for entitlement to punitive damages and the award of punitive damages (A.14-16), although class treatment of the punitive conduct of the Industry was the very purpose for class certification (A.15, 19). This constituted an abandonment and waiver of those issues. *See Fla. Dept. of Transp. v. Juliano*, 801 So.2d at 101, 107 (Fla. 2001).

(11th Cir. 2003) ("earlier certification of the class could have triggered reliance among members of the class, such that the decertification could have created an injustice"); *Woe v. Cuomo*, 729 F.2d 96, 107 (2d Cir. 1984) (order of decertification during late stage of proceedings reversed because "it is an extreme step to dismiss a suit simply by decertifying a class. . . [where there is] possible prejudice to members of a class who failed or were unable to take independent steps to protect their rights precisely because they were members of the class."); *Scott v. City of Anniston, Ala.*, 682 F.2d 1353, 1357 (11th Cir. 1982) ("[T]o decertify at this late date actually has the effect of denying the class adequate representation rather than ensuring it."); *White v. Bowen*, 835 F.2d 974, 979 (2d Cir. 1987) (motion to amend class denied when it was after entry of judgment); *Langley v. Coughlin*, 715 F.Supp. at 552 ("At a minimum, in such circumstances, the court must take into consideration that an eve-of-trial decertification could adversely and unfairly prejudice class members who may be unable to protect their own interests"); *Doe v. Karadzic*, 192 F.R.D. 133, 136 (S.D. N.Y. 2000) (same). *See also*, *Ford v. United States Steel Corp.*, 638 F.2d 753, 754-61 (5th Cir. 1981), reversing a decertification after four years of class certification:

> . . . Although we agree that the requirements of Rule 23 may have been strained by the district court's certification of this class, we believe that the decertification of the class and dismissal of the case may work an injustice on those who may have relied on that certification. . . . Of central concern are those who may have relied on the district court's

> certification. . . Some may not have acted to protect their interests, believing they were properly and adequately represented.

A district court may reconsider the *law of the case* only in "exceptional circumstances" where a prior ruling would result in "*manifest injustice*." *Florida Dept. of Transp. v. Juliano*, 801 So.2d 101, 105-06 (Fla. 2001). Where thousands of Floridians placed their trust in *Engle I* and *Broin* and relied to their detriment, *stare decisis* and *law of the case* are at their "zenith." Absent the most compelling and exceptional circumstances, the *Engle I* decision should never have been reversed and the Class decertified, seven years later, after a two-year trial. *See North Florida Women's Health*, 866 So.2d at 637-38. Nothing significant changed between *Engle I* and *Engle II*. The Court in *Engle II* stated "[A]t the time of certification. . . plaintiffs estimated the class size at approximately 300,000 people. . . . The plaintiffs have now more than doubled their original estimate of class size from 300,000 to at least 700,000" (*Engle II* at *442-43). But defendants in *Engle I* argued that a national class would exceed 50 million Americans; when the *Engle I* court reduced the case to a more manageable Florida Class, eliminating 49 states, defendants argued on rehearing that a Florida Class would still exceed one million Floridians; (A.14, 16, 28, 29). Clearly, there has been no material change of circumstances as to numerosity, that

could form a principled basis for failing to follow *Engle I*.[8]

Choice of law concerns were yet another basis for decertification. However, there are no choice of law issues remaining. The trial court ruled, in a ruling never challenged by defendants, that Florida law would apply to all Floridians whose medical conditions were diagnosed in Florida (A.41). There are no choice of law issues as to the three class representatives whose conditions were diagnosed in Florida. As to a limited number of Floridians who may have been diagnosed elsewhere, given Florida's significant contacts with the claims, Florida law should nonetheless apply. *See Renaissance Cruises, Inc. v. Glassman*, 738 So.2d 436, 439 (Fla. 4th DCA 1999). Subclasses can also be established. *See Broin*, 641 So.2d at 891, n.2; *Paladino v. American Dental Plan, Inc.*, 697 So.2d 897 (Fla. 1st DCA 1997). Finally, if potential choice of law issues cannot be accommodated, the solution is to remove those Floridians from the Class whose medical conditions were diagnosed outside of Florida, thereby avoiding all choice of law issues.

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[8]The district court found that the length of the *Phase IIA* Class Representatives' trial also warranted decertification. *Engle II* at *445 n.8. But that proceeding was longer than a typical absent class member's case because numerous class issues were addressed in these "test" cases. If future compensatory hearings are required, (*see* discussion, *infra*, *Ault v. Lohr*), the proceedings will be streamlined. The trial court noted in its final judgment that future claims of absent class members "will be tried before different judges and different juries" and "will not be concerned with the general causation issues of the previous trials, nor the conduct or behavior of the defendants, or punitive damages." *Engle F.J.* *12.

The opinion found that decertification was required due to recent foreign decisions in smokers' class actions. But none of those cases involved a case that was seven years in litigation, with an appellate decision affirming class certification, legal notice to hundreds of thousands of Floridians, a two-year trial, and entry of a final judgment. *See Owner-Operator Ind. Drivers Ass., Inc. v. Arctic Express, Inc.*, 288 F.Supp.2d 895, 902 (S.D. Ohio 2003) (the mere fact that a court in another circuit recently reached the opposite conclusion as to class certification was not grounds for decertification.) Nor did those jurisdictions have *Broin*, a case never distinguished or even mentioned in *Engle II*. The district court also ignored *In re: Simon II Litigation*, 211 F.R.D. 86 (E.D. N.Y. 2002), where U.S. District Court Judge Jack Weinstein granted national class certification (excluding the *Engle* Class), in a non-opt-out punitive damages only action against Tobacco.

The record reflects that each "change" relied upon by the district court for decertification in *Engle II* was raised, argued and rejected in *Engle I* in opposition to the initial class certification (A.14-16; 27-29). *Juliano, supra*, is dispositive and precludes the *Engle II* decertification. Thousands of Floridians placed their trust and relied on the *Engle I* class certification and *Broin*. The *Engle II* court was not entitled to ignore the *law of the case*, or to decertify a class action after a final judgment was entered, nor does its rationale for doing so have any merit. Accordingly,

decertification should be reversed.

B. A Class Action Serves the Public Interest.

The U.S. Supreme Court has said: "Tobacco use, particularly among children and adolescents, poses perhaps the single most significant threat to the public health in the United States." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. at 161. Absent class treatment, victims of Tobacco have no redress.[9] As the court found in *Broin*, the non-smoking flight attendant nationwide class action against Tobacco, citing *Tenney v. City of Miami Beach*, 11 So.2d 188, 189 (Fla. 1942):

> "The very purpose of a class suit is to save a multiplicity of suits, to reduce the expense of litigation, to make legal processes more effective and expeditious, and to make available a remedy that would not otherwise exist." (*Tenney*) Here, as in *Tenney*, if we were to construe the rule to require each person to file a separate lawsuit, the result would be overwhelming and financially prohibitive. Although defendants would not lack the financial resources to defend each separate lawsuit, the vast majority of class members, in less advantageous financial positions, would be deprived of a remedy. We decline to promote such a result.

In accord,Thayer v. Liggett & Meyers Tobacco Co., 1970 U.S. Dist. Lexis 12796 *60 n.33 (W.D. Mich.) (A.47) (the trial judge in an individual smoker's action suggested

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[9]The district court's assumption that class members will be able to proceed individually, is belied by the fact that tens of millions of Americans have contracted diseases, suffered and/or have died from smoking cigarettes but only a small number of victims have been able to get to trial. It is further belied by defendants' acknowledgment in their Initial Brief in *Engle II* that "although dozens of smokers cases have gone to trial, so far only *one* has resulted in a final pro-plaintiff judgment after the resolution of all appeals." (A.46)

the use of a class action for a fairer proceeding); *Smith v. R.J. Reynolds Tobacco Co.*, 630 A.2d 820 (N.J. Super. Ct. 1993); *Haines v. Liggett Group, Inc.*, 814 F.Supp. 414 (D. N.J. 1993). Decertification, with an invitation to Floridians to file "close to a million" individual lawsuits, conflicts with *Tenney, supra*; and *City of Miami v. Keton*, 115 So.2d 547, 552 (Fla. 1959) ("a quarter of a million cases. . . would create chaos in the courts [a]nd impose a useless and insufferable burden.")

Floridians were unable to proceed individually, even before all punitive damages claims were extinguished in *Engle II*. The record reflects that during the *Engle* trial many Floridians filed motions to "opt-in" the Class because their counsel withdrew from their individual cases. The trial court addressed the problem of multiple motions for readmission, including those filed in proper person (T.31885-93; 33172-81; 35242-46; A.43).[10]

Nor is there any prohibition against class actions seeking punitive damages. The trial plan in each of the following class actions provided for an award of punitive

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[10]Several prominent Florida attorneys including Sheldon Schlesinger (Ft. Lauderdale), Glen Mayfield (Ormond Beach), Woody Wilner and Greg Maxwell (Jacksonville), Robert Kerrigan (Pensacola) and Howard Acosta (St. Petersburg) withdrew from individual cases with the understanding from defense counsel that upon a dismissal, their clients' would be readmitted to the *Engle* Class. (A.43) Judge Kaye recognized "there is no other way for these people to prosecute their case on an individual basis, because of the nature of the case and the fact that they allege that they could not get representation. . . . Sometimes life is cruel." (T.31891).

damages prior to any compensatory damages award. *See Hilao v. Estate of Marcos*, 103 F.3d 767, 782 (9th Cir. 1996); *Jenkins v. Raymark Indus. Inc.*, 782 F.2d 468, 474-45 (5th Cir. 1986); *Watson v. Shell Oil Co.*, 979 F.2d 1014 (5th Cir. 1992); *In re: New Orleans Train Car Leakage Fire Litigation*, 795 So.2d 364 (La. Ct. App. 2001); *In re: Exxon Valdez*, 270 F.3d 1215 (9th Cir. 2001); *Sterling v. Velsicol Chemical Corp.*, 855 F.2d 1188, 1217 (6th Cir. 1988); *Simon II*, *supra*; *Equal Employment Opportunity Comm. v. Dial Corp.*, 259 F.Supp.2d 710 (N.D. Ill. 2003).

II. Extinguishment of All Punitive Damages Claims for Floridians Is a Misapplication of Res Judicata and Violates Due Process.

The district court held:

> The punitive award is precluded by the settlement agreement which resolves all claims asserted by the states, as well as the final judgment resolving the State of Florida's suit against the tobacco industry. . . . Florida's settlement and release, and the *res judicata* effect of the resulting final judgment, preclude the plaintiffs' punitive-damage claims here. *Engle II* at 467-68.

That result was wrong. The State of Florida settled a different claim with different parties for recoupment of Medicaid expenses. *See Agency for Health Care Admin. v. Assoc. Indus.*, 678 So.2d 1239 (1996) and *American Tobacco Co. v. State*, 697 So.2d 1249, 1251 (Fla. 4th DCA 1997). There can be no *res judicata* effect where there is no identity of parties and where the claims were not actually litigated in prior proceedings. *Albrecht v. State*, 444 So.2d 8, 12 (Fla. 1994). "Plaintiffs" are

defined by the Florida Settlement Agreement [FSA] as the Governor, Department of Business and Professional Regulation, the Agency for Health Care Administration, and the Department of Legal Affairs (A.8 at 4-5).

Floridians were not parties to that case.[11] Floridians could not object to the terms of the settlement nor its distribution. To bar all Floridians from punitive damages based on the Florida and Master Settlement Agreements [MSA] violates Article I, §9, Fla. Const. and U.S. Const. Amend. XIV, because those settlements were not by a party which could be said to represent the Class. *See Richards v. Jefferson County*, 517 U.S. 793 (1996) and *Hansberry v. Lee*, 311 U.S. 32 (1940). It also presents conflict with the meaning of due process. *See Keys Citizen for Responsible Gov't, Inc. v. Florida Keys Aqueduct Auth.*, 795 So.2d 940, 948 (Fla. 2001).

Different claims were at issue. Florida's action was filed in 1995 and sought reimbursement of Medicaid expenditures to recover health care costs incurred by the State in treating various diseases of Medicaid smokers. *American Tobacco*, 697 So.2d at 1251. The Settlement occurred more than two and a half years before the

[11]Some of the defendants were different. The State's lawsuit included American Tobacco, RJR Nabisco, BAT, PLC, BATUS Holdings, Philip Morris Companies, Loews, U.S. Tobacco, UST, Hill & Knowlton, and British American Tobacco, none of whom were defendants in the *Engle* trial (A.9 at 1). Liggett and Brooke were defendants in *Engle* but not sued by the state (A.13c).

Engle defendants moved to strike punitive damages based on the MSA and FSA (A.9). If defendants believed that the settlement of Florida's action extinguished punitive damages on behalf of all Floridians they would not have not waited years to assert that position. Prior to the State Settlement, the Palm Beach Circuit Court granted Tobacco's motion for partial summary judgment as to Florida's punitive damages claims, holding that no further amendments to those claims would be permitted (A.13). Thus, since the State did not have the right to recover punitive damages at the time of settlement, it could not possibly have settled that claim and foreclosed all Floridians from recovering punitive damages. *See Medicaid Third Party Liability Act*, Fla.Stat. §409.910 (A.13a, 13b). The specific terms of the FSA precludes its use by defendants in *Engle*:

> [N]either this Settlement Agreement nor any evidence of negotiations hereunder, shall be offered or received in evidence in this Action, or any other action or proceeding, for any purpose, other than in an action or proceeding arising under this Settlement Agreement. (A.8 at 4-5).

See Williams v. Philip Morris, Inc., 48 P.3d 824, 842-43 (Or. Ct. App. 2002) ("By its own terms . . . the settlement was not admissible for the purpose for which defendants seek to use it in this case.")

The decision below misapplied *res judicata* and *Young v. Miami Beach Improvement Co.*, 46 So.2d 26, 30 (Fla. 1950), in its zeal to preclude punitive

damages. *Young*, which precluded the public from reasserting an easement in an oceanfront strip of land that the city had previously litigated and lost, clearly does not bar injured plaintiffs from seeking punitive damages where the State settled a different claim with different parties for recoupment of Medicaid expenses.

A. The Trial Court Did Not Abuse its Broad Discretion in Instructing the Jury as to the Applicability of the Master Settlement Agreement and Florida Settlement Agreement -- The Instructions, as a Whole, Were Fair and Complete.

The district court held:

> [T]he trial court committed further reversible error by instructing the jury not to consider the MSA and FSA with regard to the issue of punishment and deterrence. *Engle II* at 468.

Over Class' objections, the trial court admitted evidence as to the MSA and FSA during the punitive damages phase. Defendants were permitted to argue that each Company had "changed its conduct" and had incurred enormous continuing financial obligations, adversely impacting their ability to pay a punitive damages award in *Engle* (T.57789; A.18; 1333). But Tobacco wanted more -- it wanted to also argue that its voluntary settlement payments constituted punishment and deterrence, precluding a punitive damages award in *Engle*. It is improper to consider sums paid in other settlements as evidence of prior punishment when assessing punitive damages, particularly where the settlement does not specify what portion, if any, is allocable to

punitive damages. *See Dunn v. HOVIC*, 1 F.3d 1371, 1390-91 (3d Cir. 1993); *Simpson v. Pittsburgh Corning Corp.*, 901 F.2d 277, 281-82 (2d Cir. 1990).

The MSA and FSA were brilliant economic and public policy decisions for the tobacco industry -- the antithesis of punishment. Plaintiffs' public health experts testified that defendants' costs incurred from the MSA and FSA were passed on to smokers/consumers through increased prices that actually enhanced the profitability and financial wealth of the tobacco companies. (T.52281-83; 52301-02; 52313; 53003-04) As cigarette sales increase, payments under the MSA increase (T.53621). Lorillard's CEO testified that its net income rose about 85% from 1998 to 1999 and revenue increased 41% (*Engle F.J.* at 56).

Jury instructions must be viewed as a whole; here the instructions were fair and complete and defendants have no cause to complain. The jury was advised four times that it could decline to award any punitive damages (T.57788; 57790; 57785-86). There was no abuse of discretion. *See CSX Transp., Inc. v. Whittler*, 584 So.2d 579, 586 (Fla. 4th DCA 1991); *Holiday v. State*, 753 So.2d 1264, 1269 (Fla. 2000).

III. The Trifurcated Trial Plan Was Within the Broad Discretion of the Trial Judge and Comports with Due Process -- Requiring Individual Compensatory Damages Awards as Predicates for Individual Punitive Damages Awards, Was Error.

In *Ault v. Lohr*, 538 So.2d 454, 456 (Fla. 1989), this court held: "an express

finding of a breach of duty should be the critical factor in an award of punitive damages." The jury found that the companies acted in concert and breached duties *vis a vis* the Class. Those findings constitute a sufficient predicate for awarding punitive damages under *Ault* and *Lassiter v. Int'l Union of Operating Eng'rs*, 349 So.2d 622, 626 (1977). The district court erroneously relied on a concurring opinion in *Ault*. *See Horizon Leasing v. Leefmans*, 568 So.2d 73, 75 (Fla. 4th DCA 1990) (punitive damages can be awarded "where the fact finder has found a breach of duty but no compensatory or actual damages have been proven"); *Russin v. Greminger*, 563 So.2d 1089 (Fla. 4th DCA 1990); (punitive damages awarded in action for tortious interference with business relationships where there were no compensatory damages); *Mortellite v. American Tower, L.P.*, 819 So.2d 928, 934-35 (Fla. 2d DCA 2002) (Plaintiff "was entitled to punitive damages for. . . breach of fiduciary duty, irrespective of a compensatory damage award. . . [A]n express finding of a breach of duty should be the critical factor in an award of punitive damages. . . [W]e conclude [Plaintiff] will ultimately be entitled to a punitive damage award even if, after remand, it is again determined that he is not entitled to compensatory damages.")[12]

[12]Nor did the trial plan violate the district court mandate in *Engle I*. In *R.J. Reynolds Tobacco Co. v. Engle*, 806 So.2d 503 (Fla. 3d DCA 1999) (A.22), the court initially quashed the trial plan order authorizing the class-wide punitive damages trial for an aggregate lump sum. The September 3, 1999 opinion found that the *Engle I* decision required "the issue of damages both compensatory and punitive, must be

Due process is a flexible concept. *Connecticut v. Doehr*, 501 U.S. 1, 10 (1991); *Rosenthal v. Scott*, 150 So.2d 433, 439-40 (Fla. 1963); *Hynes v. New York Cent. R. Co.*, 131 N.E. 898, 900 (N.Y. 1921) (Cardozo, J., "[maxims] must be reformulated and readapted to meet exceptional conditions.") Courts have found that trial plans adjudicating damages on a class-wide basis prior to compensatory damages, comport with due process. E.g., *Sterling, supra*; *Hilao, supra*; *Jenkins, supra*; *In re: New Orleans Train Car Leakage Fire Litigation, supra*; *In re: Simon II, supra*; *Watson, supra*; *In re: Exxon Valdez, supra*.

IV. The District Court Misapplied Florida and Federal Law Governing the Review of a Punitive Damages Award Challenged as Excessive.

The district court, in conflict with *St. John v. Coisman*, 799 So.2d 1110, 1114 (Fla. 5th DCA 2001), failed to consider "the degree of the reprehensibility of defendants' misconduct." Nor did it consider "the disparity between the actual or potential harm suffered by the plaintiff [Class] and the punitive damages award." *State*

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tried on an individual basis." Then that order was vacated, *sua sponte*, by the district court, and oral argument was scheduled. (A.23) The district court issued *R.J. Reynolds Tobacco Co. v. Engle*, 784 So.2d 1124 (Fla. 3d DCA 1999), holding "the motion to enforce mandate is denied," citing *City of Miami Beach v. Arthree, Inc.*, 300 So.2d 65 (Fla. 3d DCA 1973). (A.24) In *Arthree*, the district court denied a motion to enforce mandate stating "it affirmatively appears that the trial court has proceeded properly in this manner." *Id.* at 57. The only conclusion is that the district court found the trial plan consistent with the *Engle I* mandate. The turn-around in *Engle II* is legally and logically inexplicable.

Farm Mut. Auto Ins. Co. v. Campbell, 538 U.S. 408, 418 (2003), citing *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996). The district court held that absent individual compensatory damage awards it was "impossible" to determine "whether punitive damages bear a 'reasonable' relationship to the actual harm inflicted on the plaintiff, and required by. . . *Bankers Multiple Line Ins. Co. v. Farrish*, 464 So.2d 530, 533 (Fla. 1985)" (*Engle II* at 451).[13]

Under both Florida and federal law, compensatory damages are not the *sine qua non* for punitive damages. *Ault*, 538 So.2d at 456 ("[A]n express finding of a breach of duty should be the critical factor in an award of punitive damages"); *State Farm*, 538 U.S. at 418. The Supreme Court noted in *TXO Prod. Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 460-61 (1993):

> . . . [B]oth State Supreme Courts and this Court have eschewed an approach that concentrates entirely on the relationship between actual and punitive damages. It is appropriate to consider the magnitude of the *potential harm* that the defendant's conduct would have caused to its

[13]*Bankers Multiple Line* said just the opposite: "We adhere to that holding. . . 'that there is no rule of law that punitive damages must bear some reasonable relationship to compensatory damages.'" *Id.* at 533. *In accord, Arab Termite & Pest Control of Florida, Inc. v. Jenkins*, 409 So.2d 1039, 1042-43 (Fla. 1982) ("punitive damages. . . are to be measured by the enormity of the offense entirely aside from the measure of compensation to the injured plaintiff.") *See also* Florida Statute §768.73(1)(A) (1994) excluding class actions from any legislative statutory limitations on punitive damages awards. The district court's repudiation of the statute's express exception for class actions, conflicts with *Holley v. Auld*, 450 So.2d 217, 219 (Fla. 1984).

> intended victim if the wrongful plan had succeeded, as well as the possible harm to other victims that might have resulted if similar future behavior were not deterred.

Nor are compensatory damages even required in order to measure harm or potential harm. The Court in *TXO* noted that under West Virginia law a defendant may be liable for punitive damages "even if the jury did not award the plaintiff *any* compensatory damages." *Id.* at 465.[14]

Federal and Florida law are uniform in holding that "the most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant's conduct." *State Farm*, 538 U.S. at 419-20, citing *Gore* at 575; *Owens Corning Fiberglas Corp. v. Ballard*, 749 So.2d 483 (Fla. 1999).[15] The court in *St.*

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[14]Defendants have been on notice for over fifty years that a substantial punitive damages award could be assessed against tobacco companies for the hundreds of thousands of diseases and deaths of Floridians caused by the Industry's egregious misconduct. A comparable "penalty" is the punitive damages award to a single smoker's estate in Oregon of $79.5 million. *Williams v. Philip Morris, Inc.*,2004 WL 1259675 (Or. Ct. App. 2004) (A.58). During the applicable time frames, there have been no monetary limitations on punitive damages recoverable in Florida; class actions were excluded from former Florida Statutes §768.73(1)(a) (1994).

[15]*State Farm* sets forth the criteria for determining reprehensibility, including "whether: the harm caused was physical as opposed to economic; the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; the target of the conduct had financial vulnerability; the conduct involved repeated actions or was an isolated incident; and the harm was the result of intentional malice, trickery, or deceit, or mere accident." *Id.* at 419. Here, each of the indicia for reprehensibility has been met, as reflected by the trial court's application of the *BMW* factors in its final judgment. *Engle F.J.* (A.3).

John, 799 So.2d at 1114, wrote:

> . . . [A] court must look at the evidence adduced in the case in a light most favorable to the plaintiff. The trial court is in a better position than an appellate court to make this kind of assessment, and it would be helpful if it did so first.

And that is precisely what the trial court did in rendering its 67 page final judgment (A.3). But the district court ignored the record and Judge Kaye's findings as to the reprehensibility of Tobacco's misconduct, the reasonable relationship between the punitive damages award and the harm done, and each defendant's financial resources and ability to pay a punitive damages award. The trial court was owed due deference by the district court. *See Ballard* (noting "the deference due to the trial judge, who has had the opportunity to observe the witnesses and consider the evidence in the context of a living trial rather than upon a cold record.") This Court should now conduct the requisite *de novo* review of the trial court's application of the *Gore* factors, particularly the evidence of reprehensibility of defendants' misconduct. If the Court finds the punitive damages verdict to be excessive, then it should enter a remittitur. *See, e.g., Campbell v. State Farm*, 2004 WL 869188 (Utah 2004) (upon remand from the U.S. Supreme Court, the Utah Supreme Court recalculated punitive damages and entered remittitur to $9,018,780.75).

Nor did the district court follow the criteria established by this Court in *Ballard*

for awarding punitive damages. The *Ballard* criteria are strikingly similar to those of *Gore* and *State Farm*. The *Engle* jury instructions included the criteria of *Gore*, *State Farm* and *Ballard*. The jury was instructed to consider the reasonable relationship between the punitive damages award and the harm likely to result as well as the harm that did result from defendants' misconduct; the degree of reprehensibility; the duration of the harmful conduct; any concealment by defendants; the profitability to defendants; the financial condition of each defendant and the impact of a particular judgment; the seriousness of the hazards to the public; the number and level of employees involved; and the duration of the misconduct (T.57786-87). The district court rejected the Rule of *Ballard*, *Gore* and *State Farm* by failing to apply the appropriate criteria for review of the punitive damages award.

A. The District Court Improperly Sat as the Seventh Juror on Contested Issues as to Each Tobacco Company's Financial Resources and Ability to Pay a Punitive Damages Award.

A district court may not substitute its view of the evidence for that of the jury. *Castillo v. E.I. DuPont De Nemours & Co., Inc.*, 854 So.2d 1264, 1277 (Fla. 2003) ("It is a basic tenet of appellate review that appellate courts do not reevaluate the evidence and substitute their judgment for that of the jury"). Here, the district court's disregard for the evidentiary record and the findings of the jury in three jury verdicts, spanning two years of evidence, rose to a level that deprived the *Engle* Class of their

right to a trial by jury. *See U.S. v. Horton*, 622 F.2d 144, 147 (5th Cir. 1980) (the court should not "merely substitute his judgment for that of the jury and thereby deprive the litigants of their right to a jury trial.") Art. I, §22, Fla. Const. The district court improperly accepted as dispositive the CEOs' claimed book value/net worth, in conflict with *Atlas Properties, Inc. v. Didich*, 226 So.2d 684, 690 (Fla. 1969) ("[T]he jury could have reasonably disbelieved the financial statements . . . entered at cost instead of the actual fair market value"); *Tennant v. Charlton*, 377 So.2d 1169, 1170 (Fla. 1979) ("It is the height of naivete to suggest that a sworn statement of ones net worth must be accepted as the final word"); *Int'l Union of Operating Eng'rs v. Lassiter*, 295 So.2d 634, 644 (Fla. 4th DCA 1974) ("[financial resources] encompasses many capabilities and potentials other than naked assets and liabilities.")

The Class presented the testimony of two highly qualified experts who rendered opinions based upon accepted methods of valuation. (*Engle F.J.* at *17-*23; A.31). In contrast, defendants withdrew all financial experts during the punitive damages phase, including each company's comptroller, relying solely on the testimony of CEOs, with limited financial background and enormous self-interest. (A.3 at *22-*28; A.18). The trial court noted in its final judgment "The defendants, although they had listed several financial expert witnesses in their pre-trial documents, declined to call any

of them, nor did they see fit to call any company financial officer or consultant. This record, therefore, is devoid of such proof." *Id.* at *28. "What we have in the instant case is a conflict in the evidence of net worth and actual worth." *Id.* at *29. The district court's rejection of the Class' evidence in the punitive damages phase is inexplicable and wrong.

The district court improperly excluded any consideration of each tobacco company's trademarks, such as *Marlboro, Winston and Kool,* although highly relevant on defendants' financial resources and ability to pay. When Philip Morris' CEO was asked "What is the *Marlboro* trademark worth?", he responded: "I think that it's kind of asking what is the company worth." (T.54152). Yet the district court called book value "net worth" and excluded admittedly valuable trademarks, research and development, goodwill, infrastructure and all of the other valuable intangibles that comprise the value of each tobacco company. Defendants' financial statements contained only shareholders' net equity/book value, a bookkeeping entry that does not reflect a company's financial resources (T.52920).

V. The Three Verdicts and Judgment Against Liggett and Brooke are Fully Supported by the Evidence.

The district court improperly re-weighed the evidence in a *de novo* consideration. *See Castillo,* 854 So.2d at 1277; *Odoms v. Traveler's Ins. Co.*, 339

So.2d 196, 198 (Fla. 1976). Liggett was a member of CTR and TI, Industry controlled organizations that deceived and misled the American public about smoking and health and the addictiveness of nicotine. Bennett Lebow, the principal of Liggett/Brooke testified during the punitive damages phase that he agreed with the jury verdicts in Phases I and II -- the jury got everything "right." (T.55348; A.25). These admissions are binding under Florida law. *Dicus v. Dist. Bd. of Trustees*, 734 So.2d 563, 564 (Fla. 5th DCA 1999); *Curr v. Helene Transp. Corp.*, 287 So.2d 695 (Fla. 3d DCA 1974). He testified that Liggett had known the truth about causation for years and had deceived the public; there was a "party line" as to smoking, health and addiction and that Liggett and the other tobacco companies had conspired to lie to the public health authorities and the American people on these critical issues. Lebow admitted that Liggett should have disclosed the tobacco documents and told the truth earlier (T.13831-39; 13980-81; 13967-68).

The district court erroneously reasoned that since Lebow, Liggett and Brooke cooperated with the State Attorneys General, Liggett must be relieved of all liability for its past misconduct. While Liggett's recent cooperation was a mitigating factor, it did not absolve Liggett from liability. *See Johns-Mansville Sales Corp. v. Janssens*, 463 So.2d 242 (Fla. 1st DCA 1984) (where a legal basis for punitive damages is established, evidence in mitigation is not considered in determining whether the case

is one in which punitive damages may be allowed); *Celotex Corp. v. Pickett*, 490 So.2d 35 (Fla. 1986) (successor corporation takes "bad will" along with goodwill and was liable for punitive damages for predecessor's misconduct).

The Liggett verdict was not inconsistent. Since the three class representatives whose claims were tried during Phase II were not regular smokers of Liggett cigarettes, the jury appropriately found no fault against Liggett and Brooke as to the products liability counts, but found liability for conspiracy and fraud, consistent with its Phase I verdict (A.3b). Indeed, defense counsel for Liggett admitted during closing arguments in Phase IIA that "the fact that these three plaintiffs never purchased a Liggett product does not immediately end your inquiry on these claims" [fraud by misrepresentation, fraud by concealment and the conspiracy claims] (T.49891). While Amodeo was not a regular smoker of *Chesterfields*, he relied on many of the pre-1970 Chesterfield ads with athletes, movie stars and Arthur Godfrey: "Those ads kept me smoking." (T.41418-31; PX 1869-73; 5426; 1021; 1014; 1036; A.42).

The punitive damages verdict is also fully supported by the evidence. The sole financial testimony presented by Liggett was that of Lebow, who controls Vector, the parent of Liggett/Brooke. Any punitive damages award would substantially reduce the value of Lebow's eleven million shares of Vector's stock (T.55372-78; 55380-81; 55418; 55426). Utilizing standard capitalized earnings and comparable sales

methodology, the experts valued Liggett's financial resources at $1.8 billion, substantially more than the verdict of $790 million (T.53017-18).

The opinion contains disparaging remarks about the jury, particularly while addressing the Liggett/Brooke verdicts; yet the court relied on the wisdom of the jury's findings in holding that Amodeo's claims were barred under statutes of limitation. *Engle II* at 455, n.23. The trial court found it "inconceivable that the jury ignored or misconceived the evidence or the merits of the case." *Engle F.J.* *31. Defense counsel repeatedly acknowledged the jury's attentiveness and conscientiousness. (T.36957; 32925-27; 42826; 49686; 49725; 50022; 49689; 32929.)[16] The Phase I jury deliberated over seven days, reviewed thousands of documents, exhibits and their notes. The *Engle* jurors were not "lemmings" that "ran amuck."[17]

VI. Post-judgment Narrowing of Class, and Ordering That Defense Judgments Be Entered in Favor of Defendants, Against the Three Class Representatives, Was Error.

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[16]During Phase I, the juror who would later serve as the foreperson, a high school principal, asked to be excused after seven months of service because of professional and financial concerns. Defendants opposed discharging the juror, arguing that he was "an excellent, able juror", "perhaps the most fastidious note-taker", a "core juror" and that "it would almost be a tragedy" to lose this juror. "Whatever his thinking is, it has been developed as a function of very very carefully listening to the evidence in this case" (T.32925-27). The juror remained.

[17]Lemmings are mindless rodents that commit suicide through mass migration into the sea where they drown. "Amuck" is "possessed with a murderous or violently uncontrollable frenzy." Webster's 9th New Collegiate Dictionary.

Following the adverse verdict in Phase I on liability and entitlement to punitive damages, defendants first attacked the standing of two class representatives, Mary Farnan and Angie Della Vecchia, in an attempt to derail the trial (R.51437-58). In August, 1999, defendants argued for the first time that the cut-off date for class membership should be the date of national class certification, October 31, 1994, contradicting its earlier pronouncements that *Engle* was a Class with no time constraints. The trial court denied defendants' eleventh hour motion. Rulings as to the standing of class representatives or the scope of the class are reviewed for abuse of discretion. *Fla. Dept. of Agric. & Consumer Servs. v. City of Pompano Beach*, 829 So.2d 928, 930 (Fla. 4th DCA 2002); *Aetna Life Ins. Co. v. De Angelis*, 317 So.2d 106, 107 (Fla. 3d DCA 1975). The district court erroneously reviewed these issues *de novo*, giving no deference to the findings of the trial court. Moreover, the district court opinion exceeded what defendants requested, ordering that defense judgments be entered against Farnan and Della Vecchia. Post-judgment narrowing of the Class will have a prejudicial impact on thousands of Floridians whose claims may now be time-barred if judgments against Della Vecchia and Farnan stand.

The October 31, 1994 cut-off date for class membership is belied by defendants' earlier inconsistent litigation positions. In *Engle I*, defendants argued that

the *Engle* Class definition was vague, but never suggested a 1994 cut-off date. *Engle I* rejected defendants' challenge of the Class' definition. *Engle I* at 40-41. Defendants proposed a series of Class legal notices to be published in newspapers throughout Florida. None of the proposed notices suggested a cut-off date for class membership; instead, the notices included all Floridians during all time frames (A.48-49). Defendants obtained dismissals and abatements in individual actions where plaintiffs had lung cancers and other diseases diagnosed in 1997 or thereafter, on the basis that those individuals were *Engle* class members (A.50). Nor was there a 1994 cut-off for class membership during voir dire. Defense counsel excused potential "class member" jurors for cause if the juror or his relative was diagnosed with a tobacco related disease in 1997 or 1998, because "there are no time limitations" in the *Engle* Class (T.1375-77; A.56).

Other examples of defendants' inconsistent litigation positions include their submission before the U.S. Supreme Court, (claiming that Judge Kaye's angioplasty in 1999 made him a class member), describing the *Engle* Class as including "*any smoker or former smoker* who is a Florida citizen or resident and suffers from a disease claimed by Plaintiffs to be smoking-related" (A.51); their petition for a writ of certiorari in the State Medicaid action, describing *Engle* as "a Class consisting of all Florida residents and citizens [that], encompasses all potential claimants in Florida

seeking recovery for alleged smoking and addiction-related injuries" (A.11a). Defendants also stipulated during Phase I for the readmission to the Class of many Floridians who had opted out to pursue individual actions, but then requested to "opt-in" because their counsel withdrew. Many of those actions accrued after 1994. (T.31885-93; 33172-81; 35242-46; A.43).

Defendants' challenge of the class representatives' standing was untimely. Farnan and Della Vecchia were substituted as class representatives prior to the Phase I trial, after full disclosure of their dates of lung cancer diagnosis (A.52-54). Defendants waited fifteen additional months, until after the Phase I verdict, before challenging their standing (R.51437-58). Prior to the Phase I verdict, the defense position had been "We want as many people as possible bound" (A.57); so that "not a single Florida. . . injured smoker in this Class can ever recover punitive damages from any of the defendants in this courtroom" (T.36004-05). This "wait-and-see" attitude has been condemned. *See e.g., Danzig v. Jack Grynberg & Associates,* 161 Cal.App. 3d 1128, 1136-37 (Cal. Ct. App. 1984).

The requisites for class membership, "like a statute of limitations, is subject to waiver, estoppel and equitable tolling." *Zipes v. Trans. World Airlines*, 455 U.S. 385, 392 (1982). The defendants, through their conduct and inconsistent litigation positions, waived any cut-off dates for class membership. *In accord, Birmingham*

Steel Corp. v. Tennessee Valley Auth., 353 F.3d 1131, 1341 (11th Cir. 2003) (Judicial estoppel is "an equitable doctrine that promotes the integrity of the judicial process by prohibiting parties from deliberately changing positions according to the exigencies of the moment"); *New Hampshire v. Maine*, 532 U.S. 742, 749-50 (2001) ("Judicial estoppel. . . prevents parties from 'playing fast and loose.'") Changing the rules and establishing a new cut-off date after nine years of litigation, is wrong. *See Vizcaino v. U.S. Dist. Ct. for the Western Dist. of Washington*, 173 F.3d 713, 721 (9th Cir. 1999) (court rejected Microsoft's attempt to "substantially narrow the membership of the class" following an appellate mandate and decision on the merits.)

It was error to order that judgments be entered against class representatives Farnan and Della Vecchia because their diseases were diagnosed after the revised cut-off dates.[18] *Diamond*, 397 So.2d at 672; (Article I, §21, Fla. Const. guarantees access to courts); *Southland Corp. v. Smith*, 426 So.2d 1182, 1183 (Fla. 5th DCA 1983) (denial of due process to enter defense judgment without giving litigants the right

[18]It was also error to order that judgment be entered against Amodeo. The trial court properly found that application of statutes of limitation would deprive Amodeo of a remedy without due process of law. *Diamond v. E.R. Squibb & Sons, Inc.*, 397 So.2d 671, 672 (Fla. 1981); *Pulmosan Safety Equipment v. Barnes*, 752 So.2d 556 (Fla. 2000) (litigants cannot be deprived of their causes of action prior to actual discovery of the misconduct causing the injury). A defendant is estopped from asserting the statute of limitations to gain an advantage from his own wrongdoing. *Tanner v. Hartog*, 618 So.2d 177, 185 (Fla. 1993) (Kogan, C.J. concurring).

to prove his case upon remand); *Palm Shores, Inc. v. Nobles*, 5 So.2d 52 (Fla. 1941) (denial of due process to bar claims without providing Plaintiffs "an adjudication on the merits"). Under Florida law, all Floridians' statutes of limitation are tolled. *See Lance v. Wade*, 457 So.2d 1008, 1011 (Fla. 1984) (following class decertification "purchasers should not be subject to the defenses of the statute of limitations or laches").

VII. Comments of Counsel Did Not Interfere with the Jury's Deliberations and Decisions.

This Court has recognized "the superior vantage point of the trial judge" who was on the scene and is in the best position to determine the impact, if any, of argument of counsel on the jury and has ordered the abuse of discretion standard to be applied because the "trial judge is in the best position to determine the propriety and potential impact of allegedly improper closing argument." *Murphy v. International Robotic Systems, Inc.*, 766 So.2d 1010, 1031 n. 25 (Fla. 2000). The trial judge here was crystal clear:

> The Court has carefully considered the Motion for Mistrial in this Cause and has determined that curative instructions to the jury and/or motions to strike have been granted as requested by the movant, for most of the motions, and in any event the cumulative effect of the alleged error, was not in the opinion of the Court, sufficient to have so influenced the jury as to affect the outcome of the case considering the length of the trial, the number of witnesses presented, the quality and quantity of the

> testimony, the huge amount of documentary evidence, and specifically the substance of the alleged remarks. The jury in this case rendered three verdicts, each based upon a mountain of evidence over a period of two years in three separate trials. The Court feels confident, that although some remarks of counsel may have been uncalled for, or subject to objection, they were not so egregious as to require a new trial.

Engle F.J. at *7. The trial court further found that the jury "did not evince any prejudice, passion or corruption in rendering its verdict." *Engle F.J.* *31. The district court failed to provide the proper deference to the trial court's findings, applying an improper *de novo* standard of review rather than the requisite abuse of discretion standard. Defendants' trial strategy, was to defend the case by convincing the jury that tobacco manufacturers should not be liable for selling a legal product with congressionally mandated warnings ("Can a plaintiff in 1999 seriously come into this courtroom and suggest that manufacturing a legal product is beyond all bounds of decency, atrocious and utterly intolerable?" "Manufacturing, advertising, and marketing a product that our society has told us is a legal product. . . cannot be behavior which goes and fits into [the verdict form]" "The Attorneys General wanted to be certain that the tobacco companies would actually be able to stay in business to sell a legal product") (T.37523; 37390; 51101).[19]

[19]But legality was never an issue since the legality of an act does not insulate it from tort liability. See *McCarthy v. Olin Corp.*, 119 F.3d 148, 163 n. 14 (2d Cir. 1997). Nor did Congress intend for tobacco companies to be immune from liability for selling "a legal product." *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992).

Counsel properly used Civil Rights examples as an analogy of where "legality" of the product - cigarettes - was not dispositive of the issue; being legal did not make defendants' conduct "right." There is wide latitude in closing arguments and the analogies were appropriate. *See Street v. State*, 636 So.2d 1297, 1303 (Fla. 1994) (counsel's argument may include references to and quotes from the Bible); *Paramore v. State*, 229 So.2d 855, 860-61 (Fla. 1969) ("Counsel should not be so restricted in argument as to prevent references by way of illustration to principles of divine law relating to transactions of men as may be appropriate to the case.")

Class Counsel did not pander; the defendants did, calling an African American employee (Gertrude Bourgeois) as a damage control witness, a woman who had never testified or given a deposition in a tobacco case, and who offered this response to a question about difficulty in marketing to local stores: "[O]n several occasions, in the small little areas that I would service, I was greeted at the front door and I was told, 'Nigger, you cannot service this store.'" (T. 56206). Defense counsel gratuitously

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The Class filed a motion in limine to prohibit this argument because it was misleading. (A.44-45); (T.37467; 37452; 37449). Defendants "legality defense" is apparently standard trial strategy, judging from a recent opinion affirming a punitive damages award after remand from the U.S. Supreme Court, in *Williams v. Philip Morris*, 2004 WL 1259675 (Or. Ct. App. 2004): "Defendant argued that Oregon cannot punish it. . . for selling a lawful product. . . . [T]he punitive damages award was based not simply on defendant's sale of cigarettes but on its using fraudulent and deceptive means in order to do so." (A.58 *27).

asked the employee if she worked in Los Angeles during "the Rodney King time" (T. 56210). She was also used as a *raison d'etre* to announcing that Garth Reeves "was the recipient" of the "Kool Achiever Award." (T. 56213). At a sidebar conference, the trial judge reacted, stating "This courtroom is incensed and it should never have happened" (T. 56213-14). Defendants also attempted (unsuccessfully) to call a series of African American witnesses who had no relevant testimony i.e., the Mayor of Macon, Georgia (where one juror was born and raised), Garth Reeves, the publisher of The Miami Times and Mattie Mack, a small tobacco farmer (T. 61995-98).

The majority of the comments of counsel that are referred to by the district court occurred during Phase I, *over a year before the jurors deliberated in Phase IIB* and determined their punitive damages award.[20] The district court's view that counsel "personally vouched to the jury that the defendants would not go bankrupt" and was "urging the jury to assume any award would be payable in installments over decades

[20]Multiple personal insults were hurled by defendants at Class Counsel, who were accused, in the presence of the jury, of conducting a "heresy trial" (T. 36880-81; 36955); distorting and misrepresenting documents (T. 36808); having no interest in "truth or justice or in exposing massive wrongdoing" "This case is about money" (T. 37161; 37246; 37348; 36786); everything the Class did was in an effort to "win a larger pot of money" (T. 36960); "Mr. Rosenblatt does not seek truth, he does not seek fairness and he does not seek justice. He only seeks money" (T. 57186-87).

into the future," is out of context.[21] Counsel's argument to the jury that "under the instructions you get and based on the evidence and testimony you have heard in this case, I represent to you. . .", was not counsel's personal voucher but rather a figure of speech such as "I think" or "I believe". *See Murphy*, 766 So.2d at 1029, approving *Forman v. Wallshein*, 671 So.2d 872 (Fla. 3d DCA 1996).

It was defendants who injected the MSA and FSA into *Engle*, and the concept of a payout (T.51050; 51088-90). Commencing with opening statements and continuing thereafter, Tobacco argued that in contrast to the MSA, where Tobacco's payments spanned 25 years, defendants must pay a punitive damages verdict in *Engle* "immediately" "in a single lump sum amount" (T.51101-03; 53183; 54803-04). The trial court's reaction was that it was unfair to mislead the jury by defendants' false assertions:

> The Court: We are not telling the jury a lot of stuff. We are not telling the jury, for example, if they come up with an award, no matter what it is, the only money that the defense has to come up with is $100 million for an appeal. . . . I think to mislead [the jury] and say 30 days from the time of the verdict is wrong. If you want me to explain to them the techniques of what is going on, you know, I'll do that. T.53063-64.

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[21]The opinion fails to consider any of Class Counsel's comments in context. *See State v. Jones*, 867 So.2d 398, 400 (Fla. 2004). The opinion is filled with "partisan rhetoric" derived from its almost verbatim adoption of defendants' *Engle II* briefs (A.7; 5 at 7-21). This Court has condemned a similar practice by trial judges. *See Perlow v. Berg-Perlow*, 2004 WL 583130 *15-16 (Fla. 2004) (Lewis, J. specially concurring).

Tobacco declined the trial court's offer. Defendants received a curative instruction and a special instruction at the conclusion of the evidence, advising the jury that it was only the "current financial condition and resources" of each defendant that the jury was to consider and "current ability to pay a punitive damages award" and specifically "not whether a defendant can pay using a payout or an installment plan." (T.57789). The district court disregarded settled Florida law that a jury is presumed to follow the instructions given to them. *See Carter v. Brown & Williamson Tobacco Corp.*, 778 So.2d 932, 942 (Fla. 2001). The punitive damages instructions, as a whole, were fair and complete. *Holiday*, 753 So.2d at 1269. Defendants cannot complain of alleged error that was clearly invited. *See Barwick v. State*, 660 So.2d 685, 694 (Fla. 1995); *Dufour v. State*, 495 So.2d 154, 160-61 (Fla. 1986); *State v. Mathis*, 278 So.2d 280, 281 (Fla. 1973); *Rodriguez v. State*, 2004 WL 93942 *8 (Fla. 3d DCA 2004).

In the context of two years of litigation, with over 57,000 transcript pages, 23 days of opening and closing statements during three phases, where defense objections were sustained and curative instructions were given, and where the evidence of defendants' guilt was overwhelming, any alleged error contained within a handful of comments, is harmless and invited. *See Murphy*, 766 So.2d at 1013 n.2; *State v. Compo*, 651 So.2d 127, 130 (Fla. 2d DCA 1995); §59.041, Fla. Stat. (2001).

CONCLUSION

The Florida *Engle* Class most respectfully requests that this Court quash the decision of the district court and reinstate class certification, the three jury verdicts and the final judgment. If this Court determines that the punitive damages verdict is excessive, then the Class requests that this Court enter a remittitur, pursuant to the criteria in *Ballard*, *Gore* and *State Farm*.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the Petitioners' Brief on the Merits was hand delivered to Norman Coll, Esquire, Shook Hardy & Bacon, LLP, Miami Center, Suite 2400, 201 South Biscayne Boulevard, Miami, FL 33131-2312 this 14th day of June, 2004 and delivered by Federal Express to all other counsel on the attached Service List.

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief complies with the font requirements of Rule 9.210(a)(2) of the Florida Rules of Appellate Procedure.

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