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Case No. SC13-139
L.T. No. 1D11-3724

IN THE SUPREME COURT
STATE OF FLORIDA

LUCILLE RUTH SOFFER,

Plaintiff/Petitioner,

v.

R.J. REYNOLDS TOBACCO COMPANY,

Defendant/Respondent.

On Review from a Decision of the
First District Court of Appeal

ANSWER BRIEF OF RESPONDENT R.J. REYNOLDS TOBACCO COMPANY

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STATEMENT OF THE CASE

This appeal presents the question whether members of the class prospectively decertified in *Engle v. Liggett Group, Inc.*, 945 So. 2d 1246 (Fla. 2006), may recover punitive damages on claims for strict liability and negligence. In *Engle* itself, the class did not seek punitive damages for such claims in the first phase of the *Engle* trial. And when the class belatedly sought to do so in the second phase—after a jury had already returned a verdict on significant liability-related issues—the trial court held that it could not, and instructed the jury not to award punitive damages on such claims. Accordingly, the individual class representatives whose claims were tried to final judgment in *Engle* were not allowed to seek punitive damages on such claims. And neither the class itself, nor those individual class representatives, appealed the trial court's ruling limiting punitive damages to the intentional-tort claims.

In this case, the First District held that individual progeny plaintiffs, like the class and the individual class representatives in *Engle* itself, cannot seek to recover punitive damages on claims for strict liability and negligence. The court reasoned that strict-liability and negligence claims with a demand for punitive damages attached to them are fundamentally different from strict-liability and negligence claims without such a demand, and thus that equitable tolling could not extend to the latter. The court further reasoned that progeny plaintiffs, who obtain signifi-

cant litigation advantages by choosing to proceed within the framework established in *Engle*, must accept the burdens as well as the benefits of *Engle* class membership. The First District's decision is sound, and this Court should affirm it.

A. *Engle* Class Proceedings

1. The *Engle* class action was filed in 1994. As modified on appeal, the class definition included all Florida smokers (and their survivors) who contracted diseases caused by an addiction to cigarettes containing nicotine. *R.J. Reynolds Tobacco Co. v. Engle*, 672 So. 2d 39 (Fla. 3d DCA 1996). The class raised various tort claims against the leading domestic cigarette manufacturers, including claims for strict liability, negligence, fraudulent concealment, and conspiracy.[1] However, the class sought punitive damages only on its intentional-tort claims. *See Liggett Grp., Inc. v. Engle*, 853 So. 2d 434, 453 (Fla. 3d DCA 2003), *aff'd in part & rev'd in part on other grounds*, 945 So. 2d 1246 (Fla. 2006); *Engle* Am. Class Action Compl. for Compensatory and Punitive Damages ¶¶ 103, 125, 135, 154(c) (Pet. App. 45–46, 49–50, 52, 58); *Engle* Trial Tr. 27561 (Mar. 12, 1999) (Pet. App. 69) (class counsel acknowledging that the complaint "asked for punitive damages for

[1] The class also raised claims for fraudulent misrepresentation, conspiracy to commit fraudulent misrepresentation, and intentional infliction of emotional distress. This Court eliminated those claims from the case, leaving the concealment and concealment-based conspiracy claims as the only intentional-tort claims available to progeny plaintiffs. *See Engle v. Liggett Grp., Inc.*, 945 So. 2d 1246, 1254–55 (Fla. 1996).

fraud, conspiracy to commit fraud, and also for infliction of emotional distress" but "didn't include" other punitive-damages requests).

After certifying the *Engle* class, the trial court developed a three-phase trial plan. Phase I addressed assertedly common questions regarding the defendants' conduct, whether smoking causes various diseases and is addictive, and class-wide entitlement to punitive damages. *See Engle*, 945 So. 2d at 1256. It did not address issues specific to individual plaintiffs, such as legal causation. During the lengthy Phase I trial, which took place between October 1998 and July 1999, the class sought to put at issue virtually all of the tobacco industry's conduct dating back at least to 1953. *See Engle v. R.J. Reynolds Tobacco Co.*, No. 94-08273CA-22, 2000 WL 33534572, *1–*5 (Fla. Cir. Ct. Nov. 6, 2000) (summarizing Phase I evidence) (Resp. App. 1–5).

In the middle of the trial, class counsel signaled a desire to seek punitive damages on the claims for strict liability and negligence, but did not file any motion to do so. *Engle* Trial Tr. 27439–40 (Mar. 12, 1999) (Pet. App. 63–64); *id.* at 27561–62 (Mar. 12, 1999) (Pet. App. 69–70). At the end of Phase I, the jury found that each defendant had sold defective cigarettes, breached duties of care, and concealed information about the health or addiction risks of smoking, both individually and through a conspiracy. *Engle* Phase I Verdict Form (Pet. App. 115–26). The jury further found that smoking is addictive and causes some 20 different diseases,

but does not cause three others. *Id.* (Pet. App. 115–16). Finally, the jury found that the defendants were subject to punitive damages, but did not specify on which counts. *Id.* (Pet. App. 126).

In September 1999, two months after the Phase I verdict but before Phase II commenced, the class attempted to amend the class-action complaint to seek punitive damages for strict liability and negligence. *See Engle* Trial Tr. 38193–204 (Oct. 14, 1999) (Resp. App. 26–40); *id.* at 38340–69 (Oct. 26, 1999) (Resp. App. 43–72). The trial court deferred ruling on the issue. *Engle* Omnibus Order Regarding Phase II Trial 2 (Oct. 28, 1999) (Resp. App. 74).[2]

Phase II consisted of two subparts. In Phase II-A, the same jury found the defendants liable to three named class representatives (Mary Farnan, Frank Amodeo, and Ralph Della Vecchia) and awarded each of them compensatory damages. *Engle* Phase II-A Verdict Form (Resp. App. 76–93). Phase II-B addressed the amount of punitive damages for the class. During the Phase II-B charge conference, class counsel reiterated their request to add a demand for punitive damages to

[2] For the Court's convenience, Reynolds has included additional cited material in an appendix as "other authorities" under Florida Rule of Appellate Procedure 9.220. All of these materials were either contained on a DVD of *Engle* record materials filed with the trial court, *see* R.57:11303, or, in the case of the *Engle* Omnibus Order Regarding Phase II Trial (Oct. 28, 1999), cited in the text above, and the *Engle* Agreed Motion for Discharge of Bond (May 14, 2008), cited below at 7, may be judicially noticed under § 90.202(6), Fla. Stat., as "[r]ecords of any court of this state."

the claims for strict liability and negligence. *Engle* Trial Tr. 56547–48 (July 6, 2000) (Pet. App. 131–32). The court rejected the proposed expansion of these claims and instructed the jury that it "may award punitive damages" on the intentional-tort claims, but "may not award punitive damages based upon strict liability, breach of express or implied warranty or negligence." *Id.* at 57787–88 (July 14, 2000) (Pet. App. 145–46). The jury returned punitive-damages awards totaling approximately $145 billion. *Engle* Phase II-B Verdict Form (Pet. App. 153–54).

During Phase III, new juries were to determine the defendants' liability to the remaining class members and, if liability were established, to determine an appropriate amount of compensatory damages. *See Engle*, 945 So. 2d. at 1258. But as explained below, the defendants appealed before Phase III began.

2. At the end of Phase II-B, the trial court entered a final judgment and amended omnibus order in favor of the class. *Engle*, 2000 WL 33534572 (Resp. App. 1–25). Among other things, the trial court held that there was legally sufficient evidence to support the various jury determinations, rejected a motion to decertify the class, and denied the defendants' motion to remit the punitive-damages award. *See id.* at *2–*31 (Resp. App. 2–23). The final judgment set forth the compensatory damages due to Farnan, Amodeo, and Della Vecchia, and the punitive damages due to the class and immediately payable into the court's registry.

See id. at *31–*33 (Resp. App. 23–25). It further provided for immediate execution of those various judgments. *See id.*

Defendants filed an appeal from the final judgment. Neither the class itself, nor the individual class members whose claims had been adjudicated, filed any cross-appeal. On appeal, the Third District ordered the class decertified and set aside the punitive awards as both premature and excessive. *See Engle*, 853 So. 2d at 442–58. The Third District also reversed the individual judgment for Amodeo on the ground that the statute of limitations barred his claims, and reversed the judgments for Farnan and Della Vecchia on the ground that they had failed to prove class membership. *See id.* at 453 n.23.

3. This Court affirmed in part and reversed in part. It agreed with the Third District that the punitive-damages awards were both premature and excessive. *See* 945 So. 2d at 1262–65. Regarding class certification, the Court concluded that "continued class action treatment for Phase III of the trial plan is not feasible," and it therefore prospectively decertified the class. *See id.* at 1267–68. However, the Court authorized former class members to file subsequent individual actions within one year of its mandate (which ultimately issued on January 11, 2007), thus equitably tolling the statute of limitations, which would otherwise have barred any such actions. *See id.* at 1269. Moreover, the Court held that certain of the Phase I findings—including those of defect, negligence, concealment, and conspiracy—would

have "res judicata effect" in such individual actions. *See id.* As the Court later explained, individual plaintiffs in these so-called "*Engle* progeny" cases thus would "pick up litigation of the approved six causes of action right where the class left off." *Philip Morris USA, Inc. v. Douglas*, 110 So. 3d 419, 432 (Fla. 2013).

Finally, this Court reversed the Third District's order setting aside the individual judgments in favor of Farnan and Della Vecchia, but it affirmed the order setting aside the individual judgment in favor of Amodeo. *See* 945 So. 2d at 1274–76. After the Supreme Court of the United States denied certiorari, *R.J. Reynolds Tobacco Co. v. Engle*, 552 U.S. 941 (2007), defendants paid the final judgments in favor of class representatives Farnan and Della Vecchia. *Engle* Agreed Motion for Discharge of Bond ¶ 6 (May 14, 2008) (Resp. App. 96).

In the wake of this Court's decision, over 8,000 individual progeny cases were filed. More than 3,200 of these cases remain pending in the Florida state courts, and more than 1,100 remain pending in the Florida federal courts.

B. Proceedings In This Case

1. In December 2007, Plaintiff Lucille Soffer sued defendant R.J. Reynolds Tobacco Company for the death of her husband in 1992. Mrs. Soffer alleged that she was a former *Engle* class member, and she raised claims for strict liability, negligence, fraudulent concealment, and conspiracy. R.3:558–60 (Third Am. Compl. ¶¶ 28–41). To render her complaint timely, Mrs. Soffer invoked the tolling

rule established in *Engle* for former class members. R.3:556 (*id.* ¶ 14–15). And to establish the conduct elements of her claims, Mrs. Soffer relied exclusively on the Phase I findings from *Engle*. R.3:556–59 (*id.* ¶ 16–24, 29, 32, 36, 40). But although the class in *Engle* was not permitted to seek punitive damages on its claims for strict liability and negligence, Mrs. Soffer sought to do so here. R.3:560 (*id.* ¶ 43).

Consistent with *Engle*, the trial court instructed the jury that it could award punitive damages only on the claims for concealment and conspiracy, and could not award punitive damages on the claims for strict liability or negligence. T.35:2770. The court also instructed the jury that, if it found Mrs. Soffer to be a member of the *Engle* class, then the *Engle* findings would conclusively establish the conduct elements of her claims (sale of defective cigarettes, breach of a duty of care, and fraudulent concealment of information regarding the health or addiction risks of smoking, individually and through a conspiracy). *See* T.35:2758–67. Accordingly, Mrs. Soffer was not required to prove any of these critical elements of liability. The jury found that Mrs. Soffer was an *Engle* class member; found for Mrs. Soffer on the claims for strict liability and negligence; found for Reynolds on the claims for concealment and conspiracy; and therefore did not reach any question of punitive damages. R.58:11524–26.

2. On appeal, Mrs. Soffer argued that the trial court erred in prohibiting the jury from awarding punitive damages on her claims for strict liability and negligence. The First District rejected that argument and affirmed. It held that progeny plaintiffs, as "part of one of the most uniquely structured and extraordinarily adjudicated cases in the state's history," had to proceed within "the parameters that are framed by that litigation"—which did not permit punitive damages on the strict-liability and negligence claims. *Soffer v. R.J. Reynolds Tobacco Co.*, 106 So. 3d 456, 460 (Fla. 1st DCA 2012). The court based this conclusion on the doctrine of equitable tolling, on considerations of fairness, and on this Court's decision in *Engle* itself. The court explained that "principles of equitable tolling do not revive claims for punitive damages that were not timely presented in the first instance in [*Engle* itself]." *Id.* at 459. As for fairness, the court explained that "progeny plaintiffs receive substantial benefits and must 'take the bitter with the sweet'; they cannot unilaterally accept the enormous benefits of equitable tolling and the res judicata effect of the Phase I findings without accepting the limitations, express and implied," of *Engle* class membership. *Id.* As for *Engle*, the court reasoned that progeny plaintiffs may seek punitive damages "to the same extent as allowed in *Engle*," but "may not tack on additional punitive damage claims lest they unjustifi-

ably broaden the intended scope and effect of *Engle* and change the nature of the litigation." *Id.* at 460–61.[3]

The First District certified as a question of great public importance whether members of the *Engle* class may seek punitive damages on claims of strict liability or negligence. *See id.* at 461. Mrs. Soffer sought review in this Court based on the certification. Subsequently, the Fourth District adopted *Soffer* in *R.J. Reynolds Tobacco Co. v. Ciccone*, 123 So. 3d 604, 616–17 (Fla. 4th DCA 2013), and the Second District rejected it in *Philip Morris USA, Inc. v. Hallgren*, 124 So. 3d 350 354–58 (Fla. 2d DCA 2013). This Court granted Mrs. Soffer's petition for review on February 28, 2014.

SUMMARY OF THE ARGUMENT

I. The First District correctly concluded that *Engle*-progeny plaintiffs cannot seek punitive damages on claims for strict liability and negligence.

A. The First District's decision follows from settled principles of equitable tolling. Courts in this state have uniformly held that *Engle* applied the doctrine of equitable tolling in authorizing former class members to file individual, otherwise-time-barred actions within a year of its decision. Such tolling extends only to claims that are "identical" to those pursued by the class prior to decertification.

[3] In a cross-appeal, Reynolds argued that the trial court had improperly stricken its limitations defense and made various evidentiary errors. The First District rejected those arguments, which are not at issue here.

Here, adding a demand for punitive damages to the strict-liability and negligence claims pursued in *Engle* would dramatically expand those claims. Under Florida law, punitive damages fundamentally alter the underlying claims to which they are attached: they are subject to distinct procedural rules; they serve distinct purposes; they involve distinct rights, duties, and substantive elements of proof; they vest at different times; and, perhaps most importantly, they vastly increase a defendant's exposure. Not surprisingly, despite Mrs. Soffer's semantic quibbling, punitive damages are frequently described as involving distinct "claims." But even to the extent that they are "remedies" rather than freestanding "claims," they nonetheless make the underlying claims vastly different from those that seek only compensatory relief.

Similarly, because of the purposes of statutes of limitations, equitable tolling applies only to the extent that the individual claims raised after decertification concern the same evidence, memories, and witnesses as those pursued by the putative class prior to decertification. A claim for strict liability does not entail any inquiry into the defendant's state of mind, but focuses instead on the objective design features of the defendant's product. Similarly, a claim for negligence focuses on the objective reasonableness of the defendant's conduct. In sharp contrast, a claim or demand for punitive damages is concerned primarily with the defendant's *subjec-*

tive motivation and intent—which necessarily involves different evidence, memories, and witnesses.

B. Application of these settled tolling rules here is compelled by basic notions of fairness. Progeny plaintiffs receive enormous benefits by choosing to proceed under *Engle*, including not only a decade-long tolling rule but also the benefit of Phase I findings that excuse them from having to prove any of the conduct elements of their claims. If progeny plaintiffs are to obtain the substantial benefits of *Engle* class membership, they must in fairness be held to the burdens as well—including the limits on the strict-liability and negligence claims as pursued by the class in *Engle*. A contrary rule would permit progeny plaintiffs like Mrs. Soffer to pursue broader claims than those available to the named class representatives whose individual claims were tried to final judgment in *Engle* itself. This strange result cannot be reconciled with the basic purpose of equitable tolling: to ensure that absent class members receive *equal* treatment as the named class representatives, not to enable them to receive *better* treatment.

Moreover, allowing progeny plaintiffs to pursue expanded claims for strict liability and negligence would be profoundly unfair to the *Engle* defendants. Two decades ago, the *Engle* complaint put defendants on notice that they faced only *compensatory* damages on the class's claims for strict liability and negligence, and that they faced vastly broader exposure to *punitive* damages only on the class's in-

tentional-tort claims. Moreover, Phase I was tried on that understanding, and its findings are now res judicata. Yet now, some 14 years after that trial—and more than six decades after many of the events at issue in *Engle* took place—Mrs. Soffer seeks to increase the defendants' exposure for strict liability and negligence by an order of magnitude. The prejudice to the defendants is obvious.

C. Largely ignoring equitable tolling and its animating principles of fairness, Mrs. Soffer contends that, if this Court had remanded for a new trial instead of decertifying in *Engle*, the class would have been free to amend its complaint to seek punitive damages on its claims for strict liability and negligence. This argument is unconvincing for several reasons. First, because this Court did *not* remand for a new trial, but rather decertified and allowed class members to file individual actions that otherwise would be untimely, the governing doctrine is not amendment, but equitable tolling. Second, and in any event, the class waived any right to file a renewed request to amend by failing to appeal the denial of its initial request to amend during Phase II of *Engle*. Third, the liberal amendment rules do *not* apply where they would prejudice the opposing party, and such prejudice occurs where a plaintiff is permitted to add punitive damages to a claim that has been tried to a verdict on a compensatory-only basis. Finally, amendments are improper if they would introduce new issues or materially vary the grounds of relief, and add-

ing a demand for punitive damages to the strict-liability and negligence claims would do just that.

D. Allowing progeny plaintiffs to seek punitive damages on claims for strict liability and negligence would also conflict with *Engle* and *Douglas*. In *Engle*, this Court held that progeny plaintiffs must show reliance in order to obtain punitive damages. That is an element of liability for concealment and conspiracy, but not for strict liability or negligence. Moreover, *Douglas* confirms that progeny plaintiffs must pick up the litigation "right where the class left off." They are thus not free to pursue claims expanded beyond those pursued by the class in *Engle*.

II. If this Court nevertheless holds that progeny plaintiffs may seek punitive damages on claims for strict liability and negligence, the proper remedy in this case would be a new trial on all issues. Florida law and federal due process both require that any punitive award be based on the same conduct that gives rise to the underlying liability. Because the determinations of liability and punitive damages are therefore intertwined, they must be tried before the same jury.

ARGUMENT

I. *ENGLE* CLASS MEMBERS CANNOT RECOVER PUNITIVE DAMAGES ON CLAIMS FOR STRICT LIABILITY AND NEGLIGENCE

As the master of her own complaint, Mrs. Soffer chose to file this lawsuit not as an ordinary civil plaintiff, but as a putative member of the *Engle* class. By doing so, she secured two critically important benefits. *First*, she obtained the

benefit of the equitable tolling rule crafted by this Court in *Engle*, without which her complaint would have been time-barred for over a decade. *Second*, she obtained the res-judicata effect of the defect, negligence, concealment, and conspiracy findings from Phase I of *Engle*, which allowed her to establish liability without proving any of the conduct elements of her claims (and which even allowed her to establish liability on the defect and negligence claims based on nothing more than a finding of class membership, *see Douglas*, 110 So. 3d at 430). But despite securing these significant litigation advantages, Mrs. Soffer still seeks to expand her strict-liability and negligence claims beyond those pursued and preserved by the class in *Engle* itself. In short, she seeks all of the benefits of *Engle* class membership, but none of the costs.

The First District correctly held that Mrs. Soffer cannot so pick-and-choose only those aspects of *Engle* that are favorable to plaintiffs. The court explained this basic point: "As members of the *Engle* class, progeny plaintiffs are subject to the posture of the case as it exists, which includes the established prohibition on punitive damages for the negligence and strict liability theories as to all class members." *Soffer*, 106 So. 3d at 459. Or, to make the same point more pithily, progeny plaintiffs must "take the bitter with the sweet." *Id.*; *Ciccone*, 123 So. 3d at 617. This conclusion follows from settled rules of equitable tolling, from the basic principles of fairness that underlie those rules, and from *Engle* itself. It even fol-

lows from the waived and inapposite rules erroneously invoked by Mrs. Soffer—those governing the amendment of complaints.

A. Equitable Tolling Does Not Extend To New Demands For Punitive Damages Beyond Those Raised In *Engle*

If not for the tolling rule applied by this Court in *Engle*, Mrs. Soffer's complaint would have been time-barred for over a decade: she filed this wrongful-death action in 2007, R.1:1–9; it is predicated on the 1992 death of her husband, T.8:581–82; and the wrongful-death statute of limitations expires two years from the date of the death, *see* § 95.11(4)(d), Fla. Stat. Accordingly, Mrs. Soffer may pursue her claims only to the extent that they were subject to tolling during the pendency of the *Engle* class action prior to, and one year after, its decertification. And in applying equitable tolling in *Engle*, this Court did not give progeny plaintiffs a blank check to pursue claims and remedies beyond those pursued and preserved by the *Engle* class.

1. Under settled principles of Florida law, the pendency of a class action that is ultimately decertified tolls the statute of limitations only as to claims that are "identical" to those previously pursued by the class. *Hromyak v. Tyco Int'l Ltd.*, 942 So. 2d 1022, 1023 (Fla. 4th DCA 2006) (equitable tolling "requires that the claims in the later action be the same as those alleged in the earlier action"); *see Browning v. Angelfish Swim Sch., Inc.*, 1 So. 3d 355, 362 n.12 (Fla. 3d DCA 2009) (Shepherd, J., concurring in part and dissenting in part) ("[T]his temporal for-

giveness extends only so long as the claims filed in the latter complaint are the same as filed in the earlier complaint."). Courts strictly apply this identity requirement. For example, in *Hromyak*, the Fourth District denied equitable tolling where the class had raised claims arising from a particular merger under the Securities Exchange Act of 1934, and the former class member sought after decertification to raise claims arising from the very same merger under the Securities Act of 1933. *See* 942 So. 2d at 1023 ("the new claims are not *identical* to those asserted in the earlier federal action" (emphasis added)). Similarly, in *Raie v. Cheminova, Inc.*, 336 F.3d 1278 (11th Cir. 2003), the Eleventh Circuit, applying Florida law, denied equitable tolling where the class had raised personal-injury claims arising from exposure to a particular insecticide, and the former class member then sought to raise wrongful-death claims based on the very same exposure. *See id.* at 1282–83.

The strict-liability and negligence claims that Mrs. Soffer seeks to pursue here—expanded to include a new demand for punitive damages—cannot remotely be described as "identical to" or "the same as" the strict-liability and negligence claims pursued by the class in *Engle*. To the contrary, seeking punitive damages fundamentally changes the nature of the underlying claim. This should hardly be surprising, as punitive damages involve completely different forms of proof and can easily increase a defendant's exposure several times over.

In several respects, Florida law treats questions of punitive damages as fundamentally different from other tort-law questions. Punitive damages serve an entirely distinct purpose from compensatory damages: not to make plaintiffs whole, but to punish culpable defendants and to deter similar misconduct in the future. *See, e.g.*, *Owens-Corning Fiberglas Corp. v. Ballard*, 749 So. 2d 483, 486 (Fla. 1999); *W.R. Grace & Co. v. Waters*, 638 So. 2d 502, 504 (Fla. 1994). Punitive damages are also subject to special procedural rules not applicable to claims that seek only compensatory damages: they cannot be pleaded unless the plaintiff proffers a "reasonable basis for [their] recovery," § 768.72(1), Fla. Stat.; Fla. R. Civ. P. 1.190(f); *Globe Newspaper Co. v. King*, 658 So. 2d 518, 519 (Fla. 1995); punitive entitlement must be proven by clear and convincing evidence, § 768.725, Fla. Stat.; and punitive amount is subject to various presumptive statutory caps, *id.* § 768.73. Punitive damages also require proof of distinctive substantive elements in addition to the elements of compensatory liability—specifically, that the defendant acted with "conscious disregard or indifference to the life, safety, or rights of persons." *Id.* § 768.72(2)(b); *see also Ballard*, 749 So. 2d at 486 ("wanton disregard for the rights and safety of others"); *W.R. Grace & Co.*, 638 So. 2d at 503 (similar).

Because punitive damages implicate distinct "rights" and "duties" and "entitlement[s]" of the parties, statutes addressing punitive damages are deemed to be "substantive" rather than "remedial" for purposes of statutory retroactivity. *Alamo*

Rent-A-Car, Inc. v. Mancusi, 632 So. 2d 1352, 1357–58 (Fla. 1994). And the distinct substantive "right" to punitive damages vests at a different time than does an ordinary tort claim. *Compare Maronda Homes, Inc. of Fla. v. Lakeview Reserve Homeowners Ass'n*, 127 So. 3d 1258, 1272 (Fla. 2013) (tort claim vests upon accrual), *with Gordon v. State*, 608 So. 2d 800, 801–02 (Fla. 1992) (right to punitive damages vests upon entry of judgment).

In various contexts, Florida law further underscores the substantive importance of punitive damages by referring to them not only as "remedies," but also as "claims." *See, e.g.*, § 768.72(1), Fla. Stat. (rules for pleading "claim for punitive damages"); *id.* § 768.79(2)(d) (offer of judgment must state amount offered to settle "claim for punitive damages"); *id.* § 627.737(4) (prohibiting "claim for punitive damages" against automobile insurers); *id.* § 400.0237 (rules for "claim for punitive damages" against nursing homes); *id.* § 429.297 (rules for "claim for punitive damages" against assisted care communities); *id.* § 766.104 ("claim for punitive damages" in medical malpractice context); *see also R.J. Reynolds Tobacco Co. v. Martin*, 53 So. 3d 1060, 1064 (Fla. 1st DCA 2010) (describing "punitive damages" as one of plaintiff's "five claims").

All of these special rules reflect the gravity to a defendant of a demand for punitive damages, which can easily increase a defendant's exposure on the claim an order of magnitude. *See, e.g.*, *Ballard*, 749 So. 2d at 483-84 (18-fold increase);

Martin, 53 So. 3d at 1071 (8-fold increase). For all of these reasons, Mrs. Soffer's claims for strict liability and negligence, expanded several times over by her demand for punitive damages, cannot remotely be described as identical to the strict-liability and negligence claims pursued by the class in *Engle*.

2. The Florida cases on equitable tolling derive from federal decisions such as *American Pipe & Construction Co. v. Utah*, 414 U.S. 538 (1974), and *Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345 (1983). Under those decisions, equitable tolling is also limited to claims that "concern the same evidence, memories, and witnesses as the subject matter of the original [class] suit." *Coon v. Ga. Pac. Corp.*, 829 F.2d 1563, 1571 (11th Cir. 1987); *see also Crown, Cork & Seal Co.*, 462 U.S. at 355 (Powell, J., concurring) ("[W]hen a plaintiff invokes *American Pipe* in support of a separate lawsuit, the district court should take care to ensure that the suit raises claims that 'concern the same evidence, memories, and witnesses as the subject matter of the original class suit,' so that 'the defendant will not be prejudiced.'" (quoting *Am. Pipe*, 414 U.S. at 562 (Blackmun, J., concurring)). That limitation is necessary to harmonize equitable tolling with the purposes underlying limitations periods, which are "designed to promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared." *Am. Pipe*, 414 U.S. at 554; *see Johnson v. Ry. Express Agency, Inc.*, 421 U.S. 454, 467

n.14 (1975) (requiring "complete identity of the causes of action" to enable the defendant "to protect itself against the loss of evidence, the disappearance and fading memories of witnesses, and the unfair surprise that could result").

Mrs. Soffer could not satisfy this further requirement for equitable tolling if she were permitted to expand her demand for punitive damages to the strict-liability and negligence claims. Such claims would not be limited to "the same memories, evidence, and witnesses" as the strict-liability and negligence claims pursued by the *Engle* class. A strict-liability claim turns entirely on objective features of the product itself—whether it was defective, unreasonably dangerous, and the cause of the plaintiff's injuries. *See West v. Caterpillar Tractor Co.*, 336 So. 2d 80, 87 (Fla. 1976). A negligence claim similarly focuses on the objective reasonableness of the defendant's conduct. *See, e.g., Fla. Std. Jury Instrs.—Civil* § 401.4; *Light v. Weldarc Co.*, 569 So. 2d 1302, 1303 (Fla. 5th DCA 1990); *Wolicki-Gables v. Arrow Int'l, Inc.*, 641 F. Supp. 2d 1270, 1288 (M.D. Fla. 2009). In stark contrast, an associated claim or demand for punitive damages focuses on the defendant's motive and intentions—in particular, whether the defendant acted with "conscious disregard or indifference to the life, safety, or rights of persons," § 768.72(2)(b), Fla. Stat., or with "wanton disregard for the rights and safety of others," *Ballard*, 749 So. 2d at 486. Given the sharp differences between the elements of compensatory and punitive liability, tacking on a demand for punitive

damages would inevitably bring into the case different evidence, witnesses, and memories than would otherwise be implicated. For that additional reason, Mrs. Soffer cannot satisfy the requirements for equitable tolling as to any demand for punitive damages on her claims for strict liability and negligence.

3. Mrs. Soffer offers three responses on equitable tolling, but none of them is convincing. *First*, she argues that tolling is not implicated because "there is no statute of limitations for seeking punitive damages." Pet. Br. 21. That observation is true, but it misses the point. The question is not whether Mrs. Soffer's claim for *punitive damages* is barred by the statute of limitations; it is whether her wrongful-death claims for *strict liability and negligence*, if expanded to include a demand for punitive damages, would be so barred. The expanded claims would be barred unless they were both (1) "identical" to the compensatory-only strict-liability and negligence claims pursued by the *Engle* class, *see Hromyak*, 942 So. 2d at 1023; and (2) rested on the same "evidence, memories, and witnesses" as the strict-liability and negligence claims pursued by the *Engle* class, *see, e.g.*, *Coon*, 829 F.2d at 1571. As shown above, Mrs. Soffer can satisfy neither of these requirements.

Second, Mrs. Soffer denies that equitable tolling is even at issue because (she says) this Court in *Engle* affirmed the class certification order. Pet. Br. 22–23. Again, she misses the point: Although this Court did affirm the original certifica-

tion order, it also prospectively decertified the class, based on its conclusion that "problems with the three-phase trial plan negate the continued viability of this class action." *Engle*, 945 So. 2d at 1267–68. That decertification created the need for class members to file their own "individual" actions, which in turn created the need for an extended filing deadline. *See id.* at 1277.[4] The one-year grace period adopted in *Engle*—permitting former class members, in the wake of a decertification order, to file individual actions that would otherwise be time-barred—obviously amounts to equitable tolling. *See Sacred Heart Health Sys., Inc. v. Humana Military Healthcare Servs.*, No. 3:07-cv-62, 2008 WL 2385506, at *2 (N.D. Fla. June 9, 2008) ("[T]he effect of ... [*Engle*] was to equitably toll the statute of limitations."). Despite their division on the bottom line, the district courts unanimously recognize this basic point. *See Hallgren*, 124 So. 3d at 356 ("Mr. Hallgren filed his wrongful death lawsuit within the additional one-year tolling period permitted by the supreme court."); *Ciccone*, 123 So. 3d at 609–10 (*Engle* provided that "each class member's time to file an additional suit would be equitably tolled to allow filing within one year of the court's decision"); *Soffer*, 106 So. 3d at 458 ("progeny plaintiffs are entitled to a lengthy, tolling of Florida's statute of limita-

[4] This Court's decision in *Engle* was rendered on December 21, 2006—more than a decade after the November 21, 1996 class-cutoff date. *See* 945 So. 2d at 1275. Absent equitable tolling during the pendency of *Engle*, all potential progeny claims would be time-barred.

tions, which ordinarily is two years"). Mrs. Soffer cites no decision suggesting otherwise.

Third, Mrs. Soffer contends that the requirements for equitable tolling are satisfied because her claims for strict liability and negligence—even as expanded to include demands for punitive damages—"are the same as those pled in *Engle*." Pet. Br. 23. To the extent that she places talismanic significance on the distinction between "claims" and "remedies," *see id.* ("claims are different from remedies"), her position is inconsistent both with repeated usage in Florida law of the phrase "claim for punitive damages" and with its characterization of such claims as "substantive" rather than merely "remedial." *See supra* at 18–19. Moreover, an award for punitive damages is *not* intended as a remedy for the plaintiff's injuries, but as a punishment of the defendant to serve public interests. *See, e.g.*, *Ballard*, 749 So. 2d at 486; *W.R. Grace*, 683 So. 2d at 504.

More fundamentally, the governing tolling principles turn on substantive and practical concerns rather than on terminology: a claim with an associated demand for punitive damages (whether characterized as a separate "claim" or "remedy") is different from, and turns on different evidence than does, a claim without such an associated demand. Thus, Mrs. Soffer is incorrect in her assertion (quoting *Hallgren*) that "[a]dding a claim for punitive damages does not materially alter the claims for negligence and strict liability." Pet. Br. 23 (quoting 124 So. 3d at 356).

For all of the reasons explained above—including that such a claim, remedy, or demand increases the defendant's exposure many times over—that proposition is simply not defensible.

B. Equitable Considerations Strongly Reinforce This Conclusion

Equitable considerations strongly confirm that Mrs. Soffer cannot expand her strict-liability and negligence claims to include demands for punitive damages. This should hardly be surprising. As its name suggests, equitable tolling is governed by, and designed to implement, basic principles of fairness. In contrast, by substantially changing the rules of equitable tolling, Mrs. Soffer would frustrate the purposes of tolling and create significant unfairness in the process.

1. There is nothing remotely unfair about holding progeny plaintiffs to the burdens as well as the benefits of *Engle* class membership. As the First District explained, progeny plaintiffs "receive substantial benefits" from *Engle* class membership, including both a decade-long tolling of the limitations period and use of the Phase I findings to establish the conduct elements of their claims. *See Soffer*, 106 So. 3d at 459. The only question here is whether, in choosing to accept those benefits, they must also accept one limitation from *Engle*—the inability to pursue punitive damages on claims for strict liability and negligence. This would not prevent progeny plaintiffs from pursuing any of their claims for compensatory liability—and thus seeking full redress for their injuries—nor from seeking punitive

damages on their intentional-tort claims for concealment and conspiracy. On balance, progeny plaintiffs fare quite well in taking "the bitter with the sweet." *See id*.; *Ciccone*, 123 So. 3d at 617.

Moreover, the contrary rule—permitting progeny plaintiffs to take only the sweet—would allow them "to take advantage where the class representatives, and the class as a whole, otherwise would not." *Id.* As explained above, in Phase II of *Engle*, the trial court barred the entire class, including the three named class representatives whose claims were tried to final judgment (Mary Farnan, Frank Amodeo, and Ralph Della Vecchia), from seeking punitive damages on their claims for strict liability and negligence. And under settled principles of res judicata, the final judgments entered in favor of Farnan, Amodeo, and Della Vecchia at the end of Phase II, *see Engle*, 2000 WL 33534572, at *31–*32 (Resp. App. 23–24), would have prevented them from seeking punitive damages in separate "progeny" actions.[5]

Placing progeny plaintiffs in a better position than the named class representatives would run contrary to the basic purpose of equitable tolling. That doctrine is designed to prevent decertification of a class from imposing an unfair *hard-*

[5] For Farnan and Della Vecchia, whose judgments were ultimately affirmed on appeal, the governing doctrine would have been that of merger. *See, e.g.*, Restatement (Second) of Judgments § 18 (1982). For Amodeo, whose judgment was ultimately reversed on appeal, the governing doctrine would have been that of bar. *See, e.g.*, *id*. § 19.

ship on unnamed class members; by preventing decertification from rendering claims untimely, tolling seeks to put absent class members in the *same* position as the named class representatives whose individual claims were adjudicated (or at least timely filed) prior to the decertification. *See, e.g.*, *Crown, Cork & Seal Co.*, 462 U.S. at 349–53; *Am. Pipe*, 414 U.S. at 552–56. That objective is fully achieved by allowing absent class members to pursue the same claims and remedies as did the class and named representatives prior to decertification. Nothing in the rule or its rationale suggests the strange purpose of giving unnamed class members a *windfall*, by placing them in a *better* position than that of the named class representatives. In this case, it is simply inconceivable that Lucille Soffer should be able to pursue claims or remedies that Mary Farnan, Frank Amodeo, and Ralph Della Vecchia could not.

Mrs. Soffer complains that it is "lawless" to impose on progeny plaintiffs the burdens as well as the benefits of *Engle* class membership. Pet. Br. 20–21. She is mistaken. Because equitable tolling is driven by basic considerations of fairness, doing so is not only perfectly fair, but also perfectly lawful.

2. The expanded tolling rule that Mrs. Soffer advocates—to allow claims for punitive damages not pursued by the class or class representatives in *Engle*—would be profoundly unfair to Reynolds. When *Engle* was filed in 1994, the complaint placed the defendants on notice that they faced exposure only to *compensa-*

tory liability on claims for strict liability and negligence, and to *punitive* liability only on intentional-tort claims (including those for concealment and conspiracy). Phase I was tried on that basis—with all parties preparing their strategy and allocating their limited resources on the understanding that only the intentional-tort claims could support punitive damages. That understanding was further reinforced years later in 2000, during Phase II-B, when the trial court explicitly rejected the class's attempt to expand its strict-liability and negligence claims to include punitive damages—a ruling that the class never appealed. Yet now, more than two decades after *Engle* was filed, and some six decades after many of the events at issue in *Engle* took place, Mrs. Soffer seeks to change the rules so as to increase the defendants' exposure on the claims for strict liability and negligence by many times over. Indeed, she seeks not only to do so in this case, but also to establish a legal rule that would do the same for the thousands of pending progeny claims that, even without punitive damages, collectively seek billions of dollars. And these strict-liability and negligence claims, as Mrs. Soffer admits, are "much easier to prove" (Pet. Br. 15) than their intentional-tort counterparts. It is difficult to imagine a more extreme form of prejudice.

Not surprisingly, many decisions confirm the prejudice from a plaintiff seeking to add a demand for punitive damages after essential elements of liability have been tried or resolved. *See, e.g.*, *Atl. Sec. Bank v. Adiler S.A.*, 760 So. 2d 258, 260

(Fla. 3d DCA 2000) (under Florida law, a "defendant has a right to assume that if it commences trial without punitive damages having been properly pled …, it need not anticipate that it will be subjected to a punitive damage claim"); *Trident Inv. Mgmt., Inc. v. Amoco Oil Co.*, 194 F.3d 772, 780 (7th Cir. 1999) ("Amoco would be unfairly prejudiced by the amendment [to add a demand for punitive damages], which was offered only after Amoco stipulated to liability and more than two years after Trident brought its initial suit"); *Orix Credit Alliance, Inc. v. Taylor Mach. Works, Inc.*, 125 F.3d 468, 480–81 (7th Cir. 1997) (amendment to conform to the proof at trial would be prejudicial because the new counts "added the possibility of punitive damages, a consequence that [defendant] might have sought to protect himself against had the claims been raised earlier"); *Wells v. XPEDX*, No. 8:05-cv-2193, 2007 WL 1362717, at *3 (M.D. Fla. May 7, 2007) ("Allowing Plaintiff to amend his complaint to add new claims of punitive damages after the deadline for discovery and expert witness disclosures and less than one month before the dispositive motion deadline would be prejudicial to Defendant."); *Bremicker v. MCI Telecomm. Corp.*, 420 N.W.2d 427, 429 (Iowa 1988) ("the insertion of the punitive damages issues substantially changed the issues at trial."); *Gray v. Nat'l Restoration Sys., Inc.*, 820 N.E. 2d 943, 960 (Ill. App. 1st Dist. 2005) ("Gray's motion for leave to seek punitive damages is separate and distinct from her claims seeking compensatory damages from [a defendant] under theories of negligence and strict

liability."). But these cases, which involved only single-plaintiff suits, capture only a tiny fraction of the prejudice that Reynolds and the other *Engle* defendants would suffer here, where thousands of progeny plaintiffs wait in the wings.

Mrs. Soffer offers no persuasive response. Quoting *Hallgren*, she contends that there would be "'no surprise or prejudice to the Tobacco Companies'" because, "'[f]rom the inception, it was no secret that the *Engle* class members were seeking punitive damages as a remedy on all of their substantive claims.'" Pet. Br. 17 (quoting *Hallgren*, 124 So. 3d at 357–58). This assertion is simply baffling, as the *Hallgren* court, in its very next breath, acknowledged that the *Engle* class did *not* initially seek punitive damages on their claims for strict liability and negligence, and were barred from doing so when they sought to expand those claims during Phase II-B. *See Hallgren*, 124 So. 3d at 356–57.

It is also baffling because Mrs. Soffer herself goes to great lengths to establish that the class's ability to seek punitive damages on the intentional-tort claims was not formerly raised and ruled on until Phase II-B. *See* Pet. Br. 3–4. She does so in the service of an additional (and contradictory) argument that the only source of prejudice in *Engle* was the insertion of an expanded demand for punitive damages into the case after Phase II-B had begun. She contends that that source of prejudice is absent here, where she sought to raise her new demand "a full four months before trial." Pet. Br. 17.

Mrs. Soffer again misses the critical point: *during Phase I*, essential elements of liability were established on the claims for strict liability and negligence, at a time when the class sought only *compensatory* damages on those claims. It was for *that* reason that the trial court likely denied the class leave to amend in Phase II-B—not simply that the Phase II-B trial had already begun. And the latter rationale would have been improper because, as Mrs. Soffer acknowledges, the class first formally sought to broaden their punitive-damages request in 1999, *before* Phase II-B had begun. Pet. Br. 3–4, 16. Just as it is obviously prejudicial to add a demand for punitive damages after the defendant has stipulated to liability, *see Trident*, 194 F.3d at 780–81, so too is it obviously prejudicial to do so after the parties have litigated to judgment the conduct elements of the relevant claims on a compensatory-only basis.[6] That potential for prejudice is as present in progeny cases as it was in Phase II-B of *Engle*.

Moreover, *Engle*-progeny defendants face yet another source of prejudice not addressed in these cases—increased exposure on claims arising some five or

[6] In *Trident*, the plaintiff sought to add its demand for punitive damages in October 1997. *See* 194 F.3d at 777. The damages trial, however, did not begin until January 1998—almost three months later. *See Trident v. Bhambra*, No. 1:95-CV-4260, Docket No. 89 (available on PACER). Thus, the holding of unfair prejudice rested entirely on the fact that the demand occurred after the parties had stipulated to liability.

six decades in the past.[7] And that kind of prejudice, far from dissipating in the two decades since *Engle* was filed, or in the 14 years since Phase II-B was tried, has only increased with the passage of time.

C. Amendment Rules Do Not Change The Analysis

Mrs. Soffer seeks to turn this case from one about equitable tolling into one about the rules for amending complaints. Again quoting *Hallgren*, she reasons that, if this Court in *Engle* "'had not opted to decertify the class and had instead remanded for a new trial, the class would have been free to renew its motion to amend the complaint.'" Pet. Br. 18 (quoting 124 So. 3d at 357). Then, she contends that any amendment would be "required," so long as it was based on the same transaction or occurrence as the original *Engle* complaint. *Id.* at 18–19. This reasoning is riddled with errors.

To begin with, it makes little sense to focus on what might have happened had this Court remanded *Engle* instead of decertifying it. Because this Court *decertified*, the governing doctrine is that of equitable tolling, as even the *Hallgren* court ultimately recognized. *See* 124 So. 3d at 356 ("Mr. Hallgren filed his wrongful death lawsuit within the additional one-year tolling period permitted by the supreme court."); *id.* (addressing *Hromyak*). And, as explained above, Mrs. Soffer

[7] As explained above, the *Engle* class put at issue conduct by the defendants dating back at least to 1953. And, in this case, Mrs. Soffer sought to impose liability based on a smoking history dating back at least to 1947. T.24:1773.

cannot satisfy the requirements for tolling to the extent that she seeks to expand her strict-liability and negligence claims to include a demand for punitive damages.

In any event, the *Engle* class waived any putative right to amend by not appealing the denial of its motion to amend in Phase II-B. Indeed, this Court specifically has held that a prevailing party *must* cross-appeal the denial of a motion to amend, or else it *waives* the right to re-assert that motion following any remand. *Airvac, Inc. v. Ranger Ins. Co.*, 330 So. 2d 467 (Fla. 1976). In *Airvac*, defendant Ranger Insurance unsuccessfully sought to amend its answer, but ultimately prevailed at trial. *See id.* at 468. The plaintiff appealed, but Ranger did not file a cross-appeal challenging the denial of its first motion to amend. *See id.* After the District Court reversed and remanded for a new trial, Ranger filed a second motion to amend. *See id.* at 469. The trial court denied the motion, the plaintiff prevailed at the second trial, and Ranger appealed, arguing that the trial court erred in denying its second motion to amend. This Court concluded that Ranger had "waiv[ed]" this argument by failing to cross-appeal the denial of its first motion to amend in the initial appeal. *See id.* Following the disposition of that appeal, this Court held, the trial court "had no authority on remand to permit [Ranger] to amend its answer." *Id.*; *see also Fla. Dep't of Transp. v. Juliano*, 801 So. 2d 101, 107 (Fla. 2001) ("this Court decided *Airvac* on principles of waiver; i.e., the failure of a party to raise an issue on appeal that was the subject of the trial court's ruling"). The

same logic is controlling here: the *Engle* class declined to cross-appeal the denial of its motion to amend during Phase II, thereby waiving any right to renew that motion following any remand. That waiver binds Mrs. Soffer, who concedes that she "stands in the same position as the class plaintiffs in *Engle* at the time this Court ordered the class decertified." Pet. Br. 16.

Finally, even if amendment principles were relevant and preserved, they would foreclose—not advance—Mrs. Soffer's argument. Mrs. Soffer errs in contending that courts are "required" (Pet. Br. 19) to accept any amendment involving the same transaction or occurrence as the original complaint. While such amendments are not categorically foreclosed once the governing limitations period has run, *see* Fla. R. Civ. P. 1.190(c) (providing for relation back), they remain subject to the general requirement that amendments be "upon such terms as may be just," Fla. R. Civ. P. 1.190(e), which in turn requires an inquiry into prejudice. *See, e.g.*, *New River Yachting Ctr., Inc. v. Bacchiocchi*, 407 So. 2d 607, 609 (Fla. 4th DCA 1982) (under Rule 1.190, "a test of prejudice is the primary consideration in determining whether a motion for leave to amend should be granted"). Mrs. Soffer's own authority recognizes as much. *See, e.g.*, *Ed Ricke & Sons, Inc. v. Green*, 609 So. 2d 504, 506–07 (Fla. 1992); *Agate v. Clampitt*, 80 So. 3d 450, 452–53 (Fla. 2d DCA 2012). And numerous cases hold that a defendant *would* be impermissibly prejudiced if a new demand for punitive damages were inserted into a case after

essential elements of liability had already been tried or resolved. *See, e.g.*, *Atlantic Sec. Bank.*, 760 So. 2d at 260; *Trident*, 194 F.3d at 780; *Orix*, 125 F.3d at 480–81; *Wells*, 2007 WL 1362717, at *3; *Bremicker v. MCI Telecomm. Corp.*, 420 N.W.2d at 429; *Gray*, 820 N.E. 2d at 960–61. Similarly, as Mrs. Soffer's authority also recognizes, "amendments are not allowed where they would 'change the issue, introduce new issues, or materially vary the grounds of relief.'" *Title & Trust Co. v. Parker*, 468 So. 2d 520, 522 (Fla. 1st DCA 1985) (quoting *Int'l Patrol & Detective Agency Co. v. Aetna Cas. & Surety Co.*, 396 So. 2d 774, 776 (Fla. 1st DCA 1981)). As shown above, expanding strict-liability and negligence claims to include a demand for punitive damages—whether characterized as a new "claim" or "remedy"—indisputably would introduce new issues and materially change the ground for relief. *Cf. Bremicker*, 420 N.W.2d at 429 ("the insertion of the punitive damages issues substantially changed the issues at trial").

The cases cited by Mrs. Soffer are not to the contrary. As she herself explains, each of them simply permits an amendment on remand, after "the original trial is set aside" on appeal. Pet. Br. 18. *See Ed Ricke & Sons*, 609 So. 2d at 507 (permitting amendment following a new-trial order with "the effect of vacating the proceeding and *leaving the case as though no trial had been had*" (emphasis added)); *Hethcoat v. Chevron Oil Co.*, 383 So. 2d 931, 932–33 (Fla. 1st DCA 1980) (permitting amendment after remand for new trial); *Agate*, 80 So. 3d 451–52. But

this Court did not "set aside" (Pet. Br. 18) Phase I of *Engle*. To the contrary, it ordered that various Phase I findings—including those establishing the conduct elements of claims for strict liability and negligence—would have "res judicata effect" in subsequent progeny actions. *See* 945 So. 2d at 1277. Mrs. Soffer cannot seek to benefit from the Phase I findings on strict liability and negligence for purposes of res judicata, but then pretend that "no trial had been had" on strict liability or negligence for purposes of amendment. This further attempt to have it both ways—to take the sweet of *Engle* but not the bitter—finds no support in law or equity.

D. Mrs. Soffer's Position Is Inconsistent With *Engle* And *Douglas*

Mrs. Soffer's position is inconsistent not only with the law governing equitable tolling and amendment of complaints, but also with the express terms of this Court's decisions in *Engle* and *Douglas*. In *Engle*, this Court held that class members could not establish "entitlement to punitive damages" without "proof of liability, which includes both *reliance* and causation." 945 So. 2d at 1254 (emphasis added). But claims for strict liability and negligence do *not* require proof of reliance, whereas claims for concealment and conspiracy do. *Engle* thus confirms that progeny plaintiffs cannot recover punitive damages on claims for strict liability and negligence, but rather must establish liability for concealment or conspiracy in order to recover punitive damages. Moreover, in *Douglas*, this Court explained that

its "decision in *Engle* allowed members of the decertified class to pick up litigation of the approved six causes of action right where the class left off." 110 So. 3d at 432; *see also* Pet. Br. 16 (progeny plaintiffs "stand[ ] in the same position as the class plaintiffs in *Engle* at the time this Court ordered the class decertified"). But picking up "right where the class left off" confirms that progeny plaintiffs must assume the burdens as well as the benefits of *Engle* class membership.

Mrs. Soffer's efforts to read *Engle* in her favor are unavailing. She contends that this Court, in setting aside the classwide punitive award, "undid *everything* that had been done in the class litigation regarding punitive damages." Pet. Br. 19. That is incorrect. The only punitive-damages issue before this Court was whether the Phase II-B award *on the intentional-tort claims* was premature and excessive. *See* 945 So. 2d at 1262–65. The availability of punitive damages on the strict-liability and negligence claims was not before this Court, for the simple reason that the class chose not to appeal the ruling adverse to them on this point. Thus, it is hardly surprising that this Court in *Engle* "did not even address the issue involved in the instant case." Pet. Br. 20. Its failure to do so cannot possibly suggest a desire to reverse the *Engle* trial judge on an issue not properly before it. Mrs. Soffer provides no justification whatsoever for somehow converting the class's *Airvac* waiver into a *sub silentio* merits ruling in her favor.

Alternatively, Mrs. Soffer provides one final block-quote from *Hallgren*: "'Because the decision preventing the *Engle* class from amending its complaint to seek punitive damages for negligence was merely procedural and was not decided on the merits, we conclude that the res judicata effect of the Phase I findings does not preclude progeny plaintiffs from seeking punitive damages on those claims.'" Pet. Br. 20 (quoting 124 So. 3d at 357). This too makes little sense. The equitable tolling question presented in this case (or even the amendment question that Mrs. Soffer contends is presented) has nothing to do with whether the *Engle* trial court's decision is better characterized as substantive or "merely procedural." Either way, the *Engle* trial court denied the motion to amend, and the class waived any right to seek later amendments by failing to appeal that decision. Moreover, nothing about the "merely procedural" nature of the denial of leave to amend in Phase II-B erases the massive prejudice that would result if progeny plaintiffs were permitted to attach a demand for punitive damages to their strict-liability and negligence claims today, some 15 years after the final adjudication of the conduct elements of those claims in Phase I.

II. THE REMEDY FOR ANY ERROR WOULD BE A NEW TRIAL ON ALL ISSUES

If this Court concludes that the trial court erred in declining to expand the strict-liability and negligence claims to include punitive damages, which it did not,

the proper remedy would be a new trial on liability, as well as punitive damages, for those claims.

Under Florida law, "intertwined" factual issues must be tried before the same jury. *See BDO Seidman, LLP v. Banco Espirito Santo Int'l*, 38 So. 3d 874, 882–83 (Fla. 3d DCA 2010). Applying that principle, the court in *Brown v. Ford*, 900 So. 2d 646 (Fla. 1st DCA 2005) (per curiam), held that, where a new trial is necessary on punitive damages, "the proper remedy would be to require a new trial on all issues" of liability and punitive damages. *Id.* at 649; *see also White v. Burger King Corp.*, 433 So. 2d 540, 541–42 (Fla. 4th DCA 1983) ("Although the errors discussed above [regarding punitive damages] do not necessarily vitiate the compensatory damage award . . . we believe the justice of the cause requires a new trial on all issues."); *DuPuis v. 79th St. Hotel, Inc.*, 231 So. 2d 532, 536 (Fla. 3d DCA 1970) ("better practice and procedure requires that one jury determine both the compensatory and punitive damages").

Federal due process likewise requires the same jury to decide intertwined factual issues. *See Gasoline Prods. Co. v. Champlin Ref. Co.*, 283 U.S. 494, 500 (1931) (separate juries cannot adjudicate different parts of a single case, unless the issues are "so distinct and separable from the others that a trial of it alone may be had without injustice"). Applying *Gasoline Products*, many courts have held that, because issues of liability and punitive damages are intertwined, it is improper to

order a partial new trial only on punitive damages. *See, e.g.*, *Hardman v. Autozone, Inc.*, 214 Fed. App'x 758, 765–66 (10th Cir. 2007) ("a second jury tasked only with having to determine a new punitive damage award would unfairly be required to 'speculate as to what Autozone conduct formed the basis of the first jury's verdict of liability and award of nominal damages'" (citation omitted)); *EEOC v. Stocks, Inc.*, 228 Fed. App'x 429, 433 (5th Cir. 2007) (requiring new trial on liability, if plaintiff sought punitive damages, because any "future jury's decision to award punitive damages will be tied to the same evidence of intent as will be the liability decision").[8]

The respective determinations of liability and punitive damages are necessarily intertwined, because Florida law and federal due process both require that any punitive award be based on the same conduct underlying the determination of compensatory liability. In deciding whether to impose punitive damages, Florida

[8] *See also Talbert v. Farmers Ins. Exch.*, 5 P.3d 610, 612 (Or. Ct. App. 2000) ("Remanding this case for a retrial on punitive damages alone creates the potential for inconsistent verdicts."); *Burke v. Deere & Co.*, 6 F.3d 497, 513 (8th Cir. 1993) ("retrial to a new jury on [punitive damages] alone would be improper because the issues underlying compensatory and punitive awards are inextricably intertwined"); *McDonald v. Johnson & Johnson*, 722 F.2d 1370, 1388 (8th Cir. 1983) (new trial on punitive damages required new trial on liability issues as well; to do otherwise would "have severed issues that are effectively intertwined"); *Maybee v. Jacobs Motor Co.*, 519 N.W.2d 341, 345 (S.D. 1994) (new trial on all issues required where a "trial solely on [plaintiff's] damages would require essentially the same evidence as a trial on both the substantive merits of the fraud claim and damages").

law requires the jury to focus on (1) whether the conduct underlying the compensatory award was sufficiently egregious to warrant a punitive award, *see, e.g.*, *W.R. Grace & Co.*, 638 So. 2d at 503, and (2) whether there is a "reasonable relationship" between the compensatory and punitive damages, *see, e.g.*, *Engle*, 945 So. 2d at 1264. *See also Fla. Std. Jury Instructions-Civil Cases*, No. 00-2, PD 1(a)(2), 797 So. 2d 1199, 1201 (Fla. 2001) (jury must determine whether "the conduct causing the [loss] [injury] [or] [damage] to (claimant)" meets the legal standards for an award of punitive damages). Similarly, as a matter of federal due process, the only conduct that can support a punitive award is the specific conduct that formed the basis for the finding of compensatory liability. *See, e.g.*, *Philip Morris USA v. Williams*, 549 U.S. 346, 353 (2007) ("the Constitution's Due Process Clause forbids a State to use a punitive damages award to punish a defendant for injuries that it inflicts upon nonparties"); *State Farm Mut. Auto. Ins. Co. 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").

Because punitive and compensatory liability must rest on the same conduct, a second jury in this case, in order to award punitive damages on any remand, would need to determine what conduct formed the basis for the first jury's determination of compensatory liability. Yet the second jury would have no way to make that determination. Accordingly, if a retrial were limited to punitive-

damages issues, an award for Mrs. Soffer could well rest on conduct that the first jury did *not* find to be actionable. Moreover, any new trial would also need to encompass the related issues of comparative fault and class membership. Questions of liability are intertwined with questions of comparative fault—a second jury on remand, not knowing the extent to which the first jury found Mr. Soffer's injury to be caused by Reynolds's tortious conduct, could not assess the relative extent to which the injury was caused by the respective negligence of Reynolds and Mr. Soffer. Finally, liability and comparative fault are both intertwined with *Engle* class membership, because all of those issues turn in part on the extent to which Mr. Soffer smoked "because of addiction" rather than "for some other reason (like the reasons of stress relief, enjoyment of cigarettes, and weight control argued below)." *Douglas*, 110 So. 3d at 431–32; *see also Philip Morris USA Inc. v. Allen*, 116 So. 3d 467, 473 (Fla. 1st DCA 2013) (questions of addiction versus choice bear on class membership and comparative fault).

Engle supports this conclusion. In that case, this Court held that common liability questions (such as defect or negligence) could be tried to separate juries from the ones determining individual issues "such as causation, damages, and comparative negligence." 945 So.2d at 1270. At the same time, however, it made clear that, in any given case, those individual issues must be tried to the same jury. *See id.* at 1271 ("In this case, although the jury decided issues common to all class

members, none involved whether, or the degree to which, the defendants' conduct was the sole or contributing cause of the class members' injuries, which is the pertinent question in applying the doctrine of comparative negligence."). Similarly, in *Mullen v. Treasure Chest Casino, LLC*, 186 F.3d 620 (5th Cir. 1999), which this Court cited with approval in *Engle*, the court held that the second jury could consider comparative negligence, but only because the first jury had not considered the related issue of individual causation. *See id.* at 628–29, *quoted in Engle*, 945 So. 2d at 1270. Under the logic of these decisions, the intertwined individualized issues of punitive damages, causation (an open liability issue in *Engle*-progeny cases), comparative fault, and class membership must all be tried to the same jury.

Of the seven decisions string-cited on this point by Mrs. Soffer (Pet. Br. 24–25), only one of them contains any reasoning. In *Stephens v. Rohde*, 478 So. 2d 862 (Fla. 1st DCA 1985), the court reasoned that punitive damages could be tried to a separate jury because "there is no rule of law that punitive damages must bear some reasonable relationship to compensatory damages." *Id.* at 863. That decision is no longer good law, *see, e.g.*, *Engle*, 945 So. 2d at 1264 ("a review of the punitive damages award includes an evaluation of the punitive and compensatory amounts awarded to ensure a reasonable relationship between the two"), and the First District has repudiated it explicitly, *see Brown*, 900 So. 3d at 649 ("'better practice and procedure requires that one jury determine both the compensatory and

punitive damages'" (citation omitted)). Three of the other unreasoned decisions cited by Mrs. Soffer (*Canavan*, *Hockensmith*, and *Rappaport*) were handed down before cases like *Engle* and *Williams* clarified the inextricably-intertwined nature of liability and punitive damages. Two of the three more recent decisions, apart from containing no reasoning on this point, involved special considerations not present here: In *Belle Glade Chevrolet v. Figgie*, 54 So. 3d 991 (Fla. 4th DCA 2010), liability was established by default, *see id.* at 996, thus making re-examination impossible by definition. And in *Young v. Becker & Poliadoff P.A.*, 88 So. 3d 1002 (Fla. 4th DCA 2012), the only punitive-damages issue tentatively assigned to the second jury was determining what amount would result in "economic castigation or bankruptcy." *See id.* at 1007. Finally, there is *R.J. Reynolds Tobacco Co. v. Townsend*, 90 So. 3d 307 (Fla. 1st DCA 2012), which did contemplate a partial remand limited to issues of punitive damages in an *Engle*-progeny case. *See id.* at 316. In *Townsend*, however, Reynolds never argued that such a limited remand would entail improper re-examination, and the First District thus did not address that question. *Townsend* is not persuasive authority on a point that was neither raised nor addressed in the court's opinion.

CONCLUSION

For these reasons, the judgment of the First District should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Florida Rule of Appellate Procedure 9.210(a)(2), counsel for Respondent hereby certifies that the foregoing brief complies with the applicable font requirements because it is written in 14-point Times New Roman font.

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