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IN THE SUPREME COURT OF FLORIDA

LUCILLE RUTH SOFFER, etc.,

Petitioner,

v.

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

R.J. REYNOLDS TOBACCO CO.,

Respondent.

ON REVIEW FROM THE DISTRICT COURT OF APPEAL, FIRST DISTRICT, STATE OF FLORIDA

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STATEMENT OF THE CASE AND OF THE FACTS

Having obtained a judgment against R.J. Reynolds Tobacco Company ("RJR") for compensatory damages on her negligence and strict liability claims in this *Engle* progeny wrongful death action, Lucille Ruth Soffer appealed the trial court's ruling that prohibited her from asking the jury to award punitive damages. The district court having affirmed, the matter is before this Court on the following question certified by the district court as being of great public importance:

> ARE MEMBERS OF THE CLASS IN *ENGLE V. LIGGETT GROUP, INC.*, 945 SO. 2d 1246 (FLA. 2006), ENTITLED TO PURSUE AN AWARD OF PUNITIVE DAMAGES UNDER THEORIES OF NEGLIGENCE OR STRICT LIABILITY?

Soffer v. R.J. Reynolds Tobacco Co., 106 So. 3d 456, 461 (Fla. 1st DCA 2012). Mrs. Soffer asks the Court to answer the question in the affirmative.

Class-Stage Trial Proceedings

The jury found (and RJR does not dispute) that Mrs. Soffer was a member of the *Engle* class. Accordingly, as the district court recognized, the procedural history of Mrs. Soffer's case actually begins with the *Engle* class action complaint. *See id.* at 460 (noting that class members like Mrs. Soffer "wear the same shoes, so to speak, as the plaintiffs in *Engle* because they **are** the plaintiffs from *Engle*"). The original complaint was filed May 5, 1994, and before any answer was filed the

class filed an amended complaint within five days. (App. 3-59.)[1] The amended complaint contained eight counts: (1) strict liability, (2) fraud, (3) conspiracy to commit fraud, (4) breach of implied warranty, (5) intentional infliction of emotional distress, (6) negligence, (7) a request for equitable relief, and (8) breach of express warranty. (App. 39-56.) The amended complaint sought punitive damages only on the counts for fraud, conspiracy, and intentional infliction of emotional distress. (App. 45, 49-50, 52, 58.)

The trial court ultimately certified the class, and the Third District affirmed after modifying the class definition to only cover Florida residents. *R.J. Reynolds Tobacco Co. v. Engle*, 672 So. 2d 39, 42 (Fla. 3d DCA 1996) ("*Engle I*"). The case proceeded to a year-long Phase I trial culminating in a verdict determining the defendants' conduct was tortious under each count and that punitive damages were warranted. (App. 115-26.) Although the fraud and conspiracy counts had each been pled as single counts, the verdict divided each count between misrepresentations and concealment: Finding 4 was that the defendants made false statements; finding

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[1] The surviving portions of the *Engle* trial and appellate records are contained on a DVD included in the record and physically filed with the First District by order dated November 4, 2011. Because of the voluminous nature of that DVD, the relevant documents are included in the accompanying appendix.

The *Engle* docket reflects that the amended complaint was filed on May 5, the same day as the original complaint, but the file stamp on the amended complaint reflects a filing date of May 10. (App. 4.) The actual date is immaterial.

4a that they concealed information; finding 5 that they conspired to make false statements; and finding 5a that they conspired to conceal. (App. 118-22.)

The issue of whether the class was limited to seeking punitive damages only on the intentional tort claims had been briefly discussed but not resolved during Phase I. After defense counsel argued that punitive damages should not be considered at all in Phase I because that phase would not determine whether the defendants were actually liable to any class members, class counsel noted that the law allowed punitive damages on claims for strict liability, too. (App. 63-64.) Defense counsel pointed out that while this was true, the class did not seek punitive damages on this count in the complaint. (App. 65.) In response, class counsel confessed to not recalling whether the complaint was so limited, but argued that even if it was, the complaint should be amended to conform with the evidence because the class had been seeking punitive damages on all counts at trial. (App. 69.) The court did not resolve the issue at this stage, and the record does not appear to contain any written motion to amend, much less an order. Neither the Phase I jury instructions nor the verdict form asked the jury to tie its determination that punitive damages were warranted to any particular count. (App. 73-126.)

Indeed, the record does not appear to reflect any ruling by the trial court on this issue until near the end of the Phase II-B trial to determine the amount of punitive damages. That phase began about ten months after the conclusion of

Phase I. During the charge conference after all the evidence was presented in Phase II-B, the trial court indicated that it intended to instruct the jury it could not base its award of punitive damages on the strict liability and related counts. (App. 130-31.) Class counsel objected and argued that the class complaint should be deemed amended to seek punitive damages on all counts to conform to the way the case was tried because, counsel argued, they had made clear to the jury from the beginning that they were, in fact, seeking punitive damages on all claims. (App. 131-32.) Over that objection, the court instructed the jury, "You may not award punitive damages based upon strict liability, breach of express or implied warranty or negligence." (App. 146.)

Class-Stage Appeal

On appeal from the judgment entered on the jury's verdicts, the Third District reversed and concluded, among other things, that the original order certifying the class had to be reversed. *Liggett Grp., Inc. v. Engle*, 853 So. 2d 434, 450 (Fla. 3d DCA 2003) ("*Engle II*"). Finding that the Third District had misapplied this Court's jurisprudence on the law of the case doctrine, this Court granted review, reversed *Engle II*, and held, among other things, that the trial court had not abused its discretion in certifying the class. *Engle v. Liggett Grp., Inc*., 945 So. 2d 1246, 1265-67 (Fla. 2006) ("*Engle III*").

The Court, however, reversed the award of punitive damages based in part on its conclusion that because the Phase I trial only decided issues related to the defendants' conduct and did not determine they were actually liable to any class member, it was error to try the issue of whether punitive damages were warranted during Phase I. *Id.* at 1262-63. The Court also concluded that the findings regarding whether the defendants committed misrepresentations, conspired to misrepresent, and intentionally inflicted emotional distress should not have been tried on a class basis because those findings could only be made on an individual basis. *Id.* at 1255, 1269. But it approved the jury's findings that applied equally to all class members, including the findings that the defendants were negligent and strictly liable, committed fraud by concealment, and conspired to commit fraud by concealment.

Concluding that the remaining issues of causation and damages could not be handled on a classwide basis, the Court held that the class had to be decertified going forward, but that each class member could continue the litigation by filing an individual claim within one year of the Court's decision. *Id.* at 1269, 1277. The Court said nothing one way or the other regarding the availability of punitive damages on each count in individual trials.

Mrs. Soffer's Individual Trial Proceedings

On behalf of the estate of her deceased husband, Maurice Benson Soffer, Mrs. Soffer filed her individual complaint against RJR within a year of *Engle III*. (R1:1-9.)[2] She alleged that she was a member of the *Engle* class and asserted claims for negligence, strict liability, fraud by concealment, and conspiracy to commit fraud by concealment. (R1:2, 6-9.)

More than a year before trial, Mrs. Soffer moved the trial court to accept her third amended complaint, which added a demand for punitive damages. (R6:1039-63.) As a basis for punitive damages, she alleged that not only had RJR "engaged in conduct that was fraudulent and conspired to engage in such conduct," but that it also "engaged in conduct, with such gross negligence as to indicate a willful and wanton disregard for the rights of others, including Plaintiff." (R3:560.) Her demand for punitive damages was not limited to any one count. (R3:560.) In opposition, RJR argued that Mrs. Soffer had not proffered sufficient evidence of gross negligence, but did not argue that *Engle* class members were prohibited from seeking punitive damages on their negligence and strict liability claims.

[2] Citations to the record are to the trial court record on appeal filed at the First District. Citations to the record of documents filed at the First District, which that court transmitted and indexed separately from the trial court record, shall be (SCR *), where * is the page number or tab.

(R12:2283-87.) The trial court overruled RJR's objection and accepted the third amended complaint. (R12:2288-90.)

During the charge conference at trial, however, RJR argued that the jury should be instructed that it may only consider punitive damages on the concealment and conspiracy claims. (R79:2576-77.) After the trial court indicated that it had given such an instruction in a prior *Engle* progeny trial, Mrs. Soffer urged the trial court to at least reserve ruling and allow the jury to consider punitive damages on all counts. (R79:2577-83.) She noted that if the jury declined an award of punitive damages, the issue would be moot, but if it awarded them, then the court could make its final decision. (R79:2578-79.) In the event the court adhered to its ruling in the prior case and that ruling was reversed on appeal, there would be no need for a new trial because the jury's award of punitive damages could simply be implemented on remand. (R79:2582-83.) After going over the possible scenarios on the jury's verdict, the court indicated it was inclined to follow this approach, but invited written memoranda. (R79:2584-89.)

The next morning, Mrs. Soffer filed a memorandum demonstrating that punitive damages are generally available for claims of negligence and strict liability where there is evidence to meet the substantive standard for punitive damages and arguing that nothing about the posture of this case, including this Court's decision in *Engle III*, limited her right to seek punitive damages.

(R57:11,373-77.) RJR filed a memorandum arguing that Mrs. Soffer could only seek punitive damages on the concealment and conspiracy claims because the class demand for punitive damages in *Engle* was based only on the intentional tort claims and not the class claims for negligence and strict liability. (R57:11,388-89.) It argued that "preclusion principles" prohibit an *Engle* class member from seeking punitive damages on these claims. (R57:11,389-91.) The trial court ruled in RJR's favor without explaining its reasoning and instructed the jury:

> Punitive damages may be awarded against R.J. Reynolds Tobacco Company based only on your findings that Reynolds is liable to Mrs. Soffer for fraudulent concealment or agreement to conceal. You may not find that punitive damages are warranted against Reynolds based upon Mrs. Soffer's claim for negligence or strict liability.

(R84:3450.)

The jury ultimately returned a verdict for Mrs. Soffer on the negligence and strict liability claims, but for RJR on the concealment and conspiracy claims. (R58:11524-25.) Pursuant to the court's instruction, the jury did not answer the question of whether punitive damages were warranted. (R58:11526.) The jury awarded a total of $5 million in compensatory damages ($1 million to Mrs. Soffer and $2 million each to decedent's surviving children). (R58:11526.) It apportioned 40% of the fault to Reynolds and 60% to Mr. Soffer. (R58:11525.) The trial court entered judgment for Mrs. Soffer in the amount of $2 million. (R63:12,457-58, 12,461.)

Mrs. Soffer's Individual Appeal

Mrs. Soffer appealed the punitive damage ruling, and RJR cross-appealed the entire judgment. (R63:12462-523, 12527-72.) In her initial brief, Mrs. Soffer argued that, contrary to RJR's argument below, no "preclusion principles" supported an interpretation of this Court's decision in *Engle III* as limiting class members' right to seek punitive damages on whatever claims they chose. (SCR Tab A at 8-9.) Anticipating an argument RJR had made in other cases (but did not make in the trial court here), she also argued that the statute of limitations has nothing to do with the issue. (*Id.* at 9-11.) Finally, she argued that the remedy for the trial court's error was a new trial solely on punitive damages. (*Id.* at 11-12.)

RJR argued that *Engle* class members lost their right to seek punitive damages on their negligence and strict liability claims as a consequence of achieving two benefits from *Engle III*. (SCR Tab B at 10-11.) First, it contended that the preclusion principles that led this Court to give res judicata effect to some of the jury's findings prohibited class members from seeking punitive damages on claims for which punitive damages were not sought in the class proceedings. (*Id.* at 11-14.) Second, it argued that the class proceedings gave class members the benefit of "equitable tolling" of the statute of limitations and that this doctrine required that the class members claims be the exact same claims litigated by the class. (*Id.*

at 14-17.) It also argued that the remedy to any error would be a new trial on all issues. (*Id.* at 17-23.)

The district court affirmed Mrs. Soffer's appeal by a 2-1 vote and unanimously affirmed RJR's cross-appeal. (SCR 1-19; App. 155-73.) The majority noted that it had "no dispute with the general proposition that plaintiffs who assert negligence and strict liability counts normally are permitted to plead and perhaps prove entitlement to punitive damages under applicable standards," but concluded that *Engle* class members lost this right. *Soffer*, 106 So. 3d at 460. The majority was swayed by RJR's complaint that "progeny plaintiffs receive substantial benefits [from *Engle III*] and must 'take the bitter with the sweet.' " *Id.* at 459 (quoting 1DCA Answer Br. at 12). It concluded that losing the right any other litigant would have to amend his complaint in a "routine case that is litigated by an individual plaintiff from start to finish" was the price class members have to pay for the benefits this Court conferred in *Engle III*, which the majority criticized as "unprecedented" and "one of the most … extraordinarily adjudicated cases in the state's history." *Id.* at 459, 460.

> Progeny plaintiffs wear the same shoes, so to speak, as the plaintiffs in *Engle* because they **are** the plaintiffs from *Engle*. Progeny plaintiffs thereby must accept the status and procedural posture of the *Engle* litigation as they find it; they must accept the parameters that are framed by that litigation—including the absence of a timely claim for punitive damages under negligence and strict liability theories. …

> This result is far from unfair. As members of the class, *Engle* progeny plaintiffs are in the same position they would have been in had they filed a complaint identical to the *Engle* class-action complaint on the same date the original complaint was filed. Here, Mrs. Soffer is not merely seeking to take advantage of *Engle* via the filing of a new and independent claim; rather, she was a party to *Engle* and, to the extent her claims differ from those in that case, she must meet the requirements for amending her complaint, which she cannot do.

Id. at 460.

The majority supported its argument by reasoning that this Court necessarily intended that class members be burdened with the same punitive damage limitations imposed by the *Engle* trial court:

> The decision says nothing to suggest, however, that the supreme court intended to preserve for the progeny plaintiffs anything other than the claims and remedies properly and timely asserted in that litigation.
>
> … There is no indication in *Engle* that our supreme court intended to extend its decision beyond the claims and remedies that had actually been timely asserted in the first place. Punitive damage claims under negligence and strict liability theories were untimely and not authorized as part of the *Engle* litigation; they were authorized only for the two intentional tort counts of fraud by concealment and conspiracy to commit fraud. If the supreme court had intended that its decision be so open-ended as to allow claims for punitive damages not otherwise made available in the course of *Engle*, it would have said so; it has not and we decline to expand the breadth of possible remedies or benefits available to progeny plaintiffs absent clearer direction from our supreme court.
>
> In conclusion, progeny plaintiffs, such as Mrs. Soffer, may choose to accept the preclusive benefits of the Phase I findings in *Engle* and the benefits of that decision's tolling of the statute of limitations, but in doing so they are constrained to the punitive damage claims timely sought in the operative class-action complaint; they may not tack on additional punitive damage claims lest they

> unjustifiably broaden the intended scope and effect of *Engle* and change the nature of the litigation. Progeny plaintiffs may assert punitive damage claims to the same extent as allowed in *Engle*, as Mrs. Soffer did here; but they may not assert such claims based on strict liability and negligence theories. To do so would provide an unjustifiable and potentially unintended windfall by expanding *Engle* beyond its existing parameters, which is not a task for this Court in the first instance under the circumstances presented.

Id. at 460-61. Having found no error, the majority did not address the remedy.

Judge Lewis dissented. He concluded that Mrs. Soffer was entitled to the benefit of the approved *Engle* findings because she was a class member asserting the same claims for negligence, strict liability, concealment, and conspiracy as the class asserted in the Phase I trial. *Id.* at 463. While she sought an additional remedy on those identical claims, that was irrelevant because (1) a request for punitive damages is not a separate cause of action but instead depends on the existence of an underlying claim, (2) class members like Mrs. Soffer have to independently prove a basis for punitive damages without relying on the res judicata effect of the approved findings, and (3) this Court declined to give the Phase I punitive damage finding preclusive effect. *Id.* He also concluded that the statute of limitations was irrelevant because Mrs. Soffer was asserting the same underlying claims that were timely asserted in *Engle* and "there is no separate statute of limitations for a demand of punitive damages." *Id.* at 463-64. Having concluded that the trial court erred, Judge Lewis opined that the remedy should be a new trial limited to the issue of punitive damages. *Id.* at 464.

In her motion for rehearing, Mrs. Soffer took issue with the majority's implicit conclusion that the class would have been prohibited from renewing its motion to amend the complaint to seek punitive damages on the negligence and strict liability claims had the class not been decertified. She pointed to case law making clear that when a plaintiff is denied leave to amend the complaint as untimely with regard to an initial trial, she is free to renew her motion when a new trial is ordered. (SCR 44-46; App. 181-83.) The district court denied rehearing without comment. (App. 190.)

SUMMARY OF ARGUMENT

The district court majority's conclusions are flawed in three respects. First, the majority's correct reasoning that an *Engle* progeny plaintiff stands in the same position as the class representatives in *Engle* demonstrates that its result was wrong. Florida law makes clear that even though the request to amend the class complaint was denied as untimely because it was not made, if at all, until months after the Phase I trial began, the class representatives would have had the right to renew the motion before any new trial because all aspects of the Phase I trial regarding punitive damages were reversed.

Second, employing a misguided equitable notion that *Engle* class members must "take the bitter with the sweet," the majority fell prey to RJR's meritless argument that preclusion principles somehow eliminated the class members' right

to renew the request to seek punitive damages on their negligence and strict liability claims. This Court gave no preclusive effect to any issue regarding punitive damages and made clear that all aspects of the class trial regarding punitive damages were reversed and could only be handled on an individual basis. The trial court's procedural ruling regarding punitive damages, therefore, could have no preclusive effect.

Third, by addressing the doctrine of equitable tolling, the majority was misled by RJR's equally meritless suggestions that a claim for punitive damages is subject to a statute of limitations independent from the period governing the underlying substantive claims and that *Engle* class members have to rely on equitable tolling to avoid the statute of limitations.

The remedy for the trial court's error is a new trial limited to the issue of punitive damages because there is no material overlap between that issue and the other issues tried without error in this case.

ARGUMENT

Standard of Review. Whether a demand for punitive damages on a particular claim may be submitted to the jury is reviewed de novo, *Estate of Williams ex rel. Williams v. Tandem Health Care of Fla., Inc.*, 899 So. 2d 369, 376 (Fla. 1st DCA 2005), as is the application of preclusion principles, *Philip Morris USA, Inc. v. Douglas*, 110 So. 3d 419, 427 n.6 (Fla. 2013).

Because of the many inherent difficulties facing an *Engle* class member seeking to prove causation on the intentional tort claims, the issue of whether class members can seek punitive damages on their much easier to prove negligence and strict liability claims is an extremely important question that arises in nearly every *Engle* progeny case. Not only does this Court have jurisdiction to answer this question because the district court certified it as one of great public importance, but it also has jurisdiction because the First District's opinion below expressly and directly conflicts with a subsequent decision by the Second District, which certified the conflict. *Philip Morris USA, Inc. v. Hallgren*, 124 So. 3d 350, 352 (Fla. 2d DCA 2013), *pending on jurisdiction* No. SC13-2289.[3] Exacerbating the split, the Fourth District has followed the First District's holding. *R.J. Reynolds Tobacco Co. v. Ciccone*, 123 So. 3d 604, 616 (Fla. 4th DCA 2013).

I. THE TRIAL AND DISTRICT COURTS ERRED IN CONCLUDING THAT *ENGLE* CLASS MEMBERS ARE PROHIBITED FROM RECOVERING PUNITIVE DAMAGES ON THEIR NEGLIGENCE AND STRICT LIABILITY CLAIMS.

The trial court erred in concluding that *Engle* class members cannot seek punitive damages on their negligence and strict liability claims because (A) a

[3] Philip Morris did not invoke this Court's jurisdiction to address the conflict. Instead, it invoked this Court's jurisdiction based on the Second District's rejection of its statute of repose defense. It has asked that the Court hold *Hallgren* pending its determination of the repose issue in *Philip Morris USA Inc. v. Russo*, No. SC12-1401, which is set for oral argument on April 30, 2014.

plaintiff whose motion to amend her complaint was denied as untimely has the right to renew the motion when a new trial is ordered, (B) the preclusive effect this Court afforded to certain class findings in *Engle III* did not eliminate that right, and (C) the statute of limitations has nothing to do with the issue in this case.

A. Once a New Trial Is Ordered, the Plaintiff Has the Right to Renew a Motion for Leave to Amend a Complaint That Was Previously Denied as Untimely.

Mrs. Soffer takes no issue with the district court's conclusion that, as a class member, she stands in the same position as the class plaintiffs in *Engle* at the time this Court ordered the class decertified. She fully "accept[s] the parameters that are framed by that litigation—including the absence of a timely claim for punitive damages under negligence and strict liability theories." *Soffer*, 106 So. 3d at 460. But the fact that the class's effort to seek the remedy as to these claims was untimely when it was denied does not mean that it was forever unavailable; nor does it mean that *Engle* forecloses timely requests by class members to seek that remedy, so long as they request it sufficiently far in advance of a trial.

The reason leave was denied in *Engle* was because the class waited until several months into the Phase I trial to request it. Even then, the motion was, at most, ore tenus and no written motion appears to have ever been filed, much less denied. It was not until the Phase II-B charge conference that it appears that an actual request to amend was made and denied. There can be no doubt that a

plaintiff can waive the right to seek punitive damages by waiting to do so until too close to trial. *E.g.*, *Minotty v. Baudo*, 42 So. 3d 824, 836 (Fla. 4th DCA 2010); *see also* Fla. R. Civ. P. 1.190(f) (noting that motion for leave to amend must be filed at least 20 days before hearing).

But RJR made no argument that Mrs. Soffer waited too long; she sought leave a full four months before trial. As the court in *Hallgren* observed about *Engle* progeny litigation:

> [W]e find no surprise or prejudice to the Tobacco Companies in allowing *Engle* progeny plaintiffs to seek punitive damages for negligence and strict liability claims. From the inception, it was no secret that the *Engle* class members were seeking punitive damages as a remedy on all of their substantive claims. The Tobacco Companies had sufficient notice and ample time to prepare their defense to those remedies. In *Engle*, however, the trial court precluded the class from seeking punitive damages on the non-intentional tort claims merely through a procedural defect—timeliness. Unlike *Engle*, in this case there was no suggestion that Mr. Hallgren's claim seeking punitive damages on all claims was untimely, nor any suggestion that the Tobacco Companies experienced any prejudice.

124 So. 3d at 357-58. RJR did not even raise this issue at the hearing on Mrs. Soffer's motion, and the trial court granted her request to accept her third amended complaint, which sought punitive damages on all counts.

And while the *Engle* class had waited too long by not moving for leave in advance of the Phase I trial, that does not prevent class members from renewing that request now:

> [W]hen the *Engle* trial court's judgment as to issues of punitive damages was reversed, the class members seeking punitive damages had to effectively start over in order to plead, prove, and collect punitive damages. If the supreme court 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 to add the remedy of punitive damages to all of its substantive claims. Thus, we conclude that Mr. Hallgren was entitled to assert a claim for punitive damages on his claims for negligence and strict liability because, as the *Soffer* majority recognized, he was in the "same position [class members] would have been in had they filed a complaint identical to the *Engle* class-action complaint on the same date the original complaint was filed."

Id. at 357 (citation omitted) (quoting *Soffer,* 106 So. 3d at 460) (alteration in original).

The policy of liberally allowing amendments applies anew when the original trial is set aside and there would no longer be any prejudice to allowing the amendment. *Ed Ricke & Sons, Inc. v. Green*, 609 So. 2d 504, 506-07 (Fla. 1992); *Hethcoat v. Chevron Oil Co.*, 383 So. 2d 931, 933 (Fla. 1st DCA 1980). For example, in *Agate v. Clampitt*, 80 So. 3d 450 (Fla. 2d DCA 2012), the trial court denied the plaintiffs' motion to amend their complaint to add a claim for quantum meruit because they waited until the "eve of trial" to make the motion. *Id.* at 451. After the appellate court reversed the trial court's disposition of the claims that had been pled, it explained that on remand the amendment to add the new claim would have to be allowed because there would no longer be any prejudice to the defendant. *Id.* at 452-53. So long as the amendment "is based upon the same

specific conduct, transaction or occurrence between the parties upon which the plaintiff tried to enforce his original claim," the amendment is required. *Id.* (citing *Toner v. Trade-Mar, Inc.*, 252 So. 2d 383, 384 (Fla. 4th DCA 1971)); *see also Title & Trust Co. of Fla. v. Parker*, 468 So. 2d 520, 522 (Fla. 1st DCA 1985) (recognizing that trial courts gain more discretion to deny leave to amend "where the amendment is sought shortly before trial, since the liberality to be exercised in granting amendments diminishes as a case progresses to trial").

Had this Court not decertified the class and instead allowed the class to continue the litigation after *Engle III*, the class would have had the clear right under the foregoing authority to renew its request to amend its complaint to seek punitive damages on whatever counts it chose. Because Mrs. Soffer stands in the same shoes as the class, she has the same right.

B. The Preclusive Effect of the *Engle* Phase I Findings Does Not Eliminate Class Members' Right to Request Leave to Seek Punitive Damages on Their Negligence and Strict Liability Claims.

Equally meritless is the suggestion that the res judicata effect this Court afforded certain findings from Phase I somehow restricts class members' rights to demand punitive damages. This Court's decision in *Engle III* undid **everything** that had been done in the class litigation regarding punitive damages precisely because the Court concluded that punitive damages issues could not be addressed until liability was established, something that could not happen until after the class

was decertified. 945 So. 2d at 1262-63. The Court's opinion in *Engle III* did not even address the issue involved in the instant case, much less suggest that the trial court's denial of leave to seek punitive damages on the negligence and strict liability claims should be given res judicata effect in progeny actions. Moreover, the trial court's ruling on that point was purely a matter of procedure, not substance. *See Hallgren*, 124 So. 3d at 357 ("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.") (citing *Douglas*, 110 So. 3d at 433).

The conclusion by the majority below that this Court "would have said so," if it had intended to allow class members to seek punitive damages that were not available in the *Engle* Phase I trial is exactly backwards. The law is well established that plaintiffs do have the right to renew motions to amend that were denied as untimely before a trial that is subsequently set aside. *Ed Ricke & Sons, Inc.*, 609 So. 2d at 506-07; *Agate*, 80 So. 3d at 452-53; *Hethcoat*, 383 So. 2d at 933. If this Court had intended to burden *Engle* class members with a restriction that applies to no other party, then it "would have said so." While the majority below articulated its belief that this Court's decision in *Engle III* was "unprecedented" and "extraordinarily adjudicated," those terms more aptly

describe the majority's decision that class members must suffer "the bitter" of its ruling because they received the "sweet" that this Court afforded the approved findings in *Engle III*. That is lawless reasoning, and this Court should reject it.

C. The Statute of Limitations Is Irrelevant to the Availability of Punitive Damages.

RJR's arguments below and the majority's holding place great reliance on issues involving the statute of limitations, including repeated assertions that the class's request for leave to seek punitive damages on the non-intentional tort claims was "untimely" and that Mrs. Soffer's claims would be barred by the statute of limitations absent equitable tolling. But Mrs. Soffer's request for leave to seek punitive damages on her negligence and strict liability claims did not implicate the statute of limitations for at least three reasons.

First, the class's mid-trial request to amend its complaint was "untimely" only in the sense that class counsel did not make the request far enough in advance of the trial to avoid prejudice to the defendants. It was not untimely in the sense of being barred by any statute of limitations. The statute of limitations was never raised in this regard at any point in the class litigation. Indeed, there is no statute of limitations for seeking punitive damages. The statute of limitations applies to causes of action, and a prayer for punitive damages is not a cause of action; it is a form of relief available for underlying causes of action. *Hallgren*, 124 So. 3d at 355 (citing *Soffer*, 106 So. 3d at 463 (Lewis, J., dissenting)); *see also id.* at 356

("What the Tobacco Companies fail to recognize is that a claim for punitive damages is not subject to a separate time limitation apart from the substantive claim to which it is linked. Accordingly, because Mr. Hallgren's substantive claims were timely under the *Engle* mandate, so too was the addition of his remedy for punitive damages."). Thus, the only limitations question in this case was whether Mrs. Soffer's claims for negligence, strict liability, concealment, and conspiracy were timely.

Second, the limitations argument that RJR makes in *Engle* progeny cases is inapt because it depends on the line of cases establishing a special doctrine of tolling the limitations period when a class action is filed but the class is either never certified or its certification is reversed on appeal. *E.g.*, *Hromyak v. Tyco Int'l Ltd.*, 942 So. 2d 1022 (Fla. 4th DCA 2006). That doctrine has no application to *Engle* cases. It was created to deal with the inequity that would result when a putative class member refrains from filing an individual complaint in reliance on a pending class action, but the class is either never certified or the trial court's order certifying the class is reversed. To avoid this inequity, the United States Supreme Court long ago "determined that class action tolling applies from commencement of the class action and continues until certification is denied." *Id.* at 1023 (citing *Am. Pipe & Constr. Co. v. Utah*, 414 U.S. 538 (1974)). But certification was never

denied in *Engle*, and this Court expressly affirmed the certification order. *Engle III*, 945 So. 2d at 1265-67.

Thus, *Engle* class members do not need equitable tolling to toll the statute of limitations until they filed their complaints; the *Engle* class action complaint actually commenced their actions. While this Court did hold the class had to be decertified going forward after *Engle III*, that simply "allowed members of the decertified class to pick up litigation of the approved six causes of action right where the class left off." *Douglas*, 110 So. 3d at 432. Or as the majority below ironically noted: "As members of the *Engle* Class, progeny plaintiffs are subject to the posture of the case as it exists … . Progeny plaintiffs wear the same shoes, so to speak, as the plaintiffs in *Engle* because they **are** the plaintiffs from *Engle*." 106 So. 3d at 460.

Third and finally, even if tolling under *Hromyak* were implicated, Mrs. Soffer met it. *Hromyak* holds that a class action complaint tolls the limitations period for all claims asserted therein. 942 So. 2d at 1023. Again, claims are different from remedies. Mrs. Soffer's claims for negligence and strict liability are the same as those pled in *Engle*. "The only difference is the extent of the remedy sought. Adding a claim for punitive damages does not materially alter the claims for negligence and strict liability." *Hallgren*, 124 So. 3d at 356.

II. THE APPROPRIATE REMEDY IS A NEW TRIAL LIMITED TO THE ISSUE OF PUNITIVE DAMAGES.

Ample Florida case law recognizes that when, as here, the only error in a trial impacted punitive damages only and there were no potential errors in the first jury's liability and compensatory damage findings, there is no reason to throw out the time and effort that jury invested by requiring a new trial on all issues. *See, e.g., R.J. Reynolds Tobacco Co. v. Townsend*, 90 So. 3d 307, 310 (Fla. 1st DCA 2012) (finding punitive damage award constitutionally excessive and remanding to allow the plaintiff to "choose between a **new jury trial solely to determine punitive damages** or acceptance of a remittitur judgment" (emphasis added)); *Young v. Becker & Poliakoff, P.A.*, 88 So. 3d 1002, 1005(Fla. 3d DCA 2012) (affirming remittitur order contemplating a new trial on punitive damages only); *Belle Glade Chevrolet-Cadillac Buick Pontiac Oldsmobile, Inc. v. Figgie*, 54 So. 3d 991, 998 (Fla. 4th DCA 2010) (reversing for a new trial based on error in jury instructions and remanding for new trial limited to issues of entitlement to and amount of punitive damages); *Estate of Canavan v. Nat'l Healthcare Corp.*, 889 So. 2d 825, 827 (Fla. 2d DCA 2004) (remanding for new trial on amount of punitive damages only); *Hockensmith v. Waxler*, 524 So. 2d 714, 715 (Fla. 2d DCA 1988) (remanding for remittitur of punitive damage award and a new trial on amount of punitive damages only if plaintiff rejects remittitur); *Rappaport v. Jimmy Bryan Toyota of Fort Lauderdale, Inc.*, 522 So. 2d 1005, 1006 (Fla. 4th

DCA 1988) (remanding for new trial on entitlement and amount of punitive damages only); *Stephens v. Rohde*, 478 So. 2d 862, 863 (Fla. 1st DCA 1985) (remanding for new trial on punitive damages despite defense argument that "compensatory and punitive damages are so intertwined as to require a new trial as to both").

Thus, there is no reason a new jury cannot be impaneled to decide the sole remaining issue in this case. To be clear, a new trial on punitive damages is the only remedy Mrs. Soffer seeks. She firmly opposes a new trial on all issues, which was the relief RJR sought on cross-appeal.

CONCLUSION

For the foregoing reasons, the Court should quash the opinion of the First District and remand with directions for the district court to remand the case to the trial court for a new trial limited to the issue of punitive damages.

Respectfully submitted,

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