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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

REPLY BRIEF OF PETITIONER

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I. *ENGLE* CLASS MEMBERS MAY SEEK PUNITIVE DAMAGES ON THEIR NEGLIGENCE AND STRICT LIABILITY CLAIMS.

A. The Test for Equitable Tolling

RJR finally concedes Mrs. Soffer's point, also addressed by the Second District, that a demand for punitive damages is not subject to any statute of limitation. (In. Br. 21-22 (quoting *Philip Morris USA, Inc. v. Hallgren*, 124 So. 3d 350, 355 (Fla. 2d DCA 2013)). But instead of acknowledging this gap in its prior briefing, RJR argues that this truism "misses the point" because the question should be whether Mrs. Soffer's timely causes of action for strict liability and negligence would have been time barred had they been "expanded" to include a demand for punitive damages. This argument is a game of semantics to divert attention from the reasoning of the district court that Mrs. Soffer's demand for punitive damages is subject to a statute of limitations. The district court expressly affirmed the trial court's holding that Mrs. Soffer's causes of action were timely. Statutes of limitations apply to causes of action, not remedies. Like the district court majority, RJR has failed to cite a single case to the contrary, other than the Fourth District's decision following the erroneous decision below. *R.J. Reynolds Tobacco Co. v. Ciccone*, 123 So. 3d 604, 616 (Fla. 4th DCA 2013).

RJR's continued argument that Mrs. Soffer's lawsuit would have been time barred but for equitable tolling is also belied by the fact that she did not need

equitable tolling. She is a member of the *Engle* class and, accordingly, she commenced her claims by the filing of the *Engle* complaint, not the individual continuation complaint she filed pursuant to this Court's direction in *Engle*. Indeed, in the lead case regarding equitable tolling, the Supreme Court held that "the filing of a timely class action complaint commences the action for all members of the class as subsequently determined" such that "the commencement of the action satisfied the purpose of the limitation provision as to all those who might subsequently participate in the suit as well as for the named plaintiffs." *Am. Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 550-51 (1974).

Thus, for example, the Tenth Circuit has explained that the label "tolling" is really not the correct term in this context unless and until a determination is made that the class could not be certified. *Joseph v. Wiles*, 223 F.3d 1155, 1168 (10th Cir. 2000) (noting that, unless and until there is a determination that a class could not be certified, recognition that the class action complaint commences the action for all class members "does not involve 'tolling' at all" because each class member "has effectively been a party to an action against these defendants since a class action covering [plaintiff] was requested but never denied"). Once a determination has been made that the class was appropriately certified for litigation on threshold issues, there is just no reason to venture into judicially-created tolling doctrines.

The only reason the Supreme Court had to engage in the delicate task of developing an equitable defense to a statutory limitations period in *American Pipe* was because the trial court in the original class action had subsequently determined that no class could be certified. 414 U.S. at 542-43. Thus, putative class members were never parties to that complaint. To remedy the unfairness that would result for members of a class that was pled but did not end up getting certified, the Court held that the filing of a class action complaint "tolls the running of the statute." *Id.* at 552-53; *see also id.* at 554 (limitations suspended for all who "would have been parties" to suit).

If equitable tolling applied in these cases, then each class member would have had to file his or her individual complaint within whatever amount of time was left on their individual limitations period as of the date the class complaint had been filed. But that is not what happened. Instead, this Court imposed a uniform, administrative one-year deadline for class members who wished to continue the claims that had been partially litigated on a class basis. At least for class members who had less than a year left on their limitations period when the class complaint was filed, the one-year deadline would have represented an arbitrary, judicial extension of a legislatively imposed statute of limitations, as opposed to the perfectly appropriate case management deadline the Court actually imposed. This administrative period matches perfectly with the one-year period this Court has

imposed on plaintiffs in every other civil case to take sufficient action to move their claims forward to avoid being deemed to have abandoned their lawsuit due to lack of prosecution. Fla. R. Civ. P. 1.420(3).

Contrary to the repeated suggestions by the *Engle* defendants, echoed in Judge Makar's opinion for the majority below, that the Court's treatment of this class action was an unprecedented aberration, the Court cited ample precedents for all of its holdings in *Engle*. Due to the enormous scope of these defendants' unprecedented misconduct[1] (both in terms of the decades over which it was perpetrated and the millions of smokers that it injured or killed), the magnitude of the lawsuit and year-long common issues Phase I trial may well have been unprecedented. *See Engle v. Liggett Grp., Inc.*, 945 So. 2d 1246, 1270 n.12 (Fla. 2006) ("[T]he procedural posture of this case is unique and unlikely to be repeated."). But the legal principles this Court applied in *Engle* were not. *See id.* at

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[1] While this Court's prior opinions say little about the evidence in these cases, others have elaborated. *See, e.g., Lorillard Tobacco Co. v. Alexander*, 123 So. 3d 67, 83 (Fla. 3d DCA 2013) (noting evidence of more than fifty years of "Lorillard's reckless disregard of the scientific findings and of its indifference to the potential physical harm to consumers caused by its product for its own purely economic gain"); *R.J. Reynolds Tobacco Co. v. Martin*, 53 So. 3d 1060, 1071 (Fla. 1st DCA 2010) (explaining how this evidence supports punitive damages based on either fraudulent conduct or gross negligence); *cf. United States v. Philip Morris USA, Inc.*, 449 F. Supp. 2d 1 (D.D.C. 2006) (federal judge's detailed findings after nine-month RICO trial including findings that defendants not only concealed known dangers, but manipulated nicotine to increase and sustain addiction and intentionally marketed to children), *vacated in part on other grounds*, 566 F.3d 1095 (D.C. Cir. 2009), *cert. denied*, 130 S. Ct. 3502 (2010).

1268-69 (citing several federal decisions, including four by different circuit courts, one of which was authored by now-Justice Sotomayor, approving of the use of class actions to resolve common issues in one phase because of the many case management tools, including decertification, for resolving remaining individual issues in subsequent proceedings). The untoward suggestion by RJR and the majority below that this Court bent the rules of precedent such that the class beneficiaries must "take the bitter with the sweet" is, in short, meritless.

None of the cases cited by RJR (or found by Mrs. Soffer) that actually apply the equitable tolling doctrine to determine whether a particular cause of action was timely involved a prior class that was properly certified to resolve some initial issues and then decertified for the remainder. Instead, RJR relies on (1) decisions that applied or discussed the equitable tolling test based on a class action in which class certification had been **denied**, *Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345, 353-54 (1983); *American Pipe*, 414 U.S. at 553-54; *Coon v. Ga. Pac. Corp.*, 829 F.2d 1563, 1571 (11th Cir. 1987); *Raie v. Cheminova, Inc.*, 336 F.3d 1278, 1282-83 (11th Cir. 2003); (2) a decision that applied the test to a prior class action that had been **dismissed** before even reaching the class certification stage, *Hromyak v. Tyco Int'l Ltd.*, 942 So. 2d 1022, 1023 (Fla. 4th DCA 2006); and (3) a dissenting opinion that opined that class certification should have been **reversed** outright, in which case equitable tolling would apply, *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).[2]

The common thread in these cases, of course, is that the plaintiff's claim was not actually commenced by the class action because he or she was not a named plaintiff and there was no certified class. As the Supreme Court explained the doctrine: "Once the statute of limitations has been tolled, it remains tolled for all members of the putative class until class certification **is denied**." *Crown, Cork & Seal Co.*, 462 U.S. at 354.

While the decision below and the *Ciccone* decision adopting it were not the only *Engle* progeny decisions to have referred to this litigation as involving "tolling," this labeling error was inconsequential in all the other decisions because the same analysis and result would have been obtained from recognizing that the class complaint actually commenced the action for the subject class members. *Gaff v. R.J. Reynolds Tobacco Co.*, 129 So. 3d 1142, 1145 (Fla. 1st DCA 2013); *Hallgren*, 124 So. 3d at 356; *Bishop ex rel. Estate of Ramsay v. R.J. Reynolds Tobacco Co.*, 96 So. 3d 464, 465-66 (Fla. 5th DCA 2012). As the district court

[2] Mrs. Soffer has found decisions from other jurisdictions that use the word "decertified" with regard to the prior class action forming the basis for equitable tolling, but in each case the term was used to refer to an order determining that the class should never have been certified at all. *See, e.g., Hall v. Variable Annuity Life Ins. Co.*, 727 F.3d 372, 375 & n.7 (5th Cir. 2013) (explaining in this context that decertification refers to "an order modifying the original grant of certification and changing it to a denial of certification").

ironically acknowledged below, *Engle* class members like Mrs. Soffer "wear the same shoes, so to speak, as the plaintiffs in *Engle* because they **are** the plaintiffs from *Engle*." *Soffer*, 106 So. 3d at 460. Because the *Engle* complaint was **their** complaint, they do not need equitable tolling.

Even if the test for equitable tolling applied, it is met. Until the district court erroneously accepted RJR's argument, no decision cited by RJR suggested that tolling is different for a cause of action that seeks one kind of damages than for the same cause of action that seeks additional kinds of damages for the same defense conduct, no matter how different those damages are in character. Indeed, many courts do not even require that the causes of action or legal authorities be identical, so long as the causes of action in the prior class action and subsequent individual action are all based on the same common facts. *See generally In re Community Bank of N. Va.*, 622 F.3d 275, 299-300 (3d Cir. 2010) (detailing competing lines of authority). Whichever way this Court may ultimately go if it ever has to resolve the issue, there is just no basis to conclude that both the causes of action and the kinds of damages sought have to be the same.

B. "Equitable Considerations"

RJR's argument about "equitable considerations" (Ans. Br. 25-32) is just further elaboration on its equitable tolling argument. But equitable tolling does not apply as just explained, and the issues in the case turn on legal considerations. To

the extent equity enters into the equation, it favors Mrs. Soffer. She has already fully taken all of the "bitter" that this Court's *Engle* decision imposed upon her and other class members. After years of hard fought litigation including nearly two years of trial, Mrs. Soffer and the rest of the class prevailed before the jury and trial court on their claims for fraudulent misrepresentation, conspiracy to make fraudulent misrepresentations, and infliction of emotional distress, as well as their claim that punitive damages were warranted. They also secured a $150 billion punitive damages judgment to be divided among them. This Court took all those things away in a ruling widely reported as a "huge victory" and "major legal triumph" for the defendants and a "crushing blow" to the plaintiffs. Peter Lattman, *Florida Supreme Court Tosses Punitive Damages in Engle Case*, Wall St. J. Law Blog, July 6, 2006, http://blogs.wsj.com/law/2006/07/06/florida-supreme-court-tosses-puntive-damages-in-engle-case/ (last visited July 24, 2014); Melanie Warner, *Big Award On Tobacco Is Rejected By Court*, N.Y. Times, July 7, 2006, http://query.nytimes.com/gst/fullpage.html?res=9801E6DF1030F934A35754C0A9609C8B63 (last visited July 24, 2014); Vanessa O'Connell, *Tobacco Industry Wins Big At Florida High Court*, Wall St. J., July 7, 2006, http://online.wsj.com/news/articles/SB115219854214999611/ (last visited July 24, 2014).

While Mrs. Soffer appreciates that it was not a complete victory for the defense and that this Court left in place the common findings the class had proven,

the Court did not confer any new benefits and left the class members in a substantially more difficult position. Instead of being able to collect her share of the punitive damage award and prove her compensatory damages in class proceedings during the contemplated Phase III, Mrs. Soffer had to find qualified attorneys willing to invest hundreds of thousands of dollars in costs and well over a million dollars in attorney time to handle her case on an individual basis many years later and prove entitlement to punitive damages from scratch. Indeed, the only reason that Mrs. Soffer or any other class member has to prove that punitive damages are warranted on any of their claims is because the defendants won *Engle*. Having prevailed before this Court on all of those issues, it is RJR and its coconspirators that must take the bitter with the sweet.

RJR's remaining "fairness" arguments suggesting that it would have done something differently during the class action had it been on notice that class members intended to seek punitive damages on the non-intentional tort claims rests on the unsupportable and unstated suggestion that RJR might have devoted more resources to defending the class action or settled. Such a claim would defy reality because it ignores the unlimited resources the tobacco companies brought to bear in the class litigation and assumes that they would have settled had the class only included a punitive damages claim in the class claims for strict liability and negligence. RJR was on notice that a class of over 700,000 people who were dead

or dying from lung cancer and other devastating illnesses were seeking to hold them negligent and strictly liable for the obviously substantial damages wrought by all those deadly cigarettes. Of course, the parties were already litigating whether punitive damages were warranted on the intentional tort claims. There is just no basis to believe that without the potential for punitive damages on the non-intentional tort claims, these defendants had insufficient incentive to mount the most vigorous defense they could muster.

C. The Rules Governing Amendments

The arguments on which the district court and RJR relied below having been exposed as meritless, RJR now offers a whole new set of arguments by contending that rules governing amending complaints support the result it seeks. Not only did RJR not raise these arguments in opposing Mrs. Soffer's motion to amend, but the trial court exercised its discretion on allowing amendments in Mrs. Soffer's favor by accepting her third amended complaint, which added a claim for punitive damages as to all four counts. (R3:560; R6:1039-63; R12:2288-90.) The ruling on appeal is not a denial of leave to amend, but a jury instruction that the jury may not award punitive damages on the non-intentional tort counts as a matter of law.

RJR's new claim made for the first time in this Court is that Mrs. Soffer and the rest of the class waived the right to move to amend the non-intentional tort claims to add a punitive damage claim by not appealing the trial court's ruling in

Phase II-B of the class trial. While that might make sense if Mrs. Soffer's position was that the trial court erred in denying leave to amend after the class trial commenced, that is just not the case. Given the timing and the trial court's discretion, any appeal would have been frivolous. This Court should reject any rule that requires a party to raise a frivolous issue on appeal to preserve its rights on remand.

The sole authority on which RJR relies for this argument is distinguishable. In *Airvac, Inc. v. Ranger Ins. Co.*, 330 So. 2d 467, 468 (Fla. 1976), the trial court denied the defendant's motion for leave to amend its answer to add an entirely new defense. The defendant suffered an adverse judgment and appealed. *Id.* After the judgment was reversed and remanded for a new trial, the defendant renewed its motion to amend, which again was denied. *Id.* at 469. This Court approved the trial court's ruling by holding that law of the case precluded the defendant from renewing the motion because it had failed to raise and win that issue in the prior appeal. *Id.* The *Airvac* decision does not state the basis for the denial of leave to amend in the first trial, so it is not possible to tell whether the defendant was contending on remand that the first ruling was erroneous or was just renewing its motion because it was not untimely in relation to the second trial on remand. Moreover, unlike the material facts in *Airvac*, (1) the class did not suffer an adverse judgment and so it had no reason to appeal, (2) Mrs. Soffer did not seek to

inject an entirely new claim into the case, and (3) RJR did not raise this issue in opposition to Mrs. Soffer's motion for leave to amend and the trial court granted that motion.

Moreover, this Court has already receded from *Airvac* to the extent it rested on the law of the case doctrine. *Fla. Dep't of Transp. v. Juliano*, 801 So. 2d 101, 107 (Fla. 2001). To the extent *Airvac* would otherwise apply to require a finding of waiver, the Court should further limit it. The Court has already held that the only reason to deny leave to amend to add a new claim or defense on remand is "where a party is misled to his or her prejudice by that party's adversary." *Ed Ricke & Sons, Inc. v. Green*, 609 So. 2d 504, 507 (Fla. 1992). Whatever sense the *Airvac* holding might make in requiring the party who lost the first trial to raise the denial of leave to amend as part of its appeal of the resulting adverse judgment, it would make no sense and only require a frivolous appeal if it requires the party prevailing in the first trial to appeal the denial of a motion to amend that was based solely on a timeliness issue that becomes moot if a new trial is ordered.

The cases that should control are *Ed Ricke*, *Agate v. Clampitt*, 80 So. 3d 450 (Fla. 2d DCA 2012), and *Hethcoat v. Chevron Oil Co.*, 383 So. 2d 931 (Fla. 1st DCA 1980). RJR seeks to distinguish them by noting that they remanded for a new trial on all issues, while this Court affirmed some of the issues resolved in the *Engle* class trial. While that distinction might make a difference if any of the

affirmed findings related to punitive damages, this Court not only reversed all findings relating to punitive damages, but held that they should not have been tried on a class basis at all.

RJR's claims of surprise and prejudice are meritless. It has been aware at least since March 12, 1999, during the Phase I trial, that the class sought punitive damages on the non-intentional torts. (In. Br. App. 69.) As explained above, there is simply no basis for RJR's implicit claim that it would have defended the class trial differently had it only known that it might eventually face punitive damages not only on the intentional torts, but also on the others. RJR can make no claim that Mrs. Soffer waited until too close to her trial to seek to amend her complaint, and in any event, the trial court exercised its discretion to allow her to do so. The facts of this case just do not support RJR's implicit argument that the trial court abused its discretion in allowing the amendment.

Thus, RJR receives no support from the cases on which it relies, each of which found the trial court did not abuse its discretion in denying leave to amend under very different circumstances. *See Atlantic Sec. Bank v. Adiler S.A.*, 760 So. 2d 258, 260 (Fla. 3d DCA 2000) (leave sought during trial); *Trident Inv. Mgt., Inc. v. Amoco Oil Co.*, 194 F.3d 772, 780 (7th Cir. 1999) (leave sought after defendant had stipulated to liability); *Orix Credit Alliance, Inc. v. Taylor Mach. Works, Inc.*, 125 F.3d 468, 480-81 (7th Cir. 1997) (leave sought during trial);

Wells v. Xpedx, No. 8:05-CV-2193-T-EAJ, 2007 WL 1362717, at *3 (M.D. Fla. 2007) (leave sought after discovery deadline and would require continuance of trial); *Bremicker v. MCI Telecomm. Corp.*, 420 N.W.2d 427, 429 (Iowa 1988) (resting on Iowa rule of procedure prohibiting amendments that add new issues after a responsive pleading has been filed).

The right to amend a timely cause of action to seek different kinds of damages for the same tortious conduct is firmly established even in *Engle* cases. *See Capone v. Philip Morris USA, Inc.*, 116 So. 3d 363, 377 (Fla. 2013) (recognizing right to amend *Engle* action upon smoker's death to seek the very different remedies available under the Florida Wrongful Death Act). If a timely *Engle* strict liability or negligence claim can be amended to seek, for example, the pain and suffering that the smoker's death caused his or her children, then there is no reason to prohibit the same claim from being amended to seek punitive damages or any other kind of damages.

D. *Engle* and *Douglas*

While this Court noted in *Engle* that to recover punitive damages under the claims for which it was pled in the class complaint required proof of reliance, it did not suggest class members could not amend to seek punitive damages on other counts in their individual actions. And the Court's statement in *Philip Morris USA, Inc. v. Douglas*, 110 So. 3d 419, 432 (Fla. 2013), that class members pick up the

litigation where the class left off supports Mrs. Soffer because the class could have amended its complaint had it not been decertified.

II. THE REMEDY IS A NEW TRIAL ON PUNITIVE DAMAGES ONLY.

RJR's claim that the issues of its liability on the non-intentional torts are "intertwined" with the issue of whether punitive damages are warranted is a rehash of the same "reconsideration" argument this Court rejected in *Engle*. The *Engle* jury decided all issues regarding liability on the non-intentional tort claims except whether each class member was injured by the defendants' cigarettes, a holding RJR recognizes. (Ans. Br. 15 (citing *Douglas*, 110 So. 3d at 430).) This issue is not even related to, much less intertwined with, the issue of whether punitive damages are warranted based on RJR's gross negligence in putting these cigarettes on the market. To the extent the amount of compensatory damages or comparative fault bear on a punitive damage award, the new jury can simply be told what the prior jury found, just as the prior jury was instructed on the *Engle* findings.

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