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IN THE SUPREME COURT OF FLORIDA

TALLAHASSEE, FLORIDA

CASE NO. SC13-2415

R.J. REYNOLDS TOBACCO COMPANY,

Petitioner,

vs.

PAMELA CICCONE, as Personal Representative of the ESTATE OF GEORGE N. CICCONE, deceased,

Respondent.
_____/

ANSWER BRIEF OF RESPONDENT

On appeal from the Fourth District Court of Appeal of the State of Florida

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PREFACE

Petitioner will be referred to as "R.J. Reynolds" or "Petitioner." Respondent will be referred to as "Ciccone" or "Respondent." The following designations will be used:

(IB) - Initial Brief of Petitioner

(A) – Petitioner's Appendix

(R) - Record-on-Appeal

(T) – Trial Transcripts

STATEMENT OF THE CASE AND FACTS

Petitioner's Statement of the Case is argumentative, describing the "manifestation" of an injury as a "term of art" (IB 1). Petitioner follows that premise with a long explanation of how its definition of "manifestation" has to be adopted (IB 1-2). None of that discussion is a statement of the procedural posture of the case.

George Ciccone ("George") suffered from peripheral vascular disease ("PVD"). PVD refers to both arterial and venous disease, while the term peripheral arterial disease ("PAD"), refers only to disease of the arteries (T9:1189; T10:1305). For purposes of George's disease, the two terms were used interchangeably in the medical records (T10:1305). PVD causes claudication, which is pain related to the narrowing of the blood vessels causing restricted blood flow (T6:677; 679). It is difficult to differentiate the symptoms of PVD/PAD from the symptoms of degenerative disk disease (T9:1189). The pain George experienced from PVD was similar to the pain George had from his degenerative disk disease, which was occurring at the same time (T9:1190).

George held a physically demanding job as a pipe-fitter, and he suffered the aches and pains that such a job might produce. He was not one to complain about his health, but he began suffering from leg pain in the 1990's. He would limp and drag his leg (T16:2302-04). George's co-worker, William Jones ("Jones"), testified

that George had pain in his right hip and leg in 1994-1996, which made it difficult for him to walk and do his job (T10:1391-93). Jones testified that George would ask him to drop him off close to the jobsite so he would not have to walk (T10:1391). Jones testified it was obvious by the way George walked that he had leg pain (T10:1394). The pain also made it hard for him to climb up and down ladders (T10:1391). George's stepson, Mark Laliberte ("Mark"), was alarmed by the symptoms he saw in his stepfather at his wedding in 1995. When George tried to climb the stairs to Laliberte's apartment, he stopped halfway up and made a comment about how his leg hurt (T10:1421-22). At the reception, George tried to dance with Mark's bride, Kelly, but had to stop after a couple of dance steps because his leg hurt (T10:1422-23). George and his wife had planned to stay in Orlando the day after the wedding but had to leave because of George's leg pain (T10:1423).

George saw Dr. Michael Hirsch ("Dr. Hirsch") for back pain in June 1991. Dr. Hirsch sent him out for an MRI and X-ray, and the reports identified spondylosis and abdominal aorta vascular sclerosis, the latter of which Dr. Hirsch described as evidence of PVD (T6:663-67; also T10:1306).

By 1998, his pain finally brought him to surgeons, first for spinal nerve decompression and then for vascular bypass surgery in 1999, which succeeded at last in resolving the symptoms and leg pain of the last decade (T6:677; 690; 693). At the time, George's physicians thought the leg pain was due to his back, but later

understood the two problems overlapped (T6:676-80). Physicians consulted for femoral bypass surgery diagnosed George with severe peripheral vascular disease ("PVD"), persistent and progressive, characterized by claudication (pain when walking) (T6:684-85). Dr. Hirsch testified at trial that George had suffered from it since 1991 (T6:685; 687).

Dr. Allan Feingold ("Dr. Feingold"), a specialist in pulmonary medicine, testified that George had PVD of the aorta and femoral artery, a condition which did not become clear until after George had back surgery and the pain from the back injury was alleviated (T9:1190). At that point the similar pain being caused by claudication became obvious (T9:1190-91). Dr. Feingold concluded that the leg pain George was having since 1991 was being caused by PVD, not the back problems (T9:1191). He testified that the symptoms described since 1991 or pain when walking, numbness in his right hip and the leg cramping were all caused by PVD (T9:1191). Those symptoms in 1991 were "the first manifestation" of the disease (T9:1191). He described the 1991 onset of PVD as "soft" (T9:1191). The term "vascular sclerosis" used in the 1991 X-ray report was the term for PVD used back then, although it is no longer used (T9:1191).

Femoral bypass surgery solved the leg problem and cured the pain, but his medical problems were far from over (T16:2305-07). In June 2002, George started wheezing and saw Dr. Hirsch, who diagnosed lung cancer. He was given four

weeks to live, and died August 22, 2002 (T16:2307-09). He smoked up to the day he died in the hospital, sneaking into bathrooms and outside to smoke cigarettes (T16:2310). Dr. Feingold testified there was no doubt that George's nicotine addiction contributed to lung cancer and peripheral vascular disease (T9:1263).

R.J. Reynolds moved for directed verdict. At the argument, the trial judge stated that according to his recollection, Dr. Hirsch testified George:

> "may have had PVD, but did not have any symptoms for it. Then he said, based on the MRI report, he had signs of PVD. Then he said he may not be manifesting any signs -- any symptoms of PVD. And then the last part that he was asked on cross-examination, he was not manifesting any symptoms until 1998" (T16:2365-66).

The court described the evidence as "extremely weak."

The trial court's recollection of the evidence is at odds with the transcript. Neither Dr. Hirsch nor Dr. Feingold testified as the court remembered. As reflected in the testimony discussed above, both physicians testified that George had symptoms of PVD beginning in 1991. With regard to cross-examination, it was defense counsel who claimed that there were no symptoms until 1998. Dr. Feingold corrected defense counsel, and testified that the 1998 report actually said "He was worst the last couple of months, <u>but he's been having pain for years</u>…" (T10:1310-11) (emphasis added). Dr. Feingold testified that George gave treating physicians a history of seeking help for leg pain <u>for years</u> when asked about Dr. Lynn Atkinson (neurosurgeon) (T10:1312). Dr. Feingold testified on cross-

examination that while George's charley horse episodes were not a classic PVD symptom, they were symptoms of a decrease in blood flow and a gradual developing peripheral arterial disease (T10:1319-20).

The Punitive Damages Verdict

The jury found in favor of Plaintiff in the first phase of the trial, finding that George was addicted to cigarettes containing nicotine and that his addiction was a legal cause of his PVD, that it manifested prior to November 21, 1996, and that he had lung cancer caused by smoking, which was a legal cause of his death (T25:3298; R68:13022-24).

In Phase II, the jury concluded that negligence on the part of R.J. Reynolds was a legal cause of George's death, that defective cigarettes manufactured by R.J. Reynolds were a legal cause of his death, that R.J. Reynolds was grossly negligent, but that George did not reasonably rely on statements by R.J. Reynolds which concealed or omitted material information which caused his death. The jury attributed 30% of the fault to R.J. Reynolds and 70% to George, but it also found by clear and convincing evidence that punitive damages were warranted, and assessed them in the amount of $50,000 (R69:13022-24).

On appeal to the Fourth District, R.J. Reynolds argued that Plaintiff could not bring a punitive damages claim based on any cause of action other than those brought by Engle. The Fourth District agreed, relying Soffer v. R.J. Reynolds

Tobacco Co., 106 So.3d 456 (Fla. 1st DCA 2012). The court reversed the punitive damages award.

SUMMARY OF ARGUMENT

The Fourth District's opinion below properly rejected the reasoning in Castleman v. R.J. Reynolds Tobacco Co., 97 So.3d 875, 877 (Fla. 1st DCA 2012). The Castleman court relied on statute of limitations law analyzing when a cause of action accrues in a creeping disease case. In the context of a creeping disease, the cause of action accrues when the accumulated effects of the deleterious substance manifest themselves to the claimant, in a way which supplies some evidence of causal relationship to the manufactured product. The definition used in those cases balances the defendant's right to have claims litigated timely so there is adequate opportunity to defend, with the plaintiff's right to bring an action of which the plaintiff is, or reasonably should be, aware.

Petitioner's reliance on statute of limitations law to answer the question of class membership is inappropriate because class membership is not concerned with when the cause of action accrues. According to the Engle class definition, the only concern is whether the smoker is suffering from the disease. The definition contains nothing to require the smoker also be award that the disease is related to smoking.

Adopting Petitioner's argument would mean tobacco manufacturers would gain the benefit of the fraudulent concealment of information material to the smoker's understanding of the risks of smoking. Petitioner and other

manufacturers engaged in a decades-long conspiracy to create doubt about the dangers of smoking, and to convince smokers there was no connection between smoking and disease. Requiring those smokers to now prove they knew smoking cigarettes caused disease would be contrary to the Engle finding that Petitioner was engaged, both individually and through a conspiracy with other manufacturers, in a fraud to mislead the public about the risk of disease. Essentially, it would mean Petitioner would reap the benefits of the fraud.

The proper reading of the requirements for Engle class membership is the one adopted by the Fourth District, and the definition applied by this court in Engle. Knowledge of what caused the smoking related disease is not relevant because it is not part of the class definition.

The second issue relates to punitive damages based on gross negligence. This Court has accepted jurisdiction over Soffer v. R.J. Reynolds Tobacco Co., 106 So.3d 456, 460 (Fla. 1st DCA 2012), a decision the Fourth District relied on in reversing the award of punitive damages in the trial below. If this Court quashes the decision in Soffer, then that portion of the Fourth District's opinion in this case should also be quashed.

ARGUMENT

POINT I

THE FOURTH DISTRICT PROPERLY AFFIRMED THE JUDGMENT WHERE THE TRIAL COURT ACCURATELY INSTRUCTED THE JURY ON CLASS MEMBERSHIP.

In Engle v. Liggett Group, Inc., 945 So.2d 1246, 1274 (Fla. 2006), this Court affirmed the class certified by the trial court which was defined as "All United States citizens and residents, and their survivors, who have suffered, presently suffer or who have died from diseases and medical conditions caused by their addiction to cigarettes that contain nicotine." (emphasis added). Later in the opinion, this Court reversed the Third District's holding that class representatives Farnan and Della Vecchia could not be class members because they were diagnosed with diseases after November 21, 1996, writing "The critical event is not when an illness was actually diagnosed by a physician, but when the disease or condition first manifested itself." Petitioners have focused on the Court's later statement and ignored the actual class definition.

This Court made it clear in Engle that diagnosis is irrelevant because of the class definition ("However, 'diagnosis' as a qualifying factor does not appear anywhere in the description of the class certified"). Id. at 1275. According to the class definition, the only factors that should be considered when deciding if a claimant is a member of the Engle class are the factors contained in the Engle: 1)

the smoker is a Florida resident, 2) the smoker suffered or died from a smoking related disease on or before November 21, 1996, and 3) that the disease was caused by addiction to cigarettes containing nicotine.

Petitioner's contrary argument is based on a modified class definition that uses the "manifested itself" language this Court used when describing when a person is considered to be "suffering" from a disease (IB 1). Then, armed with a new word, Petitioner builds the argument that "manifested itself" must mean the same as it does in other areas of the law, and chose to import the meaning used in statute of limitations analysis of a creeping disease because it would be the most restrictive. The end result is a conclusion which is far afield of the actual class definition this Court approved. According to Petitioner, the class membership requirements are: 1) the smoker is a Florida resident, 2) the smoker suffered or died from a smoking related disease on or before November 21, 1996, 3) that the disease was caused by addiction to cigarettes containing nicotine, and 4) that the smoker knew of a causal connection between the disease and smoking cigarettes. Petitioner has obviously added a knowledge requirement that is nowhere in the class definition or the Engle opinion. The question for class membership is whether the claimant "suffers or has suffered" from a smoking related disease, not diagnosis of the disease, or manifestation of the disease, or knowledge of a link

between the disease and smoking cigarettes. The Engle class definition contains no requirement that the claimant have knowledge of the cause of the disease.

The obvious reason why the smoker is not required to have knowledge of the causal connection between smoking and the disease is because this lawsuit concerns Petitioner's decades-long effort to convince smokers that there was no connection between smoking and disease. Now that Petitioner has been found liable for fraudulent concealment in Engle, it would be illogical for the class definition to include only smokers who were not fooled by the fraud. It would essentially give Petitioner the benefit of the decades of false statements designed to convince smokers there was no link between smoking and disease.

If this Court were to adopt Petitioner's strange logic, Petitioner's next argument would be that it cannot be liable for fraud as to any class member because, if it is a requirement of class membership that the smoker know there is a link between smoking and disease, then the class members could not have relied on Petitioner's fraudulent statements to the contrary. In other words, only non-Engle class members could prove reliance and fraud, a conclusion which is directly contrary to the holding in Engle that all the defendants concealed material information, and conspired to conceal information, regarding the health effects of smoking[1].

[1] The two holdings were: 4(a) (that the defendants concealed or omitted material

There is also nothing in the Engle opinion to indicate that this Court intended to change the class definition by describing the "suffering" from disease as a "manifestation" of a disease. In fact, when this Court reinstated the Farnan and Della Vechhia final judgments, the Court used the words "suffering from" with regard to Della Vecchia's disease, and "manifested" with regard to Farnan's disease, interchangeably. Id. at 1276. In neither discussion did the Court consider or even wonder whether Farnan or Della Vecchia had notice of a connection between smoking and their respective diseases.

Petitioner has argued that this Court's silence on the issue of whether Della Vecchia knew of a causal connection between her disease and smoking does not mean the smoker's knowledge was unnecessary (IB 35). Again, Petitioner is relying on a secret holding or meaning from the Engle opinion. The argument actually emphasizes that the smoker's knowledge is irrelevant. This Court considered the class definition, and it necessarily had to consider everything relevant to that definition. Petitioner is essentially arguing that it agreed the class definition did not include a knowledge component when it participated in Engle, but now wants to insert a new requirement into the class definition. It should have

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information not otherwise known or available knowing that the material was false or misleading or failed to disclose a material fact concerning the health effects or addictive nature of smoking cigarettes or both), 5(a) (that the defendants agreed to conceal or omit information regarding the health effects of cigarettes or their addictive nature with the intention that smokers and the public would rely on this information to their detriment). Engle, at 1277.

made that argument in the trial court in Engle when the class definition was created, and then appealed that issue if the definition did not include a requirement Petitioner thought was necessary. It is hardly appropriate to argue now that an essential requirement of the definition was left out. This Court's reversal of the Farnan and Della Vecchia judgments shows that their knowledge of a causal link between smoking and a disease was not a requirement of class membership. If it were a requirement, then the Engle opinion would have reflected that fact.

The Court's analysis in Engle makes it hard to understand Petitioner's argument that the "Engle class definition incorporated notice that the disease is caused by smoking" (IB 20). Nothing in Engle creates that requirement and, to be fair, Petitioner acknowledges there is no support in the Engle class definition for its argument (IB 21). Yet it also argues that "[i]n Engle this Court held that the class definition incorporated a requirement that the smoking related disease or condition had already 'manifested itself' when the class was re-certified" (IB 21). That statement misunderstands the Engle opinion, and what a "holding" of an opinion is. This Court did not "hold" that the class definition had any extra elements other than those stated in the class definition. A holding requires an express statement by the court.

Throughout the Initial Brief, Petitioner has made much of the word "manifested," pointing out various instances where the Engle trial court used

"manifest" in the class notice and the omnibus order (IB 21). Petitioner then jumps to the illogical conclusion that the "repeated use" signals the court's intention to incorporate statute of limitations law into the class definition. To the contrary, this Court's use of the word "manifest" in Engle shows that it was just a common word in the English language.

In Engle, this Court also used the word "manifest" to describe the standard of review for damages ("manifest weight of the evidence" (Id. at 1263)), and "manifest injustice" when discussing when it is appropriate for a court to revisit the law of the case (Id. at 1266). Only a desperate litigant would read a single word at the end of the opinion and assume it meant the Court made a secret holding. The word "manifest" is just a word; it has no link to statute of limitations law unless it is used in that context.

In the conflict decision, Castleman v. R.J. Reynolds Tobacco Co., 97 So.3d 875 (Fla. 1st DCA 2012), reh'g denied (Oct. 5, 2012), the First District held that the question of whether a claimant suffers from a disease must be decided by looking at what the claimant knew about the disease and the law. Specifically, the court held that a claimant can only be an Engle class member if the claimant knows he or she is suffering from a disease and that the disease is caused by smoking. The court's holding was directly contrary to the first sentence of its analysis, "Qualification for Engle class benefits does not require a formal diagnosis that a disease or condition

was tobacco-related on or before November 21, 1996." Castleman, 97 So.3d at 877. The only way the holding can be consistent with that first sentence is if the court meant that formal diagnosis is not necessary, but a lay diagnosis or so other informal understanding is required. That would mean that the Castleman court would require the smoker to know about a causal link before his treating physician does.

In reaching its conclusion, the court relied on the reasoning of the Third District in Frazier v. Philip Morris USA Inc., 89 So.3d 937 (Fla. 3d DCA 2012).[2] Relying on the reasoning in Frazier is problematic, however, because the Frazier court used the word "manifestation" in the context of the statute of limitations, and came to the conclusion that the statute of limitations in a creeping disease case (like cigarette claims) requires knowledge of the symptoms and the cause sufficient to put a Plaintiff on notice. This avoids forfeitures. Even so, the Frazier court used the term "manifestation" to mean "physical, observable, patent symptoms and effects" which it coupled with knowledge of the cause to reach its conclusion. The result is that the Castleman definition of "manifestation of a disease" for purposes of class membership is the same as manifestation of a disease for purposes of accrual of a cause of action in the context of the statute of limitations analysis.

Of course, class membership is a different question than delayed discovery and

[2] The Frazier court relied on the creeping disease discussion in Carter v. Brown & Williamson Tobacco Corp., 778 So.2d 932 (Fla. 2000), which is another statute of limitations analysis.

accrual of statute of limitations purposes, but Petitioner mistakenly conflates the two, reciting cases pertinent to accrual that miss the class membership mark set in Engle. The two rules serve very different purposes, and should not be confused. The Fourth District's opinion clearly explained the policy difference between statute of limitations and the class definition.

Petitioner's argument would make Engle manifestation the same as a statute of limitations. But the directive in Engle that diagnosis is not required would be undermined if a plaintiff is required to associate his symptoms with smoking, because that rule would require lay people to diagnose themselves for diseases both silent and subtle. In Engle, this Court eschewed that rule.

The trial court recognized the issue and crafted a definitional instruction to assist the jury in its completion of the Phase I verdict:

> In this case, 'manifest' is defined as the time when Mr. Ciccone experienced symptoms of peripheral vascular disease or was diagnosed with peripheral vascular disease (T23:3260).

The instruction captured this Court's terminology and imposed no requirement that George correctly self-diagnose, or that he make an association that his own doctors missed. All Engle required, and all that the trial court embraced, was the concept of symptoms. Plaintiff did not agree to the instruction.

Petitioner's Reliance on Limitations Law

Like the First District in Castleman, Petitioner has relied on statute of limitations law in the Initial Brief. Orange County Pub. Services v. Ottley, 9 So.3d 638, 639 (Fla. 1st DCA 2009) (whether claim was time-barred by the notice provisions of §440.185(1), Fla. Stat. (2007)); Hochberg v. Thomas Carter Painting, Inc., 63 So.3d 861, 863 (Fla. 3d DCA 2011) (whether the four-year limitations period should have been tolled until discovery of the precise nature of defects giving rise to the claim); Carter v. Brown & Williamson Tobacco Corp., 778 So.2d 932 (Fla. 2000) (statute of limitations in a creeping disease case); Pulmosan Safety Equip. Corp. v. Barnes, 752 So.2d 556, 558 (Fla. 2000) (discussing the products liability statute of repose which operated to bar a cause of action before there was any manifestation of injury). Petitioner relies on the discussion of when a claim manifests for purposes of statute of limitations or repose in those cases by arguing the court cannot diverge in the interpretation of "legal terms" in different cases, citing Phillips v. Hirshon, 958 So.2d 425 (Fla. 3d DCA 2007) (IB 22).[3]

[3] Ironically, Petitioner also argues in the brief that it was improper for the Fourth District to "borrow[] a definition of manifestation developed in the context of 'insurance coverage cases' (IB 33). The argument is ironic because Petitioner is arguing that this Court should import statute of limitations law into the class definition. The Fourth District read and applied the class definition as written, and explained its conclusion by referring to the differences between statute of limitations law and the class definition. Only after reaching its conclusion did the court refer to the explanation of manifestation in Preferred Risk Life Ins. Co. v. Sande, 421 So.2d 566, 568 (Fla. 5th DCA 1982). The court's reference to

Petitioner's representation of the holding in Phillips is inaccurate. The actual holding is, "we respectfully submit that the courts may not diverge when interpreting the same subsection of the Florida Constitution, even if it seems to make good policy." Id. at 430 (emphasis added). Petitioner took the quote, which involved the Florida Constitution, and changed it to make it more generally applicable to all "legal terms," presumably to include common words like "manifest." That was not what the Third District intended when it wrote that the interpretation of a subsection of the constitution cannot change from case to case just to make good policy. Based on that twist of words, Petitioner relies on Phillips to argue to this Court that the word "manifest" has to have the same meaning in every case, regardless of how the word is used in the case.

Requiring a court to interpret "manifest" as having the same meaning when deciding whether the verdict is against the manifest weight of the evidence would lead to some very strange discussions. The word manifest does, of course, have the same meaning everywhere it is used because it is a word in the English language. Manifest means "readily perceived by the senses and especially by the sense of sight; easily understood or recognized by the mind." Merriam-Webster

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Preferred Risk was merely a source of confirmation for the court's conclusion that manifestation of a disease does not include understanding the cause of the disease. The use of that definition was appropriate because the question in both contexts is the same; Is the [smoker][insured] suffering from the disease during the [class][policy] period? In neither context does the inquiry include knowledge of the cause of the disease.

Dictionary. When this Court wrote that the date the disease is diagnosed does not define class membership but, rather, when the disease manifests itself, the Court meant simply when the disease becomes clear, obvious or visible. Petitioner's tortured reading of the Engle opinion attempts to change the meaning of the opinion; to make the simple complex.

Like the other cases relied on by Petitioner, R.J. Reynolds Tobacco Co. v. Jewett, 106 So.3d 465, 468 (Fla. 1st DCA 2012), concerns the statute of limitations defense, and the Carter holding that a cause of action for a creeping disease accrues when the disease "first manifests itself." Petitioner's reliance on Damianakis v. Philip Morris USA Inc., 39 Fla. L. Weekly D1496 (Fla. 2d DCA 2014), is based on a liberal reading of the opinion. In Damianakis, Philip Morris stipulated that Mr. Damianakis's smoking-related illness first manifested in April 1994, the same month he moved to Florida and a year and one-half before the cut-off date. The Second District did discuss Carter and Frazier, along with a discussion of the manifestation of a creeping disease issue in those opinions, but it was in the context of pointing out that the question of when a disease manifests itself is usually one for the jury. Damianakis, at *10. The court held that because Philip Morris agreed the disease manifested itself before the cutoff date, there was no need to readdress the issue on remand. Otherwise, Damianakis deals with the issue

of whether a smoker has to be a resident of Florida at the time the disease manifests itself, an issue which is irrelevant to this discussion.

The decisions in these cases, even if they applied here, would not support Petitioner's argument. In Carter, this Court wrote that an action accrues only when the accumulated effects of the deleterious substance manifest themselves to the claimant, in a way which supplies some evidence of causal relationship to the manufactured product. Carter, 778 So.2d at 937. The discussion in Carter concerned the accrual of a cause of action, not class membership. Accrual of a cause of action requires two components: 1) manifestation of a disease, and 2) knowledge of the cause of the disease. This Court adopted the Copeland statement that the statute of limitations period starts "running from the time the facts giving rise to the cause of action [a] were [actually] discovered [by the claimant] or [b] should have been discovered [by the claimant] with the exercise of due diligence," §95.031(2), Fla.Stat. (1981); Copeland v. Armstrong Cork Co., 447 So.2d 922, 926 (Fla. 3d DCA 1984) decision approved in part, quashed in part sub nom. Celotex Corp. v. Copeland, 471 So.2d 533 (Fla. 1985). The definition used is meant to delay the running of the statute of limitations until the plaintiff is in a position to take action.

The statement relied on by Petitioners from Barnes, that "manifestation of a latent injury in a product liability claim occurs when the plaintiff is on notice of a

causal connection between exposure to the allegedly defective product and the resultant injury" is not an accurate statement of the law, and is not even consistent with other statements in Barnes (emphasis added). In the very next paragraph, for example, the Barnes court quoted the holding in Celotex Corp that a cause of action accrues when the disease manifests itself and the causal connection is known. In the first example, the court's statement is defining manifestation of a latent injury, while in the second statement the court is defining accrual. It is clear that the statement relied on by the Petitioner in this case is an unfortunate choice of words by the Barnes court, and does not reflect the court's true holding. The court did not intend to create a new meaning for manifestation of an injury.

Petitioner's Reliance on the Trial Court's Order on Previously Domiciled Members

Petitioner has erroneously relied on an Engle pretrial ruling (IB 22-23; A 26). The order relied on concerns choice of law, not class membership. The trial court noted the analysis required by the applicable precedent:

> 3). Given that [Bishop v. Florida Specialty Paint Co., 389 So.2d 999 (Fla. 1980)], and its successor case, Bates v. Cook, 509 So.2d 1112 (Fla. 1987), have established that the local law of the state where the cause of action occurred determines the rights and liabilities of the parties (unless some other state has a more 'significant relationship to the parties and the occurrence'), the issue should first center on whether the cause of action, in fact and circumstance, has arisen in Florida.

> 4). The essential holding in Bishop and Bates is to determine which state has the most significant relationship to the cause of action and the parties in each of the cases…"

The trial court's analysis in the Engle order relied on by Petitioner concerns when the cause of action accrued. It was therefore necessary for the court to determine whether the smoker could bring the cause of action, and the issue of the smoker's knowledge is essential to accrual of a cause of action. If the smoker did not know about the link between smoking and the disease, and therefore was not aware that a tort claim existed, then the delayed discovery doctrine could prevent accrual and the statute of limitations from starting to run. Hearndon v. Graham, 767 So.2d 1179, 1184 (Fla. 2000) ("The 'delayed discovery' doctrine generally provides that a cause of action does not accrue until the plaintiff either knows or reasonably should know of the tortious act giving rise to the cause of action"). As a result, when the Engle trial court was deciding when the cause of action accrued to determine what state's law applied, it had to put the timing of the disease in the context of the smoker's knowledge of a tort.

By contrast, the class definition is not concerned with when the cause of action accrued, only when the symptoms of the disease existed. Therefore, the trial court order relied on by Petitioner does not indicate that knowledge of the causal link was a part of the class definition. The Engle trial court was simply applying the law on accrual of a cause of action.

The Right to Opt Out Does Not Change the Class Definition

Petitioner's argument that the class definition has to include knowledge of the disease to allow class members to opt out rings hollow. Any objection Petitioner had with the class definition and cutoff date should have been made in the Engle appeal. It is also hard to believe Petitioner is looking out for class members who wanted to opt out but were denied that right because there was no knowledge component to the class definition. Petitioner's conduct in the sale of cigarettes has been to consistently deny any causal connection between smoking and disease, so making knowledge of the causal link a requirement of class membership creates a conundrum. The determination of whether a person is a member of class action is always made using the information available at the time class membership is determined. The Fourth District's analysis on this point was quite thorough.

The decision in Amchem Products, Inc. v. Windsor, 521 U.S. 591, 628 (1997), does not support the conclusion that the class definition in this case must be modified to be constitutionally correct. The Amchem decision was a second in a pair of asbestos cases. The first was a multi-district litigation which gathered together all the pending asbestos lawsuits. After those actions were settled en masse, the parties created a second action seeking to include in a class action essentially anyone who might bring an asbestos-related claim at any time in the

future. These "exposure-only" claims would include people who were exposed to asbestos but did not know it, people exposed with no current afflictions, and even family members of the exposed people who may have been subjected to secondary exposure to asbestos. None of the proposed class members had filed suit, nor would any trial ever take place in the class action. The class action was intended to be for settlement only. The Supreme Court described the proposed class as "sprawling." Id. at 624.

The Supreme Court affirmed the Third Circuit's decision that the class was improper for a variety of reasons, notably that the class representatives had little in common with the class. The class representatives had diseases which entitled them to immediate payment, while the deferred-disease members would receive payment years or decades in the future, yet the payment schedule was not modified for inflation. The Court also found there was no way the proposed class members could be adequately notified of the class action because, even if they saw and appreciated the class definition, "those without current afflictions may not have the information or foresight needed to decide, intelligently, whether to stay in or opt out."

The decision does not support Petitioner's argument. In Amchem the class members would be bound by the settlement even though they were not suffering from any disease. By contrast, the class definition in Engle only applies to those

who are suffering from a tobacco related disease. The Engle class is not open-ended, as it was in Amchem. The Engle class has multiple triggers to limit membership; statute of limitations, the November 21, 1996 cutoff for the disease, and then the one year limit to file an individual suit.

It bears repeating that the Amchem appeal was from the class action after the class was certified. Here, Petitioner is attempting to challenge the class definition in an individual lawsuit, nearly 20 years after the class was certified. Petitioner is in no position to modify the class definition at this late date.

George Ciccone Suffered from PVD before November 21, 1996

As reflected in the Statement of the Facts, there was ample evidence supporting the jury's conclusion that George was suffering from PVD before November 21, 1996. Dr. Feingold testified that the severity of the disease in 1998 meant it had been developing for five years. That testimony was consistent with the testimony that George suffered from leg pain when he worked and did anything mildly stressful, such as climbing stairs or dancing. His complaint of leg cramps at night supports the jury's conclusion. The radiographic study from 1991 showed vascular stenosis, which is narrowing of the blood vessel, also supports the jury's verdict. There was ample evidence that prior to 1996 George was suffering from PVD, a smoking related disease, prior to November 21, 1996.

Petitioner obviously presented its own evidence to the contrary. But the jury did not accept that evidence and found for Plaintiff after being properly instructed on the issue. There is no basis for quash the Fourth District's opinion.

POINT II

THE PORTION OF THE FOURTH DISTRICT'S DECISION REVERSING THE AWARD OF PUNITIVE DAMAGES SHOULD BE QUASHED.

The second holding in the court below held that Plaintiff could not bring a claim for punitive damages based on a cause of action which was not part of Engle. In doing so, the court relied on Soffer v. R.J. Reynolds Tobacco Co., 106 So.3d 456, 460 (Fla. 1st DCA 2012).

This Court has accepted jurisdiction in Soffer. If this Court quashes the opinion of the First District in that case, then it should also quash the portion of the Fourth District's decision in this case which reverses Ciccone's award of punitive damages by relying on Soffer. Murray v. Regier, 872 So.2d 217, 223 (Fla. 2002) (Once the Supreme Court accepts jurisdiction over a cause in order to resolve a legal issue in conflict, the court has jurisdiction over all issues).

Merits

In American Pipe & Const. Co. v. Utah, 414 U.S. 538, 94 S.Ct. 756, 38 L.Ed.2d 713 (1974), the United States Supreme Court set forth the rule of tolling during the pendency of a class action as follows: "We are convinced that the rule most consistent with federal class action procedure must be that the commencement of a class action suspends the applicable statute of limitations as to all asserted members of the class who would have been parties had the suit been permitted to

continue as a class action" (414 U.S.at 554, 94 S.Ct. at 766).

Justice Blackmun, concurring, summarized the rule and its purpose as follows (414 U.S. at 562, 94 S.Ct. at 770):

> Under our decision today, intervenors as of right will be permitted to press their claims subject only to the requirement that they have an interest relating to the property or transaction and be impaired or impeded in their ability to protect that interest. Fed.Rule Civ.Proc. 24(a). Such claims, therefore, invariably will concern the same evidence, memories, and witnesses as the subject matter of the original class suit, and the defendant will not be prejudiced by their intervention, should class relief be denied."

The American Pipe rule of tolling the statute of limitation as to members of a class action applies to all members, including those who file individual actions. Crown, Cork & Seal Co., Inc. v Parker, 462 U.S. 345, 350; 103 S.Ct. 2392, 2396; 76 L.Ed.2d 268 (1983). See also Raie v. Cheminova, Inc., 336 F.3d 1278, 1282 (11th Cir. 2003). The thrust of the rule is to allow tolling while a class action is pending and allow for individual actions should the class not obtain certification. The rule also provides that the individual actions may not go astray and raise issues for which the defendants were not put on notice and that do not concern the same evidence, memories, and witnesses as the subject matter of the original class suit.

In application, the Eleventh Circuit Court of Appeal in Raie, supra, addressed the attempt to piggyback the tolling period from a wrongful death class action with the tolling period for a product liability class action. The Court concluded that tolling would not be permitted because "a wrongful death action under Florida law is

different in kind from any action based on a defective product." Id. at 1283. Hence, the tolling was not allowed because the two actions were "different in kind" and thereby contrary to the tolling rule, as succinctly stated by Justice Powell, joined by Justice Rehnquist and Justice O'Connor, concurring in the Crown, Cork action, "...when 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.' (Citing, American Pipe, 94 S.Ct. at 770 (concurring opinion)." Crown, Cork, 462 U.S. at 355; 103 S.Ct. at 2398.

The limitation on American Pipe tolling, then, is only when it is necessary to protect a defendant against prejudice arising from stale or lost evidence, memories and witnesses. When, as here, the class proceeding secured all the evidence, memories, and witnesses, there can be no prejudice.

The decision Soffer v. R.J. Reynolds Tobacco Co., 106 So.3d 456 (Fla. 1st DCA 2012), unnecessarily limits the class members. Relying on Hromyak v. Tyco Intern. Ltd., 942 So.2d 1022 (Fla. 4th DCA 2006), the Soffer court held that the causes of action brought in that case were not "identical" to the Engle claims, because the trial court in Engle denied plaintiff's motion for leave to amend the claim for punitive damages to include gross negligence and strict liability. As a result, the court held that Engle class members cannot bring claims for punitive damages based

on gross negligence or strict liability.

The error in the Soffer court's analysis is in its understanding of the need for "identical claims" as discussed in Hromyak. There is nothing in Hromyak to require absolute identity between the claims in the two cases (Id at 1023):

> In the federal action, the 1933 Act claim related to the merger with AMP, and the Exchange Act claim concerned the U.S. Surgical acquisition. In this action, in contrast, the 1933 Act claim relates to the merger with U.S. Surgical Corporation. the trial court held that plaintiff's 1933 Act claim here is not identical to the Exchange Act claim in the federal action.

In order to prove the 1933 Act claim regarding the merger with U.S. Surgical, Hromyak would have had to rely on a totally different set of facts than in the prior action which involved a merger with a company called AMP. The causes of action were in no way related.

In this case, however, the claim for punitive damages already existed, and it was for conduct related to the design, marketing and sale of cigarettes. Negligence, strict product liability and torts of deceit and conspiracy were part of the Engle class action and this progeny trial. Engle tried claims of same kind, same subject matter, same evidence, witness and memories as was tried in Ciccone, below. Gross negligence is only a variant, holding the same conduct up to a slightly different yardstick. Hence, the properly amended complaint, filed months prior to trial, created no prejudice to defendant because the claims "'concern the same evidence, memories, and witnesses as the subject matter of the original class suit,' so that 'the

defendant will not be prejudiced.'" Crown, Cork, supra, 462 U.S. at 355;103 S. Ct. at 2398, quoting American Pipe, 414 U.S. at 562, 94 S. Ct. at 770 (concurring opinion). It is vastly different than the claim brought in Hromyak which was based on a different transaction and set of facts.

Because the claim for punitive damages based on gross negligence and strict liability were only alternative theories for the same liability based on the same set of facts, the claim would have related back. Florida Rule of Civil Procedure 1.190(c) provides that an amended pleading relates back to the date of the original pleading when it arises "out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading...." As with all pleading rules, this rule is liberally interpreted. C.H. v. Whitney, 987 So.2d 96, 99 (Fla. 5th DCA 2008). That standard also explains the result in Hromyak, because claims that do not arise out of the same transaction or set of facts do not relate back for purposes of statute of limitations. Compare Lefebvre v. James, 697 So.2d 918, 920 (Fla. 4th DCA 1997) and Turner v. Trade-Mor, Inc., 252 So.2d 383 (Fla. 4th DCA 1971).

Other courts have applied the tolling to allow claims which are not identical but fall within the rule nonetheless because they concern the same subject matter and will involve the same evidence, memories, and witnesses as the subject matter of the original class suit. See, e.g. Arivella v. Lucent Technologies, Inc., 623 F. Supp. 2d 164, 180 (D. Mass. 2009) (in order for American Pipe tolling to apply, "the claims of

a subsequent plaintiff must be sufficiently similar to the claims brought by the failed class such that the class action effectively put the defendant on notice of the plaintiff's potential claims," and further specifying that the prior class action must "put (the defendant) on notice of the potential claims it might have to defend, the factual bases for those claims, and the potential witnesses who might be called"; this standard was met when plaintiffs asserted breach of fiduciary duty claims under ERISA, and a prior class action had alleged "exactly the types of breach claimed by the instant plaintiffs").

In Cullen v. Margiotta, 811 F.2d 698, 720 (2d Cir. 1987), overruled on other grounds Agency Holding Corp. v. Malley-Duff & Associates, Inc., 483 U.S. 143, 107 S. Ct. 2759, (1987), the court held that American Pipe tolling applied to the benefit of plaintiffs asserting RICO and civil rights claims against a county based on alleged coercion of political contributions in return for promotions and employment benefits, when a prior state court class action had asserted state law claims on the same facts, despite differences between the legal theories advanced in the state court action and in district court). The court in In re Linerboard Antitrust Litigation, 223 F.R.D. 335, 351 (E.D. Pa. 2004), held that "[f]or tolling to apply, claims do not have to be identical but only substantially similar to those brought in the original class action"). See also In re Enron Corp.Securities, 465 F. Supp. 2d 687, 718-19 (S.D. Tex. 2006) ("(U)nless the state has decided otherwise … state-law claims based on the same

operative facts as the federal securities claims in Newby that require a showing of the same or very similar elements, thus providing Defendants with notice and allowing them to rely on the same evidence and witnesses in their defenses, may also be tolled by the pendency of the federal court class action"); Tosti v. City of Los Angeles, 754 F.2d 1485, 1489, 789 (9th Cir. 1985) ("We find no persuasive authority for a rule which would require that the individual suit must be identical in every respect to the class suit for the statute to be tolled").

The gross negligence claim asserted below was sufficiently similar in terms of evidence, witnesses and operative facts to justify its tolling and addition. The Fourth District's rule that with the benefits of the Engle decision come the limitations of the cause of action does not give the class members all the benefit of all their rights. The Engle trial court did not find against the class on alternative bases for punitive damages based on the merits of the claims, only on a procedural basis. Now that the procedural problem can be cured, the class members should have the right to bring the claims.

CONCLUSION

The Fourth District's decision on the issue of when an Engle class member is suffering from a disease for purposes of class membership should be approved.

If this Court quashes the decision in Soffer, then it should also quash the portion of the Fourth District's decision in this case which reverses George Ciccone's award of punitive damages by relying on Soffer.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing was furnished to all counsel of record listed on the attached service list, by email, on September 26, 2014.

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CERTIFICATE OF TYPE SIZE & STYLE

Respondent hereby certifies that the type size and style of the Answer Brief of Respondent Times New Roman 14pt.

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