Filing # 16859496 Electronically Filed 08/07/2014 05:00:52 PM

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Case No. SC13-2415

SUPREME COURT OF FLORIDA

R.J. REYNOLDS TOBACCO COMPANY,

Defendant/Petitioner,

v.

PAMELA CICCONE, AS PERSONAL REPRESENTATIVE OF
THE ESTATE OF GEORGE N. CICCONE, DECEASED,

Plaintiff/Respondent.

On Discretionary Review from a Decision of the
Fourth District Court of Appeal

INITIAL BRIEF OF PETITIONER R.J. REYNOLDS TOBACCO COMPANY

Gregory G. Katsas
Florida Bar No. 89091
JONES DAY
51 Louisiana Ave., N.W.
Washington, DC 20001
Telephone: (202) 879-3930
Facsimile: (202) 626-1700

Gordon James III
Florida Bar No. 0150077
Eric L. Lundt
Florida Bar No. 0861715
SEDGWICK LLP
2400 E. Commercial Blvd., Suite 1100
Fort Lauderdale, Florida 33308
Telephone: (954) 958-2500
Facsimile: (954) 958-2513

Counsel for Petitioner
(additional counsel listed on signature page)

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STATEMENT OF THE CASE

In *Engle v. Liggett Group, Inc.*, 945 So. 2d 1246 (Fla. 2006), this Court held that the *Engle* class was limited to individuals with a smoking-related disease or condition that had "manifested itself" before the class was certified on November 21, 1996. *Id.* at 1276. This case presents the question whether the necessary manifestation occurs as soon as the smoker experiences any symptoms of the disease, as the Fourth District held below, or whether the symptoms also must put a reasonable person on notice that smoking may have been the cause, as the First District held in *Castleman v. R.J. Reynolds Tobacco Co.*, 97 So. 3d 875 (Fla. 1st DCA 2012). We submit that the First District was correct.

The requirement of a "manifested" injury is a term-of-art in Florida products-liability law: it refers to symptoms sufficient to put a reasonable person on notice not only that he has been injured, but also that the defendant's product may have been the cause. This requirement developed in the statute-of-limitations context, where it serves to prevent the running of limitations periods before the plaintiff could reasonably have filed a claim. In the class-action context, the manifestation requirement serves a similar, equally important purpose: it ensures that the class definition encompasses only those individuals who had reason to know that they were class members at the time when they had to decide whether to opt out of the class action, or else be bound by it.

The manifestation requirement established in *Engle* was designed to ensure that individuals could ascertain whether they were class members at the time of the class certification, the class notice, and the opt-out period. The ability to make the determination that one is a class member ensures that each class member has a meaningful right to opt out of the class, and thus protects plaintiffs' right of access to the courts. At the same time, it prevents class members from seeking to avoid an adverse judgment on the ground that they did not have fair notice, and thereby protects defendants against the risk of "one-way intervention"—the patently unfair situation in which class members could wait until after the verdict to decide whether to accept it or to file their own individual actions. Finally, and relatedly, it ensures that jury findings in the class action may be given preclusive effect in subsequent cases consistent with the mutuality requirement of Florida law. *See* 945 So. 2d at 1274–75.

All of this makes sense only if individuals can reasonably ascertain whether they may be class members when they receive the class notice and are called upon to determine whether to opt out. In the context of *Engle*, that means that individuals receiving the class notice in 1996 must have had reason to know not only that they had contracted a disease or medical condition, but also that an addiction to smoking may have been the cause. That is what drove this Court in *Engle* to recognize, and the First District in *Castleman* to apply, the traditional

standard of manifestation as an element of the *Engle* class definition. The Fourth District erred in rejecting that standard and adopting an alternative definition extending the class to sweep in individuals who had no reason at the time to know that their symptoms may have been caused by smoking.

A. *Engle* Class Proceedings

1. The *Engle* class action was filed in 1994. The class raised various tort claims against leading cigarette manufacturers, including defendant R.J. Reynolds Tobacco Company. On October 31, 1994, the *Engle* trial court certified a nationwide class that it defined to include "[a]ll United States citizens and residents, and their survivors, who have suffered, presently suffer or have died from diseases and medical conditions caused by their addiction to cigarettes that contain nicotine." *R.J. Reynolds Tobacco Co. v. Engle*, 672 So. 2d 39, 40 (Fla. 3d DCA 1996). On interlocutory appeal, the Third District substituted the phrase "all Florida citizens and residents" for the phrase "all United States citizens and residents," but otherwise affirmed the class certification. *Id.* at 42.

On remand, class counsel proposed a notice informing potential class members that "[y]ou are not a member of the class and there is no need to exclude yourself if you are a smoker or former smoker who has not manifested or been diagnosed with any disease or medical condition caused by your addiction to

cigarettes that contain nicotine." App. A1.[1] The proposed notice further provided for an opt-out period of six months. App. A1. On November 21, 1996, the trial court approved the notice, which then ran in sixty-eight Florida newspapers for ninety days. App. A2–A21. On the same day, the court recertified the class as narrowed by the Third District. App. A12; *see Engle,* 945 So. 2d at 1275.

In January 1998, the trial court confirmed that the class definition excluded smokers whose diseases had manifested before they became Florida citizens or residents. The court stated that class members must be "residents of the state of Florida *at the time of [the] medical diagnosis or at time [the] evidence of the causal relationship of the cause of action had manifested itself.*" App. A26.

In February 1998, the court developed a three-phase trial plan. Phase I addressed ostensibly common questions regarding the defendants' conduct, whether smoking causes various diseases and is addictive, and class-wide entitlement to punitive damages. At the end of Phase I, the jury found that each defendant had sold defective cigarettes, breached duties of care, and concealed information about the health or addiction risks of smoking, both individually and

[1] For the Court's convenience, Reynolds has included the relevant record materials from *Engle* in an appendix to this brief. These materials are "other authorities" under Florida Rule of Appellate Procedure 9.220. All of them were contained on a DVD filed with the trial court, with the exception of the *Engle* trial court's January 6, 1998 order, which is subject to judicial notice by this Court under § 90.203, Fla. Stat. In a separate, unopposed motion, Reynolds has asked the Court to take such notice. *See, e.g.*, § 90.202(6), Fla. Stat.

through a conspiracy. App. A29–A38. The jury further found that smoking is addictive and causes some 20 different diseases, but does not cause three others. App. A28–A29. And it found that the class was entitled to punitive damages. App. A39.

Phase II consisted of two subparts. In Phase II-A, the same jury that deliberated in Phase I found the defendants liable to three named class representatives (Mary Farnan, Ralph Della Vecchia, and Frank Amodeo) and awarded each of them compensatory damages. App. A40–A57. In Phase II-B, the jury returned class-wide punitive-damages awards totaling approximately $145 billion. App. A58–A59. Defendants appealed before Phase III, in which new juries would have determined the defendants' liability to the remaining class members. *See Engle*, 945 So. 2d at 1258.

At the end of Phase II-B, the trial court entered a final judgment and amended omnibus order, in which it denied a renewed motion to decertify the class. App. A60–A126. In so doing, the court reiterated that it had "refused to allow potential claimants who have not manifested a disease or medical condition to become a member of the class." App. A79.

2. On appeal, the Third District ordered the class decertified. *See Liggett Grp., Inc. v. Engle*, 853 So. 2d 434, 442–50 (Fla. 3d DCA 2003). The Third District concluded that the *Engle* class includes only those smokers who were

"diagnosed" with a smoking-related disease "by October 31, 1994." *See id.* at 453 n.23. Applying those standards, the court reversed the individual judgments in favor of Farnan and Della Vecchia. The court reasoned that "[s]ince Farnan was diagnosed in April 1996, and [Angie] Della Vecchia was diagnosed in February 1997, they are clearly excluded from the class." *See id.*

3. This Court affirmed in part and reversed in part. On class certification, the Court held that "continued class action treatment for Phase III of the trial plan is not feasible," and it therefore decertified the class. *Engle*, 945 So. 2d at 1267–68. However, the Court authorized former class members to file individual actions within one year of its mandate. *See id.* at 1270 n.12, 1277. It held that certain of the Phase I findings—including those of defect, negligence, concealment, and conspiracy—would have "res judicata effect" in such actions. *Id.* at 1269.

The Court also held that the class definition was limited to individuals who had suffered a smoking-related disease or condition that "first manifested itself" before November 21, 1996, when the class was re-certified. *See id.* at 1275–76. Rejecting the Third District's analysis, this Court explained that "[t]he critical event is not when an illness was actually *diagnosed* by a physician, but when the disease or condition first manifested itself." *Id.* at 1276. The Court regarded manifestation on or before the date of class certification as necessary to avoid various problems associated with an "open-ended class"—*i.e.*, one without a "cut-

off date." *Id.* at 1274–75. As the Court explained "an open-ended class would not allow for notice and an opportunity to opt out as required by rule 1.220(d)(2) and may implicate potential class members' right of access to the courts under article I, section 21 of the Florida Constitution." *Id.* at 1274–75. "Further, without the ability to opt out, potential plaintiffs could argue that they should be allowed to intervene after a judgment in favor of the class or, alternatively, that they are not bound by an adverse judgment"—which would subject defendants to the unfairness of "one-way intervention." *Id.* at 1275. Finally, such "one-way intervention" would also have "the effect of giving collateral estoppel effect to the judgment of liability in a case where the estoppel was not mutual." *Id.* (quotation and citation omitted).

Applying the manifestation requirement, this Court reinstated the individual judgments in favor of Farnan and Della Vecchia. The Court explained that "Farnan was formally diagnosed with lung cancer in March of 1996, clearly demonstrating her disease had manifested" by November 21, 1996. *Engle*, 945 So. 2d at 1276. And it concluded that Ralph Della Vecchia qualified as a class member because his wife's medical records from "early 1997" established a "past medical history of 'COPD,'" which was sufficient to "indicate that she had been

suffering from a *tobacco-related* disease" prior to November 21, 1996. *Id.* (emphasis added).[2]

B. *Engle* Progeny Litigation

In the wake of this Court's decision in *Engle*, more than 8,000 "*Engle* progeny" cases were filed by individuals claiming to be *Engle* class members. More than half of them remain pending.

In Broward County, where this progeny case arose, Judge Streitfeld ruled during a case-management conference for various other pending *Engle*-progeny cases that "manifestation" for purposes of class membership requires the plaintiff to be on notice not only of his disease or condition, but also of its possible connection to smoking. *See* R.65:12542 (Case Mgmt. Conference Hr'g Tr. at 41, *In re Engle Progeny Cases Tobacco Litig. (Sammarco)*, Case No. 08-8000 (19) (Fla. 17th Cir. Ct. Apr. 1, 2011) ("manifestation" means "you either had a diagnosed disease within that time frame, or you had symptoms of the disease that put you on notice of a potential relationship between smoking and the illness")). Other trial courts have adopted similar definitions. *See*, *e.g.*, R.65:12533 (Order Granting Def.'s Mot. For Summ. J. at 4, *Castleman v. R.J. Reynolds Tobacco Co.*,

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[2] This Court further held that the punitive-damages awards in Phase II-B were both premature and excessive (945 So. 2d at 1262–68), that improper arguments by class counsel did not warrant reversal (*id.* at 1271–74), and that the statute of limitations barred Amodeo's individual claims (*id.* at 1276). This appeal does not implicate those rulings.

Case No. 2008-CA-467-XXXX-MA (Fla. 4th Cir. Ct. July 7, 2011) ("in order to be an *Engle* class member, Mr. Castleman must not only have exhibited symptoms of his subsequently-diagnosed diseases by November 21, 1996, but must have been on notice, prior to that date, that his diseases were causally connected to his cigarette smoking")).

C. Proceedings In This Case

1. In 2004, plaintiff Pamela Ciccone sued Reynolds for the death of her husband from lung cancer allegedly caused by smoking. R.1:1–31. In 2008, Mrs. Ciccone amended her complaint to allege membership in the *Engle* class. R.3:449–60. Although Mr. Ciccone's lung cancer did not manifest until 2002, Mrs. Ciccone sought to base class membership on his peripheral vascular disease ("PVD"), which she claimed had manifested before November 21, 1996. R.48:9229.[3]

Consistent with other *Engle* progeny cases, Reynolds proposed an instruction on class membership that would have required Mrs. Ciccone to prove that her husband's PVD "manifested prior to November 21, 1996," and that would have defined manifestation to mean "either there was a diagnosis of 'PVD' or there were symptoms of 'PVD' that would put a reasonable person on notice that there

[3] PVD is a disease involving obstruction of blood vessels that is "severe enough . . . to limit blood flow to an organ or extremity and cause symptoms." T.88:2691; *see also* T.78:1189.

was a connection between the 'PVD' and cigarette smoking." R.64:12194; *see also* R.63:12123 (alternative proposed instruction requiring proof of either diagnosis of PVD or "a potential connection between his symptoms of 'PVD' and cigarette smoking"). Over Reynolds's objection, the trial court refused to require Mrs. Ciccone to prove that her husband reasonably could have known, on or before November 21, 1996, of the possible causal link between any of his PVD symptoms and his smoking. Instead, in its jury instructions, the court defined "manifestation" as "the time when Mr. Ciccone experienced symptoms of [PVD] or was diagnosed with [PVD]." T.75:646; T.91:3260.

2. It is undisputed that Mr. Ciccone was not diagnosed with PVD until May 1999. *See* R.63:12129 (plaintiff stating that "[f]rom the outset, the parties have agreed that no doctor diagnosed PVD prior to November 21, 1996"). Accordingly, under the trial court's definition, class membership turned on whether Mr. Ciccone had experienced any "symptoms" of PVD before November 21, 1996. To prove such symptoms, Mrs. Ciccone introduced testimony from Dr. Michael Hirsch, her husband's treating physician, and Dr. Allan Feingold, a pulmonologist.

Dr. Hirsch testified that Mr. Ciccone suffered from back and leg pain in the late 1980s and early 1990s. T.75:663–64, 752, 764–65. He further testified that an x-ray performed on Mr. Ciccone in 1991 revealed what Dr. Hirsch later recognized to be "evidence" of early-stage PVD. T.75:666. However, Dr. Hirsch testified that

all of Mr. Ciccone's symptoms before 1998 could have been explained by his history of chronic back problems, T.75:782–83, including a work-related injury in 1992, T.79:1310, 1317. Dr. Hirsch testified that he did not recognize any symptoms of PVD before 1998. T.75:782.

Dr. Feingold testified that Mr. Ciccone needed surgery in 1999 for late-stage PVD, which must have been developing for at least five years. T.78:1190, 1197–98. He further testified that the leg pain experienced by Mr. Ciccone in 1994 and 1995 was consistent with PVD. T.78:1193–94. However, Dr. Feingold acknowledged that none of Mr. Ciccone's treating physicians even suspected PVD as a cause of his back and leg pains prior to 1998. T.79:1307–09, 1311–12, 1315–16.

Reynolds's medical expert, Dr. David Brewster, testified that Mr. Ciccone's PVD first became symptomatic in early 1998, T.88:2689; that his medical records did not reveal any later-stage PVD symptoms, T.88:2704; and that his leg pain before 1998 was inconsistent with PVD and most likely resulted from his chronic back problems, T.88:2717–19.

At the close of Mrs. Ciccone's case on class membership, Reynolds moved for a directed verdict. *See* R.63:12155–80; T.85:2360. The trial court commented that the evidence of manifestation was "extremely weak," T.85:2366, but ultimately submitted that question to the jury.

3. The jury found that Mr. Ciccone qualified as a member of the *Engle* class. Applying the trial court's definition of manifestation as symptoms of PVD, the jury specifically found that Mr. Ciccone's PVD manifested before November 21, 1996. SR:1.

In a separate trial phase, the jury found for Mrs. Ciccone on the claims for strict liability, negligence, and gross negligence, and for Reynolds on the claims for concealment and conspiracy. R.68:13022. The jury awarded Mrs. Ciccone $3,196,222.35 in compensatory damages, allocated 70% of the fault to Mr. Ciccone, and awarded $50,000 in punitive damages. R.68:13023–24. After adjusting the compensatory award to reflect the jury's apportionment of fault, the trial court entered a final judgment for Mrs. Ciccone in the amount of $1,008,866.70. *See* SR:2.

4. On appeal, Reynolds argued that the jury instructions had improperly defined manifestation. The Fourth District disagreed and affirmed. It specifically recognized that, in the statute-of-limitations context, this Court has "imbued the term 'manifest' with a notice requirement to the potential plaintiff, such that '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 a causal relationship to the manufactured product.'" *R.J. Reynolds Tobacco Co. v. Ciccone*, 123 So. 3d 604, 611 (Fla. 4th DCA 2013) (quoting *Carter v. Brown &*

Williamson Tobacco Corp., 778 So. 2d 932, 937 (Fla. 2000)). As the Fourth District explained, the rationale for this "is obvious—a plaintiff should not be required to file a cause of action before he should have realized he had one." *Id.* at 610. However, the court concluded "[t]hat concern is not applicable to the issue of *Engle* class membership," and it therefore saw no reason "to import" into the class-membership context "a definition from the 'creeping disease' statute of limitations cases." *Id.*

The Fourth District asserted that in *Engle*, this Court applied a manifestation requirement only "'to avoid multiple similar lawsuits and to make legal process more effective and expeditious.'" *Id*. (quoting *Engle*, 945 So. 2d at 1275). The Fourth District did not mention the various other concerns addressed by this Court: opt-out rights, access to the courts, one-way intervention, and mutuality.

The Fourth District acknowledged the First District's holding in *Castleman* "that a condition 'manifests' itself as a tobacco-related illness for the purpose of *Engle* class membership only when the potential plaintiff 'knew, or reasonably should have known, enough to permit her to commence a non-frivolous tort lawsuit' against the tobacco company." *Id.* (quoting *Castleman*, 97 So. 3d at 877) (internal citations omitted). But the court concluded that "*Castleman* fails to take into account the differences in policy between the accrual of a cause of action for

the purpose of the statute of limitations and pinpointing a date for class membership." *Id.* at 613.

The Fourth District held that a disease or condition "manifested" for purposes of class membership when the smoker first experienced "symptoms"—even if he had no reason to connect the symptoms to the smoking. *Id* at 614 ("'it is enough that the decedent have suffered a medical condition that first' became symptomatic before November 21, 1996" (citation omitted)). The court found support for this standard in a definition of "manifestation" used in insurance coverage cases, in its understanding of ordinary meaning, in this Court's treatment of the claims of Angie Della Vecchia in *Engle,* and in the supposed practical problems of applying accrual concepts to questions of class membership. *Id.* at 614–15.

The Fourth District certified a conflict with *Castleman*, *see id.* at 617, and this Court subsequently granted review.[4]

SUMMARY OF THE ARGUMENT

I. The Fourth District erred in concluding that *Engle* class membership requires only symptoms of a smoking-related illness by the date of class certification, regardless of whether the smoker had any reason to attribute the

[4] The Fourth District set aside the punitive award on the ground that *Engle*-progeny plaintiffs may recover punitive damages only on claims for concealment or conspiracy. *See* 123 So. 3d at 616. That ruling is not at issue here.

symptoms to smoking. That ruling cannot be squared with the language and rationale of this Court's *Engle* decision.

A. In Florida products-liability law, the concept of a "manifested" injury or disease is a term-of-art. A long line of decisions holds that, for a disease to have manifested, the plaintiff must be on notice not only of the disease itself, but also of its possible connection to the product at issue. In the statute-of-limitations context, where this specialized meaning was first developed, the manifestation requirement prevents limitations periods from running before the plaintiff is in a position to assert his claims.

B. The *Engle* class was limited to individuals who had reason to know, on the date of class certification, not only that they had contracted a disease or medical condition, but also that smoking may have been the cause. In *Engle*, this Court squarely held that the class was limited to individuals with diseases or medical conditions that had "manifested" by the date of class certification. That usage incorporates the meaning ascribed to the term in other products-liability contexts. Moreover, the *Engle* trial court specifically held that the class was limited to smokers with reason to know of the possible "causal relationship" between their disease and their smoking. After *Engle*, the district courts of appeal repeatedly treated the "manifestation" requirement for accrual of claims and the "manifestation" requirement for *Engle* class membership as identical.

C. The Fourth District concluded that, unlike in the statute-of-limitations context, there are no policy reasons to limit class membership to individuals with reason to know that their injury was caused by smoking. That is incorrect. Without any such knowledge at the time of the class certification, the class notice, and the opt-out period, individuals could not have meaningfully exercised their right to opt out of the class, because they would have had no reason to know that they may be class members. Sweeping such individuals into the *Engle* class would have produced the very problems identified by this Court in *Engle*: violating plaintiffs' right of access to the courts, subjecting defendants' to the unfairness of one-way intervention, or eliminating the mutuality that was necessary for the *Engle* findings to be given preclusive effect. Doing so also would have violated federal due process.

D. The Fourth District's affirmative justifications for rejecting the settled standard of manifestation, and defining it only by reference to symptoms of disease, are equally unpersuasive.

The court looked to a definition of "manifestation" from cases addressing insurance coverage for pre-existing conditions. In that context, however, there is no basis for reading a knowledge requirement into the terms of the insurance contract. In contrast, there is ample basis for limiting the *Engle* class to individuals

with reason to have known, at the time of class certification, that they may be class members.

The court also invoked this Court's ruling in *Engle* that Angie Della Vecchia was not an *Engle* class member. However, this Court's analysis of that question does not suggest that Mrs. Della Vecchia could have been swept into the *Engle* class without any reason to suspect, at the time of class certification, that her lung disease may have been caused by smoking.

Finally, the asserted difficulty of applying the traditional products-liability definition of "manifestation" rings hollow, because juries routinely apply that standard in the statute-of-limitations context, including in progeny cases where the relevant accrual question is not what the smoker knew or should have known as of November 21, 1996, but what the smoker knew or should have known more than six years earlier.

II. The Fourth District's erroneous definition of "manifestation" requires a new trial in this case. At trial, there was abundant evidence from which a jury could have found that Mr. Ciccone had no reasonable basis, at the time of class certification, to connect his leg and back pain to his smoking. Such a finding would have precluded Mrs. Ciccone from establishing *Engle* class membership, and thus barred her from using the *Engle* findings to establish essential elements of her claims.

ARGUMENT

I. THE FOURTH DISTRICT APPROVED AN ERRONEOUS JURY INSTRUCTION ON "MANIFESTATION"

To qualify as an *Engle* class member, Mrs. Ciccone had to prove that her husband had a disease or condition that "manifested itself" before the class was recertified on November 21, 1996. *Engle*, 945 So. 2d at 1276. In this case, the Fourth District approved a jury instruction that defined "manifestation" to occur as soon as Mr. Ciccone "experienced symptoms" of PVD—even if he could not reasonably have attributed those symptoms to his smoking. *See Ciccone*, 123 So. 3d at 607, 609. The proper meaning of the "manifestation" requirement, as defined in the jury instructions, is a pure question of law subject to review *de novo*. *See*, *e.g.*, *Rockmore v. State*, 140 So. 3d 979, 983 (Fla. 2014) (reviewing "de novo" argument that defendant "is entitled to a new trial because the trial court erred by modifying his proffered special instruction to require that the victim be aware of the [defense]"); *Williams v. State*, 121 So. 3d 524, 529 (Fla. 2013) (question whether trial court erred in denying request for a jury instruction modeled after a statute "is a purely legal matter and subject to a de novo standard of review").

A. In The Products-Liability Context, "Manifestation" Of Injury Requires Reasonable Notice Of A Possible Claim

Under Florida products-liability law, the requirement of a "manifested" injury is a term-of-art with a settled legal meaning. Various leading decisions have used that term (or its cognates) to determine when claims accrue for statute-of-

limitations purposes. In *Carter v. Brown & Williamson Tobacco Corp.*, 778 So. 2d 932 (Fla. 2000), this Court addressed that question in the context of a "creeping disease" such as lung cancer, which develops "over a period of years as a result of long-term exposure to injurious substances" such as cigarettes. *See id.* at 936–37. The Court squarely held that a claim for a creeping disease "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*." *Id.* at 937 (emphasis added; internal citation and quotation marks omitted). In other words, the claim "accrues when the plaintiff discovers or reasonably should have discovered that he has suffered a *compensable* injury." *Id* at 937 n.1. (emphasis added; quotation and citation omitted).

The Court has applied this terminology and these principles repeatedly. *See, e.g.*, *Am. Optical Corp. v. Spiewak*, 73 So. 3d 120, 126 (Fla. 2011) ("an action accrues when the accumulated effects of the substance manifest in a way which supplies some evidence of the causal relationship to the manufactured product"). In other words, the relevant "manifestation" occurs when "'the party should have been aware of a cause of action.'" *Id.* at 127 (quoting *Celotex Corp. v. Meehan*, 523 So. 2d 141, 145 (Fla. 1988)); *see also Barnes v. Clark Sand Co.*, 721 So. 2d 329, 332 (Fla. 1st DCA 1998) ("'[M]anifestation' of a latent injury in a products liability claim occurs when the plaintiff *is on notice of a causal connection*

between exposure to the allegedly defective product and the resultant injury." (emphasis added)), *approved sub nom. Pulmosan Safety Equip. Corp. v. Barnes*, 752 So. 2d 556 (Fla. 2000); *see also Carter*, 778 So. 2d at 937 (quoting *Barnes*). The district courts have extended this usage to accrual questions outside the context of creeping diseases. *See*, *e.g.*, *Hochberg v. Thomas Carter Painting, Inc.*, 63 So. 3d 861, 863–64 (Fla. 3d DCA 2011) ("an obvious manifestation" of a construction defect is one sufficient to put plaintiffs "on notice of an invasion of their legal rights or of their right to a cause of action" (citations, internal quotation marks, and alterations omitted)); *Orange Cnty. Pub. Servs. v. Ottley*, 9 So. 3d 638, 639 (Fla. 1st DCA 2009) (per curiam) ("initial manifestation" of an employment-related injury occurs when "the claimant, as a reasonable person, should recognize the nature, seriousness and probable compensable character of his injury or disease" (internal quotation marks omitted)).

B. The *Engle* Class Definition Incorporates This Settled Understanding Of "Manifestation"

The *Engle* class definition incorporates this settled definition of "manifestation" to limit class membership to individuals who, at the time of class certification, were reasonably aware not only that they had an injury, but also that smoking may have been the cause.

1. By its terms, the *Engle* class definition includes only those Florida citizens and residents (1) "who have suffered, presently suffer or who have died

from diseases and medical conditions" that are (2) "caused by their addiction to cigarettes." *See Engle*, 945 So. 2d at 1274. On its face, the definition does not clearly require knowledge of either a disease or its connection to smoking. Yet nobody contends that *Engle* class membership extends to individuals who were suffering a disease or medical condition that had not yet even become *symptomatic* by November 21, 1996—*i.e.*, a disease or condition that the smoker had no reason to know about. And there is no principled basis for inferring a knowledge requirement as to the first element of the class definition, but not as to the second.

In *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. *See* 945 So. 2d at 1276. In doing so, it confirmed statements repeatedly made by the *Engle* trial court. For example, the court-approved notice specifically informed smokers across the State that "[y]ou are <u>not</u> a member of the class . . . if you are a smoker or former smoker who has not *manifested* or been diagnosed with any disease or medical condition caused by your addiction to cigarettes." App. A1 (second emphasis added). Similarly, in its final judgment and omnibus order, the trial court confirmed that it had "refused to allow potential claimants who have not *manifested* a disease or medical condition to become a member of the class." App. A79 (emphasis added).

2. This repeated usage in *Engle* of the word "manifested" incorporates the settled definition from the statute-of-limitations cases. Courts "use context to determine the meaning" of undefined legal terms, *School Bd. of Broward Cnty. v. Pierce Goodwin Alexander & Linville*, 137 So. 3d 1059, 1070 (Fla. 4th DCA 2014), and such context includes the manner in which courts have used the term at issue, *see*, *e.g.*, *State v. Werner*, 609 So. 2d 585, 586–87 (Fla. 1992) (consulting "legal parlance," including use of term in other decisions); *Conner v. State*, 19 So. 3d 1117, 1124 (Fla. 2d DCA 2009) (meaning of legal terms may be discerned "by examining the decisions that have" applied them); *Sinquefield v. State*, 1 So. 3d 370, 372 (Fla. 2d DCA 2009) ("trial courts must rely on the statutory and decisional law governing" application of an undefined term). While legal terms "can be given different meanings in different contexts," courts should "not diverge when interpreting the same" language merely for the sake of "mak[ing] good policy." *Phillips v. Hirshon*, 958 So. 2d 425, 430 (Fla. 3d DCA 2007).

Moreover, the *Engle* trial court specifically confirmed that its class definition incorporated the traditional manifestation requirement. In its January 1998 order, the trial court explained that the requirement of a "manifested" injury, as relevant to class membership, includes some reason to know of the injury's "causal relationship" to the "cause of action" against the defendant. App. A26 (limiting class membership to "residents of the state of Florida *at the time of [the]*

medical diagnosis or at time [the] evidence of the causal relationship of the cause of action had manifested itself"(emphasis in original)). Of course, in a products-liability action against a cigarette manufacturer, the relevant "causal relationship" is the connection between the injury and smoking.

Finally, this Court in *Engle* did not hold that the trial court had misunderstood its own class definition. To the contrary, this Court explained the need for a class cut-off date in terms that make sense only if individuals, at the time of the class certification and notice, can reasonably determine whether they are class members. In particular, the Court held that a closed class limited to individuals whose smoking-related injuries had "manifested" by the date of class certification was necessary to ensure a meaningful opportunity to opt out, and to prevent the various problems that would follow without such an opportunity. *Engle*, 945 So. 2d at 1274–75. But the right to opt out is meaningful only for individuals who have some reason to think they may be included in the class, and, for the *Engle* class, that means some reason to think that one's disease or medical condition may have been caused by smoking. We address the policy considerations underlying the Court's analysis in more detail below. For now, we note simply that the reasoning in *Engle* makes no sense unless class members, at the time they received the class notice and had to choose whether to opt out of the class, could determine that they may in fact have been class members.

3. In progeny litigation after *Engle*, the district courts repeatedly have confirmed that the "manifestation" requirement for purposes of class membership is the same as the "manifestation" requirement for purposes of accrual. Two district courts have relied on the class-membership standard used in *Engle* to fix the rules governing accrual. In *R.J. Reynolds Tobacco Co. v. Jewett*, 106 So. 3d 465 (Fla. 1st DCA 2012), the First District held that accrual occurs when the smoker's injury "first manifested itself" and that such manifestation requires "some evidence of a causal relationship" between the injury and smoking. *Id.* at 468. The court explained that this standard "closely tracks language" from *Engle* as well as from *Carter*. *See id.* at 469. Similarly, in *Frazier v. Philip Morris USA Inc.*, 89 So. 3d 937 (Fla. 3d DCA 2012), the Third District relied on both *Engle* and *Carter* in holding that, for accrual purposes, "[t]he issue was not whether Ms. Frazier 'had' the creeping, stealthy disease of COPD/emphysema before [the limitations period]; the issue was whether she knew, or reasonably should have known, enough to permit her to commence a non-frivolous tort lawsuit" against the cigarette manufacturers. *Id.* at 946. As explained above, that plainly requires knowledge not only of the injury, but also of its possible connection to smoking.[5]

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[5] The Third District's further holding on the statute of repose is before this Court in *Philip Morris USA, Inc. v. Russo*, No. SC12-1401 (Fla. Sept. 3, 2013), but is not at issue in the case.

Conversely, two districts have relied on the accrual standard to fix rules governing *Engle* class membership. Most notably, in *Castleman*, the First District explicitly held that, for purposes of *Engle* class membership, a disease does not "manifest" until the smoker "attribute[s] his illnesses to his history of smoking" and becomes "aware of sufficient facts to permit the filing of a non-frivolous tort lawsuit." 97 So. 3d at 877. In so doing, the court relied on the "manifestation" principles set forth in statute-of-limitations decisions such as *Frazier* and *Carter*. *See id.* Quoting *Frazier*, the court held that "manifestation" for purposes of *Engle* class membership occurs only when the plaintiff "'knew, or reasonably should have known, enough to permit her to commence a non-frivolous tort lawsuit.'" *Id.* (quoting 89 So. 3d at 946). Because the smoker in *Castleman* "did not attribute his illnesses to his history of smoking until 1998," and could not reasonably have done so before then, the First District held that he "did not meet the deadline to qualify for *Engle* class membership." *Id.*

In *Damianakis v. Philip Morris USA Inc.*, No. 2D13–246, 2014 WL 3537019 (Fla. 2d DCA July 18, 2014), the Second District likewise applied the *Carter* accrual standard in addressing *Engle* class membership. The court explained that a person "is a member of the Engle class" so long as "his or her smoking-related illness 'manifested' on or before" November 21, 1996. *Id.* at *14. And, in addressing "*when* a plaintiff's smoking-related illness first manifested,"

the court invoked the settled accrual standard: "whether the symptoms had manifested themselves in a way that would put a reasonable person on notice that the injury was caused by smoking." *Id.* at *10 (citing *Carter*, 778 So. 2d at 934, and *Frazier*, 89 So. 3d at 946).[6]

C. Notice Is Critically Important In The Class-Action Context

The Fourth District recognized that, in the statute-of-limitations context, notice is critically important because "a plaintiff should not be required to file a cause of action before he should have realized he had one." *Ciccone*, 123 So. 3d at 610. However, the court concluded that "[t]hat concern is not applicable to the issue of *Engle* class membership." *Id.* On that basis, the court disregarded the manifestation standard set forth in *Castleman* and in statute-of-limitations decisions such as *Carter*, *Jewett*, and *Frazier*. For several reasons, this was error.

To begin with, the same concern does apply in both contexts. Opt-out rights exist to enable absent class members to pursue litigation in their own individual cases, and a decision to opt out likely does reflect a decision to pursue such claims. In the context of tort claims against cigarette manufacturers, any such claims would require proof not only of an injury, but also of its connection to smoking.

[6] The court in *Damianakis* further held that the *Engle* class definition does not require the smoker to have been a Florida citizen or resident when his disease first manifested, so long as he was a Florida citizen or resident as of November 21, 1996. *See* 2014 WL 3537019, at *14. Reynolds respectfully disagrees with that aspect of *Damianakis*, but it is irrelevant to the question presented in this case.

Requiring a plaintiff "to file a cause of action *before he should have realized he had one*," 123 So. 3d at 610 (emphasis added), is unfair regardless of whether the deadline by which the plaintiff must decide how to proceed is imposed by a statute of limitations or by a class notice. Both scenarios implicate the concerns addressed by this Court in *Engle.*

In any event, requiring individuals to decide whether to opt out of a class action, before they have any reasonable way of knowing *whether they satisfy the class definition*, is also wrong. In *Engle* itself, this Court explained that doing so would be inconsistent with the basic requirements of class actions, would threaten plaintiffs' right of access to the courts, would threaten defendants' right to avoid one-way intervention, and would prevent res judicata from attaching to any findings in the class action. *See* 945 So. 2d at 1274–75. This Court construed the class definition to require manifestation by November 21, 1996—when the class was recertified—because otherwise absent class members would have had no meaningful "opportunity to opt out." *See id.* But a class member would have had no reason to opt out unless and until he had reason to know that he had a disease or injury that may have been caused by smoking. Moreover, if included in the class definition, individuals lacking such an opportunity either would have been bound by any unfavorable judgment in *Engle*, in violation of their right of access to the courts, or else could have chosen to avoid such a judgment after the fact, in

violation of the defendants' rights. Furthermore, all of this would have raised insoluble problems of federal due process. And, finally, it would have rendered impossible the "pragmatic solution," crafted by this Court in *Engle*, to afford preclusive effect to the preserved Phase I findings. *See id.* at 1269.

Even if the term "manifestation" were otherwise ambiguous (which it is not), the term should be interpreted consistent with its usage in the statute-of-limitations context, so that the *Engle* class definition would have avoided, rather than created, all of these constitutional and other problems. *See*, *e.g.*, *Tal-Mason v. State*, 515 So. 2d 738, 739–40 (Fla. 1987).

1. Class actions require adequate notice to absent class members. Fla. R. Civ. P. 1.220(d)(2) ("notice of the pendency of the claim or defense shall be given by the party asserting the existence of the class to all the members of the class"); *see Nat'l Lake Devs., Inc. v. Lake Tippecanoe Owners Ass'n*, 417 So. 2d 655, 657 (Fla. 1982); *Frankel v. City of Miami Beach*, 340 So. 2d 463, 469–70 (Fla. 1976). The purpose of this notice requirement is to safeguard class members' right to opt out of the class and maintain their own individual actions. *See*, *e.g.*, *Nat'l Lake*, 417 So. 2d at 657; *Seven Hills, Inc. v. Bentley*, 848 So. 2d 345, 355 (Fla. 1st DCA 2003) ("The 'notice required by subdivision (d)(2)' contemplates class members' rights to opt out of the class . . . .").

In *Engle*, the trial court and this Court crafted a "finite class" limited to individuals suffering from smoking-related diseases that had manifested by the date of class certification, because "an open-ended class would not allow for notice and an opportunity to opt-out as required by rule 1.220(d)(2) and may implicate potential class members' right of access to the courts under article I, section 21 of the Florida constitution." 945 So. 2d at 1274–75. Despite recognizing that this Court "was careful to craft a 'finite class,'" *Ciccone*, 123 So. 3d at 610, the Fourth District overlooked the fact that a finite class, standing alone, does not protect opt-out rights. For example, a class limited to individuals suffering from a smoking-related disease by the date of class certification, regardless of whether the disease was symptomatic, would be closed but obviously would not protect opt-out rights. Rather, a meaningful opt-out right requires awareness of facts sufficient to put a reasonable person on notice that he may in fact be a class member—which, in the context of *Engle*, means awareness that he may suffer from a disease "*caused by* [his] addiction to *cigarettes*." *Engle*, 945 So. 2d at 1274 (emphases added and quotation omitted).

The notice requirement and the opt-out right it protects are compelled not only by Florida constitutional and procedural law, but also by federal due process. In *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997), the Supreme Court rejected a class certification in an asbestos case that included exposure-only

plaintiffs who "may not even know of their exposure, or realize the extent of the harm they may incur." *Id*. at 628. In addressing "[i]mpediments to the provision of adequate notice," the Court explained that "those without current afflictions may not have the information or foresight needed to decide, intelligently, whether to stay in or opt out," and many "[f]amily members of asbestos-exposed individuals . . . could not be alerted to their class membership" because they "may know nothing of that exposure." *Id*. The Court thus "recognize[d] the gravity of the question whether class action notice sufficient under the Constitution and [Federal Rule of Civil Procedure] 23 could ever be given to legions so unselfconscious and amorphous." *Id*. In fact, adequate notice is constitutionally necessary to bind absent class members, *see Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985), and notice is constitutionally inadequate if a person does not have reason to know that he may be part of the class, *see Amchem*, 521 U.S. at 628; *Stephenson v. Dow Chem. Co.*, 273 F.3d 249, 261 & n.9 (2d Cir. 2001) (holding that exposure-only plaintiffs in Agent Orange litigation "likely received inadequate notice").

The Fourth District's extension of *Engle* class membership to individuals who had no reason to know they might have a smoking-related condition rendered meaningless the notice and opt-out rights protected by the Florida Rules of Civil Procedure and by the state and federal constitutions. For example, without any

reason to connect his PVD symptoms to smoking prior to 1998, Mr. Ciccone could not have exercised any meaningful opt-out right during the opt-out period. Thus, had the defendants prevailed in *Engle*, he and others similarly situated would have had colorable arguments that the judgment did not bind them. And courts considering those arguments would have had to choose between plaintiffs' right of access to the courts and defendants' right to avoid the unfairness of one-way intervention. That is exactly what this Court held would have been improper. *See Engle,* 945 So. 2d at 1275.

2. This Court construed the *Engle* class definition to be closed and to require manifestation for yet another reason: to guarantee the mutuality needed for the *Engle* jury findings to be given preclusive effect. Florida law requires strict mutuality of parties in order for preclusion to attach. *Stogniew v. McQueen*, 656 So. 2d 917, 919 (Fla. 1995) ("[U]nless both parties are bound by the prior judgment, neither may use it in a subsequent action."). "Identity of parties and mutuality do not exist unless the same parties or their privies participated in prior litigation that eventuated in a judgment by which they are *mutually bound*." *Massey v. David*, 831 So. 2d 226, 232 (Fla. 1st DCA 2002) (emphasis added).

In *Engle*, this Court recognized that "one-way intervention" into an open-ended class would have "the effect of giving collateral estoppel effect to [a] judgment of liability in a case where the estoppel was not mutual." 945 So. 2d at

1275 (quotation omitted). In other words, mutuality is lacking where the defendants are bound to the judgment regardless of which side prevails at trial, but class members may choose to be bound or not depending on the outcome of the case. Thus, limiting the *Engle* class to individuals with sufficient knowledge to meaningfully consider their opt-out rights was essential not only to ensure fairness to the parties, but also to the very "pragmatic solution" at the heart of this Court's decision: affording "res judicata effect" to the preserved *Engle* jury findings. *See Engle,* 945 So. 2d at 1269.

Finally, because mutuality was necessary for such res judicata effect, the situation as it existed in 1996 mattered. Class membership is not simply an administrative convenience used to "'make legal process more effective and expeditious,'" as the Fourth District erroneously concluded. *See Ciccone*, 123 So. 3d at 610 (quoting *Engle*, 945 So. 2d at 1275). And it cannot be satisfied merely by "looking back in time from the 2006 *Engle* decision" to see whether, with the benefit of hindsight, expert testimony can "establish the link between a plaintiff's concrete symptoms and tobacco." *Id.* at 613. Rather, if an individual could not meaningfully exercise his opt-out right during the opt-out period (which ran from November 21, 1996 to July 15, 1997), he could not have been bound by any adverse judgment, mutuality would be lacking, and he thus could not subsequently invoke the "res judicata effect" of the *Engle* findings. The Fourth

District's analysis, which gives plaintiffs "the benefit of hindsight from the vantage point of 2006," *id.*, is thus incompatible with the mutuality requirement of Florida preclusion law.

For all of these reasons, the Fourth District erred in concluding that the policy rationales underlying the manifestation requirement for statute-of-limitations purposes do not apply to the question of *Engle* class membership.

D. The Fourth District's Additional Reasoning Is Unpersuasive

Having erroneously decided to disregard the manifestation requirement as set forth in the limitations cases, the Fourth District then adopted its own definition, under which mere "symptoms" of a disease or condition are sufficient even if the smoker has no reason to connect them to smoking. *See Ciccone,* 123 So. 3d at 615–16. The Fourth District's affirmative arguments in support of this definition are equally unpersuasive.

First, the court erred by borrowing a definition of "manifestation" developed in the context of "insurance coverage cases." *See id.* at 615. The question addressed in those cases—whether a disease existed when the insurance policy became effective—is entirely different from the question of *Engle* class membership, because there is no necessary connection between the policy's effective date and the cause of the insured's disease. *See*, *e.g.*, *Preferred Risk Life Ins. Co. v. Sande*, 421 So. 2d 566, 568 (Fla. 5th DCA 1982). Moreover,

individuals naturally want to insure themselves against diseases known and unknown, so a knowledge requirement in that context would make little sense. On the other hand, the right to opt out of a class is meaningless absent some reason to know one may be a class member, so a knowledge requirement in the class-action context, like a knowledge requirement in the statute-of-limitations context, makes eminently good sense.

Second, the Fourth District asserted that a knowledge-free standard "appears to fall in line with the common notion that a disease 'manifests' when it becomes diagnosable through evaluation of the patient's 'symptoms.'" *Ciccone*, 123 So. 3d at 615. But the only cited authorities define "diagnosis," not "manifestation." *See id.* (citing *Curley v. State*, 16 So. 2d 440 (Fla. 1943); *Black's Law Dictionary* 484 (8th ed. 2004)). And this Court squarely rejected a class-membership standard keyed to diagnosis as opposed to manifestation. *See Engle*, 945 So. 2d at 1276 ("The critical event is not when an illness was actually *diagnosed* by a physician, but when the disease or condition first manifested itself.").

Third, the Fourth District erred in invoking this Court's treatment of Ralph Della Vecchia's claims in *Engle*. *See Ciccone*, 123 So. 3d at 614. In *Engle*, the Third District reversed Mr. Della Vecchia's judgment because it concluded that his deceased wife, Angie, did not qualify as a class member. In making that determination, the Third District assumed that (1) class membership was keyed to

diagnosis and (2) the class cut-off date was October 31, 1994, the date of the original class certification. On those assumptions, Mrs. Della Vecchia did not meet the class definition because her lung cancer was not diagnosed until 1997. *Engle*, 853 So. 2d at 453 n.23. This Court rejected both grounds for the Third District's ruling. Applying a manifestation standard and a cut-off date of November, 21, 1996, the Court concluded that Mrs. Della Vecchia was a class member because medical records from "early 1997" established her "past medical history of 'COPD'"—a lung disease that, unlike PVD, is widely known to be caused by smoking. *Engle*, 945 So. 2d at 1275, 1276. At no point did this Court suggest that Mrs. Della Vecchia could not reasonably have known of the connection between her COPD and her smoking on or before November 21, 1996.

This Court's silence on that point does not suggest that such knowledge is unnecessary, as the Fourth District erroneously concluded. *See Ciccone*, 123 So. 3d at 614. This Court addressed only the two legal errors made by the Third District, and the parties did not dispute any of the facts regarding when Mrs. Della Vecchia had reason to know of her claims. *See* Brief of Respondents 46–47 n.32, *Engle*, 945 So. 2d 1246 (No. SC03-1856) (noting that de novo standard of review applied "because the relevant facts," including "the accrual dates for . . . Della Vecchia's claims[ ] were undisputed"). Thus, there is no basis for construing this

Court's silence as reaching out to decide an issue that was not before it, much less as abrogating the established test for the "manifestation" of latent diseases.

Finally, the Fourth District concluded that adhering to the settled legal definition of "manifestation" would create insurmountable practical problems by requiring "an inquiry into the abstraction of what a plaintiff knew or should have known over ten years earlier." *Ciccone*, 123 So. 3d at 614. Not so. The traditional manifestation standard applied in *Castleman* is precisely the same one that juries routinely use to decide questions of accrual in latent-disease cases. *See*, *e.g.*, *Carter*, 778 So. 2d at 936–38. Moreover, the *Engle* class action was filed on May 5, 1994 and is subject to a four-year statute of limitations; thus, in progeny cases, juries adjudicating limitations issues must routinely decide whether a smoker knew or should have known not only of his disease, but also of its causal connection to smoking, on or before May 5, 1990—more than six years before the class-cutoff date. *See*, *e.g.*, *Jewett*, 106 So. 3d at 468; *Webb v. R.J. Reynolds Tobacco Co.*, 93 So. 3d 331, 333–34 (Fla. 1st DCA 2012); *Frazier*, 89 So. 3d at 943. Furthermore, progeny juries routinely must address issues regarding a smoker's state-of-mind even earlier than that, in deciding why the plaintiff began or continued smoking—a central issue bearing on class membership and comparative fault. *See Philip Morris USA, Inc. v. Douglas*, 110 So. 3d 419, 431–32 (Fla. 2013). The question whether a progeny plaintiff reasonably could have

attributed his illness to smoking is neither a collateral nor an insoluble "abstraction," as the Fourth District erroneously concluded.

* * *

This case illustrates why the trigger for the statute of limitations—notice of a causal link between smoking and an illness—must also have been the trigger for *Engle* class membership. Before 1999, Mr. Ciccone had no reason to associate his leg and back symptoms with smoking. If he were nonetheless swept into the *Engle* class when it closed in 1996—without any way of knowing whether he had a smoking-related disease—he would either have been bound by *Engle*, in violation of his rights, or allowed to opt in and reap the benefits of class membership without having assumed the risk of being bound, in violation of Reynolds's rights. *See Engle,* 945 So. 2d at 1274–75. Either result would have produced exactly the kind of problems that this Court, in limiting the class to individuals whose diseases or conditions had "manifested" by the date of class certification, held that the class definition was designed to prevent.

II. THE ERRONEOUS INSTRUCTION REQUIRES A NEW TRIAL

The trial court's misstatement of the standard for "manifestation" was highly prejudicial. "Reversible error occurs when an instruction is not only an erroneous or incomplete statement of the law, but is also confusing or misleading." *Gross v. Lyons*, 721 So. 2d 304, 306 (Fla. 4th DCA 1998) (citing *Goldschmidt v. Holman*,

571 So. 2d 422, 425 (Fla. 1990); *Fla. Power & Light Co. v. McCollum*, 140 So. 2d 569 (Fla. 1962)). "[T]he test for reversible error arising from an erroneous jury instruction is not whether the instruction misled, but only whether it reasonably might have misled the jury." *McPhee v. Paul Revere Life Ins. Co.*, 883 So. 2d 364, 368 (Fla. 4th DCA 2004). "Where the evidence is inconclusive or conflicting, the failure of the trial judge to provide a charge which lays down standards for the jury to follow under varying permissible views of the evidence constitutes reversible error." *Schweikert v. Palm Beach Speedway, Inc.*, 100 So. 2d 804, 806 (Fla. 1958) (quotation omitted). That is the case here.

The record in this case contained abundant evidence from which a properly instructed jury could conclude that Mr. Ciccone could not reasonably have connected his symptoms to smoking before November 21, 1996. Although Mr. Ciccone complained of back and leg pain before then, those are hardly typical symptoms of smoking-related diseases. Moreover, his own physician testified that all of his symptoms at the time could have been explained by his history of chronic back problems, T.75:782–83, which Mr. Ciccone himself blamed on a prior workplace injury, *see* T.79:1310, 1317. Mrs. Ciccone's expert pulmonologist likewise agreed that his long history of "back injury and back disease" could have explained his pre-1998 symptoms. T.79:1316. Reynolds's medical expert testified that Mr. Ciccone's PVD did not even become symptomatic until 1998. *See*

T.88:2689, 2704, 2717–19. And the trial court itself acknowledged that, even under its watered-down definition of "manifestation" as mere symptoms of PVD, Mrs. Ciccone's case on that issue was "extremely weak." T.85:2366.

Given the conflicting evidence on whether Mr. Ciccone reasonably could have known, prior to 1998, that his symptoms were caused by smoking, that issue was for the jury to decide. *See*, *e.g.*, *Carter*, 778 So. 2d at 938 (jury issue where smoker could have attributed symptoms of lung disease either to smoking or tuberculosis). A properly instructed jury thus could readily have concluded that Mr. Ciccone was not an *Engle* class member. And, if he was not, there was no permissible legal basis for allowing Mrs. Ciccone to use the *Engle* findings to establish the conduct elements of each of her claims. *See Engle*, 945 So. 2d at 1269 (only "[c]lass members" entitled to preclusive effect of Phase I findings).

CONCLUSION

For these reasons, the judgment of the Fourth District should be reversed and the case remanded for a new trial on Mrs. Ciccone's non-intentional tort claims.

Respectfully submitted,

/s/ Eric L. Lundt

Gordon James III
Florida Bar No. 0150077
Eric L. Lundt
Florida Bar No. 0861715

eric.lundt@sedgwicklaw.com
jonathan.thomas@sedgwicklaw.com (secondary)
SEDGWICK LLP
2400 E. Commercial Blvd., Suite 1100
Fort Lauderdale, FL 33308
Phone: (954) 958-2500
Fax: (954) 958-2513

Gregory G. Katsas
Florida Bar No. 89091
ggkatsas@jonesday.com
JONES DAY
51 Louisiana Avenue, N.W.
Washington, DC 20001
Phone: (202) 879-3939
Fax: (202) 626-1700

Charles R.A. Morse
Florida Bar No. 0091561
cramorse@jonesday.com
preichert@jonesday.com (secondary)
JONES DAY
222 East 41st Street
New York, NY 10017-6702
Phone: (212) 326-3939
Fax: (212) 755-7306

Counsel for Petitioner
R.J. Reynolds Tobacco Company

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on August 7, 2014, I served a copy of the foregoing brief by electronic mail on counsel below:

Bard D. Rockenbach, Esq.
Burlington & Rockenbach, P.A.
Courthouse Commons/Suite 430
444 West Railroad Avenue
West Palm Beach, FL 33401
bdr@FLAppellateLaw.com
fa@FLAppellateLaw.com

Mark E. Millard, Esq.
Engstrom, Lipscomb & Lack
10100 Santa Monica Boulevard, 12th Floor
Los Angeles, CA 90067
mmillard@elllaw.com

William J. Wichmann, Esq.
Law Offices of William J. Wichmann, P.A.
888 S.E. 3rd Avenue, Suite 400
Fort Lauderdale, FL 33316
wwichmann@me.com

J. Michael Fitzgerald, Esq.
Fitzgerald & Associates, P.A.
P.O. Box 6246
Charlottesville, VA 22906
mfitzgerald@hardhatlaw.com

DATED: August 7, 2014

/s/ Eric L. Lundt
Attorney for Petitioner R.J. Reynolds Tobacco Co.

CERTIFICATE OF COMPLIANCE

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

DATED: August 7, 2014

/s/ Eric L. Lundt
Attorney for Petitioner R.J. Reynolds Tobacco Co.