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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

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REPLY BRIEF OF PETITIONER R.J. REYNOLDS TOBACCO COMPANY

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ARGUMENT

I. THE FOURTH DISTRICT'S ERRONEOUS "MANIFESTATION" INSTRUCTION REQUIRES A NEW TRIAL

1. This Court held in *Engle* that "[t]he critical event" for determining membership in the *Engle* class is "when the disease or condition first manifested itself." *Engle v. Liggett Grp., Inc.*, 945 So. 2d 1246, 1276 (Fla. 2006). Plaintiff dismisses this statement as a "single word at the end of the opinion," acting as if it were dictum. Ans. Br. 14. She says "[t]he question for class membership is whether the claimant 'suffers or has suffered' from a smoking related disease, *not . . . manifestation of the disease*." Ans. Br. 10 (emphasis added). But this Court held that "manifestation" is the test. Not a single Florida court has suggested otherwise, including the Fourth District in this case.

For good reason: manifestation has a well-established role in the law. It serves to provide potential plaintiffs with the notice necessary to exercise their rights. In the statute-of-limitations context, it prevents the plaintiff's claim from accruing before the plaintiff has reason to know of its existence. In the class-action context, it prevents the class definition from sweeping in individuals who had no reason to know they were class members at the time they were required to exercise their opt-out rights. In both contexts, the concept gives the plaintiff a meaningful opportunity to make an informed election of rights (to file a lawsuit, to opt out of a class action) or else be bound by the decision not to do so (to forgo a legal claim,

to be bound by a class judgment).

In *Engle*, this Court specifically adopted that rationale in explaining why the class closed on November 21, 1996. The Court reasoned that individuals had to be in a position to reasonably ascertain whether they were class members when they received notice of the class action and were put to the choice of remaining in the class or opting out. In this way, the Court explained, its ruling (a) protected the plaintiffs' right of access to the courts by ensuring that each class member had meaningful notice and an opportunity to opt out of the class, *Engle*, 945 So. 2d at 1275; (b) protected the defendants from the risk of "one-way intervention," whereby class members could avoid an adverse class judgment by claiming that they had not received adequate notice of the class action before the opt-out deadline, *id.*; and (c) protected this Court's *res judicata* holding by ensuring that the *Engle* Phase I jury findings could be given preclusive effect consistent with the mutuality requirement of Florida law, *id.*

This Court's reasoning makes sense *only* under the definition of "manifestation" that has been consistently used in the statute-of-limitations context, under which a disease manifests when an individual's symptoms would put a reasonable person on notice that the defendant's product may have caused his injury. *See* Initial Br. 18–20. That is why the published class notice defined a class member as "a smoker or former smoker who has [ ] *manifested* or been diagnosed with any dis-

ease or medical condition *caused by [his or her] addiction to cigarettes that contain nicotine*." App. A1 (emphases added).[1] If Mrs. Ciccone were right and class membership did not require manifestation of an apparently smoking-related illness, then either (a) plaintiffs without knowledge of the connection between their illness and smoking as of November 21, 1996, had no meaningful right to opt out of the class, or alternatively, (b) they could engage in "one-way intervention" and (c) thereby defeat the mutuality necessary for application of this Court's *res judicata* holding. The only conceivable basis for Mrs. Ciccone's proposed rule is a bare desire to maximize the size of the class, but at the cost of making hash out of this Court's reasoning in *Engle.* It should therefore come as no surprise that, until this case, Florida courts had consistently rejected Mrs. Ciccone's position and instead looked to the same "manifestation" standard in deciding *both* questions of accrual *and* questions of class membership.[2]

Notably, Mrs. Ciccone's position would disadvantage not only the *Engle* de-

[1] The *Engle* trial court reiterated this understanding in its January 1998 choice-of-law order, which stated that the *Engle* class was limited to "residents of the state of Florida … *at time [the] evidence of the causal relationship of the cause of action had manifested itself,*" App. A26 (emphasis in original)—a ruling this Court specifically affirmed, *see Engle*, 945 So. 2d at 1267.

[2] *See R.J. Reynolds Tobacco Co. v. Jewett*, 106 So. 3d 465, 468 (Fla. 1st DCA 2012) (accrual); *Frazier v. Philip Morris USA Inc.*, 89 So. 3d 937, 946 (Fla. 3d DCA 2012) (accrual); *Damianakis v. Philip Morris USA Inc.*, No. 2D13–246, 2014 WL 3537019, at *6 (Fla. 2d DCA July 18, 2014) (class membership); *Castleman v. R.J. Reynolds Tobacco Co.*, 97 So. 3d 875, 877 (Fla. 1st DCA 2012) (class membership).

fendants, but many prospective plaintiffs as well. The *Engle* jury's Phase I verdict was a split decision. Although the jury found that many diseases were caused by smoking, it also found that some diseases were not, including bronchioloalveolar carcinoma (a form of lung cancer) and asthmatic bronchitis. App. A28–A29. Under defendants' standard, if smokers with either of these diseases did not have reasonable notice of their medical condition and its possible connection to smoking as of the class cutoff date, they were out of the class and able to pursue their own individual claims. In contrast, Mrs. Ciccone's approach would unfairly sweep those smokers into the class and bind them to an adverse result, even though they had no meaningful opportunity to opt out. This Court's decision in *Engle* was intended to prevent this result.

2. Mrs. Ciccone makes no mention of the express rationale upon which this Court's decision in *Engle* was predicated: the need to provide class members with meaningful notice and an opportunity to opt out, and to ensure the mutuality and thus the preclusive effect of the *Engle* findings. Initial Br. 31–33. And the arguments she does make are demonstrably erroneous.

a. Principally, Mrs. Ciccone argues that *Engle* does not establish a "manifestation" test at all: she argues that "[t]he question for class membership is whether the claimant 'suffers or has suffered' from a smoking related disease, not . . . manifestation of the disease" and that there is "nothing in the *Engle* opinion to indi-

cate that this Court intended to change the class definition by describing the 'suffering' from disease as a 'manifestation' of a disease." Ans. Br. 10, 12.[3]

That argument is plainly wrong. In concluding that the class definition's reference to "those 'who have suffered . . . from diseases and medical conditions'" included more than just smokers who had received formal diagnoses as of November 21, 1996, the Court specifically incorporated the "manifestation" requirement from the published class notice. It 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." 945 So. 2d at 1276 (second emphasis added). That holding did not "change" the "suffered" language in the class definition (Ans. Br. 12); nor did it add an extra element. Rather, it *explained* the class definition: the Court interpreted "suffer[ing] . . . from a disease or medical condition" to require either an actual diagnosis or proof that the disease "manifested itself" to the plaintiff.

And as we have already shown, "manifestation" has a precise legal meaning—both in the *Engle*-progeny litigation and in Florida products-liability law more generally—that requires notice of a potential causal relationship between the disease and the product. *See* Initial Br. 18–26. Here, the context makes crystal clear that the Court meant this term to have its traditional products-liability mean-

[3] Mrs. Ciccone's related argument that "[a]ny objection Petitioner had with the class definition and cutoff date should have been made in the *Engle* appeal," Ans. Br. 23, erroneously assumes that *Engle* adopted her view of the class definition.

ing. *First*, this Court adopted a rationale—the need to provide would-be plaintiffs with adequate notice—that makes sense *only* under this standard definition. *Second*, it employed this term against the backdrop of both (1) a published class notice that specifically limited the class to "smoker[s] or former smoker[s] who ha[ve] [ ] *manifested* or been diagnosed with any disease or medical condition *caused by [their] addiction to cigarettes that contain nicotine*," App. A1 (emphases added), and (2) a trial court ruling that likewise limited the class to "residents of the state of Florida … *at time [the] evidence of the causal relationship of the cause of action had manifested itself*," App. A26 (emphasis in original). Mrs. Ciccone, in contrast, puts forward no reason to believe that the Fourth District's standard, borrowed from the far-afield insurance-coverage context, was intended to govern progeny trials.

b. Mrs. Ciccone attempts to distinguish the *Engle* trial court's choice-of-law ruling on the ground that "determin[ing] what state's law applied" depended on "when the cause of action accrued" and thus required "the smoker's knowledge of a tort," whereas membership in the *Engle* class "is not concerned with when the cause of action accrued, only when the symptoms of the disease existed." Ans. Br. 22. This argument misses the point: the trial court understood its own class definition to be limited to those for whom the "*causal relationship of the cause of action*"—i.e., the causal relationship between symptoms and smoking—"*had mani-*

fested itself" in Florida. The trial court's final omnibus order applied the same standard in "refus[ing] to allow potential claimants who have *not manifested a disease or medical condition to become a member of the class*." App. A79 (emphasis added). Mrs. Ciccone acknowledges that, at the very least, the trial court's choice-of-law ruling relied on the traditional standard of manifestation in connection with the class definition's residency requirement. Her position rests on the implicit assertion that "manifestation" means one thing for the residency requirement of class membership and another thing for the class cutoff date. Mrs. Ciccone offers no rationale for that bizarre result.

c. Mrs. Ciccone asserts that a notice requirement is inconsistent with the *Engle* Phase I jury's determination "that all the defendants concealed material information, and conspired to conceal information, regarding the health effects of smoking." Ans. Br. 11. She apparently believes that our definition allows defendants to benefit from successfully deceiving individuals into thinking that cigarettes were not dangerous. *See id.* This argument falls wide of the mark. If an individual could prove that fraud prevented discovery that smoking caused the illness, that might be a basis for tolling the statute of limitations. In certain cases—such as where tolling pushed the accrual date for a personal-injury claim past May 5, 1990—that might bring individuals within the *Engle* class. In others—where tolling pushed the accrual date past November 21, 1996—it would take individuals

outside the class. Whether a plaintiff qualifies for tolling involves a case-by-case analysis.[4] As this Court made clear in *Engle* itself, however, the *Engle* concealment and conspiracy findings do not create a categorical rule allowing every *Engle*-progeny plaintiff to plead ignorance and invoke tolling. *See, e.g.*, *Engle*, 945 So. 2d at 1276 ("agree[ing] that the district court properly held that all judgments in favor of class representative Amodeo were barred by the applicable statute of limitations" despite concealment allegations against defendants). And here, Mrs. Ciccone does not, and cannot, contend that Reynolds deceived her husband into believing that something other than smoking caused his leg and back pain. Until 1998 Mr. Ciccone's own doctors believed that a degenerative disk condition or work-related injury accounted for his symptoms. T.75:782–83; T.79:1310, 1317.

The bottom line is that the standard for manifestation adopted by the First District in *Castleman* and proposed by Reynolds in this case is precisely the same standard that courts and juries have used for years in deciding questions of accrual in latent-disease cases. Under that standard, a progeny plaintiff must simply know "enough to permit her to commence a non-frivolous tort lawsuit against [an *Engle* defendant] on the basis of . . . physical, observable, patent symptoms and effects

[4] It is doubtful, however, that any progeny plaintiff could establish fraud-based tolling given the indisputable fact that by the early 1990s cigarette packages had carried government-authored warning labels for more than 25 years and on-going litigation against tobacco companies was nationally publicized.

('manifestations')" before the class cutoff date, *Frazier*, 89 So. 3d at 946, and that same standard applies as much to fraud-based claims for concealment and conspiracy as it does to claims for strict liability and negligence. The mere existence of a fraud claim or even a fraud finding does not require the Court to jettison the well-established, legal meaning of manifestation in *Engle*-progeny cases.

d. Mrs. Ciccone contends that the traditional standard for manifestation adopted by *Castleman* is wrong "because that rule would require lay people to diagnose themselves for diseases both silent and subtle." Ans. Br. 16. But, of course, that is not what it does in the statute-of-limitations context. Instead, this Court adopted the manifestation standard for accrual of causes of action in *Carter v. Brown & Williamson Tobacco Corp.*, 778 So. 2d 932 (Fla. 2000), precisely to *avoid* the situation where the limitations period would begin to run on claims related to latent diseases without the plaintiff's having sufficient knowledge to initiate a lawsuit. *See id.* at 937. The manifestation standard does not require a lay *diagnosis*; it simply requires that the plaintiff have reasonable notice of a smoking-related injury. The identical principle applies to the *Engle* class cutoff date, which is why, previously, *Engle*-progeny courts had consistently interpreted the *Carter* accrual standard and *Engle* class cutoff date as turning on the same underlying definition of manifestation. *See Jewett*, 106 So. 3d at 468; *Frazier*, 89 So. 3d at 946; *Damianakis*, 2014 WL 3537019, at *6; *Castleman*, 97 So. 3d at 877.

Mrs. Ciccone's argument echoes the Fourth District's passing comment that "[c]lass actions typically do not require a class member, during a class membership period, to realize that he has a cause of action." *R.J. Reynolds Tobacco Co. v. Ciccone*, 123 So. 3d 604, 613 (Fla. 4th DCA 2013) (citing *Kerner v. Denver*, No. 11-cv-00256-MSK-KMT, 2013 WL 1222394, at *2 (D. Colo. Mar. 25 2013)). While a class member does not have to have *actual* knowledge that he or she has a cause of action, there must at least be "notice" sufficient to support an informed decision about whether to opt out of the class. *See* Fla. R. Civ. P. 1.220(d)(2); *Seven Hills, Inc. v. Bentley*, 848 So. 2d 345, 355 (Fla. 1st DCA 2003). The *Kerner* case simply reinforces this point by observing that the class notice gives "many putative class members" notice of "the litigation that is proceeding on their behalf." 2013 WL 1222394, at *2. That, of course, is the entire point of a class notice. Nothing in *Kerner*, however, justifies a rule that would sweep individuals into the class who have *no* way of knowing that they meet the class definition.

And here, under Mrs. Ciccone's own view of the facts, the class notice would have indicated to Mr. Ciccone that he was *not* in the class. As explained, the notice defines the class to exclude "smoker[s] or former smoker[s] who ha[ve] not *manifested* or been diagnosed with any disease or medical condition *caused by [their] addiction to cigarettes that contain nicotine*." App. A1 (emphases added). Lest there be any doubt, it goes on to admonish that "[y]ou are <u>not</u> a member of the

class and there is no need to exclude yourself if you . . . ha[ve] not manifested or been diagnosed with any disease . . . caused by your addiction to cigarettes." *Id.* Thus, notice of one's class membership requires notice that one has a disease that may be caused by addiction to cigarettes. That view aligns perfectly with this Court's express reasons for rejecting an open-ended class and crafting a "finite class"—to protect absent class members' opt-out rights and to ensure the mutuality necessary for the preclusive effect of the *Engle* findings. 945 So. 2d at 1275–76. Mrs. Ciccone's view, in contrast, flouts that reasoning.

e. Finally, Mrs. Ciccone attempts to distinguish the United States Supreme Court's decision in *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997), on the ground that "[t]he *Engle* class is not open-ended, as it was in *Amchem*." Ans. Br. 25. But Mrs. Ciccone's approach would create the same problems identified by Justice Ginsburg's majority opinion in *Amchem*. Just as the class in *Amchem* would have included people who "may not even know of their exposure, or realize the extent of the harm they may incur" and thus lacked "the information or foresight needed to decide, intelligently, whether to stay in or opt out," 521 U.S. at 628, Mrs. Ciccone's approach would permit the class period to close on those (like Mr. Ciccone) who had no inkling of the relationship between their condition and smoking, or the possibility that they would be "bound by an adverse judgment" in the *Engle* class action. 945 So. 2d at 1275.

Instead of addressing the reasons this Court gave for guarding against an open-ended class, Mrs. Ciccone advances her own "multiple triggers" that supposedly "limit [class] membership": the "statute of limitations, the November 21, 1996 cutoff for the disease, and then the one year limit to file an individual suit." Ans. Br. 25. But *Engle*'s one-year tolling provision does not limit class membership; it governs the timing of individual actions. Likewise, the statute of limitations is a general timing provision that applies to all claims, *Engle*-progeny and otherwise. The November 21, 1996 class-cutoff date is the only one of these three that produces a closed class, and the only one cited by the Court itself in *Engle*. *See* 945 So. 2d at 1275–76. But the cutoff date works as a class-closing mechanism only if the absent class members could have known, as of that date, that they had a potential claim against one of the *Engle* defendants. That is precisely why this Court held that, in order to qualify as an *Engle* class member, an individual had to "manifest" a disease prior to the class-cutoff date.

In contrast, if it were true, as Mrs. Ciccone claims, that the class definition in *Engle* sweeps in anyone "suffering from a tobacco related disease," Ans. Br. 24–25, even if they had no reason to think so, that would not ensure that plaintiffs could meaningfully exercise their right to opt out, nor would it provide adequate notice to absent class members as required by Rule 1.220(d)(2). For example, the class notice would have been completely ineffective for Mr. Ciccone who, on Mrs. Cic-

cone's own recitation of the facts, did not know his illness was caused by cigarettes until at least 1998 and therefore had no meaningful opportunity to opt out of the *Engle* class. *See, e.g.*, Ans. Br. 1–3. Mrs. Ciccone's response fails to address this critical aspect of the *Engle* decision. This Court should reverse.

II. THE COURT SHOULD AFFIRM THE FOURTH DISTRICT'S PUNITIVE-DAMAGES RULING

Mrs. Ciccone asks this Court to reverse the Fourth District's ruling that *Engle*-progeny plaintiffs may not recover punitive damages on non-intentional tort claims. This issue is already squarely before the Court in *Soffer v. R.J. Reynolds Tobacco Co.*, No. SC13-139 (July 3, 2014); the Court should decline to review it here, because Mrs. Ciccone seeks to alter the order on review without having filed her own cross-notice to join as a petitioner from the judgment below. *See* Fla. R. App. P. 9.360(a) ("A party to the cause in the lower tribunal who desires to join in a proceeding *as a petitioner* or appellant shall serve a notice to that effect . . . within 10 days of service of a timely filed petition . . . or . . .within the time prescribed by rule 9.100(c)." (emphasis added)). To permit review of this issue would thus "violate the clear purpose" of the Florida Rules of Appellate Procedure (*Premier Indus. & Claims Serv. v. Mead*, 595 So. 2d 122, 124–25 (Fla. 1st DCA 1992)), which undoubtedly govern proceedings before this Court (*e.g.*, *Jones v. State*, 966 So. 2d 319, 330 (Fla. 2007)).

But even if the Court reaches the question, it fails on the merits. The *Soffer*

briefing fully addresses most of Mrs. Ciccone's arguments. *See Soffer* Ans. Br. (No. SC13-139). Her other arguments are likewise erroneous. She attempts to distinguish *Hromyak v. Tyco International Ltd.*, 942 So. 2d 1022, 1023 (Fla. 4th DCA 2006)—which held that equitable tolling requires identity of claims—by asserting that the court denied equitable tolling only because Hromyak's claim allegedly involved "a totally different set of facts than in the prior action." Ans. Br. 30. This is incorrect. In *Hromyak*, both the second action and the prior class action challenged the U.S. Surgical merger, such that every claim in the second action arose out of conduct at issue in the first. The AMP merger, by contrast, was challenged only in the first action. Accordingly, the only difference between the two cases relevant to tolling was the legal theories used to challenge the U.S. Surgical merger: while the previous class action had challenged the U.S. Surgical merger under the Securities Exchange Act of 1934, Hromyak challenged it under the Securities Act of 1933. 942 So. 2d at 1022. The court held that tolling was therefore inappropriate, not because the facts were different between the two cases, but because "plaintiff's 1933 Act claim here [involving U.S. Surgical] is not identical to the Exchange Act claim [involving U.S. Surgical] in the federal action." *Id.*

Mrs. Ciccone also relies upon *non*-Florida cases to assert—contrary to *Hromyak*—that equitable tolling does not require identity of claims. Ans. Br. 31–33. Two of these cases actually *support* Reynolds's position, because the plaintiffs'

claims in each case were in fact identical to those in the previous class action.[5] The remaining cases are inapposite, because they involved claims that were nearly identical to claims in previous actions but that arose under the laws of different jurisdictions.[6] Here, by contrast, all of the claims—both the *Engle* class's and Mrs. Ciccone's—arise under Florida law, rendering these cross-jurisdictional cases irrelevant. And, in all events, none of Mrs. Ciccone's cases involve raising new claims for punitive damages, which Florida law treats differently from claims for compensatory damages. *Soffer* Ans. Br. at 17–22. The Court should thus deny Mrs. Ciccone's request for punitive damages on her non-intentional tort claims.

CONCLUSION

The Court should reverse the judgment of the Fourth District as to the trial court's "manifestation" instruction, affirm as to the claim for punitive damages, and remand the case for a new trial on Mrs. Ciccone's non-intentional tort claims.

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[5] *See Tosti v. City of Los Angeles*, 754 F.2d 1485, 1486–87 (9th Cir. 1985) (plaintiff and class both alleged claims under Fourteenth Amendment and 42 U.S.C. § 1983 in challenging the City's discriminatory hiring decisions); *Arivella v. Lucent Techs., Inc.*, 623 F. Supp. 2d 164, 180 (D. Mass. 2009) (class complaint "alleged *exactly* the types of breach claimed by the instant plaintiffs").

[6] *See In re Linerboard Antitrust Litig.*, 223 F.R.D. 335, 351 (E.D. Pa. 2004) ("state antitrust statutes on which plaintiffs' claims are based are modeled upon or closely track the language of the federal antitrust statutes"); *In re Enron Corp. Sec. Litig.*, 465 F. Supp. 2d 687, 718 (S.D. Tex. 2006) (tolling appropriate for state-law claims that have "the same or very similar elements" as the federal claims); *Cullen v. Margiotta*, 811 F.2d 698, 720 (2d Cir. 1987) (finding tolling appropriate for federal claims where differences from the state-law claims were "entirely peripheral").

Respectfully submitted,

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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.

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