IN THE SUPREME COURT OF FLORIDA

LINDA PRENTICE, as Personal Representative of the Estate of JOHN C. PRICE,

Petitioner,

Case No. SC20-291

vs.

L.T. Case Nos. 1D17-2104
R.J. REYNOLDS TOBACCO COMPANY, 2007-CA-11551

Respondent.

ON APPEAL FROM THE DISTRICT COURT OF APPEAL
FIRST DISTRICT OF FLORIDA

PETITIONER'S AMENDED REPLY BRIEF

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ARGUMENT IN REPLY

I. The First District's decision in *Prentice* must be quashed because it erroneously requires *Engle* progeny plaintiffs to prove the concealment actions by proving that the smoker relied on specific statements made by the *Engle* Defendants.

Our reply is limited to two points.

First, we offer more evidence from the litigation to support our point. This Court has granted review of another RJR verdict, *RJR v. Sheffield*, 266 So. 3d 1230 (Fla. 5th DCA 2019), on a different legal issue. *Sheffield v. RJR*, No. SC19-601, 2020 WL 4695953 (Fla. Aug. 13, 2020). Just like this case, neither of the fraudulent concealment jury instructions required reliance on a statement. (ASA170-72). But RJR did not appeal the *Sheffield* jury instruction, making clear that, at a minimum, a jury instruction that does not require reliance on a statement is not an abuse of discretion. Initial Brief, *RJR v. Sheffield*, 2017 WL 7300879 (Fla. 5th DCA 2017).

Second, we respond to RJR's brief preemption argument. Initially, RJR never made this argument to the First District (AppR.38, 367), so the argument is not preserved for review by this Court. *Duest v. Dugger*, 555 So. 2d 849, 852 (Fla. 1990).

Turning to the argument, RJR argues that "pure" fraudulent concealment claims (as opposed to fraudulent statements that conceal facts) are nothing more than a failure to warn claim, which is preempted. This Court already held otherwise. *Engle v. Liggett Group*, 945 So. 2d 1246,1273 (Fla. 2006) (*Engle III*). Also, the res judicata effect of the approved Phase 1 findings bars any consideration of preemption because preemption is an affirmative defense that the Defendants could have raised in the Phase 1 trial. *Cf. PM v. Lourie*, 198 So. 3d 975, 977 (Fla. 2d DCA 2016) ("[T]he tobacco companies cannot raise the implied preemption defense here even if they had not raised it in *Engle* because it *could have been* raised in *Engle*."); *see also Am. Maritime Officers Union v. Merriken*, 981 So. 2d 544, 547 (Fla. 4th DCA 2008) (federal preemption is an affirmative defense); *Engle III*, 945 So. 2d at 1259 (res judicata settles all issues that could have been litigated in the prior proceeding).

Even so, preemption would still not apply to Plaintiff's claims. The Labeling Act states:

> No requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes the packages of

> which are labeled in conformity with the provisions of this chapter.

15 U.S.C. §1334(b). This provision does not bar state-law claims against cigarette companies for fraudulently misrepresenting or concealing material facts, because those claims are based on the duty not to deceive rather than a duty based on smoking and health. *See Altria Group, Inc. v. Good*, 555 U.S. 70, 81-82 (2008); *Cipollone v. Liggett Group*, 505 U.S. 504, 528-30 (1992). And product liability claims (like negligence and strict liability) are not preempted, as long as they are not based on any allegation that the cigarette companies should have put additional warnings in their post-1969 advertising and promotions (which Plaintiff never alleged). *See Cipollone*, 505 U.S. at 524-25; *RJR v. Marotta*, 182 So. 3d 829, 833 (Fla. 4th DCA 2016).

II. Alternatively, the First District erred in granting a new trial on all issues—relief that RJR was not entitled to, and that RJR did not even ask for.

Our initial brief addresses RJR's limited response on this issue.

III. The Defendants' request to relitigate the common core issues raised in the year-long class-action trial must be denied, again.

A. Introduction

Joined by Philip Morris ("PM") appearing as an amicus party,[1] RJR also asks this Court to reconsider its 2006 decision in *Engle III*, which partially decertified the class. The Defendants waived this issue in their briefs to the First District.

And the request is an abuse of process. Throughout the history of the post-*Engle III* litigation, the Defendants have strung out the proceedings by claiming the right to relitigate every issue raised in the year-long class-action trial and start from scratch. Having been rebuffed at every level of the state and federal judiciary, including thirty-four unsuccessful certiorari petitions to the United States Supreme Court, the Defendants persist in making their challenge.

The time to challenge this Court's decisions in *Engle III* and *PM v. Douglas*, 110 So. 3d 419 (Fla. 2013), has long since passed. Unlike precedents that this Court has recently overturned, the decisions

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[1] Sylvia H. Walbolt and Joseph H. Lang, Jr., *Amicus Briefs: Friend or Foe of Florida Courts?*, 32 Stetson L. Rev. 269, 276-78 (2003) (many amicus briefs in the Florida Supreme Court merely repeat a party's argument).

challenged here involve the very same parties (the *Engle* Defendants), making the very same argument in the same case. The renewal of that argument in this proceeding is better described as an untimely rehearing motion, filed 14 years after *Engle III* and 8 years after *Douglas*. Fla. R. App. P. 9.330.

Even if procedurally proper, the argument fails because it requires review of the class action trial record and that record no longer exists, and because the argument ignores that this is a class action.

B. Facts

RJR and its Amici rely on selected quotes from appellate decisions and an isolated, few pages from a year's worth of trial transcripts.

The Defendants' Conduct

The *Engle* cigarette companies conspired for decades to conceal that they intentionally design cigarettes to be addictive despite knowing that addictive smoking causes many deadly diseases. The *Engle* cigarette companies spent billions of dollars to highly engineer the modern cigarette sold to the *Engle* class to be addictive. (R2:4371, 4579; R3:2533-36, 2551-52; ASA196, 200); *PM v.*

Boatright, 217 So. 3d 166, 169 (Fla. 2d DCA 2017); *Whitney v. RJR*, 157 So. 3d 309, 311 (Fla. 1st DCA 2014).

Previously confidential industry documents show the Defendants working together for decades to secretly conspire to hide this, and to attack any research saying otherwise. (R2:3701, 4368, 4577; ASA207, 193, 198). Publicly, they said there was no proven link between cigarettes and disease, but they would continue to research the issue and let the public know if any health risks were found. (R2:3419; ASA192). The companies also created and funded organizations which, they claimed, would research whether cigarettes actually posed a health risk. (R3:2590-96). But in reality, these organizations were merely a public relations ploy, and served as the cigarette industry's mouthpiece to create a false controversy over whether cigarettes cause disease. (R3:2590-96).

The *Engle* Class Litigation

1. The Class Complaint

The starting and ending point for determining the legal theories asserted by the class is the class complaint.[2] The *Engle* class

[2] *See Ocean Bank v. Caribbean Towers Condo. Ass'n*, 121 So. 3d 1087, 1090 (Fla. 3d DCA 2013); *cf. Soffer v. RJR*, 187 So. 3d 1219,

complaint framed four claims that are routinely pursued in *Engle* litigation today: strict liability, negligence, fraudulent concealment and conspiracy to fraudulently conceal. Class Representation Amended Class Action Complaint for Compensatory and Punitive Damages, *Engle v. RJR*, No. 94-08273CA(20), 1994 WL 16494897, at Counts I-III, VI (Fla. Cir. Ct. May 5, 1994). It also included claims for fraudulent misrepresentation, conspiracy to fraudulently misrepresent, breach of express and implied warranty, intentional infliction of emotional distress, and medical monitoring. *Id.* at Counts IV-V, VII-VIII.

The strict liability and negligence counts applied solely to the cigarette companies named as Defendants, whom the complaint described as cigarette manufacturers that "manipulated the level of nicotine in their tobacco products so as to make these products addictive." *Id.* at ¶29. These two counts alleged that the Defendants manipulated nicotine levels in their cigarettes to ensure addiction,

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1226 (Fla. 2016) (the *Engle* Defendants were successful in preventing the *Engle* class from expanding its claims beyond what was pled in the complaint).

failed to use available safer alternative designs, and failed to warn consumers of what they had done. *Id.* at ¶85, 140.

The Defendants' answers (except Liggett) claimed that the nicotine in their cigarettes occurred naturally and not through manipulation, and that their cigarettes were not addicting. (ASA12-21, 31-33, 35-36, 58, 81-83, 85-87).

The counts for fraudulent concealment and conspiracy to conceal alleged that, "[a]lthough each of the Defendants possess scientific data establishing nicotine is addictive, and linking cigarette smoking with cancer and other serious illnesses, these Defendants intentionally and fraudulently suppressed material facts from the public, including the representative Plaintiffs and members of the class," and further that "[t]here has been a conspiracy to completely hide all scientific data proving that nicotine is addictive and that smoking cigarettes causes serious illnesses, …." Amended Class Action Complaint, *Engle*, 1994 WL 16494897, at ¶90, 107.

On this, the Defendants' answers offer the internally contradictory defense that the public is informed of the alleged risks of smoking. (ASA18, 42, 92).

2. Class Action Proceedings

Class certification: The trial court certified a nationwide class of plaintiffs "who have suffered, presently suffer or have died from diseases and medical conditions caused by their addiction to cigarettes that contain nicotine." *RJR v. Engle*, 672 So. 2d 39, 40 (Fla. 3d DCA 1996) ("*Engle I*"). The certification included no limitations to those who smoked certain types of cigarettes (e.g., filtered, light, low-tar, etc.) or aspects of the concealment conspiracy. *Id.* at 40-41. The Defendants appealed on the ground that there were too many individual issues to sustain class treatment. *Id.* at 41.

Although it narrowed the class to Florida smokers, the Third District otherwise affirmed class certification because "the basic issues of liability common to all members of the class will clearly predominate over the individual issues." *Id.*

Importantly, this Court denied review of that decision. *RJR v. Engle*, 682 So. 2d 1100 (Fla. 1996).

Phase 1 trial: On remand, the trial court formulated a three-phase trial plan. Phase 1 was a year-long trial that was limited to "common issues relating exclusively to Defendants' conduct and the general health effects of smoking." *Liggett Group v. Engle*, 853 So. 2d

434, 441 (Fla. 3d DCA 2003) ("*Engle II*"). The common issues included whether nicotine cigarettes are addictive, whether the cigarette companies' nicotine cigarettes cause various fatal illnesses, whether their nicotine cigarettes were defective, whether the cigarette companies were negligent, and whether the Defendants had concealed and engaged in a conspiracy to conceal the addictive and dangerous nature of their nicotine cigarettes. Phase 1 also addressed entitlement to punitive damages for the class as a whole. *Engle III*, 945 So. 2d at 1256.

Phase 1 proposed verdict form: The parties offered competing interrogatory forms for the jury's Phase 1 verdict. The Defendants' form proposed an impractical essay-style verdict form that would have required the jury to identify in narrative form every defect it found for every brand of cigarette and every time period. (ASA108-11, 246-48). The trial judge rejected the form as improper, but made clear that, if the Defendants "want specificity, then there is a way of doing it." (ASA247-48).

Despite conceding that it was "incumbent upon all of us" to provide additional "enumerated" statements for a more detailed verdict form (ASA244-45), and despite repeated requests from the

trial judge, the Defendants failed to file a feasible alternative verdict form. (ASA246-47). The interrogatories the jury ultimately used followed the Defendants' oral suggestion of a "middle ground" (ASA248), and consisted of 12 pages with more than 240 questions including subparts. Verdict Form for Phase I, *Engle*, 1999 WL 35138926 (Fla. Cir. Ct. July 7, 1999).

All parties understood that the findings made in the Phase 1 verdict form would have class-wide impact. (ASA329-30). Indeed, that is ***exactly what the Defendants wanted.*** The Defendants proclaimed, "if the Defendants win, we want as many people as possible bound" (ASA231), and if the jury answers "no … then not a single Florida smoker can recover." (ASA251). The Defendants then acknowledged that a verdict for the plaintiffs would enable "other class members, however many thousands or hundreds of thousands it may be … [to] recover." (ASA336-39).

Phase 1 closing arguments: The Defendants then focused their arguments to the jury on the class-wide nature of the jury's decision-making task, tracking the defenses they had raised in their answers. The Defendants' argument was that cigarettes were not addictive and were not proven to cause disease, and that they could

not be held strictly liable, or found negligent, because they had attempted to make the safest possible cigarette. (ASA288-97, 301-02, 307-16). Likewise, they took an all-or-nothing approach to the fraud allegations, arguing that none of them concealed anything from the public and, even so, the public already knew everything. (ASA317-19). The Defendants described the conspiracy action as laughable because the Defendants are all "bitter, bitter competitors who fight, scratch and quarrel over every inch of the market share." (ASA320-26).

Phase 1 jury instructions and verdict form: The jury was instructed that the case was a class action and that the jury's role was to determine "all common liability issues" relevant to the class. (ASA329-31). Specifically, its role was to "address[] the conduct of the tobacco industry." (ASA310-12, 329-31). The jury instructions and verdict form tracked the class-wide evidence and argument.

Strict liability: The jury was instructed that the class had to satisfy one of two tests to prevail on their strict liability claims—that each defendant's cigarettes "fail[ed] to perform as safely as an ordinary consumer would expect when used as intended" or that "the risk of danger in the design outweighs the benefits." (ASA332-33).

The verdict question asked whether each *Engle* cigarette company defendant had "place[d] cigarettes on the market that were defective and unreasonably dangerous." Verdict Form for Phase I, *Engle*, 1999 WL 35138926, at Question 3. The jury answered yes for each cigarette company defendant separately. *Id.*

Negligence: The jury was instructed that the class had to prove that each defendant was "negligent in designing, manufacturing, testing, or marketing of cigarettes [and] prior to July 1, 1969, in failing to warn smokers of the health risks of smoking or the addictiveness of smoking." (ASA334).

The verdict question posited the existence of a non-negligent manufacturer, asking whether each *Engle* cigarette company defendant had "failed to exercise the degree of care which a reasonable cigarette manufacturer would exercise under like circumstances." Verdict Form for Phase I, *Engle*, 1999 WL 35138926, at Question 8. The jury was provided yes/no answer blanks for each cigarette company defendant and for certain time periods, and it answered yes for all. *Id.*

Fraudulent concealment and conspiracy to fraudulently conceal: The jury was instructed to consider the Defendants'

concealment of information pertaining to the dangers of cigarettes. (ASA235-37, 239-42, 256-69, 271-75); (A10-12). Verdict questions addressed each defendant as to fraudulent concealment and fraudulent misrepresentation, and regarding the existence of a conspiracy to fraudulently conceal and fraudulently misrepresent. Verdict Form for Phase I, *Engle*, 1999 WL 35138926, at Questions 4-5a. The jury answered yes for all Defendants except one. *Id.*

The jury also determined that punitive damages were warranted. Verdict Form for Phase I, *Engle*, 1999 WL 35138926, at Question 10.

Phase 2 trials: Phase 2 included two parts. Phase 2A asked the jury to resolve the remaining individual issues for the three named class representatives' claims, including causation and compensatory damages. *Engle III*, 945 So. 2d at 1257. In Phase 2B, the jury assessed a lump-sum of $145 billion in punitive damages for the entire class. *Id.* The trial court entered a final judgment in favor of the class on all but one count, including class-wide punitive damages and compensatory damages to the three class representatives. *Id.*

Phase 3 trial: The class plan required Phase 3 trials with new juries to determine causation and compensatory damages for the remaining individual class members. *Id.* at 1258.

Post-trial order: Post-trial, the Defendants renewed their directed verdict motions, including the counts tried in this progeny case.

Strict liability: The trial court found there was sufficient evidence that the Defendants' cigarettes contain carcinogens and other harmful chemicals and that they manipulated the levels of nicotine, although it also noted evidence that some cigarettes had various issues with their filters. (A10). The trial court relied on case law holding that "a design defect which renders the product more addictive than it could be or addictive when it need not be at all, may render the cigarette unreasonably dangerous in conjunction with its harmful qualities." (A10) (citing *Burton v. RJR*, 884 F. Supp. 1515 (D. Kan. 1995), and *Rogers v. RJR*, 557 N.E.2d 1045 (Ind. Ct. App. 1990)).

Negligence: The trial court again tracked the parties' pleadings and the presentation of evidence and jury argument: "The Defendants according to the testimony, well knew from their own

research, that cigarettes were harmful to health and were carcinogenic and addictive. By allowing the sale and distribution of said product under those circumstances without taking reasonable measures to prevent injury, constitutes … negligence." (A12).

Fraudulent concealment and conspiracy to conceal: The trial court likewise found sufficient evidence of the overall "concealment of known information which affected the health of the public at large." (A11).

3. *Engle III*

Before Phase 3, the Defendants argued to this Court that preclusive use of the Phase 1 findings violates their due process rights. Brief on the Merits, *Engle III*, 2004 WL 1671058, at *10-13, 27-28; *see also* (ASA115-20; A65-67, 69-73, 76-78). The argument is the same one they make now, 17 years later: "[T]he trial plan violates due process by allowing boundless 're-examination' of the Phase I verdict: Phase III juries are free to hold Defendants liable for conduct that the Phase I jury may never have considered unlawful, much less punishable." *Id.* at *27.

This Court held that class certification had been appropriate for most of the findings made in Phase 1. *Engle III*, 945 So. 2d at 1254-

55, 1265-67, 1269-71. This Court reviewed the class action record and made the factual determination that most of the findings applied equally to the class members regardless of particular circumstances (e.g., what brand of cigarettes they smoked, when they began smoking, and so forth) because they were sufficiently specific to be common to the entire class. *Id.* at 1269. These conduct findings involved only "common issues relating exclusively to the Defendants' conduct and the general health effects of smoking." *Id.* at 1257. Specifically, the common findings on the Defendants' conduct established on a class-wide basis that each *Engle* cigarette company defendant had acted negligently and had sold cigarettes that were defective and unreasonably dangerous, and that all of the *Engle* Defendants (including the industry organizations) had concealed or omitted material information not otherwise known concerning the health effects or addictive nature of cigarettes, and had agreed to so conceal. *Id.* at 1255, 1269-71, 1276-77.

Accordingly, this Court affirmed the verdicts for two of the three class representatives in the Phase 2A trial (one was barred by the statute of limitations). *Id.* at 1276.

Nonetheless, this Court decertified the *Engle* class, holding that the Phase 3 trials could not proceed because the Phase 1 and Phase 2B findings on punitive damages were error, in two respects.

First, the Phase 1 finding on entitlement to punitive damages was premature. *Id.* at 1269. A finding of liability is required before punitive damages entitlement can be determined, and that liability attaches only if the class members establish causation and reliance in Phase 2A (class representatives) or Phase 3 (the rest of the class). *Id.* at 1262-63. The Phase 2B award of punitive damages was necessarily reversed as well. *Id.*

Second, the Phase 2B class-wide punitive damages assessment was premature because a determination of compensatory damages is required before the punitive damages amount can be decided and that determination for the rest of the class members had not yet happened (the Phase 3 trials). *Id.* at 1263-65.

Both rulings required decertification of the rest of class. *Id.* at 1269. This Court concluded that the "pragmatic solution" was to allow the class members to file "individual damages actions" and, despite the decertification, to afford res judicata effect to the "common core findings," as intended. *Id.* at 1268-70, 1276-77.

These individual suits would address the individual issues relating to specific causation, comparative fault, reliance and damages. *Id.* at 1262-65, 1267-68. Punitive damages would also be addressed in those individual trials, only if the progeny plaintiff established liability first. *Id.* at 1262-63, 1269.

Res judicata effect was not afforded to all of the Phase 1 findings. The findings on fraudulent misrepresentation, conspiracy to fraudulently misrepresent, and intentional infliction of emotional distress were not common to the entire class because they "involved highly individualized determinations." *Id.* at 1269; *see also id.* at 1255 (the findings are "inadequate to allow a subsequent jury to consider individual questions of reliance and legal cause").

The Defendants sought rehearing as to the preclusive effect afforded the other findings on their conduct, repeating the argument that was made in the merits briefing and is made again in this proceeding—"[a]pplying the preserved findings will subject Defendants to liability for conduct that no one can say the Phase 1 jury found to be unlawful." (ASA122); *see also* (A99 n.1). Those arguments were rejected again. (ASA157-58).

The Defendants sought review in the United States Supreme Court. Petition for a Writ of Certiorari, *RJR v. Engle*, 2007 WL 1494692, at *12-18 (May 21, 2007). The Supreme Court twice denied certiorari. *RJR v. Engle*, 552 U.S. 941, *reh'g denied*, 552 U.S. 1056 (2007).

4. The Progeny Litigation

Initially, there were approximately 700,000 class members. *Engle III,* 945 So. 2d at 1258. That was back in the 1990s. Only about 1 percent of the original class members met the one-year deadline set by this Court for continuing the litigation. (A102). And, of those approximately 8,000 viable cases, most of the smokers have already died. That is because the class members are people who manifested fatal diseases caused by nicotine cigarettes no later than 1996 (25 years ago). *Id.* at 1275-76. Also, because these are people who started smoking as early as the 1930s, many times their family members have passed away too, thereby eliminating a possible wrongful death action.

Only 354 cases have made it to trial during the 14 years since this Court's *Engle III* decision. A dwindling number of class members wait for their day in court once jury trials resume after COVID-19.

The Defendants' Attempts at Successive Review

1. *Douglas*

In *Douglas*, this Court reaffirmed that the critical *Engle* findings on the common, core issues of the Defendants' decades of wrongful acts, as they pertained to the various causes of action, had been tried and determined on a class-wide basis. 110 So. 3d at 429-31, 436. This Court likewise reaffirmed that substantial evidence supported the findings on the Defendants' common conduct with regard to the class of smokers. *Id.* at 428, 433 (holding that progeny plaintiffs may rely upon the approved jury findings "[b]ecause these findings go to the Defendants' underlying conduct, which is common to all class members and will not change from case to case"). Thus, this Court confirmed the propriety of using these findings in individual class-member trials, as it had done with regard to the Phase 2A trial of the named class members. *Id.* at 433, 436.

The Defendants had argued in *Douglas* that *Fayerweather v. Ritch*, 195 U.S. 276 (1904), foreclosed the preclusive use of the common jury findings on due process grounds. Initial Brief, *Douglas*, 2012 WL 3078033, at *40-48 (Fla. May 30, 2012); Reply Brief, *Douglas*, 2012 WL 3078034, at *14-15 (Fla. June 18, 2012). This

Court rejected that argument. *Douglas*, 110 So. 3d at 435. This Court concluded that the Defendants' due process rights had not been abridged for the simple reason that they had received notice and an opportunity to be heard during the class-action proceedings. *Id.* at 431-32.

The Defendants had also claimed that the findings were insufficiently specific to be given preclusive effect in light of the trial record. Initial Brief, *Douglas*, 2012 WL 3078033, at *2-3, 6-11, 16-17, 21-39; Reply Brief, *Douglas*, 2012 WL 3078034, at *3-14. This Court rejected that argument too, holding that "by accepting some of the Phase I findings and rejecting others based on lack of specificity, this Court in *Engle* necessarily decided that the approved Phase I findings are specific enough." *Id.* at 428.

The United States Supreme Court again denied the Defendants' certiorari petition. *PM v. Douglas*, 571 U.S. 889 (2013).

2. *Walker*

In *Walker v. RJR*, 734 F.3d 1278, 1284 (11th Cir. 2013), the Eleventh Circuit, in an opinion by Judge William Pryor, rejected the basic premise of the Defendants' argument: "RJR argues that the Supreme Court held in *Fayerweather* ... that parties have a right,

under the Due Process Clause, to the application of the traditional law of issue preclusion, but we disagree." *Id.* at 1289. The court explained that, in fact, the Supreme Court "had no occasion in *Fayerweather* to decide what sorts of applications of issue preclusion would violate due process." *Id.* The Eleventh Circuit further held that, "[i]f due process requires a finding that an issue was actually decided, then the Supreme Court of Florida made the necessary finding…." *Id.* Judge Pryor held that this Court's *Douglas* decision did so "when it explained that the approved findings from Phase I 'go to the Defendants underlying conduct which is common to all class members and will not change from case to case.'" *Id.* (quoting *Douglas*, 110 So. 3d at 428).

The Eleventh Circuit concluded that "RJR had a full and fair opportunity to litigate the issues of common liability in Phase I." *Id.* at 1288. Additionally, "RJR also has had an opportunity to contest its liability in these later cases brought by individual members of the *Engle* class … [and] has vigorously contested the remaining elements of the claims, including causation and damages." *Id.* Accordingly, the Eleventh Circuit refused to disturb *Douglas* "[b]ecause RJR had a full and fair opportunity to be heard in the Florida class action and

the application of res judicata under Florida law does not cause an arbitrary deprivation of property[.]" *Id.* at 1280-81.

Certiorari was again denied. *RJR v. Walker*, 573 U.S. 913 (2014).

3. *Graham*

In *Graham v. RJR*, 857 F.3d 1169, 1174, 1185 (11th Cir. 2017), the Eleventh Circuit sat *en banc* and, in an opinion by Judge Pryor, "reaffirm[ed]" *Walker*'s due process holding, point-for-point. Judge Pryor also rejected the Defendants' claim that the findings were without evidentiary foundation in the record. *Id.* at 1182 ("After reviewing the *Engle* trial record, we are satisfied that the Florida Supreme Court determined that the *Engle* jury found the common elements of negligence and strict liability against PM and R.J. Reynolds.").

The Supreme Court again denied certiorari. *RJR v. Graham*, 138 S. Ct. 646 (2018).

4. *Burkhart*

Then, in *Burkhart,* Judge Gerald Tjoflat (who had dissented in *Graham*) applied the *Walker* and *Graham* holdings to the concealment and conspiracy claims. *Burkhart v. RJR*, 884 F.3d

1068, 1092-93 (11th Cir. 2018). Judge Tjoflat explained that "[t]he concealment and conspiracy claims were litigated alongside the negligence and strict-liability claims in *Engle* [and] as with the negligence and strict-liability claims, [the *Engle* Defendants] had the opportunity to argue the conduct elements of the concealment and conspiracy claims," including "the opportunity to protest the jury instructions given," and "the benefit of appellate review of the jury instructions as to those claims." *Id.* at 1093. And they had the opportunity to contest "the Florida Supreme Court's factual finding in *Douglas* that the *Engle* jury's verdict though ambiguous, established the individualized conduct elements of the plaintiffs' negligence, strict liability, fraudulent concealment, and conspiracy claims." *Id.* Finally, the Defendants "still enjoyed and continue to enjoy the right to litigate the causation and reliance elements of those intentional tort claims." *Id.*

The Defendants sought *en banc* review again, but the request was denied without any judge calling for a vote. *Burkhart v. RJR,* No. 14-14708 (11th Cir. order filed May 2, 2018). Subsequent appeals failed too. *See, e.g., Kerrivan v. RJR*, 953 F.3d 1196, 1201 n.2 (11th Cir. 2020).

5. The United States Supreme Court

During the 14 years since this Court decided *Engle III*, the Defendants have filed thirty-four unsuccessful certiorari petitions to the United States Supreme Court. (ASA340-41).

Linda Prentice's Case

1. The Trial

The jury determined that addiction to smoking RJR's cigarettes caused Mr. Price's death and found against RJR on the negligence, strict liability, and concealment conspiracy claims. (R2:5114-15). RJR won the fraudulent concealment claim. (R2:5115). The jury awarded $6.4 million in compensatory damages, and found that punitive damages were warranted. (R2:5115).

In a second phase to decide the amount of punitive damages, RJR argued repeatedly that it had been punished enough by the jury's compensatory award. (R3:5757, 6214-15, 6217-18, 6221-24, 6237). Plaintiff repeatedly (and unsuccessfully) objected that the two types of damages serve two entirely different purposes. The jury returned zero dollars for punitive damages. (R2:5130).

2. The Appeal to the First District

RJR appealed to the First District, raising seven issues. (AppR:38, 367). In 100 pages of briefing, RJR spent only two sentences on its due process argument. (AppR:95). More than three years (38 months) later, RJR asks this Court to review that one sentence of argument.

And RJR adds a new argument—the *Engle III* decision departed from Florida preclusion law.

C. RJR has not preserved its argument.

RJR waived these arguments at the First District in three, independent ways.

First, RJR's only argument to the First District was: "Plaintiff's use of the *Engle* findings in establishing the conduct elements of her claims violated federal due process. *See Fayerweather v. Ritch*, …. The Florida Supreme Court rejected this argument in *Douglas*, 110 So. 3d 419, but Reynolds preserves it for further review." (AppR:95).

As this Court held in *Duest*, 555 So. 2d at 852, "[m]erely making reference to arguments [ ] without further elucidation does not suffice to preserve issues," and such flimsy briefing means a court should

find that "these claims are deemed to have been waived." *See also Hammond v. State*, 34 So. 3d 58, 59 (Fla. 4th DCA 2010).

At a minimum, RJR waived all arguments that are not tethered to RJR's due process argument, including Florida preclusion law.

Second, in the First District, RJR did not even brief how the issue was raised and disposed of in the trial court with record citations, as required by Florida's procedural rules. (AppR:95). So, regardless of whether the trial court ever ruled on the issue, it was not preserved for appellate review. Fla. R. App. P. 9.210(b)(3); *see also Hamilton v. R.L. Best Int'l*, 996 So. 2d 233, 235 (Fla. 1st DCA 2008) ("It is the decision of the lower tribunal that is reviewed on appeal, not the issue.").

Similarly, in this Court, RJR cites only its trial court arguments, not the trial court's ruling. (AB.8 n.2). And the limited references to RJR's argument are generally irrelevant. RJR's allegations in its pleading are not a request for a ruling. And the arguments found in RJR's motion for directed verdict and jury instructions are all from the end of the trial, after the jury had already heard about the findings repeatedly.

Third, RJR conceded its appellate waiver. Plaintiff's answer brief in the First District asserted these points (AppR:285), but RJR 's reply brief did not respond (AppR:367), effectively conceding Plaintiff's argument of waiver. *See Agee v. Brown*, 73 So. 3d 882, 886 (Fla. 4th DCA 2011); *Anderson v. Ewing*, 768 So. 2d 1161, 1166 n.1 (Fla. 4th DCA 2000).

D. The law of the case precludes relitigation.

The arguments made here were decided against the Defendants with finality long ago and, therefore, are not subject to relitigation. *See Delta Property Management v. Profile Investments, Inc.*, 87 So. 3d 765 (Fla. 2012); *Brunner Enterprises, Inc. v. Dept. of Revenue*, 452 So. 2d 550 (Fla. 1984). When a court makes clear that its decision is intended to be a final resolution of the issue, that decision is law of the case. *Wells Fargo Armored Services Corp. v. Sunshine Sec. and Detective Agency, Inc.*, 575 So. 2d 179 (Fla. 1991). If this was not clear enough in *Engle III*, this Court was unquestionably clear in *Douglas*, saying: "We disagree and decline Defendants' invitation to revisit our decision in *Engle*." *Douglas*, 110 So. 3d at 427. This latest invitation is subject to the same fate.

This Court has never tolerated recalcitrant litigants. *See, e.g., Johnson v. Inch*, 2020 WL 6888143 (Fla. Nov. 24, 2020); *Wetzel v. State*, 272 So. 3d 1228 (Fla. 2019); *Hawkin v. Jones*, 211 So. 3d 993 (Fla. 2017); *Gafney v. Turker*, 79 So. 3d 744 (Fla. 2012). It should not do so now.

Also, while the 34 certiorari denials by the United States Supreme Court may not have jurisprudential stare decisis effect, they are significant: "for the case in which certiorari is denied, its minimum meaning is that this Court allows the judgment below to stand with whatever consequences it may have upon the litigants involved under the doctrine of res judicata as applied either by state or federal courts." *Brown v. Allen*, 344 U.S. 443, 543 (1953) (Jackson, J., concurring).

E. The stare decisis challenge fails.

Emboldened by this Court's recent decisions receding from precedent, RJR declares, "The time has come to abandon these clearly erroneous precedents." (AB.31). PM's amicus brief agrees that "now" is the time to "correct" this Court's "clearly erroneous" decisions in *Engle* and *Douglas*. (PM Br.15).

As Judge Pryor noted, the Defendants' arguments include logic fallacies, like the straw man argument made in *Graham*, 857 F.3d at 1185. This too is a straw man argument because it assumes that the law of receding from precedent applies. The Defendants cite no case extending the doctrine to allow a party to relitigate issues after the highest appellate court with jurisdiction has made its final ruling. Indeed, this Court has declined to recede from *Douglas* on numerous occasions.[3]

And, even so, the Defendants' argument to recede from precedent fails for multiple reasons. A pivotal failing, which we

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[3] *See, e.g.*, Brief on Jurisdiction, *PM v. Tullo*, 2013 WL 6844505, at *7-8 (Fla. Oct. 28, 2013); Brief on Jurisdiction, *RJR v. Buonomo*, 2014 WL 671026, at *7-8 (Fla. Jan. 21, 2014); Brief of Petitioner, *RJR v. Marotta*, 2016 WL 1722005, at *39-46 (Fla. Apr. 27, 2016); Brief on Jurisdiction, *PM v. Allen*, 2017 WL 5998694, at *10 (Fla. Nov. 27, 2017); Defendants/Petitioners' Response to Court's Show Cause Order, *PM v. Lourie*, 2017 WL 10439053, at *3 (Fla. May 10, 2017); Answer Brief, *Irimi v. RJR*, 2018 WL 6199591, at *44-45 (Fla. Nov. 19, 2018); Petitioners' Response to Court's Show Cause Order, 2018 WL 834871, at *5 (Fla. Feb. 5, 2018); Petitioners' Response to Order to Show Cause, *RJR v. Ahrens*, 2018 WL 843977, at *3 (Fla. Feb. 5, 2018); Respondent's Response to Order to Show Cause, *Grossman v. RJR*, 2018 WL 834868, at *3 (Fla. Feb. 5, 2018); Petitioner's Response to Order to Show Cause, *RJR v. Dion*, 2018 WL 843986, at *2-3 (Fla. Feb. 5, 2018).

explain later, is that the Defendants have not met the "clearly erroneous" standard. *See, e.g., Wilsonart, LLC v. Lopez*, 308 So. 3d 961, 964 (Fla. 2020); *Thompson v. DeSantis*, 301 So. 3d 180, 184 (Fla. 2020); *see generally Brown v. Nagelhout*, 84 So. 3d 304, 309 (Fla. 2012).

Even if they had, receding from precedent is not automatic. Various considerations "set a high (but not insurmountable) bar for overruling a precedent, and they therefore limit the number of overrulings and maintain stability in the law." *Ramos v. Louisiana*, 140 S. Ct. 1390, 1415 (2020) (Kavanaugh, J. concurring).

One such consideration is whether overruling the prior decision would unduly upset reliance interests. *State v. Poole*, 297 So. 3d 487, 507 (Fla. 2020). In *Knight v. State*, 286 So. 3d 147, 154 (Fla. 2019), this Court explained that reliance interests are lower in cases that address procedural and evidentiary rules because those cases "do not 'serve as a guide to lawful behavior.'" *Id.* at 154 (quoting *United States v. Gaudin*, 515 U.S. 506, 521 (1995)). In contrast, precedent that addresses property and contract rights binds others who are faced with the same circumstance, causing them to change legal positions regarding those rights in reliance on precedent. *Poole*, 297

So. 3d at 507. This circumstance risks serious injustice, and so militates against receding from precedent. *Brown*, 84 So. 3d at 309-310.

The Defendants rely on this language to claim that the reliance interests are minimal here because the preclusive effect of the findings "is exactly the sort of 'procedural [or] evidentiary rule[ ]' that does not engender reliance issues that count for purposes of stare decisis." (AB.40). That argument fails for three reasons.

First, this Court's reliance discussion makes our earlier point that the context here is altogether different. None of the circumstances described in *Knight* and *Poole* involve a party relitigating an issue that has already been decided with finality between the same parties. The factual underpinning of the reliance consideration is the impact of an appellate decision on non-parties.

Second, "[the] doctrine of res judicata is not a mere matter of practice or procedure.... It is a rule of fundamental and substantial justice, 'of public policy and of private peace,' which should be cordially regarded and enforced by the courts...." *Hart Steele Co. v. Railroad Supply Co.*, 244 U.S. 294, 299 (1917) (quotation omitted). The Supreme Court's words are even more compelling now, "in view

of today's crowded dockets." *Federated Dept. Stores, Inc. v Moitie*, 452 U.S. 394, 402 (1981). Preclusion here advances the substantial state interest in not relitigating matters already decided, and promotes the peace that flows therefrom.

And it avoids significantly longer trials. Absent preclusive effect, every class member would be required to repeat the Phase 1 trial. The court system cannot accommodate this, even were they to concentrate judicial and juror resources on these cases to the exclusion of all others. To do so would impinge upon the due process rights of many other parties in many other cases.

Third, the class members have, in fact, relied on these decisions. As for the class members whose appeals are pending, they justifiably relied on this Court's pronouncements in *Engle* and *Douglas* (and the cigarette companies consistently losing this issue) when they invoked the class findings at trial. In every case where the argument is preserved, the verdict would fall.

A change in course at this late date would also expose many more class members to significant attorneys' fees and costs claims in PFS litigation. The Defendants dedicate substantial resources to these cases. For example, in this case, 7 law firms and at least 20

lawyers have appeared on behalf of RJR and PM, including Arnold & Porter Kaye Scholer; Boies Schiller Flexner; Hill Ward Henderson; Jones Day; Moseley, Prichard, Parrish, Knight & Jones; Shook, Hardy & Bacon; and Smith Gambrell & Russell.

Otherwise, the defense amicus briefs claim two negative consequences that require receding from *Engle III*. Neither bears scrutiny.

First, the Florida Justice Reform Institute brief catalogs a list of horribles that will flow from the *Engle III* decision. This is not new. The *Engle* Defendants have been forecasting doom since *Engle III*. Contrary to these "sky is falling" fears, nothing during the last 14 years suggests that this unique issue has arisen outside the context of *Engle* litigation. As this Court predicted in 2006, the procedural posture of the *Engle* litigation is "unique and unlikely to be repeated." *Engle III*, 945 So. 2d at 1270 n.12.

Second, both amicus briefs claim that the partial decertification generated the extensive litigation in Florida's appellate courts. This is a false cause (or "post hoc") fallacy because it assumes a cause for an event where there is no evidence that one exists. Logic fallacies like this are meaningless.

Indeed, closer examination makes clear it is wrong. The proliferation of progeny appeals has nothing to do with the preclusive effect of the findings. Rarely (perhaps never) has there been a litigant who has raised as many appellate issues, in effect reshaping Florida jurisprudence. A few examples:

- Hearsay, state of mind exception: *RJR v. Hamilton*, 2021 WL 509654 (Fla. 4th DCA Feb. 10, 2021).
- Witness credibility: *PM v. Chadwell*, 306 So. 3d 174 (Fla. 3d DCA 2020).
- Expert testimony required to prove medical causation: Petitioners' Brief, *PM v. Santoro*, 2020 WL 6115495 (Fla. Oct. 9, 2020).
- The law of the case: *RJR v. Howard*, 286 So. 3d 936 (Fla. 2d DCA 2019).
- Withdrawal of comparative negligence defense: *RJR v. Schlefstein*, 284 So. 3d 584 (Fla. 4th DCA 2019).
- Hearsay, doctor's statements to husband: *PM v. Gloger*, 273 So. 3d 1046 (Fla. 3d DCA 2019).
- Intentional tort exception, waiver: *RJR v. Thomas*, 264 So. 3d 199 (Fla. 4th DCA 2019).
- Adult children damages: *Odom v. RJR*, 254 So. 3d 268 (Fla. 2018).
- Intentional tort exception to apportionment: *Schoeff v. RJR*, 232 So. 3d 294 (Fla. 2017).
- Punitive damages ratio to compensatory damages: *Schoeff v. RJR,* 232 So. 3d 294 (Fla. 2017).
- Juror nondisclosure: *RJR v. Allen*, 228 So. 3d 684 (Fla. 1st DCA 2017).
- Hearsay, public records exception: *PM v. Pollari*, 228 So. 3d 115 (Fla. 4th DCA 2017).
- Jury selection process: *RJR v. Grossman*, 211 So. 3d 221 (Fla. 4th DCA 2017).

- Jury cause challenge: *PM v. Putney*, 199 So. 3d 465 (Fla. 4th DCA 2016).
- Jury deadlock: Initial Brief, *PM v. Caprio*, 2015 WL 10352948 (Fla. 4th DCA Dec. 10, 2015).

The real reason for the volume of appellate litigation is the intentional litigation strategy of these Defendants. Its implementation (and success) was well-described by outside counsel for RJR in a 1988 memorandum:

> [T]he aggressive posture we have taken regarding depositions and discovery in general continues to make these cases extremely burdensome and expensive for plaintiffs' lawyers, particularly sole practitioners. To paraphrase General Patton, the way we won these cases was not by spending all of Reynolds' money, but by making that other son of a bitch spend all his.

Smith v. RJR, 630 A.2d 820, 826 n.7 (N.J. App. 1993) (quoting RJR memo); *see also* (ASA209). The same is true of the *Engle* litigation. (ASA216, 222) ("[RJR] and its affiliates… have not settled, and currently… do not intend to settle, any smoking and health tobacco litigation claims. It is the policy of [RJR] and its affiliates to vigorously defend all tobacco-related litigation claims."); ("Each of the [PM companies] has defended, and will continue to defend, vigorously against litigation challenges.").

In the *Engle* litigation, the Defendants appeal almost every verdict, no matter the size. *See, e.g.*, *PM v. Weingart*, No. 4D11-3878 (three defendants appeal verdict imposing 91% liability on the plaintiff with net damages of just $4,500 each, after additur). In contrast, the *Engle* class members rarely appeal.

F. Res judicata applies because the "thing adjudicated" in Phase 1 was the conduct elements of the same causes of action between the same parties.

The Defendants have long made the distinction between the two main doctrines governing the preclusive effect of earlier litigation (claim preclusion and issue preclusion) a defining feature of their argument to demand an *ex post facto* artificial deconstruction of the findings. This Court correctly explained that this dichotomy is beside the point because the "thing adjudicated" in *Engle III* was the set of approved conduct elements of the class members' causes of action—negligence, strict liability, fraudulent concealment and conspiring to conceal. *Douglas*, 110 So. 3d at 427-28.

The Defendants' arguments to avoid this all rest on their core claim that "the *Engle* record makes it impossible to determine whether the *Engle* jury in fact decided anything relevant to the claims of any particular *Engle*-progeny plaintiff." (AB.48). This, in turn, is

based on the premise that the jurors in their heads might have thought they were presented with alternative theories of liability on each count.

As *Douglas*, *Walker*, etc. recognized, "adjudication" is not conducting a brain scan to determine what the prior jury must have been thinking when it answered the Phase 1 verdict form. It is not a matter of ruling out any theoretical possibility that jurors may have answered "yes" based on a mistaken belief that they were not resolving matters common to the entire class. The "judicata" in res judicata means adjudication, which is not simply a jury's answer on a piece of paper. Rather, it is understood to encompass the process of judicially deciding a case.

Plus, the Defendants' claim is a virtual impossibility given the jury's constant awareness that their role in Phase 1 was to determine the conduct of the cigarette industry directed to the class as a whole. As summarized by Judge Pryor in *Graham*:

> The smokers presented a substantial body of evidence that all of the cigarettes manufactured by the named Defendants contained carcinogens that cause disease, including cancer and heart disease, and that nicotine addicts smokers. *Douglas,* 110 So. 3d at 423. They presented evidence that the tobacco

> companies "failed to address the health effects and addictive nature of cigarettes, manipulated nicotine levels to make cigarettes more addictive, and concealed information about the dangers of smoking." *Id.*

857 F.3d at 1175.

While the Defendants cite arguments that the parties made to the trial court, such as the possibility of submitting alternative theories to the jury, there is no cited instance of the trial court or counsel ever suggesting to the jury that there were alternative theories to support any of these elements. Instead, the trial court told the jury that Phase 1 was limited to determining issues that applied to the class as a whole. Both sides tailored closing arguments to the all-or-nothing approach that the jury was answering "yes" or "no" for each question on a basis that would apply to every class member, regardless of individual circumstances.

Further proof is that this Court affirmed the verdicts for two of the three named plaintiffs in Phase 2A, which were also based on the Phase 1 findings. *Engle III*, 945 So. 2d at 1255-56.

We also note that the Defendants accept that the first question (whether cigarettes cause cancer and other diseases) and the second question (whether cigarettes that contain nicotine are addictive) were

specific enough to yield binding findings of fact. (AB.45-47; PM Br.6-7). Each of the ensuing questions about negligence, strict liability, and concealment similarly addressed the ***conduct*** of the tobacco companies in the sale of ***all*** cigarettes in the relevant period.

It does not follow that because some cigarettes had additional defects (e.g., being mentholated, or sold as "light," or having air holes to compound the entry of nicotine into the lungs), the common defects found as to all of the Defendants' cigarettes cease to apply. Or that because the concealment conspiracy was a broad attack on the public's knowledge that spanned fifty years, the common conduct found as to all of the *Engle* Defendants ceases to apply.

Accordingly, the *Engle* trial "court ruled that the evidence supported a finding that *all* of the tobacco companies' cigarettes were defective even if some of the cigarettes had brand-specific dangers." *Graham,* 857 F.3d at 1177 (emphasis in original). The evidence, "the court ruled," further supported "a finding that the tobacco companies were negligent in producing and selling *all* of their cigarettes." *Id.* at 1178 (emphasis in original). Similarly, the *Engle* trial court found sufficient evidence to support class-wide findings on counts of fraudulent concealment and conspiracy. (A11).

PM's amicus brief makes another argument, challenging the concealment and conspiracy findings on the basis that the verdict form asked the jury to determine whether the Defendants concealed the health effects of smoking, its addictive nature, or both. (PM Br.11 n.7). This theory is nonsensical. Addiction and disease are inextricably intertwined not only because addiction leads to disease, but because concealing addiction *is* concealing disease, and vice versa. Both addiction *and* disease are central to the structure of *Engle* cases; the very first burden on progeny plaintiffs is to show that they are class members by proving they have a disease caused by cigarettes and that they are addicted to cigarettes. *See, e.g., Douglas,* 110 So. 3d at 426 n.4.

For all these reasons, this Court and the Eleventh Circuit unequivocally held: "'the Phase I verdict against the *Engle* Defendants resolved all elements of the claims that had anything to do with the *Engle* Defendants' cigarettes or their conduct.'" *Graham*, 857 F.3d at 1179 (quoting *Douglas*, 110 So. 3d at 432).

G. The Defendants' argument fails because they have not provided this Court with the class action trial record.

This Court held in *Engle* and *Douglas* that the trial record shows that all parties, the trial court, and the jury knew that these questions were being argued and decided on a global basis applying to all class members, regardless of the brands, the time periods they smoked, and the Defendants' fraudulent concealment conduct. Those decisions were based on review of the original Phase 1 record which consisted of a year's worth of trial testimony (nearly 38,000 transcript pages), 150 witnesses, and thousands of exhibits. *Douglas,* 110 So. 3d at 424, 431.

Reconsideration of this Court's prior factual conclusion requires review of the entire record again, but the Defendants did not provide it. Instead, they provide 27 pages of transcript. For this reason alone, the Defendants' argument fails. *See Applegate v. Barnett Bank of Tallahassee*, 377 So. 2d 1150, 1152 (Fla. 1980); *Esaw v. Esaw*, 965 So. 2d 1261, 1264-65 (Fla. 2d DCA 2007) (Canady, J.).

While we have provided some trial transcript excerpts, we do not have the full record from the 1990s trial. It is our understanding that it was destroyed years ago.

H. *Engle* and *Douglas* do not violate due process.

1. The nomenclature of the preclusion doctrine does not drive the due process inquiry.

The Defendants' due process argument is premised on a debate as to the nomenclature of preclusion doctrines. This too is a straw man argument.

The purpose of preclusion doctrines is "protecting against the relitigation of common issues or the piecemeal resolution of disputes." *Richards v. Jefferson Cnty.*, 517 U.S. 793, 797 (1996). Due process requires only that rules of preclusion avoid "extreme applications" that are "inconsistent with a federal right that is 'fundamental in character.'" *Richards*, 517 U.S. at 797 (citing *Postal Tel. Cable Co. v. City of Newport, Ky*, 247 U.S. 464, 475 (1918)).

Where a party has been furnished notice and a fair and full opportunity to be heard, the "minimum procedural requirements" of due process have been satisfied, *Kremer v. Chem. Const. Corp.*, 456 U.S. 461, 481-82 (1982), and even unorthodox preclusion rules pass constitutional muster, *see Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 328 (1979) (approving non-traditional application of preclusion rules against a party that was provided an opportunity to be heard);

Blonder-Tongue Labs, Inc., v. University of Ill. Found., 402 U.S. 313, 329-30 (1971) (allowing non-traditional application of preclusion rules when the party was afforded an "opportunity for full and fair trial").

The defense briefs do not even cite *Parklane, Blonder-Tongue, or Kremer*—the controlling cases on the due process boundaries of preclusion.

Instead, RJR claims that the Constitution essentially freezes in place the laws of preclusion because traditional practice provides a touchstone for constitutional analysis and, therefore, any deviation carries a presumption of unconstitutionality. (AB.42) Yet the case cited expressly disclaims it: "Of course, not all deviations from established procedures result in constitutional infirmity…. [T]o hold all procedural change unconstitutional would be to deny every quality of the law but its age, and to render it incapable of progress or improvement." *Honda Motor Co. v. Oberg,* 512 U.S. 415, 430-31 (1994). Due process does not and cannot mandate adhering to the ancient strictures of the common law. *Cf. Rogers v. Tennessee,* 532 U.S. 451, 466-67 (2001) (holding that a state's decision to discard a longstanding common law rule was "a routine exercise of common

law decisionmaking in which the court brought the law into conformity with reason and common sense.").

The Defendants' errant argument turns on a long-forgotten scrap of dicta from an inapposite decision, *Fayerweather*, 195 U.S. at 307. In *Fayerweather,* the Supreme Court concluded that an inheritance contest fully litigated in state court barred a later attempt to reopen the contest in federal court. *Id.* at 306. The Supreme Court had ***no occasion*** to decide what sorts of preclusion rules might violate due process. The Supreme Court has never cited *Fayerweather* for the proposition attributed to it by the Defendants. *Fayerweather* plays no role in modern preclusion law or due process law, and rightly goes unmentioned in *Taylor v. Sturgell*, 553 U.S. 880 (2008), the Supreme Court's most recent comprehensive account of preclusion law.

In reality, the Supreme Court has confined the due process inquiry in the application of preclusion law to the issues of notice and the opportunity to be heard, ascertaining "whether the litigant whose rights have thus been adjudicated has been afforded such notice and opportunity to be heard as are requisite to the due process which the Constitution prescribes." *Hansberry v. Lee*, 311 U.S. 32, 40 (1940).

The Defendants were afforded both. As Judge Pryor explained:

> The Florida courts provided them notice that the jury findings would establish the "conduct elements of the class's claims," *Douglas*, 110 So. 3d at 429. And the year-long trial provided them "a full and fair opportunity to litigate the issues of common liability in Phase I." *Walker,* 734 F.3d at 1288. Both tobacco companies seized that opportunity, presenting "testimony that cigarettes were not addictive and were not proven to cause disease and that they had designed the safest cigarette possible." *Douglas,* 110 So. 3d at 423. And they continue to contest liability in individual actions by class members, in which new juries determine issues of individual causation, apportionment of fault, and damages. *Id.* at 430; *Engle III*, 945 So. 2d at 1254.

Graham, 857 F.3d at 1184; *accord Burkhart*, 884 F.3d at 1093.

In addition, the Defendants had every opportunity to propose a workable verdict form that could have provided the specificity they desired, but chose not to do so. Instead, they clung to a fill-in-the-blank, essay-style verdict form that did not comport with Florida law or reality. For example, Florida products liability law does not require identification of a particular defect. "Product liability cases under Florida law require proof of two things. First, the product is defective; and, second, the defect caused the plaintiffs' injuries." *RJR v. Brown*, 70 So. 3d 707, 717 (Fla. 4th DCA 2011).

When the Defendants proposed their verdict form, nearly a year before the jury deliberated, the judge indicated it would reject this approach:

> THE COURT: My only comment at this point, without making any definitive ruling, is I would love to be in the jury room when the jury considers Questions 6, 8, 10, 13 and 17 on the Defendants' verdict form. I mean, I can anticipate we all getting beards by the time they come out [with a] decision.
>
> ....
>
> THE COURT: --just take Question 5, for example: Did one or more Defendants conceal the results of scientific studies not otherwise known?
> The answer is yea or nay.
> If yea, 6 is: Identify the scientific studies concealed by the Defendants and when such studies were concealed? You can go ad infinitum before you get an answer to that one.

Principle Brief of Appellees, *Walker v. RJR,* 2013 WL 1934840, at *43 (11th Cir. May 1, 2013) (quoting *Engle* transcript). Despite requests from the judge to provide a verdict form with special interrogatories that could be answered "yes/no" consistent with Florida law, the Defendants refused to do so. (*E.g.*, ASA247-49). In failing do so, for whatever strategic reason, the Defendants accepted the risk of any ambiguity in the jury's answer. *See* Fla. R. Civ. P. 1.1470; *Whitman*

v. Castlewood Int'l, 383 So. 2d 618, 619-20 (Fla. 1980); *Florida E. Coast Ry. Co. v. Gonsiorowski*, 418 So. 2d 382, 384 (Fla. 4th DCA 1982).

Plus, as Judge Pryor explained, the limits imposed on the findings are equally critical to due process. Even with those findings:

> [N]o tobacco company can be held liable to any smoker without proof at trial that the smoker belongs to the *Engle* class, that she smoked cigarettes manufactured by the company during the relevant class period, *and* that smoking was the proximate cause of her injury. Every tobacco company must also be afforded the opportunity to contest the smokers' pleadings and evidence and to plead and prove the smokers' comparative fault. Indeed, in this appeal, after the district court instructed it, the jury reduced Graham's damages award for his deceased spouse's comparative fault. And in other *Engle* progeny litigation, tobacco companies have won defense verdicts.

Graham, 857 F.3d at 1185.

On Judge Pryor's point about the trial results, the Defendants continue to win many trials. There have now been 364 progeny trials. (ASA173-84). Plaintiffs have won 191 verdicts (52%), including 103 (28%) where punitive damages were imposed. (ASA173-78). The Defendants have won 113 defense verdicts (36%). (ASA179-82). And, if mistrials are considered a defense victory, as do the Defendants,

the Defendants have prevailed in 173 trials (47%). (ASA179-84); (ASA210) (PM press release bragging that it "has won or mistried approximately two-thirds of its *Engle* cases to go to trial since the beginning of 2011"); (ASA212) (account from shareholder meeting for RJR's parent company noting that C.E.O. bragged that mistrials are "successes").

Plus, many of the plaintiff verdicts are more accurately characterized as defense wins because the damages are low. *See, e.g., Walker*, 734 F.3d at 1286 (judgments in two cases at issue were $7,676.25 and $27,500). (ASA185). The Defendants also persuade juries to find the smokers, on average, approximately fifty percent at fault. (ASA186). Ten juries found the plaintiff to be 90% or more at fault. (ASA186). Here, for example, the jury found Mr. Price 60% at fault. (R2:5115). And RJR won one of the counts—fraudulent concealment. (R2:5115). This is hardly the record of defendants who are being deprived of due process.

Consequently, applying the *Engle* findings "in this trial did not violate the tobacco companies' rights to due process of law." *Graham*, 857 F.3d at 1184.

2. The Defendants ignore the plaintiffs' right to due process.

The class members have been waiting for their day in court since 1994, when the *Engle* litigation began. Acceptance of the Defendants' arguments does not mean that this litigation will disappear. Instead, after 27 years, the class members will effectively start over in proving the Defendants' well-known and common course of misconduct in trials that will be much longer than the typical progeny case under the current trial plan.

The practical result for the plaintiffs will be that almost all of the few remaining class members will die of their cigarette-induced disease before their cases ever go to trial. Only about 1 percent of the approximately 700,000 class members met this Court's deadline for continuing the litigation. (A102). And, of those approximately 8,000 viable cases, most of the smokers have already died. That is because the class members are people who manifested fatal diseases caused by nicotine cigarettes no later than 1996 (25 years ago). *Engle III*, 945 So. 2d at 1275-76. Also, because these are people who started smoking as early as the 1930s, many times their family members have passed away too, thereby eliminating a possible wrongful death action. Combined with the Defendants' propensity to

delay litigation and payment of judgments as long as possible, each additional barrier to finality is especially troublesome.

And the practical result for the court system would be to exponentially increase the burden presented by this litigation. The ruling sought by the Defendants here would defeat the original purpose for trying the misconduct of the Defendants as a class action and return the remaining progeny cases to the starting line. Due process does not require such an unfair result.

PM's amicus brief disagrees, claiming that the findings do not shorten the length of the progeny trials, pointing to four non-*Engle* trials it says were shorter, on average, than all of its *Engle* trials. There are three problems with this argument.

First, a data pool of only four trials is far from sufficient to draw any statistical conclusions.

Second, this argument is another false cause fallacy because it assumes a cause for an event where there is no evidence that one exists. Indeed, there are many other possible reasons those four non-*Engle* trials were shorter. For example, a plaintiff may have dropped some of the claims, like the first case listed by PM where the plaintiff dropped two claims—fraudulent concealment and the conspiracy to

conceal. Verdict, *Whitney v. PM*, 2013 WL 6162038 (Fla. Cir. Ct. June 19, 2013).

Regardless, this spurious correlation seems improbable. PM never explains how, on the one hand, the findings allow the progeny juries to "assume" that these elements of the plaintiff's claims are satisfied (denying the Defendants "a fair chance to contest" them) (AB.42-43), and on the other hand the non-*Engle* trials are shorter when the plaintiff has to prove the existence of negligence and a defective product and the five decades of the fraudulent concealment conspiracy, over the Defendants' vigorous defense.

We note also that *Whitney* is an example of the real impact of delay in this litigation. The First District reversed PM's verdict, *Whitney*, 157 So. 3d at 314, but Karen Whitney died from lung cancer before her case was retried. (ASA163). The Defendants count this as a victory. (ASA210, 212).

I. This Court should once again decline the Defendants' invitation to undo *Engle III*'s application of preclusion law.

The Defendants also reprise their challenge to this Court's use of the term "res judicata." This time, the Defendants cite snippets of Judge Pryor's *Graham* opinion, like that the terminology was

"unorthodox." *Graham*, 857 F.3d at 1183-84. But they omit that Judge Pryor did not take issue with *Engle III* or *Douglas* for this, noting that "[t]he preclusive effects of former adjudication are discussed in varying and, at times, seemingly conflicting terminology, attributable to the evolution of preclusion concepts over the years." *Id.* at 1184.

Preclusion protects litigants, the judicial system, and the public from "vexation"--from burdensome multiplication or protraction of litigation, from the attendant expense, delay, and burden to the system, and from inconsistent decisions, which undermine public "reliance on judicial action." *Taylor*, 553 U.S. at 892. The "fiscal and administrative burdens" entailed in the Defendants' claimed right to endless re-trials weigh in the balance against it. *See Matthews v. Eldridge*, 424 U.S. 319, 335 (1976). *Engle* preclusion accommodates the interests of access, efficiency, and economy.

This Court simply followed an approach many other courts and commentators have approved as the superior procedure to adjudicate claims when a single course of conduct has injured thousands of potential plaintiffs who could never litigate all of their claims in their lifetimes on a purely individual basis. *See Douglas*, 110 So. 3d at

433-34, 429 (collecting cases and treatises approving multi-phase class litigation); *see also Carnegie v. Household Int'l, Inc.*, 376 F.3d 656, 661 (7th Cir. 2004) (Posner, J.) (recognizing that a class action may be decertified after the liability trial with the liability findings used in subsequent damages actions). This Court decided that claim preclusion is the proper concept because the same parties are involved and because the same claims are at issue in the earlier and subsequent proceedings. *Id.* at 432-33.

In this way, the Court preserved the function of the class action, which is deciding common issues for all class members, once and only once—despite decertifying the class. *See Sosa v. Safeway Premium Fin. Co.*, 73 So. 3d 91, 107 (Fla. 2011); Fla. R. Civ. P. 1.220(a)(2). It effectively made each progeny suit a continuation of the class action, similar to damage determinations that have to be made in some class actions. *See Sosa*, 73 So. 3d at 113. While the class was decertified and class members were directed to file progeny suits to complete their individual claims, the fact remains that not only were the Defendants parties to the *Engle* final judgment, but so was each class member. *See Soffer v. RJR,* 187 So. 3d 1219, 1224 (Fla. 2016) (approving observation by lower court opinion (that was

otherwise quashed) that "[p]rogeny plaintiffs wear the same shoes, so to speak, as the plaintiff in *Engle* because they are the plaintiffs from *Engle*").

So, the class members merely "pick up litigation of the approved six causes of action right where the class left off -- i.e., with the Defendants' common liability for those claims established." *Douglas*, 110 So. 3d at 432. For this reason, it is hard to distinguish a progeny trial from the Phase 3 proceedings envisioned in the class trial plan.

To avoid this, the Defendants cite the statement in *Douglas* that the findings would be "useless" if the Court had meant issue preclusion. That snippet is taken out of context. Instead, this Court was saying that the findings would be rendered useless in terms of saving any time and effort to avoid relitigation in the progeny actions if each class member were "required to 'trot out the class action trial transcript to prove applicability of the phase I findings.'" *Douglas*, 110 So. 3d at 433. *Douglas* simply made clear that this issue had already been fully litigated and decided against the Defendants in *Engle III* and, therefore, was not subject to relitigation in each progeny case on remand.

CONCLUSION

On issue one, *Prentice* should be quashed, and *PM v. Chadwell*, 306 So. 3d 174 (Fla. 3d DCA 2020), and *RJR v. Burgess*, 294 So. 3d 910 (Fla. 4th DCA 2020), should be approved. At a minimum, *Prentice* should be quashed because the jury instruction given here was not an abuse of discretion.

Alternatively, on issue two, *Prentice* should be quashed to the extent it granted a new trial on all actions and claims, instead of just the concealment conspiracy action.

On issue three, the Defendants' invitation to reconsider due process and preclusion law yet again should be declined.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served via the Florida Court's E-Filing Portal on all counsel in the Service List below on this 19th day of March 2021.

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I HEREBY CERTIFY that this brief complies with the font requirements of Florida Rule of Appellate Procedure 9.045(b). Pursuant to this Court's March 3, 2021, order, this brief contains 10,997 words.

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