IN THE SUPREME COURT OF FLORIDA

No. SC03-1856

On Discretionary Review From A Decision Of The Third District Court Of Appeal

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HOWARD A. ENGLE, M.D., et al., Petitioners,

v.

LIGGETT GROUP INCORPORATED; BROOKE GROUP LIMITED; PHILIP MORRIS INCORPORATED; COUNCIL FOR TOBACCO RESEARCH-USA, INCORPORATED; TOBACCO INSTITUTE, INCORPORATED; LORILLARD TOBACCO COMPANY; LORILLARD, INCORPORATED; BROWN & WILLIAMSON TOBACCO CORPORATION; AMERICAN TOBACCO COMPANY; and R.J. REYNOLDS TOBACCO COMPANY; Respondents.

BRIEF ON THE MERITS OF ALL RESPONDENTS OTHER THAN LIGGETT AND BROOKE

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INTRODUCTION

The Third District's ruling vindicates bedrock principles of substantive law and due process that were systematically violated by the trial court. The trial court ordered defendants to pay a $145 billion classwide punitive award, with no finding that defendants were liable to anyone other than three people handpicked unilaterally by plaintiffs' counsel. The trial confirmed that plaintiffs' claims were inherently individualized and had been improperly forced into the class-action mold. In addition, the trial was irreparably tainted by plaintiffs' counsel, who deliberately incited jury nullification of the law through incendiary racial appeals and other unprofessional conduct. The result was an astronomical punitive award that lacked any discernible relationship to anyone's actual damages and was bankrupting on its face.

Now, joined by their amici, plaintiffs continue their campaign of legal nullification. They ask this Court to ignore the law and a myriad of trial errors because tobacco companies sell a dangerous product and therefore deserve to be punished by any means, regardless of the law. Plaintiffs also mischaracterize the Third District's ruling, claiming that it somehow "immunizes" the tobacco industry. The decision did nothing to change the existing legal framework in which smokers with meritorious claims retain the ability and incentive to obtain full compensation for alleged injuries through individual lawsuits -- and, indeed, have exercised that

right successfully. Plaintiffs' unsupported assertions to the contrary fail to justify their effort to subvert the class-action device.

Thus, it is plaintiffs, not defendants, who claim immunity from the law. Plaintiffs seek to override legal and constitutional rules that are fundamental in all 50 states. This Court should reaffirm the principle that in Florida all litigants -- including tobacco companies -- are entitled to due process and a fair trial.

* * * *

Plaintiffs' brief begins with a one-sided misstatement of "facts." (Pl. Br. at 4-10.)[1] All of those "facts" are drawn from the Phase I trial -- a boundless, year-long vilification of the tobacco industry in which plaintiffs never tied their "facts" to the claims of any class member, e.g., what he or she knew about the risks of smoking, what he or she relied on when deciding to smoke, and whether he or she was injured by any wrongful conduct. The resulting verdict was irreparably tainted by the nullification and racial appeals of plaintiffs' counsel. Moreover, the Phase I "findings" were so generalized and abstract that they cannot be salvaged and applied for any purpose. For example, a centerpiece of plaintiffs' Phase I case was the so-called "Frank Statement," which plaintiffs highlight again in their brief. (Pl.

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[1] Plaintiffs' brief is cited as "Pl. Br. at __"; the record as "R[volume]:[page(s)]"; and the Engle trial transcript as "T[page(s)]." Cited record items are collected in the accompanying Respondents' Appendix (RA): non-transcript items bear a parallel citation as "RA[volume]:[tab]," and all Engle transcript pages are collected at RA2:27. The Third District's opinion is cited as "853 So. 2d at ___."

Br. at 4-5.) But plaintiffs never proved that any class member even saw -- much less relied on -- the "Frank Statement," and no one can say now whether the jury even found that the "Frank Statement" (or any other identifiable statement) was false. Numerous other deficiencies in plaintiffs' "facts" could be cited, but doing so is unnecessary: the issues here are legal, not factual, in nature. The Third District ruled on multiple and independent legal grounds. Plaintiffs would have to overturn each of those rulings to reinstate the judgment. They cannot overturn any. Indeed, plaintiffs have not even established a jurisdictional "conflict." This Court should either approve the Third District's ruling or decline jurisdiction.

STATEMENT OF THE CASE

Plaintiffs' description of the trial plan is inaccurate and incomplete. The trial plan provided for three phases. Only the first two have taken place.

Phase I was a trial of supposed "common issues." Plaintiffs failed to present, and defendants were barred from presenting, any evidence concerning individual class members' knowledge, conduct, disease causation, or other circumstances.[2] (T36358-59, 36445, 36746.) At the end of Phase I, the jury found that cigarettes can cause certain diseases and are "addictive or dependence

[2] The class, certified under Fla. R. Civ. P. 1.220(b)(3), was defined to include all Florida citizens and residents (and their survivors) "who have suffered, presently suffer or have died from diseases and medical conditions caused by their addiction to cigarettes that contain nicotine." R.J. Reynolds Tobacco Co. v. Engle, 672 So. 2d 39, 40, 42 (Fla. 3d DCA 1996) ("Engle I").

producing." (R304:69449-50, RA1:15.) The jury also made generalized findings that defendants had engaged in wrongful conduct, without specifying what that conduct was. (R304:69450-59, RA1:15.) Finally, the jury made a generalized finding that defendants had engaged in conduct that "rose to a level that would permit a potential award or entitlement to punitive damages," again without specifying what that conduct was. (R304:69460, RA1:15.) The Phase I verdict did not establish that any defendant was liable to any class member (for compensatory or punitive damages), or even that any defendant had wrongfully caused any class member to smoke or to develop a disease. (R304:69449-60, RA1:15.)[3]

Phase II consisted of two subparts. Phase II-A addressed the liability and compensatory-damage claims of three individuals unilaterally selected by plaintiffs' counsel: Mary Farnan, Angie Della Vecchia, and Frank Amodeo. (T38405-07.) Although plaintiffs call those individuals "class representatives," the results of their claims were never intended to determine anyone else's claims. Indeed, plaintiffs argued just the opposite: if the three individuals lost their claims, plaintiffs would not be bound by that result but would simply try other individuals' claims, until somebody won. (R217:49935-36, RA1:16; T38099, 38102.)

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[3] Plaintiffs' causes of action were strict liability, negligence, breach of express warranty, breach of implied warranty, fraud, conspiracy to defraud, and intentional infliction of emotional distress. (R1:76-131, RA1:1.) Plaintiffs sought punitive damages for the last three causes of action only. (T57787-88.) The Phase I verdict did not establish liability for any cause of action. 853 So. 2d at 441, 450 & n.16.

In Phase II-A, the jury found that (1) unspecified conduct by defendants injured each of the three individuals; (2) each individual (and each defendant) bore a different degree of fault; (3) the three individuals proved differing amounts of compensatory damages; and (4) one of the three (Amodeo) had sufficient notice of his claims to render them time-barred. The jury did not determine whether any of the three should receive punitive damages. (R304:69461-78, RA1:22.)

In Phase II-B, the jury awarded $145 billion in classwide punitive damages, without allocation to any class member and without identifying any punishable conduct. The jury made no findings as to class size, the number of class members who might later establish liability and compensatory damages, or the amounts of compensatory damages they might recover. (R304:69479-80, RA1:24.)

After Phase II but before Phase III could even begin, the trial court entered a "final judgment." (R304:69483-549, RA1:25.) The court retained jurisdiction for further proceedings but ordered defendants to pay immediately the compensatory awards to the three Phase II-A plaintiffs, and to pay immediately into the court's registry the $145 billion classwide punitive award. (R304:69546-49, RA1:25.)

The trial court entered that judgment even though it acknowledged that the claims of an estimated 700,000 class members still would have to be tried individually in Phase III, before separate juries, as to both liability and compensatory damages. (R132:31279, RA1:11.) Under the trial plan, once all

Phase III trials were completed, the trial court would divide the $145 billion punitive award per capita among all successful or "qualified" class members, regardless of their number. Thus, hypothetically, if 1,000 claimants established liability and compensatory damages (in any amounts) by the end of Phase III, each would receive $145 million in punitive damages, however large or small their individual compensatory awards might be. (T51654, 52587, 57169-70; R221: 50690-93, RA1:17.) Plaintiffs' brief omits any description of Phase III.

SUMMARY OF ARGUMENT

Point I: The Third District correctly decertified the class. Development of the trial record and an overwhelming body of precedent conclusively showed that class certification violated Florida's class-action rules, substantive tort law, and state and federal guarantees of due process and a fair trial. Engle I, which merely upheld class certification at a preliminary stage of the case (in 1996), did not preclude reassessment of certification in light of those subsequent developments.

Point II: The Third District correctly invalidated the trial plan. The trial plan violated state and federal law because (a) it required defendants to pay a punitive award for assumed injuries to all class members, without a determination that defendants were liable for such injuries; (b) it violated the constitutional rule that a claimant's punitive damages must be proportional to the actual harm incurred by that claimant as the result of punishable conduct; and (c) it produced a

generalized verdict that fails to identify any wrongful conduct and thus cannot be used to determine anyone's claims in Phase III (or in any individual suits).

Point III: The Third District correctly held that misconduct by plaintiffs' counsel invalidated the entire judgment. Plaintiffs' counsel deliberately incited jury nullification through racial appeals and other misconduct. He urged a predominantly African-American jury to fight "unjust laws," citing the civil disobedience of Martin Luther King and Rosa Parks, and he compared selling cigarettes to genocide and slavery. This and other unprofessional conduct violated settled Florida law and deprived defendants of due process and a fair trial.

Point IV: The Third District gave proper effect to the FSA and MSA. The Third District correctly held that (a) the punitive award was barred by the FSA and the final judgment in the State of Florida's parallel suit against the tobacco industry, which resolved any public interest in assessing punitive damages for the same alleged misconduct; and (b) the trial court erroneously instructed the jury to ignore the FSA and MSA in considering the need to punish and deter defendants, even though those settlements -- the largest in history -- imposed not only immense financial burdens but also strict deterrents to prevent the same alleged misconduct.

Point V: The Third District correctly held that the $145 billion punitive award was unlawfully bankrupting. The punitive award exceeded defendants' combined net worth roughly 18 times over -- and exceeded even further their

ability to pay a judgment while remaining in business. The award thus violated state and federal prohibitions against bankrupting punitive awards.

Point VI: The Third District correctly reversed the judgment in favor of the three Phase II-A plaintiffs. The Third District correctly held that (a) Farnan and Della Vecchia were not class members and thus improperly obtained awards in this case (but left them free to pursue their claims individually); and (b) Amodeo's claims were time-barred under the jury's express findings.

Point VII: Reversal was required on numerous other grounds as well. Although not addressed by the Third District, numerous other grounds support approval of its ruling, including federal preemption and the First Amendment.

ARGUMENT

I. The Third District Correctly Decertified The Class

The Third District correctly decertified the class because plaintiffs failed to satisfy the express requirements of Fla. R. Civ. P. 1.220(b)(3), under which common issues must "predominate" over individual issues, and class representation must be "superior" to other means of adjudication. The Third District's ruling was compelled by the trial record and by overwhelming authority rejecting class certification in smokers' cases. 853 So. 2d at 442-45, 449-50.[4]

[4] The Third District properly applied an "abuse of discretion" standard. A trial court "by definition abuses its discretion when it makes an error of law."

A. Plaintiffs' Claims Failed To Satisfy Rule 1.220's "Predominance" And "Superiority" Requirements

The Third District held that the trial "conclusively established that individualized issues of liability, affirmative defenses, and damages, outweighed any 'common issues' in this case, and that class representation is not superior." 853 So. 2d at 445. Furthermore, as the Third District pointed out, "virtually all courts that have addressed the issue have concluded that certification of smokers' cases is unworkable and improper," in decisions applying class-action requirements "that are functionally identical to Florida's." Id. at 444 (citing voluminous authority).

This Court and other Florida courts repeatedly have recognized that individualized issues of the type that pervade this case preclude certification. E.g., Lance v. Wade, 457 So. 2d 1008, 1010-11 (Fla. 1984) (reversing certification because each class member had to prove reliance on the alleged fraud); Norwegian Cruise Lines Ltd. v. Rose, 784 So. 2d 1248, 1248 (Fla. 3d DCA 2001) (passengers sickened by cruise ship's food and water presented "insufficient commonality"); Stone v. CompuServe Interactive Servs., Inc., 804 So. 2d 383, 388-89 (Fla. 4th DCA 2001) (individualized fact issues and numerous differences in applicable state laws precluded certification); accord, State Farm Mut. Auto. Ins. Co. v.

Koon v. United States, 518 U.S. 81, 100 (1996); see Armstrong v. Harris, 773 So. 2d 7, 11 (Fla. 2000) (issues of law are reviewable de novo). Certification decisions are reversible if they conflict with Florida law. See, e.g., Seven Hills, Inc. v. Bentley, 848 So. 2d 345, 354 (Fla. 1st DCA 2003).

Kendrick, 822 So. 2d 516, 518 (Fla. 3d DCA 2002); Execu-Tech Bus. Sys., Inc. v. Appleton Papers Inc., 743 So. 2d 19, 22 (Fla. 4th DCA 1999); Humana, Inc. v. Castillo, 728 So. 2d 261, 266 (Fla. 2d DCA 1999).[5]

The Third District correctly recognized that the individualized issues compelling decertification in this case included:

Reliance. A claimant who alleges common-law fraud must prove that he or she personally relied on the alleged misstatement or omission. 853 So. 2d at 446. In Lance, this Court rejected class certification in a fraud case for precisely that reason: "What one purchaser may rely upon in entering into a contract may not be material to another purchaser." 457 So. 2d at 1011; see Castano v. American Tobacco Co., 84 F.3d 734, 743 (5th Cir. 1996). "Presumptions" of reliance are impermissible. Agency for Health Care Admin. v. Associated Indus. of Florida, Inc., 678 So. 2d 1239, 1254 (Fla. 1996) (liability element cannot be conclusively presumed); Humana, 728 So. 2d at 265 ("Florida law imposes a reliance requirement in an omissions case, which cannot be satisfied by assumptions"). Reliance, which was excluded from Phase I and never treated as a "common issue," required lengthy, individualized examinations in Phase II-A. (E.g.,

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[5] Plaintiffs assert that defendants waived "commonality" under subsection (a) of Rule 1.220. (Pl. Br. at 17 n.7.) But threshold "commonality" was not an issue in this appeal. The issue was whether plaintiffs could satisfy the more stringent "predominance" and "superiority" requirements of subsection (b).

T41591-626, 41641-79, 42242-69, 44207-08, 44240-43, 44255-57, 44267-70.) Similar examinations would be necessary for every other claimant in Phase III. (R132:31279, RA1:11.)[6]

Awareness of health risks. The Third District also recognized that individualized inquiries concerning "each smoker's awareness of the health risks of smoking" are essential to liability and comparative fault. 853 So. 2d at 446-47 & nn.11-12; see Hutson v. Rexall Sundown, Inc., 837 So. 2d 1090, 1093 (Fla. 4th DCA 2003). Phase II-A confirmed that claimants differ on these issues. For example, Mary Farnan had trained as a nurse and knew that her father's heart condition was related to smoking. As a result, she was "convinced" that smoking causes disease, but she "absolutely wanted to continue smoking" anyway. (T40289, 40297-98.) In contrast, despite the federally-required health warnings on every cigarette pack, Frank Amodeo asserted that he did not think smoking was dangerous because "I didn't believe that the government would allow cigarettes to be sold if they were unsafe." (T41370, 41440.) Likewise, individualized inquiries

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[6] Plaintiffs refuse to acknowledge the need for any Phase III trials, even though Phase III is indispensable to the trial plan. Moreover, plaintiffs erroneously suggest that "[i]f future compensatory hearings are required," they will be radically shorter and simpler than the Phase II-A trial because Phase II-A addressed "numerous class issues." (Pl. Br. at 20 n.8.) In fact, "class issues" supposedly were resolved in Phase I. Phase II-A addressed plaintiff-specific issues, as would each Phase III trial. Even if each Phase III trial took only a single day, hundreds of thousands of such trials would consume centuries of court time.

as to each claimant's awareness and acceptance of risks would be required in each Phase III trial. Castano, 84 F.3d at 743 & n.15; Smith v. Brown & Williamson Tobacco Corp., 174 F.R.D. 90, 97 (W.D. Mo. 1997).

Addiction. The class definition (see fn. 2 above) expressly required proof of "addiction" to establish class membership and liability. In Engle I, plaintiffs asserted that addiction was a common issue because all smokers were addicted. (R19:3768-69, RA1:2; RA1:4, at 22, 29, 45.) At trial, however, plaintiffs' experts conceded that addiction must be determined individually. (T11632-33, 12226-27.) On post-trial review, the Third District recognized that addiction is "impossible to determine" without "an individual inquiry into the specifics of each" class member's circumstances. 853 So. 2d at 447 n.12; see Barnes v. American Tobacco Co., 161 F.3d 127, 134 (3d Cir. 1998) ("whether or not an individual is addicted is a highly individualistic inquiry"). Phase II-A confirmed the point. The three individuals presented numerous experts to prove that they were addicted. (T38991-94, 39287-97, 39645-51, 40792-95, 42860-62, 43029, 43123-25, 43346-47.) The three claimants also had different "quitting histories." For example, Frank Amodeo quit smoking in 1966, resumed, then quit again in 1987 (T41711-18, 41367), while Angie Della Vecchia never seriously tried to quit until after her diagnosis, because she liked to smoke (T44215, 44228). A similar individualized

analysis would be required in each Phase III trial. Barnes, 161 F.3d at 143; Castano, 84 F.3d at 740.

Specific medical causation. As the Third District recognized, whether smoking has caused a particular person's disease must be determined individually. 853 So. 2d at 446 n.9; see Bouchard Transp. Co. v. Updegraff, 807 So. 2d 768, 771 (Fla. 2d DCA 2002). Phase II-A confirmed that specific medical causation is inherently individualized. To prove that smoking had caused their particular diseases, the three plaintiffs presented numerous experts and lengthy medical histories. 853 So. 2d at 446 n.9. Phase III trials would require similarly extensive proof for individual smokers suffering any of some 20 different diseases, each of which may be caused by factors unrelated to smoking. Such individualized proof cannot be supplanted by the generalized Phase I finding that smoking can cause certain diseases. The fact that smoking can cause heart disease, for example, does not prove that it actually did cause heart disease in any particular claimant. Id. at 446-47, 453; Barnes, 161 F.3d at 145; Smith, 174 F.R.D. at 96 ("Liability will not turn on whether cigarettes are generally capable of causing disease: liability will depend upon whether cigarettes caused a particular plaintiff's disease").

Affirmative defenses. The Third District noted that affirmative defenses such as comparative fault and the statute of limitations also require individualized proof. 853 So. 2d at 447 & n.12. The Phase II-A verdict assigned different

degrees of comparative fault to each plaintiff and time-barred one plaintiff's claims (Amodeo's). Id. at 447 n.12, 453-54 & n.23. Affirmative defenses would have to be litigated individually in Phase III as well. Barnes, 161 F.3d at 143, 149.

Damages. The Third District recognized that "proof of damages is essential to liability" in this case and must be individualized "with regard to each smoker." 853 So. 2d at 447; see Execu-Tech, 743 So. 2d at 22. Phase II-A again provided striking confirmation. Each plaintiff's case required lengthy testimony on compensatory damages (T43079-87, 43416-21, 43652-54, 43670-72, 43867, 43876-78, 43956-69, 44278, 44287-88), and each resulted in a substantially different award (R304:69477-78, RA1:22). Likewise, each Phase III trial would require individualized proof of damages. Castano, 84 F.3d at 740.

Choice of law. Under Florida choice-of-law principles, each individual's claim must be examined to determine which state "has the most significant relationship to the occurrence and the parties." Bishop v. Florida Specialty Paint Co., 389 So. 2d 999, 1001 (Fla. 1980). The trial court ignored that requirement by ruling that Florida law automatically applied to any class member whose disease manifested itself or was diagnosed in Florida, regardless of other factors. (R124: 27309-14, RA1:10.) Moreover, even that erroneous ruling failed to justify applying Florida law to all class members. As the Third District noted, many class members apparently "were not Florida residents at the time of diagnosis or

manifestation." 853 So. 2d at 448. (R93:20865, RA1:8.) Especially in Florida, "which has a highly transient population, choice-of-law problems present an insuperable roadblock to smokers' class actions, even where the class is limited to one state's residents." Id.; see Philip Morris Inc. v. Angeletti, 752 A.2d 200, 232-33 (Md. 2000); Castano, 84 F.3d at 743 n.15; Smith, 174 F.R.D. at 95-96.

Plaintiffs' "subclassing" proposal (Pl. Br. at 20) cannot solve this problem. Assigning class members to different "subclasses" still would require Bishop's highly individualized, multi-factor analysis. See Ortiz v. Fibreboard Corp., 527 U.S. 815, 857-58 (1999); Aksamit v. Brown & Williamson Tobacco Corp., 2001 WL 1809378, at *9 (D.S.C. Dec. 29, 2000). In any event, "subclassing" would nullify the classwide judgment, which applies Florida law to all class members. In addition, plaintiffs never suggested "subclasses" on appeal and cannot conjure them up now. See LaDuke v. Nelson, 762 F.2d 1318, 1332 (9th Cir. 1985). Alternatively, plaintiffs propose to expel from the class all Floridians who "were diagnosed outside of Florida." (Pl. Br. at 20.) But, apart from the proposal's violation of plaintiffs' duty to represent the entire class adequately (see Estate of Bobinger v. Deltona Corp., 563 So. 2d 739, 746 (Fla. 2d DCA 1990)), determining where someone was diagnosed still requires an individualized inquiry.[7]

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[7] Plaintiffs incorrectly assert that defendants "never challenged" the trial court's choice-of-law ruling. (Pl. Br. at 20.) In fact, defendants raised and

B. The Third District Correctly Rejected Plaintiffs' "Law Of The Case" Argument

Plaintiffs argue that Engle I operated as "law of the case" and barred the Third District (and, by extension, this Court) from considering class decertification at later stages of the case. (Pl. Br. at 19.) Plaintiffs' argument cannot be taken seriously. The Third District correctly rejected it, applying Rule 1.220(d)(1) and a wealth of case law. 853 So. 2d at 442, 443 n.4. The Rule expressly provides that certification orders "may be altered or amended at any time before entry of a judgment on the merits of the action." Thus, defendants were entitled to appellate review of the trial court's refusal to grant their post-Engle I decertification motions, based on subsequent developments, up to the entry of judgment.

Because threshold certification orders necessarily precede substantial development of the issues and facts, they remain subject to modification "in the light of subsequent developments." Forehand v. Florida State Hosp., 89 F.3d 1562, 1566 (11th Cir. 1996). Indeed, a court is "required to reassess" certification "as the case develops." Barnes, 161 F.3d at 140 (emphasis added). A trial court must grant a motion to decertify if it becomes clear at any stage that class-action requirements are unsatisfied -- even if the case has been pending for years, even if a trial has taken place, and even if an appellate court has previously affirmed

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preserved the issue in the trial court and on appeal. (T44370-93; R253:57016-47, RA1:20; R254:57238-76, RA1:21.)

certification on an interlocutory basis. See Lance, 457 So. 2d at 1009; Toledo v. Hillsborough County Hosp. Auth., 747 So. 2d 958, 959-60 (Fla. 2d DCA 1999).

Plaintiffs argue that once class actions have proceeded to "late stages" in the trial court, Rule 1.220's criteria somehow become "different" (Pl. Br. at 17) and certification becomes effectively unreviewable. Plaintiffs' citations prove just the opposite. For example, plaintiffs rely chiefly on Florida Dep't of Transp. v. Juliano, 801 So. 2d 101 (Fla. 2001), but Juliano -- which was not even a class action -- emphasizes that "law of the case" applies only as long as the facts underlying the prior decision "continue to be the facts of the case." Id. at 106.[8]

According to plaintiffs, "[n]othing significant changed between Engle I and Engle II." (Pl. Br. at 19.) But, as the Third District recognized, circumstances changed radically after Engle I. Those changes included:

Development of the trial record. Engle I was decided before any trial record (or even any trial plan) existed. 853 So. 2d at 441, 442-43. As shown

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[8] Plaintiffs' other cases (Pl. Br. at 17-19, 43) confirm that certification orders are inherently tentative. See, e.g., Doe v. Karadzic, 192 F.R.D. 133, 136 (S.D.N.Y. 2000) (decertifying class; courts must "reassess their class rulings as the case develops"); Langley v. Coughlin, 715 F. Supp. 522, 552-53 (S.D.N.Y. 1989) (modifying class shortly before trial, based on finding that modified class met all class-action requirements). Most of plaintiffs' remaining cases concern adequacy of representation, which was not an issue in this appeal. See Birmingham Steel Corp. v. TVA, 353 F.3d 1331, 1337 (11th Cir. 2003); Ford v. U.S. Steel Corp., 638 F.2d 753, 754-61 (5th Cir. 1981); Scott v. Anniston, Ala., 682 F.2d 1353, 1357 (11th Cir. 1982). Plaintiffs also cite Vizcaino v. U.S. District Court, 173 F.3d 713 (9th Cir. 1999), but there the appellate court had already decided the claims of the class on the merits (id. at 721). Engle I decided no one's claims on the merits.

above, the trial demonstrated that any common issues were overwhelmed by individual issues. Trying supposed common issues in Phase I did nothing to streamline the individual claims in Phase II-A. Id. at 445-50.

Increased class size. In Engle I, plaintiffs asserted that the Florida class would have "40,000 members." (RA1:6, at 4.) But less than a year later, they admitted that it would have "well over one-half million" members. (R203:46767, RA1:7.) And at trial, their estimate rose to 700,000 or more (T52586-89, 57100, 57683, 57697) -- thus approaching the million-member nationwide class rejected as unmanageable in Engle I (672 So. 2d at 41). See 853 So. 2d at 442-43.

Development of the law. This case was the first smokers' class action to be certified (or tried) anywhere in the country. As already noted, when the Third District considered decertification seven years after Engle I, overwhelming authority throughout the country had established that smokers' claims are inherently individualized and unsuitable for certification. 853 So. 2d at 443-45.[9]

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[9] Plaintiffs also argue that class certification was compelled by Broin v. Philip Morris Cos., 641 So. 2d 888 (Fla. 3d DCA 1994), and "stare decisis." (Pl. Br. at 19.) But that decision involved only a threshold motion to dismiss the complaint's class-action allegations, which were merely "accept[ed] as true at this point in the proceedings." Id. at 890 (emphasis added). Thus, like Engle I, Broin is irrelevant after further proceedings have shown that certification is improper. Moreover, Broin addressed only subsection (a) of Rule 1.220, not subsection (b)(3), which requires "predominance" and "superiority." Id. at 889.

C. Plaintiffs' "Negative Value" And "Reliance" Arguments Cannot Supersede Rule 1.220's Requirements

Plaintiffs argue that Rule 1.220's requirements should be ignored because (1) individual claims have "negative value," i.e., they are too small to justify the costs of litigation; and (2) class members have a "reliance" interest in maintaining class certification. (Pl. Br. at 17-19.) Both arguments are meritless on their face.

"Negative value." The Third District correctly held that even if individual claims had "negative value," that would be "insufficient to overcome the hurdles of predominance and superiority, and efficient and fair management of a trial, which are required by our class action rules." 853 So. 2d at 449. In any event, plaintiffs' "negative value" assertion is patently untrue. Recent compensatory and fee awards alone are sufficient to refute it. E.g., Eastman v. Brown & Williamson Tobacco Corp., No. 521997 (Fla. 6th Jud. Cir. Oct. 3, 2003) ($3,269,000 compensatory damages, $830,000 attorneys' fees) (RA3:37); Brown & Williamson Tobacco Corp. v. Carter, 848 So. 2d 365, 366 (Fla. 1st DCA 2003) ($750,000 compensatory damages, $707,000 attorneys' fees), rev. pending, No. SC03-1209 (Fla. 2003); Kenyon v. R.J. Reynolds Tobacco Co., No. 00-5401 (Fla. 13th Jud. Cir. Dec. 18, 2001 & April 21, 2004) ($165,000 compensatory damages, $1,102,529 attorneys' fees) (RA3:38), appeal pending, No. 2D04-2138 (Fla. 2d DCA 2004); Boeken v. Philip Morris, Inc., 2001 WL 1894403 (Cal. Sup. Ct. Aug. 9, 2001) ($5,540,000 compensatory damages); Boerner v. Brown & Williamson Tobacco Corp., 2003

WL 21703767 (E.D. Ark. May 23, 2003) ($4,025,000 compensatory damages); Whiteley v. Philip Morris, Inc., 11 Cal. Rptr. 3d 807, 819 n.7 (Ct. App. 2004) ($1,689,117 compensatory damages); Henley v. Philip Morris Inc., 9 Cal. Rptr. 3d 29 (Ct. App. 2004) ($1,500,000 compensatory damages); Williams v. Philip Morris Inc., 92 P.3d 126, 130 (Ore. Ct. App. 2004) ($521,485 compensatory damages).

"Reliance." Plaintiffs do not, and cannot, identify a cognizable "reliance" interest. The express terms of Rule 1.220 put plaintiffs on notice that certification orders remain inherently conditional. Moreover, as the Third District pointed out, plaintiffs received specific notice in March 1998 that certification in this case remained subject to post-trial review. At that time, the Third District declined to review the denial of a decertification motion but expressly recognized defendants' right to seek review of that denial "by plenary appeal from any adverse final judgment." 853 So. 2d at 443. (R134:31766-67, RA1:12.) Finally, plaintiffs' "reliance" argument ignores Lance v. Wade, where this Court decertified a class even though the class had prevailed on its claims at trial. Class members were not prejudiced because they were "entitled to proceed individually" and were not "subject to the defenses of the statute of limitations or laches, providing that their actions are commenced within a reasonable time after the remand of this decision." 457 So. 2d at 1011. Here the Third District expressly held that "class members may pursue their claims on an individualized basis." 853 So. 2d at 442.

II. The Third District Correctly Invalidated The Trial Plan

The Third District aptly described the trial plan as putting the "cart before the horse" (853 So. 2d at 456) -- a backwards procedure barred by state and federal law. The trial plan was defective because (a) it required defendants to pay a punitive award for assumed injuries to all class members, without a determination that defendants were liable for such injuries; (b) it violated the constitutional rule that a claimant's punitive damages must be proportional to the actual harm incurred by that claimant as the result of punishable conduct; and (c) it produced a generalized verdict that fails to identify any wrongful conduct and thus cannot be used to determine anyone's claims in Phase III (or in any individual suits).[10]

A. Punitive Damages Cannot Be Awarded Before Liability Is Determined

Under Florida law, a defendant must be found liable before punishment can be imposed. 853 So. 2d at 451; see W.R. Grace & Co. v. Waters, 638 So. 2d 502, 506 (Fla. 1994); Oliveira v. Ilion Taxi Aero LTDA, 830 So. 2d 241, 242 (Fla. 4th

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[10] Plaintiffs declare, without citation, that the trial plan was subject to the trial court's "broad discretion." (Pl. Br. at 28.) But rulings by a trial court that ignore or misapply governing law are reviewable de novo. Armstrong, 773 So. 2d at 11.

Contrary to plaintiffs' suggestions (Pl. Br. at 4 n.2 & 29-30 n.12), the Third District never previously reviewed and approved the trial plan; it remained unreviewed until the post-trial appeal. 853 So. 2d at 441; see R.J. Reynolds Tobacco Co. v. Engle, 784 So. 2d 1124 (Fla. 3d DCA 1999) (motion to enforce mandate denied "without prejudice to Movants' right to raise the underlying issues herein, which we do not decide today, on any appropriate subsequent appeal").

DCA 2002). Federal due process incorporates the same principle. Allison v. Citgo Petroleum Corp., 151 F.3d 402, 418 (5th Cir. 1998).

Plaintiffs do not, and cannot, assert that defendants were found liable to anyone other than the three individuals in Phase II-A. Rather, they assert that findings of liability to anyone (even the Phase II-A plaintiffs) are unnecessary because the jury found a "breach of duty" in Phase I, and such a finding alone is sufficient to uphold a $145 billion classwide award. (Pl. Br. at 28-29.)

Plaintiffs' argument is unsupported -- indeed, contradicted -- by every case they cite. They rely primarily on Ault v. Lohr, 538 So. 2d 454 (Fla. 1989), quoting (in part) the first sentence of the following passage but omitting the holding:

> We believe an express finding of a breach of duty should be the critical factor in an award of punitive damages. Accordingly, we hold that a finding of liability alone will support an award of punitive damages even in the absence of financial loss for which compensatory damages would be appropriate.

538 So. 2d at 456 (emphasis added). This Court reiterated that the punitive award must rest on an "express finding of liability" (id., emphasis added) -- not merely a "breach of duty." Thus, the Third District properly applied Ault in holding that "[a] punitive award is proper only if the plaintiff proves every element of liability

on the underlying cause of action." 853 So. 2d at 452.[11] Similarly, plaintiffs' other cited cases involved findings of liability, not just "breaches of duty." See Lassitter v. Int'l Union of Operating Eng'rs, 349 So. 2d 622, 626 (Fla. 1977) ("liability for a breach of duty") (emphasis added); Horizon Leasing v. Leefmans, 568 So. 2d 73, 74 (Fla. 4th DCA 1990) (vicarious liability for compensatory and punitive damages); Russin v. Richard F. Greminger, P.A., 563 So. 2d 1089 (Fla. 4th DCA 1990) (liability for tort); Mortellite v. American Tower, L.P., 819 So. 2d 928, 935 (Fla. 2d DCA 2002) (liability for breach of fiduciary duty).

B. Punitive Damages Must Be Assessed In Proportion To Actual Harm Caused By Punishable Conduct

In addition, the trial plan violated due process under State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 424-26 (2003), which confirms that a claimant's punitive damages must be assessed in proportion to the actual harm incurred by that claimant as the result of punishable conduct. 853 So. 2d at 451, 456 & n.26; see BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 580 (1996) (due process requires consideration of the "ratio" of punitive damages "to the actual harm inflicted on the plaintiff"). Florida law incorporates the same principles.[12]

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[11] The torts alleged in Ault (assault and battery) did not require proof of actual injury or compensatory damages to establish liability. In contrast, the torts alleged here required such proof. 853 So. 2d at 452-53 & nn.20-21 (collecting cases).

[12] See Fla. Stat. § 768.74(5)(d); Langmead v. Admiral Cruises, Inc., 696 So. 2d 1189, 1193-94 (Fla. 3d DCA 1997) (punitive damages must be proportional to the

Thus, at the very least, a claimant's punitive damages must bear a reasonable relationship to that claimant's compensatory damages.[13] Here, however, the $145 billion punitive award bears no discernible relationship to the amounts of compensatory damages recoverable by class members -- amounts that not only will vary widely from one claimant to another, but also are currently unknown (except for the amounts awarded to just three individuals in Phase II-A). For these reasons Florida's Attorney General has concluded that the Engle trial plan is unconstitutional: "In the absence of any determination of the extent of compensatory damages, the court lacks a standard by which it can judge whether an assessment of punitive damages is reasonable or is grossly excessive." Op. Atty. Gen., 2000 WL 329587, at *2 (Fla. A.G. March 27, 2000).[14]

"actual harm inflicted on the plaintiff"). Plaintiffs rely on law that pre-dates and has been superseded by BMW. (Pl. Br. at 31 n.13.)

[13] E.g., Southwestern Ref. Co. v. Bernal, 22 S.W.3d 425, 433 (Tex. 2000); Allison, 151 F.3d at 417; Smith, 174 F.R.D. at 97; Philip Morris, 752 A.2d at 247.

[14] See also Barr, Engle v. R.J. Reynolds: The Improper Assessment of Punitive Damages for an Entire Class of Injured Smokers, 28 Fla. St. U. L. Rev. 787, 824 (2001). As the Third District noted, plaintiffs cannot manufacture a punitive-to-compensatory ratio by "extrapolating" the compensatory damages awarded to the three individuals in Phase II-A. 853 So. 2d at 455 & n.24. Any such "extrapolation" would be legally and factually baseless, given (a) the absence of essential information concerning class size and composition, as to which the jury made no findings; (b) the undisputed differences even among the three Phase II-A plaintiffs with respect to both liability (one plaintiff's claims were time-barred) and amounts of compensatory damages; and (c) the absence of any statistically significant sample, which cannot consist of just three handpicked individuals out of 700,000. See Cimino v. Raymark Indus., Inc., 151 F.3d 297,

Moreover, a claimant's punitive damages must bear a reasonable relationship to the actual harm incurred by that claimant as the result of punishable conduct. State Farm, 538 U.S. at 423 ("A defendant should be punished for the conduct that harmed the plaintiff, not for being an unsavory individual or business. Due process does not permit courts, in the calculation of punitive damages, to adjudicate the merits of other parties' hypothetical claims against a defendant under the guise of the reprehensibility analysis . . ."). Despite plaintiffs' assertions, no "reprehensibility" analysis can be conducted here because the jury never identified the punishable conduct or the number of class members who were actually harmed by such conduct. The mere finding that cigarettes cause disease does not establish whether and how many smokers incurred injuries caused by punishable conduct. (Indeed, plaintiffs' counsel tainted the entire verdict by urging the jury to punish lawful conduct. See Point III below.) The jury did not even determine the extent to which the three individuals in Phase II-A were harmed by punishable conduct. (R304:69461-78, RA1:22.) The trial plan improperly substituted an assumption of classwide punishable harm for the necessary individualized determinations of that issue. For that reason as well, the constitutionally required de novo review for excessiveness cannot be performed. See 853 So. 2d at 451-52, 455-56 & nn.25-26.

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319 (5th Cir. 1998); In re Fibreboard Corp., 893 F.2d 706, 710-12 (5th Cir. 1990); In re Tetracycline Cases, 107 F.R.D. 719, 734-35 (W.D. Mo. 1985).

Plaintiffs ignore these problems and merely cite a string of cases without discussion or description. (Pl. Br. at 30.) None involved a trial plan even remotely similar to this one -- and all pre-date State Farm. Unlike this case, most of the cited cases involved "single-incident mass disasters," in which liability "can be determined on a class-wide basis because the cause of the disaster is a single course of conduct which is identical for each of the plaintiffs." Sterling v. Velsicol Chem. Corp., 855 F.2d 1188, 1197 (6th Cir. 1988); see In re New Orleans Train Car Leakage Fire Litig., 795 So. 2d 364, 370 (La. Ct. App. 2001); In re Exxon Valdez, 270 F.3d 1215, 1221 (9th Cir. 2001); Watson v. Shell Oil Co., 979 F.2d 1014, 1023 (5th Cir. 1992), appeal dismissed, 53 F.3d 663 (5th Cir. 1994).[15]

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[15] See also In re Baycol Prods. Litig., 218 F.R.D. 197, 203-04 (D. Minn. 2003); In re Phenylpropanolamine Prods. Liab. Litig., 208 F.R.D. 625, 632 (W.D. Wash. 2002). Furthermore, in Exxon and Watson, punitive damages were to be awarded only after a determination of compensatory damages. In re Exxon, 270 F.3d at 1225; Watson, 979 F.2d at 1018. And Watson has no precedential value because the opinion was vacated. See Castano, 84 F.3d at 740 n.12.

Plaintiffs' other cases are equally inapposite. In Hilao v. Estate of Marcos, 103 F.3d 767, 779, 784 n.11, 785 & n.12 (9th Cir. 1996), a federal statute eliminated the need for individualized proof of causation and other liability elements -- in direct contrast to the law of Florida and other states, which requires such proof -- and the defendant waived any objection to the method of determining damages. In In re Simon II Litig., 211 F.R.D. 86, 100 (E.D.N.Y. 2002), appeal pending, No. 03-7140 (2d Cir. 2003), the trial court certified a "(b)(1) limited fund" class action that violated settled class-action law (see Ortiz v. Fibreboard, 527 U.S. at 815) and State Farm; the case is under review. Finally, Jenkins v. Raymark Industries, Inc., 782 F.2d 468 (5th Cir. 1986), has been superseded by Allison, 151 F.3d at 417-18. Moreover, the Jenkins trial plan, unlike the one here, called for a punitive award "only after class members had won or settled their individual cases." 782 F.2d at 471.

C. The Verdict Was Improperly Generalized

The Third District identified yet another trial-plan defect: "[T]here were no specific findings as to any act by any defendant at any period of time. The trial plan enabled the plaintiffs to try fifty years of alleged misconduct that they never would have been able to introduce in an individual trial, which was untethered to any individual plaintiff." 853 So. 2d at 467 n.48. In Phase I, plaintiffs "stitch[ed] together" a "fictional composite" -- a generalized, "perfect plaintiff" -- supplanting all real class members, whose knowledge, conduct, and other circumstances varied crucially. Broussard v. Meineke Discount Muffler Shops, Inc., 155 F.3d 331, 344-45 (4th Cir. 1998). This fictional smoker knew nothing about the risks of smoking, relied on every alleged misstatement or omission over the course of nearly half a century, smoked every cigarette brand sold at any time during that period, and developed every disease attributable to smoking. Use of generalized "findings" based on such evidence, for any purpose, violates not only Florida's class-action rules (see Point I above) but also Florida tort law and state and federal due process.

Moreover, the generalized verdict is useless in the trial plan's final phase -- the necessary Phase III trials of individual class members' claims before separate juries. No Phase III jury (or judge) can identify whatever misstatement(s) or omission(s) the Phase I jury found to be unlawful. Thus, the 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. See Blyden v. Mancusi, 186 F.3d 252, 257, 268-69 (2d Cir. 1999); Henley v. FMC Corp., 2001 WL 733110, at *8 (4th Cir. June 29, 2001).[16] In that respect, the trial plan also violates defendants' jury-trial right under the Florida Constitution, which is commensurate with the jury-trial right under the U.S. Constitution.[17]

The only "alternative" to re-examination is equally improper: an irrebuttable presumption that the Phase I jury found unlawful all of defendants' conduct over nearly half a century. See Agency for Health Care, 678 So. 2d at 1254 (irrebuttable presumption of liability element is unconstitutional). That was the "solution" reached in the first (and so far, only) purported "Phase III trial," Lukacs v. Brown & Williamson Tobacco Corp., No. 01-03822 (Fla. 11th Jud. Cir. 2001). (The Lukacs plaintiffs have filed an amicus brief supporting plaintiffs here.) Mr. Lukacs claimed reliance on two or three advertisements in the 1940s and 50s, but he offered no proof of their falsity or fraudulent intent. Instead, he asserted that such matters were fully established by the Engle Phase I verdict. The Lukacs trial

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[16] See also Rowlands v. Signal Constr. Co., 549 So. 2d 1380, 1383 (Fla. 1989); Alabama v. Blue Bird Body Co., 573 F.2d 309, 318 (5th Cir. 1978). Defendants unsuccessfully sought the necessary specificity in the Phase I verdict form. (R215:49493-532, RA1:14; R304:69349-60, RA1:15; T35915-16, 35952-54, 35967-71, 36298-300.)

[17] See In re Forfeiture of 1978 Chevrolet Van, 493 So. 2d 433, 434-35 (Fla. 1986); Castano, 84 F.3d at 750-51; In re Rhone-Poulenc Rorer Inc., 51 F.3d 1293, 1302-03 (7th Cir. 1995).

judge reviewed that verdict and asked: "What's the false statement [found in Engle]?" When the judge was informed that no one can answer that question, she declared as "law of the case" that all "cigarette advertising is false and misleading." (RA3:36, at 2009-14, 2279-84, 2308-09.) That absurd and fundamentally unfair result is the consequence of attempting to apply the Phase I verdict to any Phase III issue. The Phase I verdict cannot be salvaged for any purpose.[18]

III. The Third District Correctly Held That Persistent And Calculated Misconduct By Plaintiffs' Counsel Compelled Reversal

A. Plaintiffs' Counsel Incited Jury Nullification And Racial Bias

As the Third District held (quoting the record voluminously), plaintiffs' counsel repeatedly urged the jury to ignore the law and punish defendants simply because they sell a product that causes disease. Moreover, addressing a predominantly African-American jury, he incited jury nullification by attacking tobacco companies, and the law itself, as racially biased. 853 So. 2d at 458-66.[19]

Plaintiffs' counsel began making racial charges in his opening statement, declaring that defendants "study races" and "divide the American consumer up into groups," including "white" and "black." (T10842-44.) Later he presented an

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[18] In addition, improper class certification, attorney misconduct, and other errors taint the Phase I verdict (and thus the Phase II-A and II-B verdicts as well).

[19] Plaintiffs incorrectly suggest that the Third District reviewed the trial court's rulings on misconduct de novo. (Pl. Br. at 45.) In fact, the Third District held that the trial court abused its discretion because the misconduct was "prejudicial," and even though some objections were sustained, "the prejudicial effect was incurable." 853 So. 2d at 458, 465.

expert who testified that tobacco advertising had "perpetuated" the "racial segregation" of America through the 1970's and 80's. (T17034-35.) And he persistently referred to such matters as the racist views of Vice President John Calhoun, the poll tax, Strom Thurmond, and similar irrelevancies. (T32258-302.) 853 So. 2d at 459 & n.33 (quoting additional portions of the record).

Plaintiffs' counsel brought his racial attacks to a crescendo in his Phase I closing argument, when he denigrated the law itself as racially biased. He set the stage by saying: "And let's tell the truth about the law, before we all get teary-eyed about the law. Historically, the law has been used as an instrument of oppression and exploitation." (T36346.) He analogized selling cigarettes to genocide and slavery: "You want to be fair, and you say: Right, there's two sides to every question. What's the other side to the holocaust? . . . What is the other side to slavery?" (T36348.) He told the jury that, like genocide and slavery, there was just one "side" to selling cigarettes: defendants should "get out of the business. That's the only moral, ethical, religious, decent judgment to make." (T36369.) Then he explicitly invited nullification: even though selling cigarettes was legal, "Legal don't make it right. Legal don't make it right." (T36371; see T36490-91.) He again attacked the law as an instrument of oppression, invoking Martin Luther King, Rosa Parks, and the importance of "fighting against unjust laws." (T36490;

see T36396.) He even told the jury that it was sitting in a courthouse that used to have "Whites Only" drinking fountains. (T36490.) 853 So. 2d at 459-61 & n.36.

Plaintiffs assert that such statements merely responded to defense arguments. (Pl. Br. at 46-49.) But, as already noted, plaintiffs' counsel began his racial assaults on the first day of trial. Indeed, long before this trial began, plaintiffs' counsel wrote a book boasting about his use of the same race-based nullification arguments in another case, describing them as incurably prejudicial. Stanley M. Rosenblatt, Murder of Mercy: Euthanasia on Trial (1992) (R235: 53321-506, RA1:26). As the Third District recognized (853 So. 2d at 461 n.37), Mr. Rosenblatt states in his book that, although the law bars him from explicitly telling a jury to "ignore the law" (R235:53331, RA1:26), he can still induce juries to do so: "The area I would need to spend the most time on [during trial] was my 'Piss on the Law' theme. . . . I assured [my client] that I would get out my words about Martin Luther King and the unjust laws he fought against." (R235:53472, RA1:26.) He writes that even if the court instructs the jury to ignore his comments, the jury inevitably will remember them: no court can "unring a bell." (R235:53434, RA1:26.) 853 So. 2d at 462-63; see Williams v. State, 715 So. 2d 1152, 1153 (Fla. 3d DCA 1998) (even though objections were sustained, "[t]he die was cast -- the damage was done"); Walt Disney World Co. v. Blalock, 640 So. 2d

1156, 1158 n.1 (Fla. 5th DCA 1994) ("[Y]ou can throw a skunk into the jury box and instruct the jurors not to smell it, but it doesn't do any good").

In the present case, the fact that Mr. Rosenblatt followed the same script almost verbatim confirms that his racial pleas for nullification were premeditated and improper, not legitimate "analogies" or "responses" to defense arguments:

"**MURDER OF MERCY**"	**ENGLE PHASE I CLOSING**
"And before anyone gets all teary eyed about the majesty of the law, let's step back and look at the law." (R235: 53492, RA1:26.)	"And let's tell the truth about the law, before we get all teary-eyed about the law." (T36346.)
"Blacks certainly understand how the law was historically used as an instrument of repression." (R235: 53473, RA1:26.)	"Historically, the law has been used as an instrument of oppression and exploitation." (T36346.)
"The Civil Rights Movement began when Rosa Parks refused to give up her seat on a bus to a white person. Under the law she was sitting in a section of the bus which was reserved for whites. I have the right to say to this jury -- was that a good law or a bad law? Was she a criminal because she violated the law?" (R235:53484, RA1:26.)	"Let's discuss the concept of legal in the context of America. I noticed in last week's newspaper Rosa Parks, who is 86 years old, got the Congressional Gold Medal because in 1955 -- [objection] --she refused -- ." (T36396.)
"One of the biggest events in America in the last thirty years has been the Civil Rights Movement. How did Martin Luther King, Jr., become a national figure?" (R235:53484, RA1:26.)	"The whole civil rights movement of the '60s was fighting against unjust laws. Dr. King was arrested in the '60s." (T36490.)
"You had separate drinking fountains." (R235:53492, RA1:26.)	"[T]here were drinking fountains which said Whites Only." (T36490.)

Counsel's nullification appeals had "absolutely no place in a trial." Urbin v. State, 714 So. 2d 411, 420 (Fla. 1998). Nullification arguments violate state and

federal due process by exposing defendants to liability and punishment for lawful conduct. State v. Sykes, 434 So. 2d 325, 328 (Fla. 1983); State Farm, 538 U.S. at 421. Likewise, counsel's racial appeals violated state and federal due process and the right to a fair trial. Murphy v. Int'l Robotic Systems, Inc., 766 So. 2d 1010, 1030 (Fla. 2000); see State v. Davis, 872 So. 2d 250, 258 (Fla. 2004) (Anstead, C.J., concurring) ("It is of the utmost importance that racial prejudice not enter into Florida's courtrooms"); Robinson v. State, 520 So. 2d 1, 7 (Fla. 1988).

Finally, plaintiffs try to excuse their counsel's misconduct by referring to the length of the trial. (Pl. Br. at 49.) But there is no "long trial" exception to the rules against inciting jury nullification or racial bias. Similarly, the misconduct in Phase I cannot be dismissed as harmless because it took place "over a year before" the jury's award in Phase II-B. (Pl. Br. at 47.) The Phase I misconduct tainted the Phase I verdict, on which the Phase II-A and II-B verdicts were based.

B. Plaintiffs' Counsel Engaged In Other Prejudicial Misconduct

The Third District correctly held that plaintiffs' counsel engaged in further "egregious" misconduct, particularly during Phase II-B. 853 So. 2d at 463-66. As the Third District noted (id. at 466 n.45), plaintiffs' counsel was a repeat offender who had already been reprimanded in another case for similar misconduct. Maercks v. Birchansky, 549 So. 2d 199, 200 (Fla. 3d DCA 1989).

References to an "appeal." Plaintiffs' counsel repeatedly suggested that the jury need not worry about bankrupting defendants because any award would be subject to reduction on appeal. (T53183, 54803-05; see T50960-70, 53060-65, 57752.) This signaled to the jury that it could inflate its award freely because any excess would be eliminated later. Such statements deprived defendants of due process and a fair trial under state and federal law. Pait v. State, 112 So. 2d 380, 384 (Fla. 1959); Baggett v. Davis, 169 So. 372, 378 (Fla. 1936); see also Caldwell v. Mississippi, 472 U.S. 320, 332-33 (1985).

References to "payouts." On numerous occasions, plaintiffs' counsel falsely suggested to the jury that the law would allow defendants to pay an award in installments over decades. (T51103, 52299-302, 52979-80, 53275-76, 53279-80, 55364-65, 56022-24, 57045-48, 57063, 57172, 57679-80, 57683, 57750.) His references to extended "payouts" had only one purpose -- to mislead the jury into inflating its award exponentially beyond defendants' current ability to pay. His conduct violated the basic rule that defendants' ability to pay must be measured as of the time of trial -- a rule plaintiffs never dispute. 853 So. 2d at 463 & n.39 (collecting cases); see Bould v. Touchette, 349 So. 2d 1181, 1187 (Fla. 1977).

In an in camera hearing, the trial court held plaintiffs' counsel in contempt for his references to "payouts." (T56100-03.) 853 So. 2d at 464 & n.42. Plaintiffs' counsel ignored that ruling and proceeded to tell the jury to base its award on the

25-year payouts involved in defendants' proposed or actual settlements with federal or state governments. 853 So. 2d at 464. (T57045-48, 57063, 57172, 57679-80, 57683, 57750; see also T52301-02, 52979-80.) Despite its prior contempt ruling, the trial court overruled defendants' objections (T57045-48, 57063), denied a mistrial (R304:69499, RA1:25), and refused defendants' request that it instruct the jury specifically to ignore plaintiffs' references to settlements.[20]

Personal vouching. Plaintiffs' counsel gave the jury his personal guarantee: "I represent to you that a verdict of $154 billion will not cause any one of these companies to go bankrupt." (T57754.) His statement violated Florida law and the rules of professional ethics. 853 So. 2d at 463, 465; Maercks, 549 So. 2d at 200; R. Regulating Fla. Bar 4-3.4(e). Plaintiffs argue that the statement was simply a "figure of speech" like "I think" (Pl. Br. at 48), but counsel's $154 billion voucher was nothing less than an unconditional warranty on a central issue in the case.

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[20] The court told the jury: "It is only a defendant's current ability to pay a punitive damage award that is relevant, and not whether a defendant can pay using a payout or an installment plan." (T57789.) That was too little, too late. See Williams, 715 So. 2d at 1153. The instruction was inadequate because it omitted what defendants requested -- a specific direction that the jury ignore plaintiffs' references to payouts in "the attorney general settlement agreements and the proposed congressional settlement." (R285:64372, RA1:23, at No. 24.)

IV. The Third District Gave Proper Effect To The FSA And MSA

A. The FSA And Res Judicata Bar Claims For Punitive Damages

The Third District correctly held that the punitive award was precluded by the FSA and the final judgment resolving the State of Florida's claims against the tobacco industry, including all punitive-damage claims, based on the same alleged misconduct. 853 So. 2d at 467-68. Because the judgment in the State's case addressed the same "public wrong" alleged here, plaintiffs were properly barred from re-litigating the public interest through private punitive-damage claims.[21]

The State sued to vindicate the general public interest of all Floridians, not just the State itself. Plaintiffs argue that the State sued only to recoup "Medicaid expenses," referring to the State's compensatory-damage claims. (Pl. Br. at 24.) But the State's punitive-damage claims were far broader. The State alleged a nationwide, decades-long conspiracy that harmed "millions of Americans and hundreds of thousands of Floridians." (Third Amended Complaint ¶ 183, Pl. Br. at Appendix Tab 13c; see also id. at ¶¶ 50-131.) The State's allegations of misconduct are mirrored by plaintiffs' allegations here.[22]

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[21] Because this was a purely legal issue, the trial court's ruling was subject to de novo review. State v. McBride, 848 So. 2d 287, 289 (Fla. 2003).

[22] Plaintiffs' assertion that all of the State's punitive-damage claims were dismissed (Pl. Br. at 26) is false. Punitive-damage claims in Count Four (see ¶¶ 185-89) remained pending when the FSA was executed. Moreover, dismissal of any other claims remained subject to appeal. See, e.g., Kvaerner Constr., Inc. v. American Safety Cas. Ins. Co., 847 So. 2d 534 (Fla. 5th DCA 2003).

In asserting such public wrongs, the State was in privity with its citizens and was not required to take further steps to bind individual Floridians to the judgment. Joining hundreds of thousands of individuals as named parties was unnecessary to establish the judgment's res judicata effect with respect to punitive damages. That conclusion necessarily follows from Young v. Miami Beach Improvement Co., 46 So. 2d 26, 30 (Fla. 1950), in which this Court held that a judgment in a prior suit involving a municipality resolved "a matter of general interest to all its citizens" and therefore was binding on all of them; each citizen was "a real, although not a nominal, party to such judgment, and cannot relitigate any of the questions which were litigated in the original action." See Castro v. Sun Bank of Bal Harbour, N.A., 370 So. 2d 392, 393 (Fla. 3d DCA 1979) (where the State settled public-nuisance and other claims, private parties were bound "irrespective of whether they were formal parties to the original action").[23]

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[23] Citing Albrecht v. State, 444 So. 2d 8, 12 (Fla. 1984), plaintiffs argue that res judicata does not apply "where there is no identity of parties and where the claims were not actually litigated." (Pl. Br. at 24.) But Albrecht did not involve punitive damages or the assertion of a general public interest by the State; it merely held that prior review of administrative action did not preclude a later inverse condemnation suit. Furthermore, Albrecht does not say that res judicata is limited to claims "actually litigated" in the prior suit. Res judicata bars claims actually or potentially litigated in the prior suit. State v. McBride, 848 So. 2d at 290.
Similarly, plaintiffs' amici Trial Lawyers for Public Justice et al. rely on Stogniew v. McQueen, 656 So. 2d 917 (Fla. 1995), Thomas v. Shelton, 740 F.2d 478 (7th Cir. 1984), and In re Exxon, 270 F.3d at 1227-28 (amicus brief at 9-10, 13, 15), all of which are inapposite. In Stogniew, as in Albrecht, the administrative

This Court's logic in Young applies with special force to punitive damages. Plaintiffs themselves concede that the purpose of punitive damages is to "remedy a public rather than private wrong." (RA3:29, at 212.) Because such damages are limited to public wrongs, private plaintiffs have no "right" to punitive damages at all. 853 So. 2d at 468 (collecting cases); see State Farm, 538 U.S. at 416. Thus, plaintiffs have not been deprived of a "right" without "due process" (Pl. Br. at 25-26); the "right" did not exist to begin with. Plaintiffs' "due process" cases did not involve punitive damages or a sovereign state's claims on behalf of its citizens.[24]

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agency did not seek punitive damages or assert a general public interest. In Thomas, the federal government sought only medical expenses as the subrogee of a single tort victim. It did not seek punitive damages and did not assert a general public interest. And in In re Exxon, the prior government suit, which sought civil penalties under the federal Clean Water Act, addressed a harm "distinct" from the harm alleged by the private plaintiffs. 270 F.3d at 1228. Moreover, civil penalties under the Act are not a substitute for punitive damages. See Earth Island Inst., Inc. v. Southern Cal. Edison, 166 F. Supp. 2d 1304, 1305 (S.D. Cal. 2001).

[24] Keys Citizens for Responsible Government, Inc. v. Florida Keys Aqueduct Auth., 795 So. 2d 940 (Fla. 2001), addressed the required notice in a bond validation proceeding. Hansberry v. Lee, 311 U.S. 32 (1940), merely set forth general principles of due process, and Richards v. Jefferson County, 517 U.S. 793 (1996), applied those principles to facts clearly distinguishable from those involved here. In Richards, no party in the first action even purported to vindicate the rights of the plaintiffs in the second action. Id. at 801-02. Furthermore, the plaintiffs' rights in Richards were "personal in nature" (id. at 802 n.6), whereas punitive damages are not a personal right but rather a remedy for public wrongs. Richards also emphasized that the plaintiffs had been deprived of their "chose in action." Id. at 804. Here, in contrast, punitive damages are not a chose in action but only one form of relief. E.g., Byrne v. Nezhat, 261 F.3d 1075, 1093 n.34 (11th Cir. 2001). (See also Trial Lawyers for Public Justice et al. amicus brief supporting plaintiffs, at 10: punitive damages "are merely a form of relief.")

Finally, plaintiffs contend that the FSA was inadmissible for any purpose, citing a clause that merely restricts its use under particular circumstances. (Pl. Br. at 26.) But res judicata hinges on the final judgment in the State's case, not on the FSA. Plaintiffs cannot argue that the judgment was "inadmissible."

In sum, plaintiffs' arguments flout settled law. They also defy sound public policy. The State must have the flexibility to resolve claims for public wrongs in litigating matters of statewide concern for the benefit of all Floridians. The FSA and MSA are the largest settlements in history. The Third District noted that defendants must pay the states approximately $200 billion over the first 25 years, and "billions more in perpetuity after that." 853 So. 2d at 468. Billions of dollars are payable to Florida alone. The State decided that Florida's interest in securing those billions warranted a settlement of all punitive-damage claims based on the same misconduct alleged here. In asserting their own punitive-damage claims, plaintiffs seek to act as "private attorneys general." See, e.g., Jackson v. Johns-Manville Sales Corp., 781 F.2d 394, 403 (5th Cir. 1986). If the real attorney general cannot resolve all such claims arising from the same misconduct affecting Florida as a whole, the State's ability to litigate and settle matters of statewide concern will be undermined. Plaintiffs offer no justification for that result.

B. The Jury Was Erroneously Instructed To Ignore The FSA And MSA In Assessing The Need For Punishment And Deterrence

Punitive damages cannot exceed the minimum amount necessary to punish and deter. State Farm, 538 U.S. at 417. In violation of that principle, the trial court instructed the jury that the FSA and MSA were irrelevant to the need for punishment and deterrence, even though they imposed on defendants enormous financial obligations and stringent restrictions on future conduct, enforceable by state attorneys general in Florida and throughout the United States. (R285:64359, RA1:23, at No. 10; T51210, 53976-77, 54483-84, 57788-89.) The Third District correctly held that the instruction excluded a "crucial" mitigating factor, which was yet another reason for invalidating the punitive award. 853 So. 2d at 468-70.[25]

Plaintiffs say nothing about the deterrence provisions of the FSA and MSA and thus do not challenge their effectiveness. See id. at 469 & n.49 (summarizing deterrence provisions). The FSA and MSA impose a comprehensive regime for the future conduct of the tobacco industry. (FSA: R272:61039-41, RA3:31. MSA: R272:61194-202, R272:61208-17, R272:61224-28, RA3:32.) On that basis alone, the trial court's jury instruction was prejudicial error.

Plaintiffs focus solely on the settlements' monetary obligations. First, plaintiffs suggest (without authority) that the settlements were properly disregarded

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[25] A charge that takes a disputed issue from the jury is prejudicial error. South Motor Co. v. Accountable Constr. Co., 707 So. 2d 909, 912 (Fla. 3d DCA 1998).

because the payments were "voluntary." (Pl. Br. at 27.) But settlements by definition are "voluntary." That does not preclude their consideration. See, e.g., In re Exxon, 270 F.3d at 1244 (government consent decree); Alfa Fin. Corp. v. Key, 927 F. Supp. 423, 430-31 (M.D. Ala. 1996), aff'd, 112 F.3d 1172 (11th Cir. 1997).

Second, plaintiffs argue that the FSA and MSA were properly disregarded because the settlements fail to "specify what portion, if any, is allocable to punitive damages." (Pl. Br. at 27-28.) But even compensatory damages are properly considered in mitigation. State Farm, 538 U.S. at 419-20, 425; Safety Techs., L.C. v. Biotronix 2000, Inc., 136 F. Supp. 2d 1169, 1178 (D. Kan. 2001).[26]

Finally, plaintiffs argue that defendants' payments of billions of dollars are "the antithesis of punishment" because such payments supposedly are "passed on to smokers/consumers through increased prices." (Pl. Br. at 28.) Plaintiffs offer no authority for their assertion that settlements can be excluded on that basis. At most, any supposed "pass-on" would go to weight, not admissibility.

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[26] Plaintiffs' "allocation" argument is unsupported by the two cases they cite, Dunn v. Hovic, 1 F.3d 1371 (3d Cir. 1993), and Simpson v. Pittsburgh Corning Corp., 901 F.2d 277 (2d Cir. 1990). (Pl. Br. at 28.) Those cases addressed an issue distinct from mitigation -- whether prior judgments or settlements are relevant to determining whether a punitive award violates due process. Neither case suggests that settlement payments must be earmarked as "punitive damages" before they can serve to mitigate the need for punishment or deterrence.

V. The Third District Correctly Held That The $145 Billion Punitive Award Was Unlawfully Bankrupting

The Third District correctly held that the $145 billion punitive award -- the largest judgment in history -- was bankrupting on its face because, "[a]s acknowledged by even the plaintiffs' purported experts, the $145 billion punitive award will extract all value from the defendants and put them out of business." 853 So. 2d at 456 (emphasis added). Indeed, by extracting defendants' entire value solely for the benefit of the Engle class, the award denies all other claimants -- in Florida and nationwide -- the "right to recover at least compensatory damages for their smoking related injuries." Id. at 458.

As the Third District recognized, Florida law categorically prohibits punitive awards that exceed a defendant's ability to pay and therefore are bankrupting or financially crippling. Id. at 456 (collecting cases). Federal due process incorporates similar principles. State Farm, 538 U.S. at 419-20 (state court should have "gone no further" than necessary "to achieve punishment or deterrence").[27]

Ability to pay is properly determined through the objective application of "generally accepted accounting principles" (GAAP). 853 So. 2d at 457 n.28 (collecting cases). A critical benchmark of ability to pay is the accounting concept

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[27] Whether a punitive award is bankrupting or excessive is subject to de novo review. Cooper Indus., Inc. v. Leatherman Tool Group, Inc., 532 U.S. 424, 436 (2001); St. John v. Coisman, 799 So. 2d 1110, 1114 (Fla. 5th DCA 2001).

of "net worth." Id. (collecting cases). Defendants proved at trial that their combined net worth was no more than $8.3 billion, and that their capacity to pay any punitive award while remaining in business was far less. The $145 billion award exceeded defendants' combined net worth roughly 18 times over. Id. at 457 & n.29 (citing each company's net worth). No known Florida decision endorses even remotely comparable awards. In fact, the largest known awards involve only a fraction of net worth -- 20% at most, and typically much lower. Id. at 457 n.28 (collecting cases). Multiples of net worth are unheard of.

Defendants carried their burden of proving their net worth and limited ability to pay by presenting their independently audited financial statements and the testimony of each manufacturer's CEO. Contrary to plaintiffs' assertion (Pl. Br. at 35-36), defendants were not required to present the testimony of outside "experts" or "each company's comptroller." 853 So. 2d at 457 n.28 (collecting cases).[28]

Plaintiffs failed to present any countervailing proof of defendants' net worth. Plaintiffs' purported experts -- Cherner and Mundstock -- "were neither CPA's nor accounting experts" and "never refuted the defendants' audited financial statements." Id. Both witnesses disavowed the concept of net worth (see T52391, 52883), they never purported to offer any alternative calculations of net worth, and

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[28] Plaintiffs' further argument that only "disinterested" experts could testify (Pl. Br. at 35) is erroneous. "Interest" goes to weight, not admissibility. P&N Inv. Corp. v. Rea, 153 So. 2d 865, 867 (Fla. 2d DCA 1963); see Fla. Stat § 90.601.

they never invoked GAAP, either to criticize defendants' financial proof or to present any proof of their own. Instead, applying methods of their own invention (which Mundstock admitted were "wrong" and "unacceptable"[29]), both witnesses purported to calculate the total "value" of each company -- a number that bore no relation to what it could pay and survive. As Mundstock admitted, requiring a company to pay its total "value," or even far smaller amounts, would drive it "out of business." (T53182 [Lorillard], 53207-08 [Reynolds].) That admission alone established that the punitive award was bankrupting. The Third District took plaintiffs' witnesses at their word. No "reweighing" of the evidence occurred.

On the other hand, plaintiffs suggest that defendants' financial proof should have been disregarded completely, citing three cases (Pl. Br. at 35), none of which applies here. In Atlas Properties, Inc. v. Didich, 226 So. 2d 684, 690 (Fla. 1969), the defendant's financial statement exhibited internal inconsistencies and other patent defects that completely disqualified it as an indicator of ability to pay. Here,

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[29] Mundstock admitted that Cherner's method was "wrong" and "unacceptable" (T53164-65), yet he proceeded to incorporate Cherner's method in his own valuations and admitted that they were "guesswork" (T52942, 52989, 53091-92, 53132-34, 53192-93, 53253-54). Moreover, the trial court conceded that it did not even understand Mundstock's method and thus could not evaluate it but admitted his testimony anyway, "leav[ing] it up to the jury" to sort matters out. (T52970-71, 52975; see also T53000-01: plaintiffs' counsel "can put on whatever evidence he wants.") This was a gross abdication of the trial court's duty to act as a gatekeeper in the admission of expert testimony. See Weinstock v. Weinstock, 634 So. 2d 775, 776-78 (Fla. 5th DCA 1994) (trial court erred in admitting expert's valuation based on invalid methodologies and insufficient data).

in contrast, Cherner and Mundstock never purported to show that defendants' financial statements were internally inconsistent or defective under GAAP (and as non-accountants, they were not even qualified to try). Also inapposite is Tennant v. Charlton, 377 So. 2d 1169, 1170 (Fla. 1979), where the Court simply said that a party's own sworn statement of assets and liabilities was not the "final word" with respect to discovery. The Court did not address the sufficiency of proof at trial, and it did nothing to cast doubt on financial statements that are independently audited and fully compliant with GAAP. Finally, in Int'l Union of Operating Eng'rs v. Lassitter, 295 So. 2d 634, 644 (Fla. 4th DCA 1974), the court merely said that "there may well be additional proofs" of ability to pay beyond a defendant's "balance sheet." Here, however, Cherner and Mundstock offered no such "additional proofs." As already noted, the only numbers they purported to calculate were defendants' total "values" -- the amounts defendants supposedly would realize if they sold off their entire businesses or liquidated all of their "financial resources," including trademarks and other "intangibles." (T52257, 52262-65, 53012-18.) Plaintiffs have never explained how defendants could stay in business after disposing of all of their tangible and intangible assets.

In sum, plaintiffs' assertions concerning total "values" or total "financial resources" are legally irrelevant. Cherner and Mundstock never tried to answer the only legally relevant question -- what fraction of defendants' total assets could be

liquidated and paid out without destroying or crippling their businesses. The jury's awards against each defendant essentially matched the total "values" plaintiffs purported to calculate.[30] By definition, such awards are bankrupting.[31]

VI. The Third District Correctly Reversed The Judgment In Favor Of The Individual Plaintiffs

The Third District held that Mary Farnan and Angie Della Vecchia were not class members, and thus could not obtain awards in this class action, because their claims accrued long after the class had been certified. 853 So. 2d at 453 n.23. In doing so, the Third District correctly rejected the theory that the class was "open-ended," with no cut-off date at all.[32]

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[30] The awards against each company roughly equaled -- and in some cases even exceeded -- Cherner's and Mundstock's total "values" (T522257, 52262-65, 53012-18; R304:69479-80, RA1:24):

	Cherner	**Mundstock**	**Verdict**
Philip Morris	$75 billion	$74-80 billion	$73.96 billion
Reynolds	$37.5 billion	$36 billion	$36.28 billion
B&W	$15 billion	$21-22 billion	$17.59 billion
Lorillard	$15 billion	$16-17 billion	$16.25 billion

[31] Plaintiffs suggest that even if the $145 billion award cannot stand, this Court should "enter a remittitur." (Pl. Br. at 33, 50.) But no remittitur (except to zero) is possible, given all of the other defects of the judgment. See, e.g., Knepper v. Genstar Corp., 537 So. 2d 619, 622-23 (Fla. 3d DCA 1988) (remittitur would deny defendants the right to have a dispassionate, untainted jury determine from scratch the appropriate amount of punitive damages, if any).

[32] The issue of class membership was reviewable de novo because the relevant facts (the terms of the certification order and the accrual dates for Farnan's and Della Vecchia's claims) were undisputed. The only issue was the legal significance of those facts. See Town of Palm Beach v. Palm Beach County, 460 So. 2d 879,

Farnan and Della Vecchia were diagnosed in April 1996 and February 1997 respectively. The cut-off date for class membership was October 31, 1994. On that date, the trial court certified a class of all those "who have suffered, presently suffer or who have died from diseases and medical conditions caused by their addiction to cigarettes containing nicotine." 853 So. 2d at 453 n.23 (emphasis added). Use of the past and present tenses excluded anyone who developed a disease in the future. Indeed, plaintiffs themselves admitted: "We're limited to just people that have manifested diseases," and therefore "the question of notice to future claimants" is "not an issue here." (R105:23353-54, RA1:9.)

Plaintiffs never explain how the class definition could properly include people who became ill after the certification date. Their open-ended class theory contradicts not only the certification order's terms but governing law. This case was certified under Rule 1.220(b)(3), which requires that potential class members

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882 (Fla. 1984) (legal significance of undisputed facts is an issue of law); Armstrong, 773 So. 2d at 11 (issues of law are reviewable de novo).

In addition, the Third District correctly reversed the judgment in favor of Frank Amodeo because his claims were time-barred under the jury's express findings. 853 So. 2d at 453-54 n.23. The jury found that, more than four years before commencing suit, Amodeo had actual or constructive knowledge of his alleged addiction to smoking and of the reasonable possibility that smoking caused his cancer. (R304:69461-78, RA1:22.) As a matter of law, his actual or constructive knowledge triggered the statute of limitations. See Korman v. Iglesias, 825 F. Supp. 1010, 1015 (S.D. Fla. 1993), aff'd, 43 F.3d 678 (11th Cir. 1994). Plaintiffs cite cases (Pl. Br. at 43 n.18) that are inapplicable in light of the jury's express findings. The trial court's refusal to enforce those findings was legal error, subject to de novo review. Armstrong, 773 So. 2d at 11.

receive notice and an opportunity to opt out (Fla. R. Civ. P. 1.220(d)). In violation of the Rule, plaintiffs' theory would sweep into the class -- and bind to any judgment -- people who never had a chance to opt out because they developed their injuries after publication of the class notice and expiration of the opt-out period.[33]

Plaintiffs make no effort to address the Rule's requirements. Instead, they argue that defendants took "inconsistent litigation positions" that somehow nullified the Rule and the certification order's terms, creating a class that never closed. (Pl. Br. at 40-42.) But defendants consistently opposed the notion of an open-ended class. Defendants promptly objected when plaintiffs moved to add named plaintiffs who became ill after certification, including Farnan and Della Vecchia, and preserved their objections to any open-ended class at trial. (R146:33853-59, RA1:13; R225:51437-58, RA1:19; R285:64343-81, RA1:23.)[34]

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[33] The Third District's confirmation of the cut-off date follows common practice in class suits for damages. See, e.g., Davis v. Ball Mem'l Hosp. Ass'n, 753 F.2d 1410, 1420 (7th Cir. 1985) (class normally closes when certified).

[34] Defendants' other actions also were consistent with opposition to any open-ended class. Defendants promptly moved to disqualify the trial judge after learning (in July 1999) that he was a former smoker who suffered a relevant illness at the time of certification. (R221:50695-752, RA1:18, at 5.) And defendants moved to dismiss or abate certain individual suits because the plaintiffs themselves alleged that they were Engle class members. E.g., Luciano v. R.J. Reynolds Tobacco Co., No. 01-1370 (S.D. Fla. Nov. 5, 2001) (RA3:34); Green v. Philip Morris Inc., No. 00-3038 (S.D. Fla. Nov. 16, 2001) (RA3:35); see also Wilcox v. R.J. Reynolds Tobacco Co., No. 97-13866 (Fla. 11th Jud. Cir. April 14, 1998) (plaintiff asserted she fell within class definition and agreed to abatement) (R.142:33183-87, RA3:33).

Finally, plaintiffs argue that the Third District's ruling improperly bars Farnan and Della Vecchia from re-asserting their claims, and, by doing so, threatens to extinguish the claims of "thousands of Floridians whose claims may now be time-barred." (Pl. Br. at 40.) Properly read, the ruling merely holds that Farnan and Della Vecchia were not entitled to obtain awards as Engle class members. It does not preclude them from re-asserting their claims individually. In addition, the ruling says nothing about the timeliness of their claims -- or the claims of anyone else in their position. In that regard, there is nothing for this Court to review. When individual suits are filed, timeliness will be determined in due course by the trial courts and will be subject to review on a properly developed record. Any ruling now would be premature and improper.

VII. Numerous Other Errors Not Addressed By The Third District Also Required Reversal

The Third District did not address numerous other issues raised on appeal, each of which also required reversal. For example, the trial court improperly allowed plaintiffs to assert claims preempted by federal law. (RA3:28, at 132-43; RA3:30, at 75-79.) The trial court also improperly allowed the jury to impose liability and punishment for conduct protected by the First Amendment and the Noerr-Pennington doctrine. (RA3:28, at 125-31, 143-49; RA3:30, at 79-80.)

These and other errors provide additional, alternative grounds for approval of the Third District's ruling (or would require further proceedings upon remand).[35]

CONCLUSION

The Court should approve the Third District's ruling. Alternatively, the Court should decline jurisdiction.

Respectfully submitted,

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[35] Other issues raised on appeal but not addressed by the Third District included: (1) the trial court improperly entered a "final judgment" even though judicial labor was incomplete (Phase III had not even begun); (2) the Phase I jury instruction on "materiality" was defective; (3) the Phase I jury instruction on "scientific causation" was defective; (4) the Phase I verdict form question concerning "fraudulent concealment" was defective; (5) the trial court's failure to dismiss the "emotional distress" claim was erroneous; (6) the trial court's admission of privileged documents was erroneous; (7) plaintiffs' counsel improperly referred to defendants' non-party affiliates as potential sources of payment; and (8) the trial court erroneously failed to instruct the jury on a class cut-off date and on the need to avoid punishing lawful conduct. (RA3:28, at 53-55, 69-86, 104-06, 125-31, 141-49; RA3:30, at 33-34, 41-49, 64-65, 70-73.)

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Brief On The Merits Of All Respondents Other Than Liggett And Brooke was served by hand delivery to counsel for petitioners, Stanley M. Rosenblatt, Stanley M. Rosenblatt, P.A., Concord Building, 66 W. Flagler Street, Miami, FL 33130; by hand delivery to counsel for Liggett and Brooke, Kelly A. Luther, Clarke Silverglate Campbell Williams & Montgomery, 799 Brickell Plaza, 9th Floor, Miami, FL 33131; and by hand delivery or Federal Express to all other counsel on the attached service list this 16th day of July, 2004.

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing Brief On The Merits Of All Respondents Other Than Liggett And Brooke complies with the font requirements of Fla. R. App. P. 9.210(a)(2).

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