IN THE SUPREME COURT OF FLORIDA
CASE NO. SC11-2201

FOURTH DISTRICT COURT OF APPEAL CASE NO. 4D09-2664

R.J. REYNOLDS TOBACCO COMPANY
Defendant/Appellant/Petitioner,

v.

JIMMIE LEE BROWN,
as Personal Representative of the Estate of ROGER BROWN,
Plaintiff/Appellee/Respondent.

ON NOTICE OF DISCRETIONARY REVIEW FROM A DECISION OF THE FOURTH DISTRICT COURT OF APPEAL

BRIEF ON JURISDICTION OF RESPONDENT JIMMIE LEE BROWN

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SUMMARY OF ARGUMENT

THERE IS NO CONFLICT BETWEEN THE DECISION BELOW AND THIS COURT'S DECISION IN ENGLE, AND NO OTHER CONFLICT WARRANTING REVIEW.

The Petitioner erroneously argues that the decision below conflicts with the decision of this Court in *Engle*. In the *Engle* opinion the court stated at three separate contexts that certain findings which the Court approved have "res judicata" effect in later individual smokers' cases following *Engle*. The findings with res judicata effect included the trial court judgment that all of the *Engle* defendants, including the Petitioner, were negligent and had sold defective products. Thus, the *Engle* decision expressly states the approved findings have preclusive effect as to all issues of the *Engle* defendant's conduct. The *Engle* decision contains no qualification limiting the preclusive effect as the Petitioner suggests to require *Engle* class members to relitigate the conduct issues resolved in *Engle.* The Petitioner's discussion of pre-*Engle* Florida preclusion law is irrelevant since *Engle* sets forth the binding preclusive effect of the findings.

The trial and appellate courts below properly applied *Engle,* holding that the findings were preclusive as to conduct

elements, including negligence and the sale of defective products. There is no conflict with *Engle*.

The Petitioner argues the decision below is inconsistent with a federal court opinion interpreting *Engle*, known as the *Bernice Brown* case. Because it is a federal decision, *Bernice Brown* has no binding authority on issues of state law and has now been superseded by the First District Court of Appeal decision in *Martin* and by the Fourth District Court of Appeal in the decision below.

Both *Martin* and the decision below agree that the approved *Engle* findings are preclusive as to the conduct elements of individual *Engle* class members' actions. Both courts ruled that *Engle* class members are not required to relitigate the conduct issues resolved in *Engle* and therefore need not identify or prove specific acts of negligence by the *Engle* defendants or specific defects in their products. Both decisions agree that preclusion under *Engle* must be implemented by giving appropriate preclusive instructions to the jury.

The *Martin* court and the court below approved somewhat different formats of the causation instructions to be given in an *Engle* plaintiff's case. In *Martin*, an instruction to determine whether addiction to REYNOLDS' cigarettes was a legal cause of the decedent's death was approved as sufficient, while

the court below approved instructions which contained additional causation instructions as to each count pled. This difference in instruction format makes no difference to the outcome below, since the trial court below gave all instructions required by the opinion below and was also consistent with the format affirmed in *Martin*. Therefore, this Court should decline to exercise its discretion to review in this case.

ARGUMENT

THERE IS NO CONFLICT BETWEEN THE DECISION BELOW AND THIS COURT'S DECISION IN ENGLE, AND NO OTHER CONFLICT WARRANTING REVIEW.

The Petitioner argues that the decision below conflicts with the opinion of this Court in *Engle v. Liggett Group, Inc.*, 945 So.2d 1246 (Fla. 2006). Even though the Fourth District Court of Appeal stated that it was following and applying *Engle*, the Petitioner essentially ignores the holding and reasoning of *Engle* and argues that the decision in this case is inconsistent with the pre-*Engle* law of issue preclusion. There are several flaws in this argument. First, the identical legal argument has already been raised before this Court, most recently in REYNOLDS' jurisdictional brief seeking discretionary review of *R.J. Reynolds Tobacco Co. v. Martin*, 53 So.3d 1060 (Fla. 1st DCA 2010). Secondly, this Court is the final authority as to the

interpretation of Florida state law. *See Gonzalez v. State*, 617 So.2d 847, 849 (Fla. 4th DCA 1993) (“the Supreme Court of Florida is infallible because it is final--at least as to matters of Florida law"). Preclusion law as defined by this Court in *Engle* is the applicable Florida law for cases governed by *Engle*, whether or not the Petitioner believes the statement of the law in *Engle* is completely congruent with previous preclusion cases.

This Court in *Engle* stated in three separate contexts within the opinion that the approved Phase I verdict findings would have "res judicata" effect in later cases. *See Engle*, 945 So.2d at 1254, 1269, 1277. The approved findings which the Florida Supreme Court said must be given res judicata effect included findings that the *Engle* defendants were negligent and that they placed cigarettes on the market which were defective and unreasonably dangerous. *Engle*, 945 So.2d at 1277.

Nowhere in the discussion of the findings or in the multiple statements affirming the "res judicata" effect of the findings is there any indication that the findings will have only a limited preclusive effect; nor did this Court say that individual litigants must relitigate, as the Petitioner request, the specific defects in the *Engle* defendants' products or their specific acts of negligence. If the *Engle* Court intended to limit the preclusive effect of the findings as the Petitioner

suggests, the Court would have stated this limitation expressly rather than using the expansive term "res judicata" without qualification.

Furthermore, in the only section of the opinion where the *Engle* Court expressly defined the term res judicata, the definition clearly adopted the more expansive meaning of claim preclusion meaning rather than more limited meaning of issue preclusion. *See Engle*, 945 So.2d at 1259, quoting *Fla. Dep't of Transportation v. Juliano*, 801 So.2d 101, 105 (Fla. 2001), *Kimbrell v. Paige*, 448 So.2d 1009, 1012 (Fla. 1984) (res judicata precludes relitigation of "every other matter which might with propriety have been litigated and determined" in the original action). The Petitioner's suggestion that the *Engle* Court was somehow confused as to the meaning of the term "res judicata" is not credible. *See Dadeland Depot v. St. Paul Fire and Marine Ins. Co.*, 945 So.2d 1216, 1235 (Fla. 2006)(decision issued on the same day as *Engle* in which the Court explained and applied both the terms res judicata and collateral estoppel).

The interpretation of the findings' preclusive effect set forth both in *Martin* and the opinion below, to-wit, that the findings relieve *Engle* class members of any need to relitigate issues of the *Engle* defendants' conduct, such as their negligence and sale of defective products, is consistent with

the language of the *Engle* opinion; the strained interpretation of the Petitioner is not.

The Petitioner references a federal case discussing the application of *Engle*, *Brown v. R.J. Reynolds Tobacco Company*, 611 F.3d 1324 (11th Cir. 2010)(*Bernice Brown*). *Bernice Brown*, being a federal decision, creates no conflict with *Martin*, *Engle*, or the decision below and provides no ground for review by this Court. The unquestioningly binding authority regarding issues of Florida state law is this Court, not any federal court. *Gonzalez; Florida Insurance Guaranty Association v. Olympus Association*, 34 So.3d 791, 795 (Fla. 4th DCA 2010); *International Association of Bridge, Structural and Ornamental Ironworkers, AFL-CIO v. Blount International, Ltd.*, 519 So.2d 1009, 1012 (Fla. 2nd DCA 1987), *review denied,* 531 So.2d 168 (Fla. 1988), *U.S. cert. denied*, 488 U.S. 1005 (1989); *McMahan v. Toto*, 311 F.3d 1077, 1079 (11th Cir. 2002)(federal courts write in "faint and disappearing ink" when addressing issues of state law). The decision in *Bernice Brown* was merely a speculative guess written in "disappearing ink" as to the proper application of *Engle*, a guess inconsistent with the language of *Engle* and now superseded by two Florida district court of appeal decisions.

The Petitioner argues that a direct and express conflict exists between the decision below and the decision of the First District Court of Appeal in *Martin* regarding the precise form of causation instruction to be given in cases following *Engle*. *Martin* and the decision below in fact agree as to the essential points the Petitioner has argued regarding the application of *Engle.*

Both the Fourth District below and the First District Court of Appeal in *Martin* affirmed judgments for smokers' estates and survivors against REYNOLDS. The trial courts in both cases gave the preclusive res judicata effect to the *Engle* findings this Court ruled three times they were to have. Both in *Martin* and in the opinion below, the courts held that these preclusive *Engle* findings were binding as to the conduct elements of the respective plaintiffs' claims against REYNOLDS, thus relieving *Engle* plaintiffs of the need to relitigate conduct issues such as the exact nature of the defects in REYNOLDS' products or REYNOLDS' specific acts of negligence. *Martin*, 53 So.3d at 1069; *R.J. Reynolds Tobacco Co. v. Brown*, 70 So.3d 707 (Fla. 4th DCA 2011), Petitioner's Appendix at 10("we conclude, as *Martin* did, that individual post-*Engle* plaintiffs need not prove the conduct elements in negligence and strict liability claims, as asserted here ...the *Engle* findings

preclusively establish the conduct elements of the strict liability and negligence claims as pled in this case. Those elements are not subject to relitigation."). Both courts agreed that the preclusion of conduct elements by the res judicata findings left individual issues such as individual causation and damages for resolution in each plaintiffs' case. *Martin*, 53 So.3d at 1067-68; *Brown*, Petitioner's Appendix at 10. Thus, courts statewide can follow *Martin*, *Brown* and *Engle* by giving the *Engle* findings their intended preclusive effect as to the conduct elements of the individual plaintiffs' causes of action.

The *Martin* court and the court below did employ different but complementary forms of causation instructions to be given in an individual *Engle* plaintiff's case. The *Martin* court used a trial plan with a single trial phase for the class membership and liability issues. The court concluded under this unified trial plan that the instruction given to determine whether addiction to REYNOLDS' cigarettes was a legal cause of Mr. Martin's death, and therefore whether Mr. Martin was a class member, included by implication an instruction to the jury to determine legal causation on Mrs. Martin's strict liability and negligence claims. *Martin*, 53 So.3d at 1069. This approach makes sense under a unified trial plan, in which class

membership is tried with the liability issues because the jury is instructed on those issues in a single phase.

The court below held that an inclusive causation instruction for the class membership phase was not enough. It held that separate, express instructions on legal causation with respect to each count were also necessary. *Brown*, Petitioner's Appendix at 11. However, in *Brown* the trial was bifurcated into class membership and liability phases, so that the jury, unlike the jury in *Martin*, needed to receive the class membership causation instruction in the class membership phase and another liability causation instruction in the liability phase.

The trial court in this case gave causation instructions both as to addiction and separately as to the strict liability and negligence counts. It thereby complied both with the requirements for causation instructions in a bifurcated trial as stated in the opinion below and also with the requirements applicable in a unified trial as stated in *Martin. Brown*, Petitioner's Appendix at 14 ("Here, the trial court properly applied the *Engle* findings, instructing the jury on the issue preclusion effect of the Phase I findings, and making certain to submit the remaining elements of each legal theory to the jury for its determination. Accordingly, we affirm the final judgment."). If this Court were to hold either that the form of

causation instruction required in the *Martin* unified trial is sufficient or that the repeated causation instructions required in the opinion below were necessary, the result would be the same; affirmance, since the trial court below instructed correctly under either trial plan. Ultimately, any difference between *Martin* and the opinion below is dicta, making no difference to the outcome in this case. This Court need not decide whether a unified or bifurcated trial plan is preferable, since both comply with *Engle.* The Court should therefore decline to exercise jurisdiction in this case.

CONCLUSION

Since there is no conflict between the decision below and *Engle*, and no other ground warranting review, the Court should decline review.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing was delivered by overnight delivery service this 23d day of November, 2011 to counsel on the attached service list.

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CERTIFICATE OF FONT COMPLIANCE

WE HEREBY CERTIFY that the foregoing jurisdictional brief complies with the font requirements of Rule 9.210(a)(2), Florida Rules of Appellate Procedure, having been prepared in Courier New 12-point font.

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