Case No. SC11-2201

Fourth District Case No. 4D09-2664

IN THE SUPREME COURT
STATE OF FLORIDA

R.J. REYNOLDS TOBACCO COMPANY,

Defendant/Petitioner,

v.

JIMMIE LEE BROWN, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF ROGER BROWN,

Plaintiff/Respondent.

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

BRIEF ON JURISDICTION OF PETITIONER R.J. REYNOLDS TOBACCO COMPANY

Gregory G. Katsas
Florida Bar No. 89091
ggkatsas@jonesday.com
JONES DAY
51 Louisiana Ave., N.W.
Washington, DC 20001
Phone: (202) 879-3930
Fax: (202) 626-1700

Gordon James III
Florida Bar No. 0150077
gordon.james@sedgwicklaw.com
Eric L. Lundt
Florida Bar No. 0861715
eric.lundt@sedgwicklaw.com
SEDGWICK LLP
2400 E. Commercial Blvd., Suite 1100
Fort Lauderdale, FL 33308
Phone: (954) 958-2500
Fax: (954) 958-2513

Counsel for Petitioner

TABLE OF CONTENTS

Page

TABLE OF CITATIONS

Page(s)

Cases

Other Authorities

STATEMENT OF THE CASE

The ruling of the Fourth District in this case creates an express and direct conflict with *R.J. Reynolds Tobacco Co. v. Martin*, 53 So. 3d 1060 (Fla. 1st DCA 2010), on the implementation of this Court's decision in *Engle v. Liggett Group, Inc.*, 945 So. 2d 1246 (Fla. 2006). In *Martin*, the First District held that a determination of class membership alone (*i.e.*, that a cigarette addiction caused the smoker's injuries) was enough under *Engle* to establish "legal causation on the underlying strict liability and negligence claims." A:9. The Fourth District expressly "depart[ed] from the First District's decision in *Martin*," A:11, holding that "plaintiffs do not satisfy their burden of proving legal causation in a strict liability or negligence claim by merely establishing class membership," A:10. The Fourth District's opinion also misapplies, and thus conflicts with, *Engle* by interpreting it to depart from, rather than incorporate, traditional principles of res judicata and due process. *Id.* Indeed, the Fourth District itself expressed substantial "concern[]" that its interpretation of *Engle* violates Reynolds's due-process rights. A:11. These express and direct conflicts, and the fact that the questions at issue affect thousands of pending cases, establish the Court's jurisdiction and demonstrate the compelling need for its immediate review.

Respondent Jimmie Lee Brown sued Petitioner R.J. Reynolds Tobacco Company for her husband's death. A:4. In an initial trial phase, the jury found

that Mr. Brown's cigarette addiction caused his death, and that Mr. Brown therefore was an *Engle* class member. A:7. In a second phase, the court instructed the jury that "certain findings" from *Engle* were binding on it, including that Reynolds had been negligent and had placed defective cigarettes on the market. *Id.* The court asked the jury to determine whether Reynolds's negligence and defective products had caused Mr. Brown's death. A:7-8. The jury found for Mrs. Brown on these negligence and strict-liability claims, and a $600,000 final judgment was entered in her favor. A:8.

The Fourth District affirmed. A:14. It noted that two other appellate courts had already interpreted *Engle*. A:9. In *Martin*, the First District held that the *Engle* findings automatically "established the conduct elements of" progeny plaintiffs' strict-liability and negligence claims. *Id.* *Martin* also held that class membership alone (that a cigarette addiction caused the plaintiff's injuries) established causation for those claims. *Id.* In *Brown v. R.J. Reynolds Tobacco Co.*, 611 F.3d 1324 (11th Cir. 2010) ("*Bernice Brown*"), the Eleventh Circuit "refused to give the *Engle* findings such broad application." A:9. It required each plaintiff to prove that the issue for which the plaintiff sought preclusion had been actually decided in *Engle*. *Id.*

The Fourth District "conclude[d] that the *Martin* court did not go far enough and the [*Bernice*] *Brown* court went too far." A:10. Disagreeing with *Bernice*

Brown, it interpreted *Engle*, as *Martin* did, to establish "the conduct elements" of the strict-liability and negligence claims. *Id.* Although affirmatively expressing its "concern[] [that this] preclusive effect of the *Engle* findings violates Tobacco's due process rights," the court believed that its holding was compelled by this Court's mandate in *Engle*. A:11. But the Fourth District disagreed with *Martin* on the element of causation, holding that class membership alone does not establish causation for the strict-liability and negligence claims. A:10. Rather, the jury "must be asked to determine" both "whether the defendant's failure to exercise reasonable care" and "whether the defective and unreasonably dangerous cigarettes" "were a legal cause of decedent's death." A:10-11.

SUMMARY OF THE ARGUMENT

This Court has jurisdiction because the Fourth District's decision expressly and directly conflicts with *Martin* and *Engle*. The Fourth District created a conflict with *Martin* by rejecting the First District's holding that class membership alone (*i.e.*, that a cigarette addiction caused the plaintiff's injuries) establishes causation. The Fourth District also created a conflict with *Engle* by misapplying its "res judicata" reference as impliedly departing from, rather than incorporating, traditional preclusion and due-process principles.

This Court should exercise its jurisdiction. The questions presented impact thousands of pending cases. As Chief Judge May put it in her concurrence, courts

will be forced to continue to play "legal poker"—guessing at what *Engle* intended and proceeding in a constitutionally questionable manner—until this Court resolves those questions. Time is also of the essence, given the number of trials scheduled over the next year and the economic difficulties confronting the courts.

ARGUMENT

I. THE COURT HAS JURISDICTION OVER THE FOURTH DISTRICT'S DECISION

This Court has jurisdiction because the decision below "expressly and directly conflicts with" *Martin* and *Engle*. Art. V, §3(b)(3), Fla. Const. An express and direct conflict exists if a district court's opinion expressly disagrees with an opinion of another district court on the same issue. *Hardee v. State*, 534 So. 2d 706, 707 (Fla. 1988); *D'Oleo-Valdez v. State*, 531 So. 2d 1347, 1348 (Fla. 1988). Such conflict also exists if a district court's decision arguably misapplies a decision of this Court. *Jaimes v. State*, 51 So. 3d 445, 446 (Fla. 2010); *Wallace v. Dean*, 3 So. 3d 1035, 1040 (Fla. 2009).

A. Under these standards, the decision below expressly and directly conflicts with *Martin*. In *Martin*, the First District held that a finding of class membership is alone sufficient to establish causation for strict-liability and negligence claims, so that an *Engle* progeny plaintiff may establish liability by showing nothing more than that the smoker's "addiction" to cigarettes "was the legal cause" of his injury. *See* 53 So. 3d at 1069. The Fourth District expressly

"depart[ed] from the First District's decision in *Martin*" on this point. A:11. It held that the First District erred "[b]y equating the legal causation instruction used on the issue of addiction with a finding of legal causation" for the strict-liability and negligence claims. *Id.* The court reasoned that "the First District effectively interpreted the 'res judicata' language . . . in [*Engle*] to mean claim preclusion instead of issue preclusion," but "[w]e do not read . . . [*Engle*] so broadly, and we do not think the Florida Supreme Court intended for claim preclusion to be applied." *Id.* Contrary to *Martin*, the Fourth District "h[e]ld that to prevail in the tobacco cases post-*Engle*, plaintiffs must prove more than mere class membership and damages." A:10. According to the Fourth District, the plaintiffs must also prove that the specific defect and negligent conduct found to exist in *Engle* legally caused their injuries. A:10-11. This Court has jurisdiction in light of this express conflict on the "face of the [two] opinion[s]." *Hardee*, 534 So. 2d at 707 n.*.

In opposing certification below, Mrs. Brown argued primarily that the Fourth District's causation ruling was dictum. That is incorrect. The Fourth District expressly stated: "We hold that to prevail in the tobacco cases post-*Engle*, plaintiffs must prove more than mere class membership and damages." A:10. Its ruling on that specific point—based on extended analysis of *Engle*, *Martin*, and *Bernice Brown* more generally—obviously creates binding district precedent that circuit courts in the district must follow. In any event, Mrs. Brown's contention is

simply immaterial for purposes of the Court's jurisdiction. *See, e.g., Cowan Liebowitz & Latman, P.C. v. Kaplan*, 902 So. 2d 755, 756 (Fla. 2005) (finding conflict jurisdiction because decision below "expressly and directly conflicts with [the Court's] statements in [other cases] (albeit in dictum)"); *Twomey v. Clausohm*, 234 So. 2d 338, 340 (Fla. 1970) ("Even if the statement from one of the earlier cases can be regarded as obiter dictum the conflict still establishes our jurisdiction.").

B. Additionally, in holding that the *Engle* jury findings automatically establish the conduct elements of strict-liability and negligence claims in progeny cases, the Fourth District misapplied *Engle* itself. A:10. *Engle*'s unelaborated reference to "res judicata" cannot fairly be interpreted, as the Fourth District did, to depart from, rather than to incorporate, decades of settled precedent. *See Puryear v. State*, 810 So. 2d 901, 905 (Fla. 2002). Issue preclusion has long applied only to the "precise facts" that "were determined by [a] former judgment." *Bagwell v. Bagwell*, 14 So. 2d 841, 843 (Fla. 1943). It has never applied where, as here, the prevailing party in the first case proffered alternative theories and "it is impossible to determine which theory the [first] jury relied on." *Sun State Roofing Co. v. Cotton States Mut. Ins. Co.*, 400 So. 2d 842, 844 (Fla. 2d DCA 1981); *see Acadia Partners, L.P. v. Tompkins*, 673 So. 2d 487, 489 (Fla. 5th DCA 1996); *Allstate Ins. Co. v. A.D.H., Inc.*, 397 So. 2d 928, 929-31 (Fla. 3d DCA 1981). Moreover, the

U.S. Supreme Court has long held that this settled Florida rule is compelled by federal due process. *See Fayerweather v. Ritch*, 195 U.S. 276, 299, 307 (1904). Indeed, the Fourth District recognized as much, expressly stating that its interpretation raises serious due-process "concern[s]." A:11. This Court has jurisdiction because the Fourth District misapplied *Engle*. *See Jaimes*, 51 So. 3d at 446.

At a minimum, the proper interpretation of *Engle* is subject to reasonable disagreement. As the Fourth District explained at length, three different appellate courts have attempted to determine the extent to which the *Engle* jury findings establish wrongful-conduct and proximate-cause elements in individual progeny litigation, and those courts have reached three markedly different conclusions. A:10 ("the *Martin* court did not go far enough, and the [*Bernice*] *Brown* court went too far"). That reasonable disagreement about the proper meaning of *Engle* itself demonstrates that this Court has jurisdiction. *See Public Health Trust of Dade Cnty. v. Menendez*, 584 So. 2d 567, 569 (Fla. 1991) (finding conflict jurisdiction where statements in a decision of this Court "reasonably may be read" differently from a district court's decision); Harry Lee Anstead et al., *The Operation & Jurisdiction of the Supreme Court of Florida*, 29 Nova. L. Rev. 431, 520-21 (2005) (same).

II. THE COURT HAS COMPELLING REASONS TO EXERCISE ITS DISCRETIONARY JURISDICTION IN THIS CASE

For several reasons, this Court should exercise its jurisdiction. *First,* the questions presented affect a vast number of cases. The preclusive effect of the *Engle* findings is a critical threshold issue in every one of the approximately 7700 progeny cases pending in state and federal courts throughout Florida. The sheer volume of these cases—and the fact that the preclusion and causation questions are central to each of them—makes the questions supremely important.

Second, a ruling from this Court would substantially benefit the judges and parties involved in these cases. The issue presented is what facts the plaintiff must prove with independent evidence to establish liability, and, conversely, what facts are deemed established by the *Engle* findings. That question affects every aspect of *Engle* progeny litigation, from pleading to discovery to dispositive motions to trial. As Chief Judge May noted, "[u]ntil [the Court] answers these . . . questions, parties to the tobacco litigation will continue to play legal poker, placing their bets on questions left unresolved by *Engle* and calling the bluff of trial courts on a myriad of issues." A:17 (May, C.J., specially concurring). A ruling from this Court will establish whether *Martin*, *Bernice Brown*, the decision below, or yet another interpretation sets forth the appropriate rules for *Engle* progeny cases.

Third, time is of the essence. *Engle* progeny trials are proceeding at a rate of at least two cases per month, and trial dates are set for over 100 more *Engle* trials

over the next couple of years. Prompt review is even more important given the "protracted economic difficulties" and "substantial caseloads" facing these trial courts. *In re Certification of Need for Additional Judges*, 60 So. 3d 955, 955, 957 (Fla. 2011). Allowing dozens of *Engle* progeny trials to proceed without authoritative guidance from this Court risks a wholesale waste of increasingly scarce judicial resources.

Fourth, the stakes for this "poker game" are unprecedented. Including those cases currently in the post-trial stages and on appeal, *Engle* progeny plaintiffs have already received jury verdicts for almost $500 million in only 51 cases tried to verdict, with thousands more *Engle* progeny cases still pending.

Finally, the Fourth District's decision raises important federal constitutional issues. To our knowledge, other than *Martin* and the decision below, no decision in the history of Anglo-American law has authorized preclusion based on a mere determination that a prior jury "could have, but may not have" decided the issues that were precluded. *Bernice Brown*, 611 F.3d at 1334. To the contrary, as the U.S. Supreme Court explained long ago, precluding a party from litigating a relevant issue violates due process unless the record in the former case affirmatively demonstrates that the "question was decided." *Fayerweather*, 195 U.S. at 299.

Indeed, quoting *Richards v. Jefferson County*, 517 U.S. 793, 797 (1996), the Fourth District itself observed that "extreme applications of the doctrine of res judicata may be inconsistent with a federal right that is fundamental in character." A:11 (internal quotation marks omitted). Moreover, the Fourth District expressed its "concern[]" that its interpretation of *Engle* "violated Tobacco's due process rights." *Id.*; *see also* A:17 (May, C.J., specially concurring) ("[A] lurking constitutional issue hovers over the poker game: To what extent does the preclusive effect of the *Engle* findings violate the manufacturer's due process rights?"). Yet the Fourth District still rejected, as assertedly inconsistent with *Engle*, Reynolds's argument that the preclusion standard that it adopted was inconsistent with due process. A:11. This Court should be the final arbiter of whether its own *Engle* decision must or should be interpreted to create the grave due-process concerns that the Fourth District correctly identified.

By any measure, the decision here raises issues warranting this Court's attention—it impacts thousands of cases, concerns judgments totaling hundreds of millions of dollars, and implicates weighty constitutional questions.

CONCLUSION

Reynolds requests that the Court grant review.

Respectfully submitted,

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Gordon James III
Florida Bar No. 0150077
gordon.james@sedgwicklaw.com
Eric L. Lundt
Florida Bar No. 0861715
eric.lundt@sedgwicklaw.com
SEDGWICK LLP
2400 E. Commercial Blvd., Suite 1100
Fort Lauderdale, FL 33308
Phone: (954) 958-2500
Fax: (954) 958-2513

Gregory G. Katsas
Florida Bar No. 89091
ggkatsas@jonesday.com
JONES DAY
51 Louisiana Ave., N.W.
Washington, DC 20001
Phone: (202) 879-3930
Fax: (202) 626-1700

Stephanie E. Parker
Florida Bar No. 0688355
separker@jonesday.com
John M. Walker
Florida Bar No. 0691021
jmwalker@jonesday.com
JONES DAY
1420 Peachtree Street, N.E., Suite 800
Atlanta, GA 30309-3053
Phone: (404) 521-3939
Fax: (404) 581-8330

Counsel for Appellant R.J. Reynolds Tobacco Co.

CERTIFICATE OF SERVICE

We certify that on November 4, 2011, a copy of this Brief on Jurisdiction was served by electronic mail and UPS overnight delivery on:

Philip M. Gerson, Esq.
Edward Schwartz, Esq.,
Gerson & Schwartz, P.A.
1980 Coral Way
Miami, FL 33145

Edward Zebersky, Esq.,
Zebersky & Payne, LLP
110 SE 6th Street, Suite 2150
Fort Lauderdale, FL 33301

_____

Eric L. Lundt

CERTIFICATE OF COMPLIANCE

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

DATED: November 4, 2011

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Eric L. Lundt