IN THE SUPREME COURT OF THE STATE OF FLORIDA

PHILIP MORRIS USA INC.; R.J. REYNOLDS TOBACCO COMPANY; and LIGGETT GROUP, LLC,

Petitioners,

v.

JAMES L. DOUGLAS, as Personal Representative for the Estate of CHARLOTTE M. DOUGLAS,

Respondent.

Case No. SC12-617

L.T. Case Nos. 2D10-3236 & 08-CA-008108

ON REVIEW FROM THE SECOND DISTRICT COURT OF APPEAL

ANSWER BRIEF ON THE MERITS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Rules

TABLE OF ABBREVIATIONS AND RECORD REFERENCES

The Parties

In this brief, we refer to Respondent, James L. Douglas the Personal Representative of the Estate of his late wife Charlotte M. Douglas, as "Mr. Douglas" or "Plaintiff." We refer to his late wife as "Charlotte" or "Mrs. Douglas." We refer to Petitioners, R.J. Reynolds Tobacco Company ("RJR"), Philip Morris USA Inc. ("Philip Morris"), and Liggett Group LLC ("Liggett"), collectively as the "Defendants" or the "Cigarette Companies."

Record and Other References.

The trial transcripts in the *Douglas* trial below are cited as "T." and the record as "R." For example, R5 1040 would refer to volume 5 of the record at page 1040. Defendants' Initial Brief is referred to as "Br."

The brief contains citations to the trial proceedings in the original *Engle* case. Defendants filed a DVD containing a substantial portion of the *Engle* trial record as Exhibit V to their Motion to Set Aside the Verdict. This Exhibit appears in the record at 12591.

For the Court's convenience, we bundled these transcript excerpts and pleadings from the original *Engle* proceedings into an appendix, which we cite to as "A." The Index to the Appendix directs the reader to the folder and document location on the disc where the reader can find the actual transcripts and pleadings.

STATEMENT OF THE CASE AND FACTS

Introduction

Defendants RJR, Philip Morris, and Liggett seek to overturn a jury verdict in favor of James Douglas, the personal representative of the estate of his late wife, Charlotte. Mrs. Douglas, a lifelong smoker of Defendants' cigarettes, began smoking as a teen. Her addiction to Defendants' cigarettes caused her to develop COPD and lung cancer, which ultimately led to her death in 2008 at age 62.

This case was tried pursuant to the procedures established by this Court in *Engle v. Liggett Group, Inc.*, 945 So. 2d 1246 (Fla. 2006) ("*Engle*"). After an eight-day trial, the jury found that Mrs. Douglas was a member of the *Engle* class; that is, the jury determined that Mrs. Douglas was addicted to Defendants' cigarettes and that this addiction was a legal cause of her death. The jury then found that each of the Defendants was liable for Mrs. Douglas' death, apportioned fault among the parties, and awarded compensatory damages.

Defendants now attack the final judgment entered upon that verdict. Defendants do not contest that there was competent, substantial evidence that Mrs. Douglas was addicted to their products and this addiction caused her injuries and death. Nor could they; the record is replete with evidence supporting Mr. Douglas' claims. Instead, Defendants challenge the procedures established by this Court in *Engle* and followed by the trial court below.

In their attack on *Engle*, the Defendants ask this Court to send each of the thousands of *Engle* progeny plaintiffs -- who have been waiting eighteen years for their day in court -- back to square one. Rearguing *Engle*, the Cigarette Companies press a narrow interpretation of "*res judicata*" that would render meaningless this Court's labors (and the year-long labors of the original *Engle* jury) and compel thousands of trials on the issue of the Defendants' misconduct. Then, ignoring over one hundred years of precedent, Defendants press a novel due process theory that would outlaw the doctrine of *res judicata* itself. Defendants' *Engle* and due process arguments have been rejected by every Florida trial and appellate court to consider them and by the federal district court judge managing the federal court *Engle* progeny litigation. As we demonstrate below, these many courts are correct.

The *Engle* Case

The trial below was merely the latest chapter in a long litigation saga. Mr. Douglas' lawsuit originated eighteen years ago as a class action against Defendants and other tobacco companies and organizations (collectively, "Tobacco") seeking damages for diseases caused by addiction to cigarettes. *R.J. Reynolds Tobacco Co. v. Engle*, 672 So. 2d 39, 40 (Fla. 3d DCA 1996). The trial court certified a class of all Americans[1] "who have suffered, presently suffer or have died from diseases and medical conditions caused by their addiction to cigarettes that contain nicotine."

[1] The Third District later narrowed the class to only Florida smokers. *Id*. at 42.

Id. The class was certified under Florida Rule of Civil Procedure 1.220(b)(3), which requires common questions to "predominate" over individual questions. *Id*.

The Third District Court of Appeal affirmed class certification, rejecting Tobacco's argument that the case was inappropriate for class certification, holding that "the basic issues of liability common to all members of the class will clearly predominate over the individual issues." *Id.* at 41. This Court summarily denied review. *R.J. Reynolds Tobacco Co. v. Engle*, 682 So. 2d 1100 (Fla. 1996).

The case then proceeded under the three-phase trial plan summarized in Defendants' brief (Br. 5). The first phase concerned the claims common to the entire class -- the misconduct of Tobacco. After a year-long trial in which the jury heard from hundreds of witnesses and reviewed thousands of documents, the jury reached findings applicable to every member of the class concerning the conduct of Tobacco (A42, A45). The relevant findings for purposes of this brief are:

- **Medical Causation.** Cigarette smoking causes serious disease, including COPD and lung cancer;
- **Addiction.** Nicotine is addictive;
- **Strict Liability.** Defendants placed cigarettes on the market that were defective and unreasonably dangerous;
- **Negligence.** Defendants were negligent;
- **Breach of Warranty.** Defendants sold cigarettes that did not conform to representations of fact made by said Defendants.

- **Fraud by Concealment and Conspiracy.** Defendants concealed from the public and agreed with each other to conceal from the public material information concerning the health effects and addictive nature of nicotine and acted together to further that conspiracy.

Defendants argue that only the class findings on medical causation and addiction are binding.[2] They attack the strict liability, negligence, breach of warranty, and fraud findings, however, as too general to be binding on the class. In light of this argument, we focus on the evidence supporting these claims and, in particular, the arguments of the parties to the *Engle* jury and the development of the jury verdict forms in Phase I of *Engle*.

The Development of the Modern Cigarette

Although tobacco smoking has been common for hundreds of years, lung cancer was extremely rare before the industry's development of the modern cigarette in the early 20th Century (A8 at 11560, A19 at 18707-078, T. 1065).[3] Smoking tobacco in its natural, unprocessed form is harsh and unpleasant, making

[2] Defendants can take no credit for even these limited concessions. As a result of their settlement with the State Attorneys General, Defendants' websites now admit that cigarette smoking is addictive and causes various diseases, including lung cancer and COPD. In this 1998 trial, however, Defendants were still disputing that nicotine was addictive and still disputing the harmful effects of cigarette smoking.

[3] The evidence presented to the *Engle* jury was comprehensively summarized by the *Engle* trial court in its Omnibus Final Judgment (A45). Other courts hearing this same evidence have written comprehensively about Tobacco's 50-year conspiracy to hide the dangers of smoking cigarettes from the public. The most detailed by far is found at *United States v. Philip Morris USA Inc*., 449 F. Supp. 2d 1, (D.D.C. 2006), *affirmed*, 566 F.3d 1095, 1107 (D.C. Cir. 2009), *cert. denied*, 130 S.Ct. 3501 (U.S. 2010). The table of contents in the District Court's opinion provides an excellent summary of the scope of Tobacco's misconduct.

it difficult to inhale (A5 at 11080-81, A7 at 11258). Thus, cigars and pipes, the most common smoking devices before the modern cigarette was developed, ordinarily are puffed, not inhaled (A19 at 18704, A26 at 20843, T. 1324).

The Defendants developed the modern cigarette, by contrast, to allow tobacco smoke to be inhaled deep into the lungs (A5 at 11080-81, A9 at 11947, T. 1160-68). Defendants and the other cigarette companies blended the tobaccos and added ingredients to render the smoke milder and easier to inhale (A5 at 11080-81, A7 at 11258, A9 at 11947, A10 at 12045, T. 1165).

The development of this modern, inhalable cigarette had two dangerous consequences. First, by making it easy for its customers to draw smoke deeply into their lungs, the industry enhanced the delivery and physiological impact of the nicotine (A9 at 11947, 11986, 12007-10, T. 1160-68). This made smoking more pleasurable, but extraordinarily more addictive (A9 at 11947, T. 1160-68).

The second consequence of the modern, inhalable cigarette is that the carcinogens and other toxic substances deposit themselves deep in the lungs (A10 at 12132, T. 1059-62, 1160-68). These dangerous substances turn lethal with the repeated exposures caused by addictive smoking (A15 at 15214-15, T. 1059-62, 1160-68). Nicotine's addictive nature, now enhanced by inhalability, causes addicted smokers like Mrs. Douglas to smoke many cigarettes each day and hundreds of thousands of cigarettes over their lifetimes, ensuring that their lungs

are repeatedly bathed in carcinogens over a lifetime of smoking. Soon, lung cancer catapulted from medical obscurity to a national epidemic (A11 at 12514). At trial, the most recent public health estimates held that over 400,000 Americans are killed every year by smoking cigarettes (A6 at 11194, T. 1144-45).

This modern, inhalable and extraordinarily addictive cigarette was no accident. Defendants' cigarettes are engineered to be addictive (A12 at 13471-72, 13475-76). One secret RJR document presented to the *Engle* jury and the jury in this case described the cigarette as "a vehicle for [the] delivery of nicotine designed to deliver the nicotine in a generally acceptable and attractive form." (A2, T. 1302).

Although Defendants can eliminate nicotine from cigarettes, they choose not to (A9 at 11989, A14 at 14880, T. 1302-03). To the contrary, Defendants studied addiction extensively, and carefully monitored nicotine levels to ensure that they delivered precisely the nicotine dose to achieve the desired impact on their customer base (A3, A10 at 12044-45, A13 at 13698). The reason is obvious -- absent nicotine, no one would buy their cigarettes (A21 at 19386-87, T. 1162).

Defendants' Conspiracy to Conceal

Defendants' concessions that cigarettes are addictive and cause disease are of recent vintage (T. 817-18, 961-62). As late as 1994, the CEOs of every major tobacco company denied under oath that cigarettes were addictive (A45 at 16). At this same time, the Defendants' continued their forty-year argument, that there was

no proven connection between cigarettes and lung cancer or COPD (A16 at 16246-47, 16250, A22 at 19863, A23 at 19987, A24 at 20039, A25 at 20284, A27 at 20901). Their denials continued through Phase I of the *Engle* trial in 1998.

The *Engle* jury, however, was presented with evidence that Defendants knew by the early 1950s that smoking was addictive and that their cigarettes contained carcinogens (A12 at 13557-59, 13565). The industry's unanimous response was to conceal those facts from the public (A29 at 27344).

As evidence from some of the first scientific studies began to emerge in the 1950s on the risks of smoking, the industry's response was immediate (A29 at 27344). Defendants' top executives met at the Plaza Hotel in New York City and hatched a plan to conceal the health risks and addictive nature of smoking. *Id*. They agreed to attack the sources of these health warnings and to cast doubt on the connection between smoking and disease (A1, A29 at 27344).

At the same time, however, the industry, working primarily through its jointly funded trade association and public relations organization, pledged the opposite to the public (A1, A18 at 16607, A29 at 27344, A30 at 32650-51). It promised that it would continue to study carefully any information concerning the health risks of smoking and inform the public immediately of any such risks (A1).

Despite these promises to the American public, for the next 50 years, the industry continued to deny that there were any health risks to smoking cigarettes,

and attacked any scientific evidence to the contrary (including the reports of the Surgeon General on smoking) (A7 at 11234-35, A28 at 27210, A29 at 27234-35, 27253-56). At the same time, Defendants spent billions of dollars marketing cigarettes as glamorous, sexy, and tacitly safe (A7 at 11377, A17 at 16436, A20 at 18998; A45 at 2). Yet, Tobacco's internal documents revealed that the Defendants were well aware of the addictive nature and deadly health risks of smoking cigarettes (A2, A12 at 13477-78, 13557-59, 13565, 13575).

Arguments to the *Engle* Jury

At the conclusion of Phase I, the parties argued the strict liability, negligence, warranty, and concealment claims to the jury (along with the addictive nature of cigarettes and medical causation). Contrary to the impression left by Defendants' brief, Plaintiffs' argument did not ask the jury to find brand-specific defects based on the various alternative "defect theories" described by Defendants in their brief (Br. at 25-26). Defendants fail to identify any place in the record where Plaintiffs asked the jury to return a verdict based on any brand specific verdict such as the position of holes in the filter or the use of particular additives or ingredients or any of the other particular "micro" defects listed in Defendants' brief. Instead, both Plaintiffs and Tobacco focused their arguments on the class-wide nature of the jury's task. Tobacco's argument was that cigarettes were not addictive and were not proven to cause disease, including lung cancer and COPD,

and that it could not be held strictly liable because it had attempted to make the safest possible cigarette (A38 at 37053-63, A39 at 37276, 37354-63).[4]

Plaintiffs responded that a strict liability finding was appropriate as to all cigarette brands because each contained "carcinogens, nitrosamines, and carbon [mon]oxide, among other ingredients harmful to health which, when combined with nicotine cigarettes also contain, make the product unreasonably dangerous." *R.J. Reynolds Tobacco Co v. Martin*, 53 So. 3d 1060, 1068 (Fla. 1st DCA 2010). *See* A35 at 36668, A40 at 37431-35, A45 at 4. Indeed, there is no dispute now that every brand of nicotine-containing cigarettes Tobacco sold to the class during the relevant time period was in fact addictive and disease-causing. Based on this evidence of class-wide application, the jury was asked whether Tobacco's cigarettes were unreasonably dangerous; that is, (1) did they fail to perform as safely as an ordinary consumer would expect when used as intended or in a manner reasonably foreseeable by the manufacturer, or (2) did the risks outweigh the benefits? (A41 at 2).

Similarly, as to the class's negligence, warranty, and fraud claims, the jury considered the industry's failure to address the health risks and addictiveness of its

[4] Liggett did concede that cigarette smoking was addictive for "some people" and could cause certain diseases (A38 at 37102-03). RJR and Philip Morris, selling the same story they had been selling since the 1950s, continued to argue that neither the addictive qualities of cigarette smoking nor the connection to disease had been sufficiently proven (A36 at 36845-46, A37 at 36886-91, A39 at 37319, 37332).

products, including Tobacco's manipulation of nicotine levels and its concealment of information pertaining to the dangers of smoking (A9 at 11988-90, A12 at 13475-77; A34 at 36451, 36472-80, 36484-85, A35 at 36717, 36729-32, A45).

In short, the class-wide findings go to the Defendants' underlying conduct, which does not change from case to case.

Development of the *Engle* Phase I Jury Verdict Form

At the conclusion of Phase I, the *Engle* jury was instructed that the case was a class action and that the jury's role was to determine "all common liability issues" relevant to the class (A41 at 37557-59). Specifically, its role was to "address[] the conduct of the tobacco industry." (A34 at 36357-58, A41 at 37557-59).

Contrary to the argument in the Defendants' brief, Tobacco never submitted a proper jury verdict form containing more detailed or specific questions concerning the strict liability, negligence, warranty, or other claims. At the end of the trial, the parties offered competing interrogatory forms for the jury's verdict. Tobacco's proffered form included numerous blank lines to be filled in by the jurors with narrative explanations for their verdict (A31, A32 at 35967-70). The judge rejected the form as improper. Despite conceding that it was "incumbent upon all of us" to provide additional "enumerated" statements for a more detailed verdict form (A32 at 35954), and despite repeated requests from the trial judge, Defendants failed to submit a feasible alternative verdict form (A32 at 35967-68).

The jury interrogatories ultimately utilized followed a defense-counsel suggestion of a "middle ground" (A32 at 35969), and consisted of 12 pages with more than 240 questions including subparts (A41).

There was no doubt that all parties understood that the findings would have class-wide impact (A41 at 37558). Indeed, that is exactly what Tobacco wanted. Tobacco repeatedly demanded that all jury findings have full preclusive effect. Thus, Tobacco proclaimed, "if the defendants win, we want as many people as possible bound" (A4 at 11), and if the jury answers "no . . . then not a single Florida smoker can recover" (A32 at 36007). Tobacco then acknowledged that the jury's verdict will enable "other class members, however many thousands or hundreds of thousands it may be . . . [to] recover" (A43 at 38878, 38896-97).

The *Engle* Verdict

Answering these 240 interrogatories, the *Engle* jury then reached the conclusions outlined above: Cigarettes were addictive and caused various diseases including COPD and lung cancer; Defendants were negligent and breached warranties, sold an unreasonably dangerous product; and individually and as part of a conspiracy, worked to hide the addictive nature and health risks of tobacco from their customers and potential customers (A42).

Utilizing these common findings concerning Tobacco's misconduct, the trial court then tried the damages claims of the named class representatives. The jury

awarded compensatory damages to the class representatives and then awarded punitive damages on behalf of the entire class (A44). The trial court entered judgment and Tobacco filed its appeal (A45).

The Third District reversed, finding the original class certification to be in error. *Liggett Group, Inc. v. Engle*, 853 So. 2d 434, 442 (Fla. 3d DCA 2003).

This Court's *Engle* Decision

This Court granted review and reversed, holding that "the trial court did not abuse its discretion in certifying the class." *Engle v. Liggett Group, Inc.*, 945 So. 2d 1246, 1266-67 (Fla. 2006).

The Court agreed, however, that the case could not proceed any further as a class action. According to the Court, "continued class action treatment for Phase III of the trial plan is not feasible because individual issues such as legal causation, comparative fault, and damages predominate." *Id.* at 1268. Instead, this Court held that individual class members could continue their cases by filing separate, individual actions within a year of the *Engle* mandate. *Id.* at 1277.

The Court then explained how these individual "*Engle* progeny" lawsuits would be tried; the findings reached by the *Engle* jury outlined above concerning Tobacco's misconduct would have a "*res judicata* effect" in subsequent, individual trials by class members:

> In this case, the Phase I trial has been completed. The pragmatic solution is to now decertify the class, retaining the jury's Phase I

> findings other than those on the fraud and intentional infliction of emotion distress claims, which involved highly individualized determinations, and the finding on entitlement to punitive damages questions, which was premature. *Class members can choose to initiate individual damages actions and the Phase I common core findings we approved above will have res judicata effect in those trials.*

Id. at 1269 (emphasis supplied).

Significantly, as discussed in more detail in our argument below, the Court rejected the arguments raised by Defendants in this case. The Court carefully considered each finding and approved only those findings that raised issues common to the class. The Court also addressed and rejected the same due process argument now raised by Defendants in their brief, *id.* at 1270-71, which had been articulated by Justice Wells in dissent. *Id.* at 1282-84 (Wells, J., dissenting).

On rehearing, Tobacco articulated again the specific arguments raised here -- that this Court's decision violated established Florida principles of *res judicata* and due process (A46). The Court gave these arguments careful attention and, on rehearing, modified its opinion to ensure that it had approved only those findings that were applicable to the entire class (A47). Tobacco's arguments were otherwise rejected and the United States Supreme Court denied certiorari.

The *Douglas* Lawsuit

Mr. and Mrs. Douglas timely filed this *Engle* progeny lawsuit against RJR, Philip Morris, and Liggett within a year of the *Engle* mandate (R127 20318-31). They alleged that Mrs. Douglas was a member of the *Engle* class because she was

addicted to cigarettes containing nicotine which caused her death from COPD and lung cancer (R127 20320, 20324-26). Mr. and Mrs. Douglas then claimed the benefit of the findings of Defendants' misconduct reached by the *Engle* jury.

In her complaint, Mrs. Douglas conceded that she bore some responsibility for her death because of her failure to successfully quit smoking (R127 20326). Defendants' answers denied that their misconduct played *any* role in Mrs. Douglas' death, despite the *Engle* findings and the evidence later presented at trial (R1 90-121, 122-55, R2 178-206).

Mrs. Douglas passed away during the course of the litigation. The lawsuit was amended to become a wrongful death claim, and Mr. Douglas was substituted as plaintiff (R1 74-85). He ultimately presented claims sounding in negligence, strict liability, concealment, warranty, and conspiracy to conceal (R1 74-85).[5]

Prior to trial, Defendants attacked the procedures established by this Court in *Engle* (R31 5656-5846). Defendants argued for a very narrow interpretation of "*res judicata* effect" that would essentially make the *Engle* findings meaningless and require every *Engle* progeny plaintiff to retry the misconduct of Tobacco in every *Engle* progeny case (R31 5656-5846). The trial court rejected Defendants' arguments, deferring to this Court's determination that Tobacco's misconduct would not have to be retried in thousands of *Engle* progeny cases (R95 17740).

[5] Other claims, including a claim for punitive damages were dropped.

The Trial Below

Defendants concede in this case that nicotine is addictive and that smoking cigarettes caused Mrs. Douglas' COPD, lung cancer, and eventual death (Br. 19 n.5, T. 961-62, 2254). Thus, the main questions for the jury on liability were:

First, whether Mrs. Douglas was a member of the *Engle* class and thus entitled to have the benefit of the *Engle* findings? In other words, was Mrs. Douglas addicted to cigarettes containing nicotine and was that addiction a legal cause of her death? (R65 12112). If so, she was entitled to the *res judicata* benefit of the negligence, defect, warranty, and concealment findings.

Second, what percentage of fault did the Defendants and Mrs. Douglas bear for her injuries? (R65 12114).

Third, what amount of damages was Mr. Douglas entitled to recover based on Mrs. Douglas' wrongful death? (R65 12114).

Addiction and Causation

There was overwhelming expert and lay evidence in this case that Mrs. Douglas, a life-long, heavy smoker, was addicted to cigarettes containing nicotine and Defendants no longer argue otherwise (T. 1050, 1052-53, 1441, 1495, 1501, 1511, 1527, 1572, 1731).[6]

[6] Mrs. Douglas smoked and was addicted to cigarettes manufactured by all three Defendants (T. 1558, 1567, 1571).

The addiction expert and her treating physician testified that this addiction caused her COPD, lung cancer, and untimely death (T. 1066, 1161-63, 1441). The jury heard evidence that addiction is what causes smokers like Mrs. Douglas to bathe their lungs in carcinogens by smoking cigarette after cigarette, day after day, year after year for decades. These multiple doses of carcinogens over significant periods of time, driven by her addiction, is what ultimately led to her illness and death (T. 1059-62, 1065-66, 1158-63). Defendants do not argue to the contrary.

Comparative Fault

Defendants argued Mrs. Douglas' death was not caused by her addiction, but rather by her decision to start and to continue smoking (T. 957, 966, 989, 997, 2250-2298). Because it is possible to quit, Defendants argued, Mrs. Douglas bore the sole responsibility for her failure to quit and her resulting illness (T. 1363).

The jury heard conflicting evidence on this point, and competent substantial evidence supported the verdict. Plaintiff presented evidence that Mrs. Douglas began smoking in an era when Defendants were still denying that cigarette smoking was addictive and before there were any formal warnings about the addictive nature of smoking and the connection between smoking and COPD and lung cancer (T. 952, 2219-20). Plaintiff's experts testified how powerful nicotine addiction can be and how difficult it is to quit smoking for some, regardless of their strength of will (T. 1182-83, 1270-77, 1316-17). Indeed, statistics show that

97% of those who quit smoking in a particular year relapse by the next year (T. 1151-52, 1319, 1403-04). Most smokers take multiple attempts to quit and some, like Mrs. Douglas, are not able to quit, no matter how many times they try. On average it takes three to five quit attempts, occurring over the course of many years, before a smoker is able to break their addiction -- though some never do (T. 1374, 1402).

Plaintiff's experts explained why the powerful nature of addiction and the physiological changes to the brain from long-term smoking make quitting extremely difficult for some, no matter how strong-willed and determined they are (T. 1157-58, 1182-83, 1270-77, 1282-84, 1316-17). As Plaintiff's addiction expert explained, "once you're an addict, your brain is really different, and you're vulnerable for relapse for the rest of your life. . . ." (T. 1276).

Mrs. Douglas, who was profoundly addicted to nicotine, was a perfect example. She smoked even after she was diagnosed with COPD and lung cancer; smoking until nearly the end of her life (T. 1501). She wanted desperately to quit and, from the late 1970s onward, made serious quit attempts every year or two (T. 1569-70). She tried about every technique available, from the nicotine patch (T. 1436-37), to nicotine gum (T. 1574, 1972), to drugs such as Zyban and Wellbutrin (T. 1440). She went to an anti-smoking clinic, the Schick center (T. 1529, 1531-32). She tried chewing hard candies and lifesavers (T. 1972). She tried cigarette

holders that gradually made it harder and harder to draw in the smoke (T. 1972). She tried chewing tobacco until she swallowed a plug of tobacco and became sick (T. 1569). She tried cold turkey and even tried hypnotism (T. 1564, 1972).

None of her quit attempts worked. Although she might have been successful for small periods of time, she always relapsed and continued her lifelong smoking habit until she was too ill to smoke any longer (T. 1501-02, 1727-29, 1887).

The Verdict

After an eight-day trial, the jury concluded that Mrs. Douglas' addiction caused her death, and thus that Mrs. Douglas was a member of the *Engle* class and entitled to rely on the *Engle* findings, including the findings of strict liability, warranty, and negligence (R65 12112). The jury also found that smoking RJR, Philip Morris, and Liggett brands were each a cause of her death (R65 12112-13). As to the concealment claim, the jury ruled against Plaintiff determining that Mrs. Douglas did not rely to her detriment on information concealed or omitted by the Defendants (R65 12113). The jury awarded $5 million in compensatory damages (R65 12114). As to comparative fault, it divided responsibility 5% to RJR, 18% to Philip Morris, 27% to Liggett, and 50% to Mrs. Douglas (R65 12114).

Based on the findings of comparative fault and an agreement of the parties, the trial court reduced the compensatory award by 50% and entered judgment for

Mr. Douglas in the amount of $2.5 million, divided $900,000 against Philip Morris, $250,000 against RJR, and $1,350,000 against Liggett (R65 12121-22).

Post-Trial Proceedings and Appeal

Defendants filed post-trial motions attacking *Engle* and virtually every ruling of the trial court below (R65 12190-248, 12249-50, R66 12251-633, R68-73 12634-13734). Most relevant here, Defendants reiterated their arguments that the *Engle* procedures violated due process, and that it was error to instruct the jury to give the *Engle* findings "*res judicata* effect" (R65 12190-248, 12249-50, R66 12251-12633, R68-73 12634-13734). The court denied all post trial motions, and Defendants filed their timely appeal (R108 19951-52, 19953-54, 19955-56).[7]

The Second District affirmed. Joining the First, Third, and Fourth Districts, the Court held that the trial court had properly applied *Engle* and that giving *res judicata* effect to the *Engle* findings did not violate due process.[8] The Court, however, certified the due process question to this Court.

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[7] Defendants raised only one trial-specific claim on appeal -- the trial court's determination to give the standard concurring cause jury instruction (IB at 47-50). Defendants have not raised that issue in this Court.

[8] Arguably the Fifth District can be included in that list having held that the conspiracy finding of the *Engle* jury would be binding in subsequent *Engle* progeny litigation. *Blake v. Lorillard Tobacco Co.*, 81 So. 3d 637 (Fla. 5th DCA 2012).

SUMMARY OF THE ARGUMENT

Having the benefit of the entire record, this Court held that the *Engle* findings were supported by the record, applicable to the entire class, and were binding in the subsequent litigation among the parties. Defendants' brief is an attack on *Engle* itself. Defendants argue that the findings are meaningless, because no one knows exactly what the first jury determined. As we demonstrate in Point I of this brief, Defendants' argument mixes collateral estoppel with *res judicata* and mischaracterizes the nature of the findings, as every Florida court to consider the application of *Engle* has decided. The jury fully considered the strict liability, negligence, warranty, and other claims, and reached a judgment that was affirmed on appeal. *Res judicata* bars relitigation of those claims, without any further reference to the evidence and arguments that were raised (or never raised, for that matter). Those issues regarding the misconduct of the Defendants have been forever settled for *Engle* class members, as every Florida court to consider the issue has held.

Attacking the application of *Engle* to this case, Defendants argue that Plaintiff did not prove causation. To the contrary, as we demonstrate in Point II, the entire trial below centered on causation. Defendants argued that Mrs. Douglas bore sole responsibility for her illness and death because of her choice to smoke. Plaintiff argued that it was her addiction at the hands of Defendants that caused her

injuries. The jury considered these arguments, and, properly instructed using Florida standard jury instructions, found that Mrs. Douglas and Defendants shared responsibility for her death. Defendants had their opportunity to convince the jury otherwise and failed. Because Defendants do not challenge the sufficiency of Plaintiff's evidence on this point, the jury's verdict must be affirmed.

We close, in Point III, with a discussion of Defendants' due process arguments, which, like their attacks on *Engle*, ignore the distinction between *res judicata* and collateral estoppel. As we demonstrate, no case has ever held that the long-settled preclusion principles applied by this Court violate due process. Defendants had a full and fair opportunity to defend the defect, negligence, and warranty claims. Indeed, Defendants have had more due process than any defendant in history. No constitutional principle requires that Defendants be given thousands more bites at the apple.

STANDARDS OF REVIEW

The trial court's interpretation of *Engle,* discussed in Point I and whether *Engle* comports with due process, discussed in Point III, are questions of law reviewed *de novo*. The judge's decision regarding the charge to the jury discussed in Point II "has historically had the presumption of correctness of appeal." *Kearse v. State,* 662 So. 2d 677, 682 (Fla. 1995).

ARGUMENT

The *Engle* jury, after one of the most time-consuming trials in Florida history, found that Defendants' addictive and deadly products were defective and unreasonably dangerous. The same jury found that Defendants were negligent and breached their warranties in selling these products and concealed the health risks and addictive nature of cigarettes from the public. The result of these wrongs was that millions of young people, like Mrs. Douglas, became addicted to cigarettes, long before the era of explicit warning labels and antismoking education.

This Court then reviewed the findings of the *Engle* jury, and the evidence upon which they were based, and determined that they were applicable to every *Engle* class member. The misconduct of Defendants was settled and the jury's findings were made binding upon Defendants and the class.

Defendants now attack *Engle* itself. Arguing that the year-long *Engle* trial was meaningless, Defendants suggest that every *Engle* progeny plaintiff must prove anew the misconduct established by the Phase I jury. After 18 years of litigation, every *Engle* progeny plaintiff must start over, as if *Engle* never happened. As we demonstrate, no legal principle supports such an unfair result.

I. This Court Correctly Applied *Res Judicata* to the Phase I Findings.

The first section of Defendants' brief is an attack on *Engle* itself. Defendants argue that this Court must have meant collateral estoppel when it gave "*res*

judicata effect" to the *Engle* findings. Defendants then mischaracterize the results of *Engle* Phase I, arguing the Phase I findings on strict liability, negligence, warranty, and fraud are too general to be applied in any subsequent action. Defendants are wrong on both points, as every Florida trial and appellate court to consider the issue has ruled.

Defendants Confuse *Res Judicata* and Collateral Estoppel.

This Court determined that the Phase I jury verdict would have "*res judicata* effect" in subsequent *Engle* progeny trials. *Engle*, 945 So. 2d at 1269, 1277.[9] There is nothing complicated or ambiguous about this holding. *Res judicata* effect means that all claims relating to Tobacco's misconduct are fully settled among the parties, as this Court explained elsewhere in its *Engle* opinion. 945 So. 2d at 1259. Thus, all issues and arguments relevant to these misconduct claims, including all issues that were litigated or *could have been litigated* are forever settled. *See id.*; *Ferrell v. State*, 918 So. 2d 163, 178 (Fla. 2005); *Stogniew v. McQueen*, 656 So. 2d 917, 919 (Fla. 1995); *Smith v. State*, 445 So. 2d 323, 325 (Fla. 1982).

Res judicata (also called claim preclusion) is premised on finality.[10] Once two parties have had the opportunity to litigate a claim, they are forever bound by

[9] Defendants concede that the preclusive effect of *Engle* Phase I is a matter of state law (Br. at 18).

[10] *E.g., Baxas Howell Mobley, Inc. v. BP Oil Co*., 630 So. 2d 207 (Fla. 3d DCA 1993) (*res judicata* often referred to as claim preclusion); *Hart v. Yamaha-Parts Distributors, Inc*., 787 F.2d 1468, 1470 (11th Cir. 1986) (*res judicata* is "a doctrine of claim preclusion").

the result. *Engle*, 945 So. 2d at 1259. It does not matter that they may now wish to litigate the claim differently or raise arguments that they did not raise the first time around. The matter is concluded and cannot be relitigated in subsequent proceedings. *Id.* (*res judicata* means that a judgment is "absolute"); *Florida Dept. of Transp. v. Juliano*, 801 So. 2d 101, 105 (Fla. 2001) ("res judicata provides finality to judgments, predictability to litigants, and stability to judicial decisions").

Res judicata applies whenever the two cases raise the same claim. *Stogniew*, 656 So. 2d at 919. The focus is not on the evidence presented or the arguments articulated, but on the claim itself. *See Leahy v. Batmasian*, 960 So. 2d 14, 17 (Fla. 4th DCA 2007) (describing when two claims are the same). Once a party has been found negligent, for example, the nature of that negligence or the evidence supporting the claim no longer matters. What matters is that the parties have had their full and fair opportunity to present whatever arguments they wished on the matter of negligence, which is now forever settled between the parties.[11]

As *Engle* recognizes, that is exactly what happened in this case. The parties went into Phase I knowing that it was their opportunity to present their class-wide

[11] *See The Florida Bar re Collier*, 526 So. 2d 916, 917 (Fla. 1988) (*res judicata* applied where the party had every opportunity to present evidence and testimony on the claim); *Caldwell, for Use & Benefit of Hawkins v. Massachusetts Bonding & Ins. Co.*, 29 So. 2d 694, 695 (Fla. 1947) (a party that has had the opportunity to litigate a claim should not be permitted "to litigate it again to the harassment and vexation of his opponent."); *Hay v. Salisbury*, 109 So. 617, 620 (Fla. 1926) ("The foundation principle upon which the doctrine of res judicata rests is that parties ought not to be permitted to litigate the same issue more than once").

evidence and arguments on the strict liability, negligence, warranty, and other claims. The point of Phase I was to settle these conduct claims conclusively as to Tobacco and the members of the class. Certainly, Tobacco thought so. It stressed several times (when it thought that it was going to win) that it wanted to be sure that all Florida class members would be bound: "if the defendants win," they emphasized, "we want as many people as possible bound." (A4 at 11). *Res judicata*, however, is not a one way street.

Defendants' application of collateral estoppel (also called issue preclusion or estoppel by judgment) to this case is inapt.[12] Collateral estoppel applies when two parties litigate *different* claims or causes of action that happen to have some factual or issue overlap.[13] *E.g., Stogniew*, 656 So. 2d at 919 (collateral estoppel applies to different causes of action); *Topps v. State*, 865 So. 2d 1253, 1255 (Fla. 2004) (same); *Gordon v. Gordon*, 59 So. 2d 40, 44 (Fla. 1952) (same). If a particular issue relevant to one claim also has relevance to an entirely separate claim, the parties are bound by the earlier resolution of the issue they litigated in the first case. *Stogniew*, 656 So. 2d at 919. Because collateral estoppel focuses on issues,

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[12] Collateral estoppel is also referred to as estoppel by judgment, *Stogniew*, 656 So. 2d at 919, or issue preclusion. *City of Oldsmar v. State*, 790 So. 2d 1042, 1046 n.4 (Fla. 2001).

[13] Although complete identity of parties is still required in Florida, *Mobil Oil Corporation v. Shevin*, 354 So. 2d 372, 374 (Fla. 1977), in federal court collateral estoppel may also apply to the same issue even when one of the parties in the subsequent case on a different claim was not involved in the original litigation. *E.g., E.E.O.C. v. Pemco Aeroplex, Inc.*, 383 F. 3d 1280, 1285 (11th Cir. 2004).

not claims, the party seeking to apply estoppel to a different claim must focus on the issues that were actually litigated and demonstrate that the parties have already litigated that particular issue to conclusion. *Id.*

Defendants ignore this critical distinction between claim preclusion and issue preclusion. In this case, the parties fully litigated their strict liability, negligence, warranty, and other *claims*. The jury was not asked to resolve particular evidentiary issues or disputes, it was asked to resolve particular class-wide claims or causes of action. The specific evidentiary and legal arguments the parties chose to litigate (or failed to litigate) along the way to the resolution of those claims is now irrelevant in connection with an attempted relitigation of the same claim. The strict liability, negligence, warranty, and other conduct claims resolved by the *Engle* jury have been forever settled. *See R.J. Reynolds Tobacco Co. v. Martin*, 53 So. 3d 1060, 1067 (Fla. 1st DCA 2010) (*Engle* jury decided the "conduct" elements of the claims asserted by the class and not simply "a collection of facts relevant to those claims").

At bottom, the case is no different than if plaintiffs had sued one cigarette manufacturer for strict liability and won. There is no doubt that the losing defendant could not attempt to overturn the result of the first lawsuit in another forum. As to the parties in the first case, the issue of strict liability is forever settled, regardless if Defendants wish they had litigated the case differently or

claim to have additional defenses that would have enabled them to prevail. One claim, one opportunity to litigate, it is as simple as that.

Defendants make much of the fact that the *Engle* jury did not resolve the individual causation and damages elements of the strict liability, negligence, and warranty claims. Defendants have not explained why the existence of these remaining individual issues should convert what would normally be *res judicata* into collateral estoppel. There can be no dispute that the conduct elements of the strict liability, negligence, warranty, and other claims were fully litigated in *Engle,* perhaps as fully litigated as any case in Florida history. There is also no doubt that Defendants are seeking to relitigate those same misconduct claims here. The cases could not be clearer. Later litigation on the same claim invokes *res judicata*. Collateral estoppel only applies if the second case is based on a different claim.[14] *E.g.*, *Topps*, 865 So. 2d at 1255; *Gordon*, 59 So. 2d at 44-45.

Equally significant, the work of the later *Engle* progeny juries on causation or damages could have no impact on the previous misconduct findings. The point is, as this Court recognized in giving the *Engle* Phase I findings *res judicata* effect, these class-wide conduct claims were fully litigated and decided and need not be

[14] Defendants also argue that the court in the second case determines the preclusive effect of the first judgment (Br. 20). This is true as to trial courts, but this Court, as the ultimate decider of Florida law, had the power to determine how the *Engle* findings would be used in the subsequent litigation among the parties. Defendants cite nothing to the contrary.

litigated again. No other result makes sense (or is fair to the plaintiffs) under the unique circumstances of this case

Defendants also argue that *res judicata* cannot apply to just the conduct portion of the Plaintiffs' tort claims (Br. at 18-19). Yet, Defendants have offered no reason why *res judicata* should not apply to the conduct findings here, when the conduct claim has been fully litigated, subject to a jury verdict, and received the full panoply of appellate rights including review by this Court and the United States Supreme Court. As we have demonstrated, the proper focus is whether the parties are litigating the same or different claims. If Defendants attempt to relitigate the same claim, *res judicata* applies. As the First District recognized in rejecting Defendants' argument, the parties litigated the conduct elements of the claim, not individual facts.[15] *Martin*, 53 So. 3d at 1067.

In short, this Court meant what it said when it gave the *Engle* Phase I findings "*res judicata* effect."

The *Engle* Phase I Findings Are Not Vague or Uncertain.

Defendants argue that the Phase I findings are too vague and uncertain to be given any preclusive effect. According to Defendants, the jury may have narrowly decided that only one particular brand was defective and perhaps, Defendants

[15] At the end of the day, as *Martin* recognized, this fuss over *res judicata* versus collateral estoppel is academic. *Martin*, 53 So. 3d at 1067. The bigger point is, this Court intended the conduct claims, however characterized, to be forever settled among the Defendants and the class. *Engle*, 945 So. 2d at 1267.

speculate, Mrs. Douglas never smoked that defective brand. This argument is too late, has been waived, and ignores the way this case was litigated.

First, the argument is too late. Defendants knew that Phase I was going to lead to findings applicable to every member of the class. Indeed, that is exactly what they wanted. If they thought that the Phase I findings were inadequate for that purpose, they should have proposed instructions in *Engle* Phase I that would have protected that interest. For whatever strategic reason, Defendants chose not to offer such a form. *Res judicata* means, however, that this argument should have been raised in *Engle* Phase I, not now. Any argument over the adequacy of the *Engle* Phase I jury instructions is now settled. *Engle*, 945 So. 2d at 1259 (*res judicata* applies to any issue that could have been raised).

Defendants never submitted a more detailed proposal in any proper form. The closest they came was their form asking for fill-in-the-blank and narrative answers, which the judge quite properly rejected (A31). Defendants failed to offer another more detailed form, despite requests from the trial judge. The Defendants' failure to offer a proper verdict form has waived their argument that the verdict form should have been more detailed. To preserve an argument for a jury instruction or verdict form, a party must propose a version which itself is accurate and not objectionable. *See* 1.1470, Fla. R. Civ. P.; *Whitman v. Castlewood Int'l*, 383 So. 2d 618, 619-20 (Fla. 1980) (to properly object to a general verdict form,

party must submit a proper special verdict form).

In short, if Defendants wished to avoid a class-wide finding, they should have submitted a proper verdict form with the questions they believed were necessary to protect their interests in the subsequent phases of the trial. *See Florida E. Coast Ry. Co. v. Gonsiorowski*, 418 So. 2d 382, 834 (Fla. 4th DCA 1982) (to preserve the issue, defendant was required to present a special verdict form). And if the Defendants felt that the rejection of their narrative jury verdict form was erroneous, the time for that challenge was in the original *Engle* appeal. Any issues relating to the adequacy of the Phase I verdict form are now settled.

Of course, the reason that Defendants did not ask for a more detailed verdict form was that they had no interest in litigating the "micro" defects discussed in their brief (Br. at 24-26). Nor did they have any interest in distinguishing among their brands. Defendants chose to go "all or nothing," arguing to the jury that *none* of their cigarettes were defective. Having placed that bet and lost, it is too late to complain that only some of their brands were defective.[16]

[16] For example, Defendants emphasize that Tobacco presented evidence to the jury about their attempts to reduce tar (Br. at 25-26). But Defendants never argued to the jury that it should bring back a verdict that only their higher tar cigarettes were defective. Instead, Tobacco argued just a few pages later that none of its cigarettes were defective because the industry was doing the best it could to make cigarettes safer, as demonstrated by its experimentation with the sale of lower tar brands. Defendants App. P at 37053. Even in this context, Defendants would not admit that there was any proof that tar levels made a difference, trotting out the usual story that the epidemiological evidence was just too "uncertain." *Id*. at 37060-61.

Likewise, the Plaintiffs did not ask the jury to render a verdict based on an individualized defect that applied to only a single brand of cigarette.[17] Indeed, virtually none of Defendants' citations concerning the various "micro" defects come from Plaintiffs' argument to the jury. Plaintiffs argued for class-wide findings that all of the class members were sold defective cigarettes. The problem was not the shape or size of filter holes or any of the other "micro" defects listed in Defendants' brief. The problem was that Defendants manipulated their cigarettes to be highly addictive even though they contained toxins that caused injury and death with repeated exposure and then marketed them while actively disputing the addictive nature and health risks of smoking.[18] In light of these facts, the jury determined that Defendants' nicotine-containing cigarettes were defective under Florida law. Similarly, the jury determined that the sale of such cigarettes under such circumstances also satisfied the elements of Plaintiffs' negligence and

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[17] Defendants argue that class counsel "acknowledged" that not every issue would apply to every class member (Br. 33). This discussion had nothing to do with the verdict form or to the class-wide arguments ultimately made to the jury. The comment came during a relevancy objection to certain youth marketing evidence.

[18] As Defendants concede (Br. 33-34), the *Engle* class has never argued that their claim is based on "mere[ly] continuing to manufacture cigarettes." *Liggett Group, Inc. v. Davis*, 973 So. 2d 467, 472 (Fla. 4th DCA 2007). The defects proven were not based upon marketing cigarettes *per se* but rather on developing and marketing unreasonably dangerous cigarettes while concealing their dangerous qualities, thereby frustrating consumers' reasonable expectations, and violating the consumer expectation test. In any event, the time for litigating Defendants' preemption argument was in *Engle,* not now. *Res judicata* applies to every issue that was litigated or could have been litigated, preemption included.

warranty claims, which were similarly based on Defendants' actions in selling their defective and dangerous product (A45). These claims, having been fully litigated through the United States Supreme Court, are forever settled among the parties.

Defendants' Attack on *Engle* has Already been Raised and Rejected.

Defendants' attempt to narrow the preclusive effect of *Engle* Phase I has been rejected by every court to consider it, with one now irrelevant exception discussed below. First, it was rejected in *Engle* itself where this Court rejected the Third District's conclusion that the class should not have been certified. *Engle*, 945 So. 2d at 1266-67. It could not have done so without deciding that Tobacco's wrongdoing (such as the negligence and strict liability claims at issue here) applied to all members of the class. *Id.* at 1255 (approving the findings "in favor of the *Engle* Class"). These findings did not need to be relitigated, because they applied to *every* member of the class (precisely as the *Engle* jury was instructed).

Moreover, in reaching this conclusion, this Court very carefully distinguished between those findings that it thought proper to apply to the class and those presenting individual issues that needed to be relitigated in subsequent trials. The Court did not approve, for example, the *Engle* findings of fraud by misrepresentation and intentional infliction of emotional distress. These findings were "inadequate to allow a subsequent jury to consider individual questions of reliance and legal cause." *Id*. In other words, this Court rejected those findings

that were not of practical use to the subsequent *Engle* progeny juries, because they could not be applied to the class. It follows that the Court determined that the strict liability, negligence, concealment, and conspiracy claims were sufficiently established for class-wide application and did not need to be relitigated.

Equally important, Defendants' complaint that the findings should have no class-wide impact, overlooks that this Court had the benefit of the complete *Engle* Phase I record when it determined that the findings would have *res judicata* effect in the progeny cases. Based on its review of the record, this Court determined that the wrongdoing of the tobacco companies was settled on a class-wide basis and need not be revisited in subsequent *Engle* progeny cases.

Responding to this Court's decision, Defendants then unsuccessfully raised on rehearing in *Engle* the same preclusion arguments they raise here. Defendants asked this Court to retreat from its holding in *Engle* based on the same meritless concerns they raise again in this case. Defendants then sought review in the United States Supreme Court, which denied certiorari.

Defendants continued to press their arguments in the *Engle* progeny litigation. In response, Florida trial and appellate courts have been unanimous in their interpretation of *Engle* -- Defendants' misconduct has been established and need not be litigated again in thousands of subsequent *Engle* trials. *See Martin*, 53 So. 3d at 1066 ("RJR urges an application of the supreme court's decision that

would essentially nullify it. We decline the invitation."); *Philip Morris v. Douglas*, 83 So. 3d 1002, 1010 (Fla. 2d DCA 2012) (requiring *Engle* progeny plaintiffs to relitigate issues related to the tobacco company's conduct would undercut the intent of the *Engle* decision); *R.J. Reynolds Tobacco Co. v. Jimmie Lee Brown*, 70 So. 3d 707, 715 (Fla. 4th DCA 2011) (acknowledging the preclusive effect of the *Engle* I findings); *Frazier v. Philip Morris USA Inc*., -- So. 3d --, 2012 WL 1192076 (Fla. 3d DCA April 11, 2012) (same).[19] The first of these cases, *Martin*, was the subject of unsuccessful attempts at discretionary review, both in this Court and in the United States Supreme Court. Defendants' argument should be rejected yet again.

The only departure from this unanimous authority is the Eleventh Circuit's early decision in *Bernice Brown v. R.J. Reynolds Tobacco Co*., 611 F.3d 1324 (11th Cir. 2010), a decision which came before any Florida court had weighed in on the issue of the preclusive nature of the *Engle* findings. As the Eleventh Circuit itself has recognized (and Defendants concede), Florida courts, not the federal

[19] The Third District reached a similar conclusion on analogous facts in *Philip Morris Inc. v. French*, 897 So. 2d 480 (Fla. 3d DCA 2005). *French* concerned the interpretation of the settlement arising out of a class action brought by 60,000 non-smoking flight attendants who had been exposed to second-hand smoke. *Broin v. Philip Morris Inc*., 641 So. 2d 888 (Fla. 3d DCA 1994). The parties settled certain class-wide issues reserving individual causation for subsequent trials. As in this case, Philip Morris and RJR argued for a narrow interpretation of the settlement filings that would have required each plaintiff to prove all of the elements of their claim in each subsequent trial. The court rejected the argument as seeking an "absurd result." *French*, 897 So. 2d at 489. As in *French*, the only way the *Engle* case has any practical meaning is to interpret *Engle* as settling the issue of Tobacco's misconduct as to every member of the *Engle* class.

courts, have the last word on the correct interpretation of *Engle*. *See McMahon v. Toto*, 311 F.3d 1077, 1079 (11th Cir. 2002) ("[W]hen we write to a state law issue, we write in faint and disappearing ink").

Moreover, Defendants overstate the holding in *Bernice Brown*. *Brown* specifically refused to reach the practical question of how the *Engle* findings would actually apply in the progeny litigation, leaving that question for later, and declined to declare *Engle* a violation of due process. *Bernice Brown*, 611 F.3d at 1335-36. Moreover, the Eleventh Circuit specifically rejected the Defendants' arguments that the Phase I findings were meaningless. *Id*. at 1336.

Where the court differed with the later Florida decisions was its suggestion that *Engle* progeny plaintiffs needed to point to a specific location in the *Engle* Phase I record where a particular issue was litigated. Like the Defendants, however, the court overlooked that this Court had the benefit of the entire Phase I record when it determined that the Phase I findings applied class-wide and were entitled to "*res judicata* effect." Thus, the state court decisions have given *res judicata*, not collateral estoppel, effect, as this Court intended. *See supra*, at 23-27; *Martin*, 53 So. 3d at 1069 ("we do not agree that every *Engle* plaintiff must trot out the class action trial transcript to prove applicability of the Phase I findings.")

Once those findings are given *res judicata* effect, there is no need to go into the record to determine what facts the *Engle* jury decided. *Bernice Brown*

overlooks that *res judicata* is not dependent upon the issues that were litigated or the facts that were presented. Defendants litigated the strict liability and other claims and lost. This settles all issues relevant to those claims. *See supra* at 23-27.

The *Bernice Brown* ink having disappeared in light of the Florida decisions, the federal district court judge directing the *Engle* progeny litigation has now given *res judicata* (not collateral estoppel) effect to the *Engle* jury's findings, adhering to the rulings of the state court decisions on point. *Waggoner v. R.J. Reynolds Tobacco Co.*, -- F. Supp. 2d --, 2011 WL 6371882 at * 14 (M.D. Fla. 2011). Based on *Waggoner*, several federal trials have now been conducted in which the Phase I findings have been given the same *res judicata* effect they have been given in state cases. Defendants have largely prevailed in each of these federal trials, further demonstrating that this litigation is fair, and not a denial of due process.

These courts are surely correct. Defendants had a full and fair opportunity to defend the defect, negligence, warranty, and other claims resolved by Phase I, which were specifically litigated on a class-wide basis. This Court should reject Defendants' attempt to relitigate these cases again in thousands of progeny trials.

II. The Jury was Properly Instructed on Causation.

Defendants argue that Plaintiff was relieved of his obligation to prove causation. To the contrary, the jury was thrice-asked to determine whether Defendants had caused Mrs. Douglas' injury and death, and the jury three times

answered this question in the affirmative.

Indeed, virtually the entire trial was focused on causation. Plaintiff argued that Mrs. Douglas was addicted to Defendants' cigarettes and that this addiction drove her to a lifetime of smoking and thus, her eventual debilitation from COPD and death from lung cancer. Defendants countered that Mrs. Douglas bore sole responsibility for her illness and death. According to Defendants, it was Mrs. Douglas' choice to smoke, not her addiction, that caused her disease and death. After hearing eight days of testimony, which overwhelmingly proved that Mrs. Douglas' addiction played a primary role in her eventual death, the jury answered the three causation questions in Plaintiff's favor.

The jury verdict form began by asking whether Mrs. Douglas was a member of the class (R65 12112). The jury was properly instructed that Mrs. Douglas was a class member if she suffered from a disease or medical condition legally caused by an addiction to smoking cigarettes (T. 2186). The jury answered "yes" based on the overwhelming evidence presented about her addiction and the role addiction played in her death (R65 12112).

Second, the jury was asked whether each of the Defendants' products had caused her injury and death (R65 12113). This question was designed to address RJR's argument that Mrs. Douglas smoked too little of its brands for RJR's brands to be a legal cause of her addiction. Once again, the jury answered "yes" as to all

three Defendants, based on substantial expert testimony that every cigarette plays a proportionate role in a smoker's addiction and disease.

Third, the jury considered how much responsibility Mrs. Douglas bore and how much responsibility should be borne by the Defendants (R65 12114). Once again, Defendants argued that they bore no fault and that one hundred percent of the blame for her injury and death had to be placed on Mrs. Douglas' decision to smoke, not their own actions.[20] The jury rejected Defendants' arguments, and, based on competent substantial evidence, decided that Mrs. Douglas bore 50% of the responsibility and the Defendants bore 50% divided among them.

As this Court recognized in *Engle,* consideration of the parties' comparative fault satisfied the causation requirement. *See Engle*, 945 So. 2d at 1270-71 (equating causation with comparative fault). Thus, no further causation question was required. Because Defendants' great wrong centered on the development and marketing of an easily inhalable and highly addictive product that kills upon repeated usage, proof that Mrs. Douglas was addicted (just as Defendants intended) and that her addiction was a legal cause of her disease, satisfied any causation element of her claims. *Martin*, 53 So. 3d at 1069.

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[20] As several *Engle* progeny juries have done, the jury might have determined that Mrs. Douglas was 100% responsible for her injuries. In light of the evidence of her powerful addiction and the Defendants' responsibility for that addiction, the jury's conclusion that Defendants shared some responsibility is not surprising.

The point is, Defendants had a full and fair opportunity to defend every element of Plaintiff's claims. In the original year-long Phase I trial, they had the opportunity to prove that they did not sell a dangerous and defective product, that they were not negligent, and had not breached a warranty. They failed and that verdict was affirmed by this Court. In this case, Defendants had every opportunity to prove that Mrs. Douglas was not addicted to their dangerous products or that her choice, rather than Defendants' defective products, caused her death. After eight days focused on this issue, they lost again and do not dispute that this verdict was supported by competent substantial evidence. Plaintiff has proven his case.

Attacking the particular causation instructions here, Defendants overstate the minor differences in how *Engle* juries have been instructed on causation (Br. 1-2, 38-39). None of the approaches adopted by the trial courts, however, have been reversed as an abuse of discretion. Moreover, the core instructions are similar in each case. *See Douglas*, 83 So. 3d at 1007-10. In every case, the jury is asked whether a plaintiff's injuries were caused by addiction to cigarette smoking. A defendant can win on that question by proving that the plaintiff was not addicted or that the medical condition was not caused by smoking or that plaintiff did not smoke its products.[21] Then, in every case, the jury is asked in the comparative

[21] The only exception as to proof of particular brand usage concerns the conspiracy count. As two district courts have agreed, any of the defendants can be sued for their participation in the conspiracy, even if plaintiff did not smoke their

fault question whether those injuries were caused by the plaintiff's choices or the defendants' defective products or a combination of the two. Defendants can win that issue by proving that the fault was entirely the plaintiff's choice to smoke, not the dangerous nature of the product or their actions in marketing that product. As discussed above, these questions are enough to demonstrate causation, as *Martin* has confirmed, *Martin*, 53 So. 3d at 1069, and as *Douglas* confirmed, at least as to the strict liability claim. *Douglas*, 83 So. 3d at 1010.

The Fourth District in *Jimmie Lee Brown*, however, suggested that yet another causation question was required. In addition to asking the jury whether the addiction caused the injury and to determine comparative fault, *Jimmie Lee Brown* approves instructions that also asked whether the defect caused the injury and whether the negligence caused the injury. *Jimmie Lee Brown*, 70 So. 3d at 717-18.

Defendants are wrong when they argue that these extra questions are essential (Br. 38-39). First, these questions are redundant. There is no need to ask a third causation question (actually a *fourth* causation question in this case), once it has been established that a plaintiff's addiction caused the injury and that the Defendants shared the blame for that addiction. Second, these additional questions give Defendants the opportunity to ask the second jury to revisit the strict liability and negligence findings of the first jury. To ask whether the defect caused the

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brands. *See Brackett v. Lorillard Tobacco Co.*, 81 So. 3d 636, 637 (Fla. 5th DCA 2012); *Rey v. Philip Morris, Inc.*, 75 So. 3d 378, 381-83 (Fla. 3d DCA 2011).

injury is to invite the jury to speculate about the nature of the defect and to second guess the first jury's findings in that regard. Such an instruction would open the door to reltigating the *Engle* Phase I verdict in front of the second jury.[22]

In fact, the Fourth District has retreated from requiring this additional causation question in *Philip Morris USA, Inc. v. Hess*, -- So. 3d --, 2012 WL 1520844 (Fla. 4th DCA May 2, 2012). According to *Hess*, once it was shown that (1) the plaintiff was addicted and that the plaintiff's disease was caused by smoking the Defendants' brands, and (2) the jury resolved the comparative fault question, no further causation question was required. *Id*. According to the Fourth District, these findings "coupled with the accepted *Engle* findings concerning [defendant's] conduct obviated the need to provide strict liability and negligence causation instructions . . . ." *Id*. This is precisely the holding of *Martin*, 53 So. 3d at 1069, and *Douglas*, as to the strict liability issue. 83 So. 3d at 1010. *Hess*, *Martin*, and *Douglas* are consistent, and correct, on this point.

Simply put, *Hess* resolves any conflict between the *Martin* and the *Jimmie Lee Brown* approaches on causation. In both *Martin* and *Hess*, the jury was asked

[22] This relitigation, of course, is just what the Defendants want. As soon as a court rules that the jury must be asked whether the defect or negligence caused the injury, the Defendants then proclaim that it is impossible to answer those questions without knowing what the defect or negligence was. There is no need to answer these questions, because a plaintiff does not get the benefit of the class-wide findings unless he or she proves that she was addicted to Defendants' cigarettes and that the addiction caused his or her injury. Every plaintiff that proves addiction and causation has proven that he or she was injured by Defendants' misconduct.

to determine comparative fault and to determine whether plaintiff's addiction was "a legal cause of death." *Martin*, 53 So. 3d at 1069; *Hess*, 2012 WL 1520844 (May 2, 2012). Those questions, coupled with either a finding or a stipulation that smoking Defendants' brands caused the disease, established causation in each case, without the need for the addition questions asked of the *Jimmie Lee Brown* jury. *Id*.; *Martin*, 53 So. 3d at 1069.

Nor is there any basis to distinguish between the strict liability and negligence instructions as the *Douglas* Court did below. The Second District correctly held that the finding that the cigarettes were "defective and unreasonably dangerous" coupled with the finding that Mrs. Douglas' addiction was caused by the Defendants' defective products was enough to prove Plaintiff's strict liability case. *Douglas*, 83 So. 3d at 1010. The same is true of the negligence claim which was based on the same underlying misconduct -- the sale of a dangerous and defective product, while disclaiming both the addictive nature and health risks of that product.[23] Once the original *Engle* jury found that it was negligence (and a breach of warranty) to sell their defective and unreasonably dangerous products, proof of Plaintiff's addiction to that product coupled with the jury's determination that Defendants shared responsibility for that addiction was enough to support liability.

[23] Although based on the same misconduct, strict liability focuses on the defect itself, while negligence and warranty focus on the Defendants' conduct.

Plaintiff proved causation three times. The verdict should be affirmed.

III. *Engle* Does Not Violate Due Process.

Signaling the weakness of their "core" argument, Defendants do not address the certified question until the last few pages of their brief. Defendants' lack of confidence on the due process issue was justified. Every *Engle* progeny trial or appellate court to be presented the issue has rejected it, including the court below,[24] the First, Third, and Fourth Districts,[25] this Court in *Engle*,[26] and even the Eleventh Circuit Court of Appeals in *Bernice Brown* case, Defendants' signature case.[27] Moreover, this precedent recently was punctuated by a lengthy and scholarly opinion rejecting Defendants' due process arguments, authored by the federal district court judge assigned to direct the federal *Engle* litigation. *Waggoner v. R. J. Reynolds Tobacco Co*., -- F. Supp. 2d --, 2011 WL 6371882 (M.D. Fla. 2011).

This unanimity is not surprising. No defendants in the history of Florida litigation have ever had more due process. The cornerstone of due process, of course, is a full and fair opportunity to be heard. *U.S. v. Gentile,* 332 Fed. Appx. 699 (11th Cir. 2009), *citing Mullane v. Cent. Hanover Bank & Trust Co.,* 339 U.S. 306, 131-14, 70 S. Ct. 652, 657 (1950). The Defendants certainly have been heard.

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[24] *Douglas*, 83 So. 3d at 1011.

[25] *Martin,* 53 So. 3d at 1068-69 (affirming in the face of Defendants' due process argument; *Jimmie Lee Brown*, 70 So. 3d at 717-18 (same); *Frazier*, 2012 WL 1192076 at *9 (rejecting Defendants' arguments on cross appeal).

[26] *See supra* at 32-34.

[27] *Bernice Brown*, 611 F.3d at 1334.

The original *Engle* Phase I record on the misconduct claims consisted of 57,000 pages of testimony, 150 witnesses, and thousands of exhibits and the case took a year to try (A45 at 2). Defendants appealed all the way to the Florida Supreme Court and unsuccessfully sought review on their due process questions in the United States Supreme Court and lost. The trial below on the causation and damages issues took 8 days (much less than the average *Engle* progeny case) and generated a 25,000 page record. Defendants lost again. In *Martin*, the Defendants pressed their due process claims all the way to the United States Supreme Court and lost. *R.J. Reynolds Tobacco Co. v. Martin*, 53 So. 3d 1060 (Fla. 1st DCA 2010), *rev. denied*, 67 So. 3d 1050, *cert. denied*, 132 S. Ct. 1794 (2012).

Indeed, after 18 years of litigation, Defendants have paid judgments in exactly four cases out of the thousands of *Engle* progeny cases tried and waiting to be tried. Four! This despite countless trial and appellate court rulings confirming the enormity of the Defendants' wrongs and the correctness of Plaintiffs' positions. No set of cases has ever been fought so completely, so expensively, and so incessantly by any set of defendants. No set of plaintiffs has ever had to overcome so many obstacles to recover. For Defendants to complain that they have not had a full and fair opportunity to be heard is positively shameless.

And what about plaintiffs' rights to due process? Could any result ever be more violative of due process than to send the *Engle* progeny cases back to square

one after 18 years of litigation, and a long series of trial and appellate court victories? For the many aging *Engle* progeny plaintiffs who will die in the meantime, such a ruling would completely deprive them of a remedy. Indeed, one of the points of the original *Engle* litigation was that it would be enormously unfair to the *Engle* plaintiffs to permit the Third District to reverse itself on the question of class certification. *Engle*, 945 So. 2d at 1266-67. Despite that clear message, the Defendants now ask this Court to reverse itself on *Engle* to reach a result that has been rejected by every court to look at it.

Most of Defendants' due process argument is simply a re-articulation of their attempt to reverse *Engle* itself. They argue that they have not had the opportunity to litigate whether their misconduct caused Plaintiff's injuries. As we explained in great detail above, Defendants' argument is based on a mischaracterization of the way *Engle* Phase I was litigated, *see supra* at 28-32, and a misunderstanding of the doctrine of *res judicata*. *See supra* at 23-27. After a hundred thousand pages of trial record in *Engle* and *Douglas*, Defendants lost on these issues.

Defendants' legal argument is even weaker. Essentially, Defendants attack the doctrine of *res judicata* itself as unconstitutional. According to Defendants, a general finding of liability on a claim of negligence, strict liability, warranty, or concealment can have no preclusive effect in subsequent litigation on the same claims against the same parties unless the jury answers special interrogatories on

all of the underlying evidentiary foundations for the claim. No state or federal case has ever imposed this requirement. To the contrary, as we discussed in detail in Point I above, courts routinely apply *res judicata* to all claims, litigated or not, without a reexamination of the evidence or defenses. *Supra* at 23-27. No case in the history of American jurisprudence has ever held that this routine application of *res judicata* violates the Constitution.

Certainly, *Fayerweather*, Defendants' centerpiece due process case, does not. *Fayerweather v. Rich*, 195 U.S. 276 (1904). Reaching deep into precedent, Defendants attempt to build a constitutional claim out of one line of dicta in this 1904 Supreme Court decision. The holding of *Fayerweather*, however, reaches precisely the opposite result. The Court gave preclusive effect to a general verdict and specifically rejected the need to re-examine the facts supporting that verdict.

In *Fayerweather*, the decedent left the bulk of his estate to charity, attempting to circumvent state court laws that required a certain percentage of the estate be left to his surviving spouse and children. In the course of the state court litigation, the surviving relatives entered into a release waiving their challenges to the charitable devise, but later pressed their claims despite the release. The state court ultimately entered judgment in favor of the estate -- without discussing or addressing the release. The result was affirmed on appeal.

The surviving relatives then repeated their same claims in federal court. Not

surprisingly, the federal trial court rejected their claims on *res judicata* grounds. Challenging this result in the United States Supreme Court, the survivors alleged that the application of *res judicata* violated due process because no one could be sure whether the trial judge had considered or ruled on the validity of the release -- virtually the identical argument raised by the Defendants here. In fact, the survivors' argument was stronger. The survivors presented testimony from the trial judge himself who testified that he had not, in fact, ruled on the release.

Despite this direct evidence, the Supreme Court held that there was no constitutional violation resulting from the application of *res judicata*. The survivors had the opportunity to litigate their claims relating to the devise, including the release issue, and lost. The fact that the trial judge did not mention the release, and even the fact that the trial judge later disclaimed any ruling on the release, was irrelevant. *Id*. at 307. The general verdict settled all claims that were litigated and could have been litigated in connection with the will challenge, including the release issue. *Id*. at 302.

Simply put, once the parties have had a full and fair opportunity to litigate a particular claim, the matter is settled. As *Fayerweather* makes clear, the general verdict settles all claims, without the need to go behind the general verdict with an evidentiary examination of the record. *Id*. at 302 ("a judgment without any special findings, like a general verdict of a jury, is tantamount to a finding of the

successful party of all the facts necessary to sustain the judgment"). Applying this principle, the Supreme Court rejected the survivors' proposed evidentiary analysis as irrelevant. *Id.* at 307.

In the course of reaching its holding, the Supreme Court stated that it would violate due process to give *res judicata* effect to a matter that had not been litigated. *Id*. at 307. What Defendants misunderstand, however, is that this requirement does not mean that the subsequent court must analyze the first trial to see what particular evidence was offered, or not offered, or what arguments were raised or not raised. The Court made this clear by rejecting the evidence from the trial judge who said that he did not rule on the release. What the Court requires is a determination that the actual claim -- the will challenge -- was litigated. If it was, the same parties cannot litigate that same claim again, regardless whether the first judge was in error or new arguments were to be raised. The *Fayerweather dicta* was simply a recognition of the unremarkable concept that it would violate due process to apply *res judicata* in a will challenge case, if the survivors did not actually have a fair opportunity to challenge the will the first time around. But the survivors litigated the case to judgment, and that was all that was required. Further delving into the evidentiary record was unnecessary.[28] *Id*. at 307-08.

[28] For example, suppose that the survivors had, for whatever reason, failed to present the release issue at all in the first case and the Court had rejected their will challenge. It is absolutely clear that the survivors could not relitigate the will

The recent *Waggoner* decision analyzes Defendants' due process arguments in great detail before rejecting them. 2012 WL 6371882. *Waggoner* confirms that the preclusive effect of *Engle* is for the state courts, *id*. at ** 7-8, and rejects Defendants' analysis of the *Fayerweather* holding, *id*. at * 20. Most importantly, *Waggoner* rejects Defendants' suggestion that *Fayerweather* sets a constitutional bar that prevents state courts from determining what preclusive effect is appropriate in a particular case. *Id*. at ** 20-21. So long as there was no interference with the Defendants' opportunity to litigate the claims presented (and the district court found none), the Constitution imposes no limits on the flexibility of state courts in applying the doctrine of *res judicata*. *Id*. at ** 21-27.

Thus, the question here is not what pieces of evidence or particular arguments the jury found persuasive in *Engle* Phase I. The question is whether the strict liability, negligence, warranty, and other claims were litigated to judgment. They were and that settles the due process question.[29]

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challenge in another forum, because the release argument could have been raised. *Fayerweather*, 195 U.S. at 307-08; *Ragsdale v. Rubbermaid, Inc*., 193 F.3d 1235, 1238 (11th Cir. 1999).

[29] Defendants' other cases are equally off point or support our position. In *Richards v. Jefferson County*, the Supreme Court rejected the application *of res judicata* in a case where the litigant was not even a party. 517 U.S. 793, 805 (1996). *De Sollar v. Hanscome* is a classic collateral estoppel case where the parties were litigating a different claim the second time around. 158 U.S. 216, 221-22 (1895).

This interpretation of *Fayerweather* is representative of over one hundred years of federal precedent, which applies *res judicata* in an identical fashion to Florida and every other state. As long ago as 1876, the United States Supreme Court, in a case relied upon by Defendants, held that *res judicata* applies to bar relitigation of any matter, litigated or not, in a second case on the same claim. *Cromwell v. Sac County*, 94 U.S. 351, 352-53 (1876). Defendants do not suggest that the law is any different today in Florida or federal court.[30] Nor have they cited a single case that holds that this long-settled principle of finality somehow violates due process or any other clause of the Constitution. Nor could they. The argument is completely without merit. Due process requires that the Defendants have the opportunity to litigate their case. It does not give them the right to relitigate those claims *ad infinitum* if they are dissatisfied with the first result.

Defendants' constitutional attack on the black letter law of *res judicata* should be rejected.

CONCLUSION

Thousands of *Engle* plaintiffs have been waiting for their day in court for nearly 18 years. This Court should put Defendants' due process and *Engle* complaints to rest once and for all. The certified question should be answered in the negative and the judgment affirmed.

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[30] *E.g., Arizona v. California,* 530 U.S. 392, 424 (2000).

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was sent by electronic mail and U.S. Mail to the attorneys on the attached service list this _____ day of June 2012.

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief complies with the font requirements of Florida Rules of Appellate Procedure 9.210(a)(2).

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