IN THE SUPREME COURT OF FLORIDA

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

Petitioners,

v.

Case No.: SC12-617
L.T. No.: 2D10-3236

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

Respondent.

ON DISCRETIONARY REVIEW FROM THE DISTRICT COURT OF APPEAL, SECOND DISTRICT, STATE OF FLORIDA

AMICUS BRIEF OF *ENGLE* PLAINTIFFS' FIRMS IN SUPPORT OF RESPONDENT JAMES DOUGLAS

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STATEMENT OF IDENTITY OF AMICI

This amicus brief is filed on behalf of several law firms who collectively represent thousands of *Engle* class members in their individual actions against the tobacco companies.[1] These clients, who are far too numerous to list individually, have a direct interest in this case because they wish to hold on to the rights secured on their behalf in the *Engle* class litigation and will be severely and negatively affected if this Court retreats from its holdings in *Engle*. If they have to start over in proving the defendants' well-known and common course of misconduct, the overwhelming majority will perish, as will many of their heirs, before their cases ever come to trial. Due to the age of the already-shrinking plaintiff class, and the natural course of smoking-related disease, further delays in resolving these cases will likewise prevent a substantial number of class members from ever having their cases tried.[2]

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[1] The specific law firms are Abrahamson & Uiterwyk, Alley Clark Griewe, Avera & Smith LLP, Beltz & Ruth, P.A., Dennis A. Lopez & Associates, Domnick & Shevin, PL, Doffermyre Shields Canfield & Knowles LLC, The Ferraro Law Firm, Howard & Associates, P.A., Kelley Uustal PLC, Law Offices of Gary Paige, P.A., Law Offices of John S. Kalil, P.A., The Law Firm of Gary, Williams, Lewis & Watson, P.L., Levin Papantonio Thomas Mitchell Rafferty & Proctor, P.A., Michael S. Olin, P.A., Milberg LLP, Morgan & Morgan, Ogle Law, LLC, O'Shea & Reyes, LLC, Parker Waichman LLP, Ratzan Law Group, Richard J. Diaz, P.A., Rossman, Baumberger, Reboso, Spier & Connolly, P.A., Searcy Denney Barnhart Scarola & Shipley, P.A., Trop & Ameen, P.A., William J. Wichmann, P.A., The Wilner Firm, and Zebersky & Payne, LLP.

[2] *See generally Starling v. R.J. Reynolds Tobacco Co.*, No. 3:09-cv-10027-J-37JBT, 2011 WL 6965854, at *13 n.19 (M.D. Fla. Nov. 2, 2011) (noting

The amici law firms also have a financial interest in this case because they have invested tens of thousands of hours of attorney time and millions of dollars in costs and expenses in litigating *Engle* progeny cases in reliance on this Court's holding in *Engle v. Liggett Group, Inc.*, 945 So. 2d 1246 (Fla. 2006), that the approved *Engle* findings are "common to all class members" and will have *res judicata* effect in class members' individual trials.

SUMMARY OF ARGUMENT

For the past six years, the amici plaintiffs' firms have observed firsthand and actively participated in the effectuation of *Engle* in courts across the state. Despite contending with the tobacco defendants' litigation tactics that seek costly and lengthy delays to the resolution of these cases, amici have obtained several noteworthy successes for their clients. Plaintiffs' verdicts, however, are not as numerous as the initial brief implies. Rather, the statistics show that *Engle* plaintiffs have had final judgments entered in their favor in just over half (56%) of the cases resolved so far. The outcome of cases against tobacco defendants is anything but a foregone conclusion.

Thus, while the res judicata application of this Court's findings in *Engle* has assisted class members in streamlining parts of their individual suits, that

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that the tobacco defendants "are well aware that *Engle* Smokers are dying at a fairly constant rate and it is likely that in the coming years, **most** of the *Engle* progeny cases will be brought by the *Engle* Smokers' personal representatives").

assistance has far from guaranteed victory in every case as the defendants not only mount every defense available under the sun, but continue to try to relitigate defenses decided against them in *Engle*. And if this Court were to reward that by receding from *Engle*, few surviving *Engle* plaintiffs will live to see any courtroom victories or the execution of their hard-fought judgments. These plaintiffs' advancing years and poor health due to smoking-related diseases combined with the tobacco defendants' propensity to delay litigation and payment of judgments as long as possible make each additional barrier to finality especially troublesome.

Turning to the merits of this case, amici agree with Mr. Douglas that the issues regarding the defective and unreasonably dangerous nature of the Petitioners' cigarettes containing nicotine and the Petitioners' negligence were actually litigated in *Engle*. This Court therefore has determined that those facts apply equally to all class members; Petitioners' arguments related to these findings are unavailing. And their attempt to interject a federal preemption argument into this appeal fails because in addition to being meritless on its face, it is both foreclosed by *Engle* and waived as a matter of Florida appellate procedure.

The amici also remind the Court that the Petitioners' arguments in this case are limited to the strict liability and negligence claims; the Petitioners do not (and cannot in this case given its posture) make any due process arguments regarding *Engle* claims for fraudulent concealment and conspiracy. While a ruling in favor of

Mr. Douglas would necessarily end any due process question as to these other claims, the inverse is not true. The amici have developed a number of additional arguments to immunize the concealment and conspiracy claims from any due process problems.

Finally, Judge Altenbernd's concurring opinion notwithstanding, it would be premature for the Court to develop standard jury instructions for these cases. Though a desirable goal, jury instructions specific to these cases ought to await the evolution of the many issues working their way through the court system. Moreover, this Court's civil jury instruction committee is already forming a subcommittee to explore the issue. This Court therefore should not delay resolution of this case by trying to craft standardized instructions.

ARGUMENT

I. THE DEFENDANTS' RECORD IN DEFENDING *ENGLE* PROGENY CLAIMS BELIES ANY CONCERN THAT THESE COMPANIES HAVE RECEIVED INSUFFICIENT PROCESS

The Petitioners' initial brief gives the impression that *Engle* progeny plaintiffs simply show up with their *Engle* findings in hand, prove damages, and walk away with a big verdict. Nothing could be further from the truth. Despite the important benefits of the *Engle* findings, trying a lawsuit against these tobacco companies remains an arduous task because they avail themselves of all possible defenses. Most of these cases take three weeks to try. The jury hears from the

family of the plaintiff, treating physicians, expert witnesses on both sides on the history of tobacco and addiction, and expert witnesses on the medical causation. The jury sees thousands of documents concerning the conspiracy to manufacture a false controversy to conceal the dangers of smoking and how all of that impacted the plaintiff. The jury hears from expert and lay witnesses and substantial argument by the parties on allocating fault between the parties. In short, the trials are hard fought and expensive.

Contrary to the tenor of the Petitioners' arguments, they have fared quite well in defending these claims, winning a sizable percentage of cases tried to date. **Exhibit 1** lists, in chronological order, the 79 *Engle* progeny trials that have taken place to date.[3] The plaintiffs prevailed in 44 cases, the defendants won 21, and 14 ended in mistrials. Thus, in the 65 cases tried to verdict, the defense has won nearly one third of the time notwithstanding that their decades-long course of heinous misconduct has already been established. And if one counts a mistrial as a

[3] This chart does not include at least two cigarette cases in which the plaintiffs asserted *Engle* class membership but otherwise might not be considered "*Engle* progeny." Robin Lukacs successfully asserted that she was a member of the class and obtained a judgment before this Court's decision in *Engle*, and that judgment was subsequently upheld in *Philip Morris USA, Inc. v. Lukacs*, 34 So. 3d 56 (Fla. 3d DCA 2010). Carmela A. Ferlanti prevailed in her individual action even though the jury found that she was not a member of the *Engle* class, and that judgment was affirmed in *Liggett Group LLC v. Ferlanti*, 53 So. 3d 1229 (Fla. 4th DCA 2011).

defense victory, as do the defendants,[4] they have prevailed in 44% of the trials to date.

While the plaintiffs have prevailed in nearly two-thirds of the cases tried to verdict, the results have varied significantly and many are more accurately characterized as defense wins. **Exhibit 2** lists the jury awards in cases in which the plaintiff at least nominally prevailed. Although some awards are substantial in light of the circumstances of the individual plaintiffs, a plaintiff's "win" is often pyrrhic. In two cases, the juries awarded zero damages; and in six more, the gross damage award (before reduction for comparative fault) was less than $1 million. Juries awarded punitive damages in only 25 of the 44 plaintiffs' verdicts. Juries find plaintiffs, on average, fifty percent at fault, although four juries found the plaintiff to be over 90% at fault.[5]

Prevailing in front of the jury, of course, is not the end of the process as the trial and appellate courts review the verdicts to ensure they are in accord with the law and not excessive. **Exhibit 3** lists the 38 plaintiffs' judgments trial courts have

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[4] *See* **Exhibit 5** (Philip Morris press release bragging that it "has won or mistried approximately two-thirds of its *Engle* cases to go to trial since the beginning of 2011"); **Exhibit 6** (account from recent shareholder meeting for R.J. Reynolds' parent company noting that C.E.O. bragged that mistrials are "successes").

[5] A verdict like the one in the Rohr case that found the plaintiff to be 100% at fault on the negligence and strict liability claims and finding for the defense on the intentional tort claims is listed as a defense verdict. But a plaintiff's verdict for zero damages is not because it is subject to additur.

entered to date that have not been reversed. These judgments average $8.4 million. **Exhibit 4** lists the 10 plaintiffs' judgments that have been affirmed by the district courts of appeal, which also average $8.5 million. Four judgments have been reversed.[6]

Mr. Douglas's case is the first judgment in which this Court has granted review. The *Engle* defendants, who appeal every judgment no matter how small,[7] have vowed to seek review in the Supreme Court of the United States in every case affirmed by the state courts, even per curiam affirmances without opinion ("PCAs"). To date, they have sought Supreme Court review in four cases (including three PCAs), and that Court has denied review in all four.[8]

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[6] *Philip Morris USA, Inc. v. Hess*, No. 4D09-2666, 2012 WL 1520844 (Fla. 4th DCA May 2, 2012) (reversing punitive damage award based on statute of repose); *R.J. Reynolds Tobacco Co. v. Webb*, No. 1D10-6557, 2012 WL 1150210 (Fla. 1st DCA Apr. 9, 2012) (reversing $79.2 million judgment as excessive); *Philip Morris USA, Inc. v. Barbanell*, No. 4D09-3987, 2012 WL 555402 (Fla. 4th DCA Feb. 22, 2012) (reversing for entry of defense judgment based on statute of limitations); *R.J. Reynolds Tobacco Co. v. Townsend*, No. 1D10-4585, 2012 WL 447282 (Fla. 1st DCA Feb. 14, 2012) (reversing $51.6 million judgment as excessive).

[7] For example, the three tobacco defendants in *Philip Morris USA, Inc. v. Weingart*, No. 4D11-3878, have appealed a judgment in which the jury found the plaintiff 91% at fault and awarded no damages. After the trial court granted an additur of $150,000, the net verdict against the three tobacco defendants was $4,500 each. Thus, by the time the defendants paid the filing fee and paid their lawyers to perfect the appeal and record, they had already spent more than is at issue.

[8] *R.J. Reynolds Tobacco Co. v. Martin*, 132 S. Ct. 1794 (2012); *Philip Morris USA Inc. v. Campbell*, 132 S. Ct. 1794 (2012); *R.J. Reynolds Tobacco Co.*

Statistics aside, history teaches that these defendants have taken tremendous advantage of their due process rights in an unprecedented manner. Trying these cases is particularly daunting and expensive because, in the experience of the amici, the defendants continue to employ the strategies touted in their internal documents to win cases or deter trials by making it as difficult and expensive for plaintiffs and their lawyers as possible[9] and to confuse jurors on issues of causation and addiction with the same false controversies that are at the heart of the conspiracy.

Making smoking and health litigation as burdensome and expensive for the amici as possible is not a new strategy for the industry. Its implementation (and success) was well-described by outside counsel for R.J. Reynolds Tobacco Company in a 1988 memorandum:

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

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v. Hall, 132 S. Ct. 1795 (2012); *R.J. Reynolds Tobacco Co. v. Gray*, 132 S. Ct. 1810 (2012).

[9] Though costs clearly vary (especially with mistrials), it typically requires several hundred thousand dollars in advanced expenses and more than $1 million worth of attorney time to try an *Engle* case to judgment.

Smith v. R.J. Reynolds Tobacco Co., 630 A.2d 820, 826 n.7 (N.J. Super. Ct. App. Div. 1993); *Blue Cross & Blue Shield of New Jersey, Inc. v. Philip Morris, Inc.*, 178 F. Supp. 2d 198, 237 (E.D.N.Y. 2001), *rev'd sub nom. Empire Healthchoice, Inc. v. Philip Morris USA Inc.*, 393 F.3d 312 (2d Cir. 2004).

Even with the benefit of the *Engle* findings, former class members and the amici are routinely subjected to overlong, burdensome, and wasteful discovery and pretrial proceedings. Class members (mostly elderly and afflicted with serious consequences of smoking-related disease) are often deposed over multiple days and subjected to endless inquiry over irrelevant matters. The defendants often list multiple expert witnesses they have no intention of calling at trial, which forces conscientious plaintiffs' counsel to conduct very expensive and otherwise unnecessary discovery. While it is within the power of the trial courts to curb these abuses, many of the trial courts are new to smoking and health litigation and are reluctant to place limits on the defendants without a track record of waste and abuse. The unnecessary expense and burden of the litigation, coupled with the built-in delay of litigation against the industry, has raised unnecessary barriers to the prosecution of many cases, further raising the likelihood that many class members will never come close to a courtroom, let alone obtain a judgment against the defendants.

The point of all of this is that the Petitioners' complaints of insufficient process should ring hollow to this Court. No group of persons or companies in the history of jurisprudence has received as much process as these defendants.

II. THE PETITIONERS' CURSORY PREEMPTION ARGUMENT IS BARRED, WAIVED, AND WITHOUT MERIT

As is clear from the opinion itself and explained in Mr. Douglas's answer brief, the *Engle* findings establish that the defendants' cigarettes containing nicotine were defective and unreasonably dangerous and that the defendants were negligent. This Court approved these findings as "common to all class members" without any limitation to only class members who smoked certain kinds or brands of cigarettes.[10] *Engle*, 945 So. 2d at 1271. Indeed, where the individual circumstances of a particular class member's conduct were relevant, this Court declined to give the findings *res judicata* effect. *Id.* at 1255.

Thus, whether the *Engle* Defendants' cigarettes containing nicotine were defective and whether the *Engle* Defendants were negligent was actually litigated in *Engle*, and this Court expressly determined that those facts apply the same to all class members. Because the *Engle* Defendants' "preclusion law" and due process

[10] The Petitioners' repeated suggestion that the class tried its claims to the jury based on different "defect theories" was properly rejected in *Engle* as unsupported by the record. While these theories were argued to the trial court earlier in the trial, a review of class counsel's arguments to the jury demonstrates that the jury's verdict must have applied to all class members regardless of what kind of cigarettes (containing nicotine) they smoked.

arguments all depend on their continued assertion that those issues were not common to the class, those arguments themselves are barred by *res judicata* and law of the case.

In what is likely an attempt to manufacture a basis for review in the Supreme Court of the United States, the *Engle* Defendants drop a footnote seeking to craft a back-door federal preemption argument that would morph the common findings regarding cigarettes containing nicotine smoked by members of the *Engle* class into a broader finding "that all cigarettes are inherently defective." (Initial Brief at 34 n.7.) Putting aside the obvious flaws in this argument – cigarettes containing nicotine manufactured by specific defendants and sold to a closed class of smokers whose diseases manifested during the conspiracy[11] are not the same thing as "all cigarettes" – the time to raise this argument was in the *Engle* litigation, not now.

Moreover, a conclusory argument in a footnote is insufficient to preserve the issue for appellate review. *E.g.*, *Coolen v. State*, 696 So. 2d 738, 742 n.2 (Fla. 1997); *see generally* Paul D. Fogel & David J. de Jesus, *Don't Put Your Footnote in Your Mouth*, 48 No. 12 D.R.I. for the Defense 76 (Dec. 2006) (collecting cases from across the country for the proposition that "perfunctorily making an argument in a footnote causes a waiver").

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[11] The evidence presented in most *Engle* progeny trials demonstrates that the conspiracy continued until at least 2000, after the class cut-off date, when the tobacco companies finally admitted what they have known for decades.

III. THE PETITIONERS' ARGUMENTS ARE LIMITED TO THE STRICT LIABILITY AND NEGLIGENCE CLAIMS

In light of the tremendous expense and delay involved in litigating *Engle* cases, several *Engle* class members have begun experimenting with different trial plans that may help resolve these cases more expeditiously. Consolidated trials of similar cases is one area that is currently being explored both in federal court and at least one state venue (Escambia County); but in the meantime, some class members have sought to find a streamlined way to try their cases individually. For example, unlike many other *Engle* class members, Mr. Douglas elected not to seek punitive damages or to fully pursue a conspiracy claim. Trying a conspiracy claim and putting on sufficient evidence to warrant punitive damages results in a far longer and more expensive trial.

For these reasons, the Court should understand in deciding this case that Mr. Douglas's trial was different from many other *Engle* trials. While all the many strong reasons to reject the Petitioners' arguments apply equally to the concealment and conspiracy findings, the Petitioners' arguments themselves are directed only at the strict liability and negligence findings. Even if their "what defect?" argument had any currency at all, it has no application to the concealment and conspiracy claims. At the risk of gilding the lily, the amici have formulated additional counter-arguments to the various iterations of the due process challenge

these defendants have made regarding these claims in other courts.[12] Because the concealment and conspiracy findings are not at issue in this case, the amici have no reason to develop them here.

IV. ATTEMPTING TO FORMULATE STANDARD JURY INSTRUCTIONS WOULD BE PREMATURE AS THE AREAS OF DISPUTE ARE STILL PERCOLATING THROUGH THE LOWER COURTS

In his concurring opinion below, Judge Altenbernd suggested that "it might be helpful if the supreme court approved a standard set of jury instructions for use in *Engle* cases." *Philip Morris USA, Inc. v. Douglas*, 83 So. 3d 1002, 1011 (Fla. 2d DCA 2012) (Altenbernd, J., concurring). While this is a laudable goal, the amici respectfully submit that this endeavor is not something that the Court should undertake in this case. As this Court's recent experience with the standard instructions in products liability cases has likely taught, formulating standard instructions in this area can be time-consuming and contentious even where the issues have been vetted in the case law for years.

As the Fourth District has noted, *Engle* litigation is still "in its infancy." *R.J. Reynolds Tobacco Co. v. Brown*, 70 So. 3d 707, 714 (Fla. 4th DCA 2011). That

[12] By way of example only, in many cases, the defendants have conceded that, regardless of their due process argument, the *Engle* findings do establish that they entered into a conspiracy to conceal the dangers of their cigarettes. Under many formulations of the causation instruction on this claim, the jury will necessarily have found that the plaintiff was injured by one or more specific fraudulent acts by members of the conspiracy.

may be a bit of an overstatement, because most of the major issues have been resolved after much work by the trial and appellate courts. The relatively few areas where jury instructions materially vary have been vetted in the district courts of appeals and a few potential conflicts may need resolution by this Court shortly. For example, there are varying levels of disagreement among the district courts regarding (1) the appropriate causation instruction on the strict liability and negligence claims,[13] (2) the defendants' insistence that the statute of repose defense was not resolved in *Engle*,[14] and (3) whether the statute of limitations instruction should be tied to the *Engle* disease at issue or the first smoking-related

[13] *See Brown*, 70 So. 3d at 715 (holding that a specific causation instruction should be given for each claim); *Hess*, 2012 WL 1520844, at *3 (holding that any error in failing to give the *Brown* instruction is harmless where the defendant stipulated that the plaintiff's disease was caused by smoking its cigarettes); *R.J. Reynolds Tobacco Co. v. Martin*, 53 So. 3d 1060, 1066 (Fla. 1st DCA 2010) (finding causation where the jury had found that addiction to the defendant's cigarettes caused the plaintiff's death). What appeared at first to be a conflict described in the *Brown* opinion is actually resolving itself on the ground and may never require attention from this Court.

[14] *See Hess*, 2012 WL 1520844, at *4-5 (holding that if the defendant proves that the plaintiff did not "rely" on concealment after May 5, 1982, the statute of repose bars recovery); *Frazier v. Philip Morris USA, Inc.*, No. 3D11-580, 2012 WL 1192076, at *9 (Fla. 3d DCA Apr. 11, 2012) (holding that the statue of repose defense does not apply where the plaintiff puts on evidence of fraudulent concealment after May 5, 1982); *Webb*, 2012 WL 1150210, at *1 (noting the First District's repeated summary rejection of the statue of repose as a viable defense in *Engle* cases). In *Webb*, the parties have agreed that *Webb* and *Hess* conflict and a request to certify conflict is pending before the First District.

"injury" suffered by the plaintiff.[15] Other issues are percolating up through the courts regarding issues such as exactly what it means to prove that the plaintiff's disease was "caused by addiction" in order to be a class member and whether the causation instruction for the concealment and conspiracy claims requires proof of "reliance" on some specific statement that omitted information or simply proof that the plaintiff would have avoided injury had the defendants not concealed the dangers of smoking.

Finally, to the extent standard jury instructions are feasible at this early stage, this Court's civil jury instruction committee is already in the process of setting up a subcommittee to explore this precise issue. Accordingly, this Court should resist any temptation to hold up resolution of this case while it tries to formulate appropriate standard instructions.[16]

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[15] *See Frazier*, 2012 WL 1192076, at *8 (holding that period is triggered only with relation to the disease at issue); *Webb*, 2012 WL 1150210, at *2-4 (same); *Barbanell*, 2012 WL 555402, at *3-4 (holding that finding that plaintiff had shortness of breath but no disease was sufficient to trigger the limitations period). In *Webb*, the parties have agreed that *Webb* and *Barbanell* conflict and a request to certify the conflict is pending before the First District.

[16] Unlike any other kind of case, an *Engle* judgment is automatically stayed even after the district court of appeal affirms and issues its mandate so long as the case is pending in this Court. § 569.23, Fla. Stat. (2012). The *Engle* plaintiffs are challenging the constitutionality of this statute in *Hall v. R.J. Reynolds Tobacco Co.*, No. SC11-1611. But in the meantime, whenever this Court "tags" an *Engle* case while it considers a case like this one, the plaintiff is unable to enforce his or her judgment for an indefinite period of time, no matter how patently correct the judgment may be.

CONCLUSION

For the foregoing reasons, the Court should answer the certified question in the negative.

Respectfully submitted,

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I HEREBY CERTIFY that the foregoing brief is in Times New Roman 14-point font and complies with the font requirements of Rule 9.210(a)(2), Florida Rules of Appellate Procedure.

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