Case No. SC12-617

IN THE SUPREME COURT OF FLORIDA

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

Defendants/Petitioners,

v.

JAMES L. DOUGLAS, as personal representative for the Estate of CHARLOTTE M. DOUGLAS,

Plaintiff/Respondent.

On Review from the District Court of Appeal of Florida, Second District
Case No. 2D10-3236

INITIAL BRIEF FOR PETITIONERS PHILIP MORRIS USA INC., R.J. REYNOLDS TOBACCO COMPANY, AND LIGGETT GROUP LLC

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STATEMENT OF THE CASE AND FACTS

This case arises in the aftermath of *Engle v. Liggett Group, Inc.*, 945 So. 2d 1246 (Fla. 2006) (per curiam) ("*Engle III*"), which decertified a statewide class of smokers injured by their addiction to cigarettes. This Court concluded that *Engle* could not proceed as a class action because "individual issues such as legal causation" vastly "predominate[d]" over common ones, *id.* at 1268, but it expressly left standing a number of findings that had been made by a jury in Phase I of the class proceedings. The Court ruled that class members could "initiate individual damages actions" against the defendants in which the findings from Phase I "will have res judicata effect." *Id.* at 1269. This "*Engle* progeny" case, like thousands of similar cases pending in the lower state and federal courts, turns on the meaning and permissible scope of that statement.

Courts are divided over the preclusive effect that the *Engle* Phase I findings can be given in class members' individual suits. Applying longstanding Florida preclusion law, the Eleventh Circuit Court of Appeals held that, to establish elements of their claims based on the findings' preclusive effect, individual class members must point to "specific parts" of the *Engle* "trial record" showing that those specific issues were "'actually adjudicated'" in their favor in Phase I. *Bernice Brown v. R.J. Reynolds Tobacco Co.*, 611 F.3d 1324, 1334-35 (11th Cir. 2010) (quoting *Gordon v. Gordon*, 59 So. 2d 40, 44 (Fla. 1952)). Several District

Courts of Appeal, in contrast, have applied the findings more broadly, deeming them conclusively to establish the "conduct elements" of each tort claim pursued by plaintiffs in progeny cases without any showing that those issues were actually decided in Phase I of *Engle*.

The Second District has certified a question of great public importance that asks this Court to decide the issue left unresolved in *Engle* itself: What preclusive effect can be afforded the *Engle* Phase I findings consistent with due process?

A. The *Engle* Class Action

The *Engle* case began in 1994, when six individuals filed a class action complaint in Miami-Dade County seeking billions of dollars in damages from defendants and other tobacco companies. The *Engle* plaintiffs brought claims for strict liability, negligence, breach of warranty, fraudulent misrepresentation and concealment, conspiracy to commit fraudulent misrepresentation and concealment, and intentional infliction of emotional distress. The class ultimately certified in *Engle* encompassed all "Florida citizens and residents," "and their survivors, who have suffered, presently suffer or have died from diseases and medical conditions caused by their addiction to cigarettes that contain nicotine." *R.J. Reynolds Tobacco Co. v. Engle*, 672 So. 2d 39, 40, 42 (Fla. 3d DCA 1996).

The *Engle* trial court adopted a three-phase trial plan. The jury in Phase I returned a series of findings regarding the health effects and addictiveness of smok-

ing and each defendant's alleged tortious conduct during a period dating back to the mid-1950s. Those findings fell into two categories. The first category established that cigarette smoking is a medical cause of 20 specific diseases, including chronic obstructive pulmonary disease ("COPD") and lung cancer, and that cigarettes that contain nicotine are addictive. *Engle III*, 945 So. 2d at 1276-77.

The second category established that each defendant had engaged in six types of tortious activity, but did not identify any particular act or omission that the jury found to be tortious from among the disparate allegations—spanning nearly five decades—that the class had attempted to prove during the year-long trial. For example, the class asserted numerous alternative theories of product defect that applied only to particular designs or brands of the defendants' cigarettes—including unfiltered cigarettes, "light" cigarettes, cigarettes with specific additives or flavorants, cigarettes with charcoal or cellulose filters, and cigarettes that used particular blends of tobacco. *See, e.g.*, *Engle v. R.J. Reynolds Tobacco Co.*, 2000 WL 33534572, at *2 (Fla. Cir. Ct. Nov. 6, 2000); DR. 68-73:12634-13734 [App. Tab J at 3; App. Tab P at 16312-19].[1]

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[1] Documents in the original record on appeal compiled by the circuit court clerk from the *Douglas* docket (or the "all cases" Hillsborough *Engle* Progeny docket) are cited as "DR. (or HR.) [volume number]: [page number(s)]." The Trial Transcript is cited as "T. [page number(s)]." For the Court's convenience, copies of

The jury was not asked to identify which of the class's alternative theories of tortious conduct it accepted. It merely answered "yes" to the following generic questions as to each defendant:

- Did the defendant "place cigarettes on the market that were defective and unreasonably dangerous?";

- Did the defendant "conceal or omit material information, not otherwise known or available, knowing the material was false or misleading [*sic*], or fail[ ] to disclose a material fact concerning or proving the health effects and/or addictive nature of smoking cigarettes?";

- "Did two or more of the Defendants enter into an agreement to conceal or omit information regarding the health effects of cigarette smoking, or the addictive nature of smoking cigarettes, with the intention that smokers and members of the public rely to their detriment?";

- Did the defendant "sell or supply cigarettes that were defective in that they were not reasonably fit for the uses intended?";

- Did the defendant "sell or supply cigarettes that, at the time of sale or supply, did not conform to representations of fact made by said Defendant(s), either orally or in writing?"; and

- Did the defendant "fail[ ] to exercise the degree of care which a reasonable cigarette manufacturer would exercise under like circumstances?"

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record documents cited herein are included in an Appendix to this brief and cited as "App. Tab [letter] at [page, paragraph or section number]."

DR. 65-73:12634-13734 [App. Tab I].[2]

The jury did not hear evidence in Phase I about whether or how the defendants' conduct affected any particular smoker. As this Court subsequently emphasized, the Phase I findings therefore did not resolve individualized issues of "legal causation and reliance" and "did *not* determine whether the defendants were liable to anyone." *Engle III*, 945 So. 2d at 1263 (emphasis in original; internal quotation marks omitted).

In Phase II-A of *Engle*, the same jury determined individualized issues of legal causation and compensatory damages as to three named plaintiffs only; in Phase II-B, that jury assessed a classwide punitive damages award. *Engle III*, 945 So. 2d at 1257. In Phase III, separate juries would have decided for each remaining class member what the original jury decided in Phase II-A for the named plaintiffs: whether the defendants were liable to that class member, and, if so, what amount of compensatory damages was appropriate. *Id.* at 1258.

Before Phase III commenced, however, the trial court entered a final judgment in favor of the three class members whose claims were tried in Phase II-A, and the defendants appealed. This Court affirmed the final judgment as to two of

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[2] The jury also returned findings against the defendants for affirmative fraud, conspiracy to commit fraud, and intentional infliction of emotional distress. This Court later disapproved those findings. *Engle III*, 945 So. 2d at 1255, 1276-77.

the three class representatives. It also vacated the classwide punitive damages award, and decertified the class on a prospective basis, concluding that "class action treatment for Phase III of the trial plan is not feasible because individualized issues such as legal causation, comparative fault, and damages predominate." *Engle III*, 945 So. 2d at 1268. The Court explained that, to recover on their individual claims, class members would be required to "initiate individual damages actions" against the defendants. *Id.* at 1269. The Court stated that the "Phase I common core findings . . . will have res judicata effect in those trials." *Id.*

The Court did not elaborate on this statement, and did not address the specific "res judicata effect" that the Phase I findings would have in subsequent suits filed by individual class members. As the class urged it to do, the Court left that task for courts presiding over individual class members' suits. *See* DR. 68-73:12634-13734 [App. Tab N at 5-6].

B. The Trial Court Proceedings

Plaintiff seeks to invoke the "res judicata effect" of the generalized findings from Phase I of *Engle* in this wrongful death action against defendants Philip Morris USA Inc., R.J. Reynolds Tobacco Co., and Liggett Group LLC. Plaintiff's third amended complaint alleged that his wife, Charlotte Douglas, was a member of the *Engle* class who died from COPD and lung cancer caused by her addiction to cigarettes. DR. 1:74-85 [App. Tab B ¶¶ 2, 24]. The complaint asserted claims for

strict liability, negligence, breach of express and implied warranty, fraudulent concealment, and conspiracy to commit fraudulent concealment. *Id.* ¶¶ 1-2, 28-45. Plaintiff made clear, however, that he did not actually intend to prove at trial that defendants had committed any of the tortious conduct alleged in the complaint. Rather, plaintiff stated that he would "rely[ ] on the Phase I *Engle* findings as *res judicata*" to "conclusively establish" the tortious conduct elements of each of his claims. *Id.* ¶¶ 1-2, 29, 32, 35, 38, 41, 44.

The trial court agreed with plaintiff's expansive interpretation of the preclusive effect of the *Engle* Phase I findings. In an Order Regarding the Effect of the *Engle* Phase I Findings on Pending Cases, the court ruled that, if plaintiff established that Mrs. Douglas was an *Engle* class member, he could invoke the *Engle* findings to establish every element of his claims except the reliance element of his fraudulent concealment claim, comparative fault, and damages. HR. 8:1514-18 [App. Tab A]. According to the trial court, "*all* issues which were or *which might have been* litigated and determined in *Engle* are preclusively established in every *Engle* progeny case," *id.* at 1 (emphases added), and plaintiff therefore was "not . . . required to prove such things as design flaws with cigarettes or to identify specific acts of Defendants' negligence in order to establish a prima facie case. The preclusive effect of the *Engle* findings has already done that." *Id.* at 4.

Thus, to prevail on his strict liability claim, the trial court did not require plaintiff to establish that any defect found by the *Engle* Phase I jury was present in the particular brands of cigarettes smoked by Mrs. Douglas—Lark, Benson & Hedges, Virginia Slims, Winston, and Salem. Nor did the court require plaintiff to establish that any alleged defect in those cigarettes was related *in any way* to Mrs. Douglas's specific injuries. The court similarly relieved plaintiff of his burden of proving the tortious conduct elements of his negligence, breach of warranty, fraudulent concealment, and conspiracy claims.

At trial, plaintiff focused on establishing that Mrs. Douglas was an *Engle* class member. Defendants, in turn, presented evidence that Mrs. Douglas smoked for reasons other than addiction, such as stress relief, enjoyment of cigarettes, and weight control. At the conclusion of the evidence, the trial court rejected defendants' proposed jury instructions and adopted instructions that omitted most of the bedrock elements that a tort plaintiff must prove under Florida law. For example, the trial court's strict liability instructions, adopted over defendants' objection, did not require the jury to determine whether defendants' cigarettes smoked by Mrs. Douglas contained a specific defect, or, if so, whether the defect had anything to do with, let alone caused, Mrs. Douglas's death. T. 1232-33, 1236-37 [App. Tab F].

The trial court also rejected defendants' proposed verdict form—which included questions encompassing each of the essential elements of plaintiff's tort

claims under Florida law—and, again over defendants' objection, adopted a verdict form that did not include *any* questions specific to plaintiff's strict liability claim (or his claims for negligence and breach of warranty). DR. 65:12112-14 [App. Tab E]. The first question on the verdict form asked the jury to determine whether Mrs. Douglas was "a member of the *Engle* class." *Id.* The second question asked the jury to determine whether "smoking *cigarettes* manufactured by one or more of the Defendants [was] a legal cause" of Mrs. Douglas's death, and if so, to make that determination with respect to each defendant on an individualized basis. *Id.* (emphasis added). The jury was not asked, however, whether any *defect* in defendants' cigarettes—as opposed to simply "smoking [defendants'] cigarettes"—was a legal cause of Mrs. Douglas's death. The third question on the verdict form asked whether plaintiff had proven the reliance element of his fraudulent concealment claim. *Id.* The final two questions asked the jury to determine comparative fault and compensatory damages. *Id.*[3]

On March 10, 2010, the jury returned a verdict that found that Mrs. Douglas was an *Engle* class member and that smoking cigarettes manufactured by each defendant had caused her death. T. 2348-49 [App. Tab F]; DR. 65:12112-14 [App.

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[3] Plaintiff initially sought both compensatory and punitive damages, but dismissed his claim for punitive damages before trial. He did not submit a verdict form question on his conspiracy claim, and the jury therefore did not decide that claim. *See* DR. 58:10958-93 [App. Tab D]; DR. 65:12112-14 [App. Tab E].

Tab E]. According to the trial court, these findings were sufficient to establish liability on plaintiff's claims for strict liability, negligence, and breach of warranty. The jury found in defendants' favor on the fraudulent concealment claim. T. 2349 [App. Tab F]; DR. 65:12112-14 [App. Tab E]. The jury awarded plaintiff $5 million in compensatory damages. T. 2350 [App. Tab F]; DR. 65:12112-14 [App. Tab E]. In entering final judgment, the court reduced the damages award to $2.5 million based on Mrs. Douglas's comparative fault.

C. The Second District Court of Appeal's Decision

The Second District affirmed solely on the basis of plaintiff's strict liability claim. *Philip Morris USA, Inc. v. Douglas*, 83 So. 3d 1002, 1010 (Fla. 2d DCA 2012). The court rejected defendants' argument that *Engle* must be interpreted—consistent with Florida preclusion law and due process—to extend the benefit of preclusion only where a progeny plaintiff demonstrates that the *Engle* jury actually decided the specific facts that he seeks to establish based on the Phase I findings. Instead, the court concluded that *Engle* itself had implicitly dictated a broader scope for preclusion in progeny cases.

According to the Second District, *Engle* class members may invoke the findings' preclusive effect "as to the issues of [defendants'] conduct" without making any record-based showing that the issues they seek to establish through preclusion were actually decided in their favor in Phase I of *Engle*. *Douglas*, 83 So. 3d at

1010. The Second District therefore held that, on his strict liability claim, plaintiff was not required "to prove specific defects existing in specific cigarettes" that were smoked by Mrs. Douglas, or to identify any material in the *Engle* record demonstrating that the Phase I jury actually decided that the cigarettes smoked by Mrs. Douglas contained a defect that was related to her injuries. *Id.*

The Second District acknowledged that plaintiff was required to "prove legal causation" on all of his claims, including his non-intentional tort claims. *Douglas*, 83 So. 3d at 1010. Because "the verdict form did not ask the jury if it was [defendants'] failure to exercise reasonable care that was the legal cause of Mrs. Douglas['s] injury" and the jury made no finding on that issue, the Second District concluded it could not affirm the negligence verdict. *Id.* at 1010 n.8. But the Second District concluded that plaintiff had fully established "legal causation" on his strict liability claim merely by showing that cigarettes, as distinct from any defect in them, caused Mrs. Douglas's injuries. *Id.* at 1010.[4]

Finally, the Second District rejected defendants' argument that their federal due process rights were violated by permitting plaintiff to rely on the *Engle* Phase I

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[4] The Second District did not expressly address plaintiff's breach-of-warranty claims, but—as with the negligence claim—the jury was not asked to "make a finding of legal causation as related to" those claims because "the verdict form did not ask the jury if" defendants' breach of their express or implied warranties "was the legal cause of Mrs. Douglas['s] injury." *Douglas*, 83 So. 3d at 1010 n.8.

findings to establish the conduct elements of his claims. Having passed upon the issue, the court certified that due process question as one of great public importance. *Douglas*, 83 So. 3d at 1010.

On May 15, 2012, this Court accepted jurisdiction.

SUMMARY OF ARGUMENT

The Court should vacate the judgment on plaintiff's claim for strict liability and order a new trial.

I. In *Engle*, this Court held that the Phase I findings would be given "res judicata effect" in suits brought by individual *Engle* class members. *Engle III*, 945 So. 2d at 1277. The question here is how to implement that holding and grant the Phase I findings preclusive effect consistent with Florida law and federal and state due process.

As the Eleventh Circuit Court of Appeals recognized in another *Engle* progeny case, traditional principles of Florida preclusion law apply to suits brought by *Engle* class members. *Bernice Brown*, 611 F.3d at 1334-35. This Court's statement in *Engle* that the Phase I findings would be given "res judicata effect" did not purport to alter those principles or prejudge the preclusive effect that the Phase I findings would have in individual class members' suits. It simply removed any potential uncertainty as to whether the elements of mutuality and finality—prerequisites to the application of issue preclusion under Florida law, *see Dep't of*

Health & Rehabilitative Servs. v. B.J.M., 656 So. 2d 906, 910 (Fla. 1995)—were satisfied in the unusual procedural posture of the *Engle* case.

Thus, plaintiffs in *Engle* progeny cases face the same burden that parties seeking to invoke issue preclusion have always faced under Florida law: They must demonstrate to a "reasonable degree of certainty" (*Seaboard Coast Line R.R. Co. v. Indus. Contracting Co.*, 260 So. 2d 860, 865 (Fla. 4th DCA 1972)) that the issues on which preclusion is sought were "actually litigated *and decided*" in the prior case. *Gordon*, 59 So. 2d at 45 (emphasis added).

The first two *Engle* findings—that smoking can cause 20 specific diseases and that nicotine is addictive—are sufficiently specific to enable progeny plaintiffs to meet that burden based on the language of the findings themselves. The remaining findings, however, lack the necessary specificity. The language of Finding 3, for example, simply establishes that defendants manufactured some unspecified cigarettes that contained some unidentified defect at some unknown point over a fifty-year period. To invoke the preclusive effect of that finding on their strict liability claims, *Engle* class members therefore must point to material in the *Engle* record that establishes that the Phase I jury *actually decided* that the particular cigarettes they smoked contained a defect that was relevant to their injuries.

Plaintiff did not even attempt to meet that burden here. Nor could he conceivably have done so. In Phase I of *Engle*, the class attempted to prove numerous

alternative theories of product defect that applied only to particular cigarette designs and brands manufactured at different times over the course of five decades—including, for example, allegations about filtered and unfiltered cigarettes, "light" and non-light cigarettes, cigarettes with and without various additives, and cigarettes with vastly different tar and nicotine yields. In light of the number and diversity of alleged defects—and the highly generalized language of the Phase I findings—it is impossible to determine whether the *Engle* jury actually decided that the cigarettes smoked by Mrs. Douglas contained a defect, and, if so, what the defect was. The Second District therefore erred in holding that the *Engle* Phase I findings relieved plaintiff of his burden of introducing evidence to prove the elements of his strict liability claim (or any of his other claims) at trial. This Court should clarify that it did not intend in *Engle* to endorse such a wholesale departure from settled principles of Florida preclusion law—a result that would overturn decades of this Court's well-established precedent and raise serious due process problems.

II. The Second District's decision to relieve plaintiff of his burden of proof on legal causation underscores the error in the court's preclusion analysis. In *Engle*, this Court made clear that the Phase I jury did not resolve issues of "legal causation." *Engle III*, 945 So. 2d at 1263. Thus, as in any other Florida strict liability action, plaintiff was required to prove that Mrs. Douglas's injuries were caused by some *defect* in defendants' product—here, cigarettes—rather than by the

product generally. *West v. Caterpillar Tractor Co.*, 336 So. 2d 80, 86 (Fla. 1976). The Second District, however, required plaintiff to prove only that Mrs. Douglas's death was caused by defendants' cigarettes, not by any *defect* in those cigarettes.

III. Giving the Phase I findings any broader preclusive effect than permitted under traditional principles of Florida preclusion law would violate defendants' federal and state due process rights. Like longstanding Florida law, due process ensures basic fairness in the application of issue preclusion by requiring that a court be "certain that the precise fact was determined by the former judgment" before giving a prior finding preclusive effect. *De Sollar v. Hanscome*, 158 U.S. 216, 221 (1895); *see also Fayerweather v. Ritch*, 195 U.S. 276, 307 (1904). That due process requirement is grounded in the settled principle that a plaintiff is entitled to recover a judgment against a defendant only where the plaintiff has proved *every* element of its claim, *see, e.g.*, *Rollins, Inc. v. Butland*, 951 So. 2d 860, 874 (Fla. 2d DCA 2006), and the defendant has been afforded the opportunity to mount *every* available defense. *Philip Morris USA v. Williams*, 549 U.S. 346, 353 (2007). Due to the general terms in which the *Engle* Phase I findings are framed, however, and the numerous alternative theories asserted by the class regarding the defendants' allegedly tortious conduct, it is impossible to be "certain" about the "precise fact[s]" that underlie the *Engle* jury's findings. Accordingly, there can be no assurance that any jury has ever actually decided the elements of plaintiff's strict lia-

bility claim in his favor. This Court should confirm that defendants in *Engle* progeny suits cannot be deprived of their property in this arbitrary, irrational, and fundamentally unfair manner.

ARGUMENT

Engle did not purport to predetermine the specific preclusive effect of the Phase I findings in any progeny cases that might follow—indeed, preclusion is universally decided by the second court, not the court that renders the original judgment. *See Smith v. Bayer Corp.*, 131 S. Ct. 2368, 2375 (2011). Thus, the most natural reading of this Court's direction that the Phase I findings would have "res judicata effect" in class members' individual suits is that the preclusive effect of the Phase I findings is to be determined by antecedent and longstanding principles of Florida preclusion law. Under those settled principles, the proponent of preclusion must establish that a specific issue relevant to his case was "actually adjudicated" in his favor in the prior litigation. *Gordon*, 59 So. 2d at 44. This requirement of actual adjudication is universally shared by other jurisdictions, and is so fundamental and deeply rooted that a departure from it would violate due process. *See, e.g.*, *Fayerweather*, 195 U.S. at 307.

Under this settled framework, the first two *Engle* findings establish with sufficient certainty that the Phase I jury actually decided that smoking can cause a number of specific diseases and is addictive. Progeny plaintiffs are therefore re-

lieved of the burden of proving these issues—which had been highly contested in prior tobacco cases—in their individual suits. The language of the remaining Phase I findings, however, establishes only that, at some point during a fifty-year period, the defendants manufactured *some* cigarettes that were defective, negligently designed, or misleadingly marketed—*in some unspecified and unknowable respect*. This ambiguity did not result from accident or inadvertence by either this Court or the defendants. Instead, it was successfully sought, over the defendants' objections, by the *Engle* class. And because the class pursued numerous alternative, distinct theories of liability for each of their claims—some of which were relevant only to certain cigarette brands or types, or to certain diseases—to date *no Engle* progeny plaintiff has been able to demonstrate that the remaining findings necessarily established any identifiable defect, negligence, or concealment that is relevant to his or her case.

Because no one can identify any particular tortious conduct that was actually and necessarily found by the *Engle* jury, the District Courts of Appeal that have expansively interpreted the *Engle* findings have also watered down or outright eliminated any significant legal causation inquiry for progeny plaintiffs' non-intentional tort claims, such as strict liability and negligence. Those courts have inquired merely whether *smoking cigarettes* proximately caused the plaintiff's injury, rather than—as ordinarily required by Florida tort law—whether a particular

defect or act of negligence did so. That cannot possibly be a proper interpretation of *Engle*, which clearly and expressly left "legal causation" as an independent element that must be proven in progeny cases. 945 So. 2d at 1268.

I. THE SECOND DISTRICT MISAPPLIED *ENGLE* AND VIOLATED WELL-ESTABLISHED FLORIDA LAW BY GIVING PRECLUSIVE EFFECT TO THE *ENGLE* PHASE I FINDINGS ON ISSUES THAT PLAINTIFF FAILED TO DEMONSTRATE HAD BEEN ACTUALLY DECIDED BY THE *ENGLE* JURY.

In *Engle*, this Court decertified the class on a prospective basis and held that "[i]ndividual plaintiffs within the class will be permitted to proceed individually with the findings [from Phase I] given res judicata effect." *Engle III*, 945 So. 2d at 1277; *see also id.* at 1269 (same). The question here thus is not whether the *Engle* Phase I findings are entitled to "res judicata effect"—the parties agree that they are—but what that effect *is*.[5]

The Second District correctly held that issue preclusion (rather than claim preclusion) is the governing principle in *Engle* progeny cases. *See Douglas*, 83 So. 3d at 1010; *see also Bernice Brown*, 611 F.3d at 1333 n.7 (same); *R.J. Reynolds Tobacco Co. v. Jimmie Lee Brown*, 70 So. 3d 707, 715 (Fla. 4th DCA 2011); *R.J. Reynolds Tobacco Co. v. Martin*, 53 So. 3d 1060, 1067 (Fla. 1st DCA 2010), *cert. denied*, 132 S. Ct. 1794 (2012). Indeed, claim preclusion would "bar[ ]" *any* "subsequent suit" between *Engle* class members and defendants, *Stogniew v. McQueen*,

[5] A court's decision to afford "res judicata effect" to prior findings is reviewed *de novo*. *Campbell v. State*, 906 So. 2d 293, 295 (Fla. 2d DCA 2004).

656 So. 2d 917, 919 (Fla. 1995) (internal quotation marks omitted)—a result that this Court plainly did not intend.

Under well-established Florida law, the "essential elements" of the doctrine of issue preclusion are "that the parties and issues be identical, and that the particular matter be fully litigated and determined in a contest which results in a final decision." *B.J.M.*, 656 So. 2d at 910. This Court's holding that the Phase I findings should be given "res judicata effect" removed potential uncertainty as to whether two of those elements—that the parties be "identical," and that there be a "final decision"—were satisfied in *Engle*. Absent that clarification, there could have been some doubt about whether those requirements were met because the class had been prospectively decertified, and no final judgment had been entered at the time of decertification, except as to the three class members whose claims were tried in Phase II-A of *Engle*. *Cf. Key v. Gillette Co.*, 782 F.2d 5, 7 (1st Cir. 1986) (noting that "decertification" prevents "adverse res judicata effects").

Nothing in this Court's passing references to the "res judicata effect" of the Phase I findings, however, indicates that the Court meant to go further and eliminate the other "essential elements" of issue preclusion—namely, that an "identical" issue must have been "fully litigated *and determined*" in a prior proceeding. *B.J.M.*, 656 So. 2d at 910 (emphasis added); *see also Puryear v. State*, 810 So. 2d 901, 905 (Fla. 2002) ("[T]his Court does not intentionally overrule itself sub

silentio.”). In fact, on the same day that it issued its final opinion in *Engle*, this Court *reaffirmed* those requirements, holding that a party invoking issue preclusion must establish that the issue on which preclusion is sought has been “‘fully litigated and determined.’” *Dadeland Depot, Inc. v. St. Paul Fire & Marine Ins. Co.*, 945 So. 2d 1216, 1235 (Fla. 2006) (quoting *B.J.M.*, 656 So. 2d at 910).

Thus, as the Eleventh Circuit Court of Appeals found, the Phase I findings are entitled to the same preclusive effect that any other set of findings would receive under traditional principles of Florida preclusion law. *Bernice Brown*, 611 F.3d at 1334. The findings “operate[ ] to prevent the re-litigation of issues that were decided, or ‘actually adjudicated’” in Phase I of *Engle*, but “may not be used to establish facts that were not actually decided by the jury” in that proceeding. *Id.* As in every other case, the precise “res judicata effect” of the Phase I findings was left to be determined in later cases, because it is black-letter law that “a court does not usually get to dictate to other courts the preclusion consequences of its own judgment.” *Smith*, 131 S. Ct. at 2375 (internal quotation marks omitted); *see also Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 805 (1985).

The Second District therefore erred when, based on a misinterpretation of *Engle*, it bypassed bedrock principles of Florida preclusion law by permitting plaintiff to invoke the Phase I findings to establish issues that he did not even attempt to demonstrate the Phase I jury had actually decided. A new trial is required.

A. Under Settled Florida Preclusion Law, The Phase I Findings Establish Only Those Issues That The *Engle* Jury *Actually* Decided.

Under Florida issue-preclusion law, "only those matters actually litigated and determined in the initial action are foreclosed—not other matters which might have been, but were not, litigated or decided." *Gordon*, 59 So. 2d at 43 (internal quotation marks omitted). The party invoking preclusion bears the burden of showing "with sufficient certainty" that these requirements are met, *Meyers v. Shore Indus., Inc.*, 597 So. 2d 345, 346 (Fla. 2d DCA 1992), and must demonstrate that "*the precise facts*" on which preclusion is sought "were determined by the former judgment" and "a critical and necessary part of the prior determination." *Bagwell v. Bagwell*, 14 So. 2d 841, 843 (Fla. 1943) (per curiam) (emphasis added); *Goodman v. Aldrich & Ramsey Enters.*, 804 So. 2d 544, 546 (Fla. 2d DCA 2002).

Florida courts routinely, and correctly, deny broad preclusive effect to prior findings where the generality of an earlier verdict makes it impossible for the party invoking preclusion to "demonstrate that the issue to be barred from relitigation was determined in a previous suit." *Sun State Roofing Co. v. Cotton States Mut. Ins. Co.*, 400 So. 2d 842, 844 (Fla. 2d DCA 1981). In *Seaboard*, for example, the Fourth District Court of Appeal held that the defendant could not invoke the preclusive effect of a prior verdict where, because of the absence of a special-verdict form, it was "impossible to ascertain with any reasonable degree of certainty as to

what issue was adjudicated in the former suit." 260 So. 2d at 865. "It is essential that the question common to both causes of action was *actually adjudicated in the prior litigation*," the court explained, and "[i]f there is any uncertainty as to the matter formerly adjudicated the burden of showing it with sufficient certainty . . . is upon the party who claims the benefit of the former judgment." *Id.* at 864; *see also Sun State*, 400 So. 2d at 844; *Acadia Partners, L.P. v. Tompkins*, 673 So. 2d 487, 489 (Fla. 5th DCA 1996); *Freehling v. MGIC Fin. Corp.*, 437 So. 2d 191, 194 (Fla. 4th DCA 1983).

Under these settled principles of preclusion law, the *Engle* Phase I findings plainly bar defendants from relitigating *some* issues in individual suits brought by *Engle* class members. For example, it is clear that the *Engle* jury actually decided that cigarettes are a medical cause of 20 specific diseases—including lung cancer, heart disease, and COPD—and that cigarettes containing nicotine are addictive. *Engle III*, 945 So. 2d at 1276-77. As a result of these findings, *Engle* class members are not required to offer proof on any of these issues—which in the past had been sharply contested in tobacco litigation.

The generalized language of the Phase I findings does not establish, however, that defendants committed specific tortious conduct that caused the injury of any specific class member, including Mrs. Douglas. In other words, the Phase I findings do not establish that the particular cigarettes that Mrs. Douglas smoked

contained a defect or that any such defect had anything to do with, much less was the legal cause of, her particular injuries. As the Eleventh Circuit recognized, the language of the Phase I findings is far too generalized to establish that facts specific to any particular class member were "'actually adjudicated'" in Phase I. *Bernice Brown*, 611 F.3d at 1334 (quoting *Gordon*, 59 So. 2d at 44).

The generality of the Phase I findings did not arise from happenstance or any tactical choice by the *Engle* defendants. To the contrary, the class made a deliberate strategic decision to seek generic findings and to oppose the defendants' request for a detailed special-verdict form in Phase I of *Engle*. That verdict form would have required the jury to identify the specific factual grounds for each finding, enabling courts and juries in individual class members' trials to ascertain the precise basis for the Phase I findings—for example, which products and product features the Phase I jury found to be defective. DR. 68-73:12634-13734 [App. Tab P at 35914-16, 35953-54]; DR. 68-73:12634-13734 [App. Tab H at 3 et seq.]. But, in order to maximize the likelihood that the jury would return a generic finding that could support a classwide punitive damages award under the then-governing trial plan, the class objected to the defendants' request for more detailed findings. DR. 68-73:12634-13734 [App. Tab P at 35891-93, 35916-17, 35953]. The trial court sided with the class. DR. 68-73:12634-13734 [App. Tab I].

Because of the absence of a sufficiently specific verdict form, Florida preclusion law requires individual class members to demonstrate, by reference to "specific parts" of the "trial record" in *Engle*, that the Phase I jury actually decided the issues on which preclusion is sought. *Bernice Brown*, 611 F.3d at 1335. Thus, to establish through the use of preclusion that the Lark, Benson & Hedges, Virginia Slims, Winston, and Salem cigarettes smoked by Mrs. Douglas contained a defect at the times she smoked them, plaintiff was required to identify material in the *Engle* record that proved, to a "reasonable degree of certainty," that the *Engle* jury *actually* made that determination—not merely that the jury *could* have made such a finding (as the Second District found below). *Seaboard*, 260 So. 2d at 865. Plaintiff did not even attempt to meet that burden. Nor could he plausibly have done so. The vast catalogue of disparate defect theories alleged in *Engle* Phase I—together with the generality of the findings—makes it impossible to determine what specific issues were actually decided in favor of the class.

B. The Class Pursued Numerous Alternative Theories Of Defect During Phase I Of *Engle*.

The trial of Phase I of *Engle* lasted a year and involved numerous alternative theories of tortious conduct—what the *Engle* trial judge described as "hundreds," "thousands," or even "hundreds of thousands" of allegations. DR. 68-73:12643-13734 [App. Tab P at 35813]. The class presented extensive testimony and argu-

ment about alleged defects limited to particular cigarette designs marketed at different points over a fifty-year period, including unfiltered cigarettes, "light" cigarettes, cigarettes with various additives and flavorants, cigarettes with specific filter styles, and cigarettes that used particular tobacco blends. *Engle*, 2000 WL 33534572 at *2; DR. 68-73:12634-13734 [App. Tab J at 3; App. Tab P at 16312-19]. The class also presented extensive brand-specific evidence, including, for example, that in-house testing showed very high nitrosamine levels in Virginia Slims cigarettes, and that the smoke from Marlboro and Kool cigarettes had higher pH levels (and therefore allegedly greater nicotine impact) than other brands. *See* DR. 68-73:12634-13734 [App. Tab P at 27377, 36664-65].

Moreover, expert witnesses for both sides testified about the correlation between cigarettes' yields of tar (the collection of particulate compounds in inhaled smoke that contains carcinogens) and the relative health risks of smoking: the greater the tar, the greater the risks. *See, e.g.*, DR. 68-73:12634-13734 [App. Tab P at 12131-36, 29071, 27641-42, 37052-63]. And the defendants offered testimony and exhibits showing that they manufactured a range of different cigarette types and brands with widely varying tar yields. For example, undisputed evidence demonstrated that Philip Morris USA sold brands with tar yields as high as 15.8 milligrams and as low as 0.9 milligrams. *See id.* at 29056-57; DR. 68-73:12634-13734 [App. Tab O at DX36790]. The defendants highlighted that evidence in

their closing arguments, and the jury might well have decided that brands with tar yields above a certain level were defective and brands with tar yields below that level were not defective. DR. 68-73:12634-13734 [App. Tab P at 37051-52, 37061].

Similarly, a considerable part of the defendants' case in *Engle* was that cigarette manufacturers did all they could over the years to make cigarettes as safe as was technologically and economically feasible. Expert witnesses explained that each defendant had developed and implemented various technological innovations that dramatically lowered average tar yields. *E.g.*, DR. 68-73:12634-13734 [App. Tab P at 29050-57, 25578-81, 25622-44, 25657-65, 37048-52].

For example, the defendants designed, implemented, and refined filters; expanded tobacco; reconstituted tobacco; reduced the circumference of cigarettes; and added ventilation holes. *Id.* at 12128-31, 37048-50. The jury was shown that those innovations had resulted in lowering average tar yields from nearly 38.0 milligrams in 1955 to less than 12.0 milligrams in 1998, and average nicotine yields from more than 2.5 milligrams to less than one milligram over the same period. *Id.* at 29052-53, 37174-75; DR. 68-73:12634-13734 [App. Tab O at DX37115]. The tar and nicotine yields of some individual brands dropped more or less than the average, and the timing of such decreases varied from brand to brand. DR. 68-73:12634-13734 [App. Tab O at PX0111, DX36834, DX36835]. Such evidence

might well have led the jury to conclude that particular brands were defective when they contained high tar yields but were not defective at later points in time, when their tar yields dropped. Alternatively, the jury could have concluded that particular brands were *not* defective in the 1950s and 1960s, but *were* defective later on because they failed to incorporate all of the available technological advances.

The *Engle* class repeatedly acknowledged that it was relying on a number of independent factual theories to prove its case. For example, the class proposed a strict liability jury instruction that stated:

> The Florida Class members allege under their strict liability count that cigarettes designed, manufactured and marketed by [defendants] were defective and unreasonably dangerous to smokers *for several alternative reasons*, including the addictiveness of cigarettes, the manipulation of levels of nicotine by defendants so as to maintain the physical and psychological dependence of cigarette smokers, the disease-causing carcinogens contained in cigarettes, or the failure to produce safer cigarettes.

DR. 68-73:12634-13734 [App. Tab G at 2.4 (emphasis added)]. And in its opposition to the defendants' directed verdict motion, the class referenced at least eight possible independent bases for the Phase I defect finding:

- "[T]hat certain cigarettes use[d] genetically engineered high nicotine tobacco";
- "[T]hat ammonia was used in the manufacture of certain other cigarettes to create unbound nicotine that reached the brain faster";
- "[T]hat cigarettes burned too hot";

- "[T]hat ventilation holes in filtered cigarettes were placed in the wrong location";
- "[T]hat unfiltered cigarettes had higher tar and nicotine yields";
- "[T]hat cigarette smoke contains carcinogens, nitrosamines, carbon monoxide and other allegedly deleterious compounds";
- "[T]hat cigarettes before July 1, 1969 did not have adequate warnings";
- And "that certain cigarettes contained different additives and flavorance [*sic*]."

DR. 68-73:12634-13734 [App. Tab J at 3].

The *Engle* trial court expressly relied on these various brand-specific and design-specific theories when determining the sufficiency of the plaintiffs' evidence and denying the defendants' directed verdict motion:

> There was more than sufficient evidence . . . to support the jury verdict that cigarettes manufactured and placed on the market by the defendants were defective in many ways including . . . [t]hat levels of nicotine were manipulated, sometime[s] by utilization of ammonia to achieve a desired "free basing effect," . . . [that] some cigarettes were manufactured with the breathing air holes in the filter being too close to the lips so that they were covered by the smoker . . . [and] that some filters being test marketed utilize glass fibers that could produce disease.

Engle, 2000 WL 33534572, at *2.[6]

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[6] The evidence introduced on the class's other causes of action was equally varied. For example, the *Engle* trial court instructed the Phase I jury that it could find the defendants liable for negligence in "failing to design and produce a reasonably safe cigarette with lower nicotine levels," negligence in "understating nicotine and tar levels in low-tar cigarettes," and negligence in "failing to warn of the dangers

In light of the diverse allegations presented by the *Engle* class—and the generalized language of the Phase I findings—it is impossible to know what particular issues were "actually . . . decided" in favor of the class by the *Engle* jury. *Gordon*, 59 So. 2d at 45. It is possible, for example, that the defect found by the *Engle* jury was the alleged misplacement of ventilation holes on the filters of defendants' "light" cigarettes—which there is no evidence Mrs. Douglas ever smoked—and that the *Engle* jury never found a defect in the non-light cigarettes that Mrs. Douglas did smoke. Or the defect may have been the use of ammonia in a brand of cigarettes that Mrs. Douglas never smoked, or the failure to use available technology to reduce tar yields in still a different set of cigarettes that Mrs. Douglas never tried. Such determinations would fully account for the jury's answer to the defect question on the *Engle* verdict form.

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of smoking and the addictiveness . . . of cigarettes prior to July 1, 1969," among other theories. DR. 68-73:12634-13734 [App. Tab P at 37564]. The class also asserted numerous alternative theories on its fraudulent concealment claim, including that the defendants had concealed information regarding whether smoking causes disease, whether smokers of "light" cigarettes may "compensate" for the lower nicotine yields by inhaling more deeply or smoking more cigarettes, and whether the defendants manipulated nicotine yields. *See Engle*, 2000 WL 33534572, at *2-3, *6; DR. 68-73:12634-13734 [App. Tab K at 25-26]. And the class alleged that the defendants had committed a breach of warranty, for example, by "advertis[ing] their products as being safe," "[i]n some instances making claims that a particular brand [was] easier and smoother on the throat," and "[s]ubsequent to 1969 . . . shift[ing] to claims of low tar and nicotine when in truth the defendants knew the tar and nicotine levels were either false or manipulated." *Engle*, 2000 WL 33534572, at *5.

Thus, while the findings establish that, at some point over a fifty-year period, defendants marketed some, unspecified defective cigarettes, the findings' highly generalized language cannot be read to establish that defendants' cigarettes smoked by Mrs. Douglas contained a defect. Plaintiff nonetheless made no effort to meet his burden under Florida law of identifying "specific parts" of the *Engle* "trial record" that established that the issues on which he sought preclusion—including whether the cigarettes smoked by Mrs. Douglas contained a defect that had any connection to her injuries—were "actually decided" in Phase I. *Bernice Brown*, 611 F.3d at 1334-35. Traditional principles of Florida preclusion law therefore prohibited plaintiff from relying on the Phase I findings to establish the tortious conduct elements of his claims.

C. The Second District Erred In Giving Preclusive Effect To The Phase I Findings On Any Issue That The *Engle* Jury *Could Have* Decided.

The Second District Court of Appeal did not purport to examine the preclusive effect of the Phase I findings under these well-established principles of Florida preclusion law. Instead, despite the generality of the Phase I findings and the numerous alternative theories of liability pursued by the class, the Second District concluded that this Court's decision in *Engle* requires that the findings be deemed "binding on future claims as to the issues of [defendants'] conduct." *Douglas*, 83 So. 3d at 1010. According to the Second District, plaintiff was therefore relieved

of the burden on his strict liability claim "to prove specific defects existing in specific cigarettes" smoked by Mrs. Douglas. *Id.*

Rather than fully explain the basis for its conclusions, the Second District adopted the reasoning of the Fourth District in *Jimmie Lee Brown*, which similarly held that "the *Engle* findings preclusively establish the conduct elements" of *Engle* class members' claims. 70 So. 3d at 715. The Fourth District, in turn, had adopted the reasoning of the First District in *Martin*, which held that, "[n]o matter the wording of the findings on the Phase I verdict form," the "common issues, which the [Phase I] jury decided in favor of the class, were the 'conduct' elements of the claims asserted by the class." 53 So. 3d at 1067 (emphasis omitted).

In reaching that conclusion, *Martin* did not determine that the *Engle* Phase I jury *actually* found that the defendants had engaged in any particular tortious conduct relevant to any particular *Engle* class member. Indeed, the court rejected the Eleventh Circuit's holding that *Engle* class members must identify material in the *Engle* record demonstrating that the issues on which they seek preclusion were actually decided in their favor. *Martin*, 53 So. 3d at 1067. In the words of the First District, "we do not agree every *Engle* plaintiff must trot out the class action trial transcript to prove applicability of the Phase I findings." *Id.* Thus, in the First District's view, individual *Engle* class members can invoke the findings without pointing to anything in the "class action trial transcript" or any other part of the *Engle*

record that connects those findings to any defect in the particular cigarettes they smoked or their particular injuries. *Id.* at 1067-68.

None of the rationales offered by the Florida appellate courts in *Engle* progeny cases comes close to reconciling that result with traditional principles of Florida preclusion law.

Order Denying Directed Verdict. First, *Martin* relied on the existence of "evidence" in the *Engle* record—catalogued in the *Engle* trial court's order denying the defendants' directed verdict motion—that *could have* supported findings by the Phase I jury on the various theories asserted by the *Engle* class. *Martin*, 53 So. 3d at 1068 (citing *Engle*, 2000 WL 33534572, at *1-3). But the fact that the class introduced sufficient evidence to survive a directed verdict motion plainly does not mean that the *Engle* jury *actually found* in favor of the class on any particular theory of tortious conduct. After all, the standard applied on a motion for a directed verdict asks only whether there is evidence upon which the jury *could have found* for the plaintiff—not whether the jury actually decided the case on any specific theory. *See Swilley v. Econ. Cab Co. of Jacksonville*, 56 So. 2d 914, 915 (Fla. 1951). In fact, the directed verdict order confirms that the *Engle* strict liability finding could have rested on any of numerous alternative theories of defect, making it impossible to conclude that any one of those theories was actually adopted by the Phase I jury. *Engle*, 2000 WL 33534572, at *2.

"Common Issues." Second, the Second District reasoned, as did the courts in *Martin* and *Jimmie Lee Brown*, that the Phase I findings should be given broad preclusive effect because this Court stated in *Engle* that the Phase I jury "considered common issues relating exclusively to the defendants' conduct and the general health effects of smoking." *Engle III*, 945 So. 2d at 1256; *see also Douglas*, 83 So. 3d at 1010; *Martin*, 53 So. 3d at 1067; *Jimmie Lee Brown*, 70 So. 3d at 715. As class counsel acknowledged, however, "[i]t's a fallacy that every common issue has to apply to one hundred percent of the class members." DR. 68-73:12634-13734 [App. Tab P at 24417-18]; *see also Sosa v. Safeway Premium Fin. Co.*, 73 So. 3d 91, 107 (Fla. 2011) ("the commonality prong only requires that resolution of a class action affect all *or a substantial number* of the class members") (emphasis added). Indeed, there is much that the members of the *Engle* class did not have in common: They smoked different brands of cigarettes, with different design features, over different periods of time, for different reasons. The Phase I findings "did *not* determine whether the defendants were liable to any[ ]" of them, and left the individualized issues of "legal causation and reliance" to be resolved in individual class members' suits. *Engle III*, 945 So. 2d at 1263 (emphasis in original; internal quotation marks omitted).

Nor can the *Engle* Phase I findings be read to have found *all* cigarettes to be inherently defective. The *Engle* class expressly disclaimed that argument. *See*

DR. 68-73:12634-13734 [App. Tab M at 233 ("The Engle Class never asserted any claims based on defendants' mere act of selling cigarettes.") (capitalization altered)]. In any event, even if the class had asserted that all cigarettes are defective, that argument would only have been one theory among the many alternative theories of defect asserted in Phase I. Thus, there still would be no basis for concluding that the Phase I jury found in favor of the class on that theory rather than one of its alternative theories.[7]

This Court's Intent in Engle. Finally, the Second District agreed with the First and Fourth Districts that requiring *Engle* class members "to relitigate issues related to [defendants'] conduct and the general health effects of smoking would undercut the intent of the Florida Supreme Court's *Engle III* decision." *Douglas*, 83 So. 3d at 1010; *see also Martin*, 53 So. 3d at 1066-67; *Jimmie Lee Brown*, 70

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[7] In addition, the Phase I findings cannot be read to establish that all cigarettes are inherently defective because that result would be preempted by federal law, which "foreclose[s] the removal of tobacco products from the market." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 137 (2000); *see also* 21 U.S.C. § 387g(d)(3) (prohibiting the FDA from banning all cigarettes). Thus, in *Liggett Group, Inc. v. Davis*, 973 So. 2d 467 (Fla. 4th DCA 2007), *rev. dismissed*, 997 So. 2d 400 (Fla. 2008), the Fourth District Court of Appeal held that both Florida law and federal law prevented a plaintiff from recovering on a negligence claim that would have held Liggett "liable for continuing to manufacture cigarettes" after it learned of smoking's health risks because the "claim would necessitate all manufacturers from refraining from producing cigarettes." *Id.* at 472, 473. Class members therefore cannot invoke the Phase I findings to establish that defendants' cigarettes are defective simply because, due to the inherent characteristics of all tobacco, they are addictive and cause disease.

So. 3d at 718. As explained above, however, this Court's holding in *Engle* that the Phase I findings should be given "res judicata effect" simply removed any uncertainty as to whether the elements of mutuality and finality were satisfied, and thus whether the findings could have any preclusive effect at all under traditional principles of Florida preclusion law. *See supra* p. 19. The Court did *not* suggest that anything other than traditional rules of preclusion should apply when determining what that preclusive effect would be. Nor did it purport to usurp the role of future courts in determining for themselves the preclusive effect of the findings in individual progeny cases.

The Second District therefore erred when, based on a misinterpretation of *Engle*, it broke with settled Florida preclusion law and gave preclusive effect to the Phase I findings on issues that may not have been actually decided by the *Engle* jury—including whether the cigarettes smoked by Mrs. Douglas contained a defect that was related to her injuries. This Court should clarify that it intended no such thing in *Engle*, and that *Engle* progeny plaintiffs are bound by the same preclusion principles as every other party under Florida law.

II. THE SECOND DISTRICT IMPERMISSIBLY EXCUSED PLAINTIFF FROM PROVING LEGAL CAUSATION ON HIS STRICT LIABILITY CLAIM.

The trial court's treatment of the legal causation issue in this case underscores the error in its preclusion ruling. In *Engle*, this Court reaffirmed the bed-

rock principle of Florida tort law that "legal causation" is a necessary element of every tort claim, including the claims of *Engle* class members. *Engle III*, 945 So. 2d at 1263, 1268. To recover on their strict liability claims, *Engle* class members are therefore required to prove that a specific defect in defendants' cigarettes was the legal cause of their injuries; proof that the product in general caused the injuries is not enough. In this case, however, plaintiff was not required to prove a causal link between a specific defect in defendants' cigarettes and Mrs. Douglas's injuries. A new trial is required.[8]

It is well-established Florida law that the legal causation element of a strict liability claim requires proof that a particular avoidable *defect* in the defendant's product caused the plaintiff's injuries. *See West*, 336 So. 2d at 86. As this Court has made clear, "when the injury is in no way attributable to a defect, there is no basis for imposing product liability upon the manufacturer" because "[i]t is not contemplated that a manufacturer should be made the insurer for *all* physical injuries caused by his products." *Id.* (internal quotation marks omitted); *see also* Fla. Standard Jury Instructions 5.2; *In re Standard Jury Instructions in Civil Cases—Report No. 09-10 (Prods. Liab.)*, _ So. 3d _, 2012 WL 1722576, at Instruction 403.12 (Fla. 2012) (per curiam).

[8] "Whether a jury instruction was legally adequate is a question of law subject to *de novo* review." *Santiago v. State*, 77 So. 3d 874, 876 (Fla. 4th DCA 2012).

Plaintiff was therefore required to establish that a specific feature of the cigarettes that Mrs. Douglas smoked—*e.g.*, the composition of the filter, the chemical ingredients in the rolling paper, or the additives used to flavor the tobacco—constituted a defect and that this defect caused her injuries. Thus, for example, if the only defect in defendants' cigarettes smoked by Mrs. Douglas was the use of a flavoring found to contain a carcinogen, but Mrs. Douglas developed cancer and COPD due to the tar in those cigarettes (an inherent quality of all tobacco) and would have developed those diseases irrespective of whether the flavoring was added to the cigarettes, then the *defect* in defendants' cigarettes would not be the legal cause of her injuries.

The Second District ignored these settled principles of Florida law when it held that plaintiff had satisfied his burden to "prove legal causation" on his strict liability claim. *Douglas*, 83 So. 3d at 1010. In reaching that erroneous conclusion, the Second District relied entirely on the jury's finding that "smoking cigarettes manufactured by one or more of the Defendants [was] a legal cause of Charlotte Douglas' death." DR. 65:12112-14 [App. Tab E]; *see also Douglas*, 83 So. 3d at 1010. But that question could not possibly have allowed the jury to make a proper finding of legal cause because it did not ask the jury to find the requisite causal link between a *defect* in defendants' cigarettes and Mrs. Douglas's injuries. It instead premised liability on nothing more than the jury's finding that Mrs. Doug-

las's injuries were caused by cigarettes—a legal product that Congress has prohibited the States from banning. *See Brown & Williamson*, 529 U.S. at 137.

The causation question that the *Douglas* jury answered was fundamentally different from the legal causation requirement applied in every other Florida tort case, including the *Engle* case itself. In Phase II-A of *Engle*, which decided the individual claims of three class representatives, the initial question on the verdict form was whether "smoking cigarettes was a legal cause of" each of the three individual plaintiffs' injuries. DR. 68-73:12634-13734 [App. Tab L, No. 1]. That was the same causation question that was posed to the jury in this case. But the *Engle* jury was *also* asked in Phase II-A whether the defendants' tortious conduct was a legal cause of the class representatives' injuries—a question that the jury in this case was not asked. *Id.* at Nos. 2-9. The Second District never explained why *Engle* class members pursuing individual claims would conceivably be permitted to recover without making the same showing of legal causation that was required of the three class representatives in *Engle* itself. This Court plainly intended no such thing when it decertified the class and held that individual class members must prove the "individualized issue[ ]" of legal causation in their own suits. *Engle III*, 945 So. 2d at 1268.

Although the Second District did not state as much, it no doubt felt compelled to relieve plaintiff of his legal causation burden because that burden is im-

possible to satisfy where a plaintiff relies on the generalized Phase I findings to establish the defect element of his strict liability claim: Absent identification of the specific defect in the cigarettes smoked by Mrs. Douglas, there is no way to determine if the defect was the legal cause of Mrs. Douglas's injuries. Thus, unlike in Phase II-A of *Engle*—which was decided by the same jury as Phase I—it is impossible for juries in progeny cases to find the requisite causal link between a defect found by the Phase I jury and the injury to any progeny plaintiff.[9]

The Second District's legal causation ruling requires a new trial. More importantly, that ruling exemplifies the arbitrary, irrational, and fundamentally unfair trial procedures that result when courts deviate from Florida's traditional preclusion principles. The Court should make clear that the preclusive effect of the *Engle* Phase I findings is governed by the same well-established preclusion principles that apply to every other set of findings under Florida law.

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[9] The appellate courts in *Martin* and *Jimmie Lee Brown* were forced to go to similar lengths to ease the plaintiffs' burden of proof on legal causation. In *Martin*, the First District held that the plaintiff had been "required to prove legal causation" on his non-intentional tort claims through a verdict form question on *Engle* class membership, which asked only whether addiction to cigarettes was the legal cause of the decedent's injuries. *Martin*, 53 So. 3d at 1069. In *Jimmie Lee Brown*, although the Fourth District "depart[ed]" from *Martin* and held that, in addition to the class membership question, a "separate causation instruction" was required for strict liability claims, the court held that the jury made a proper finding of legal causation on the plaintiff's strict liability claim when it found that the defendants' "defective and unreasonably dangerous cigarettes"—as opposed to a defect in those cigarettes—caused the decedent's injuries. 70 So. 3d at 713, 716.

III. Giving Preclusive Effect To The *Engle* Phase I Findings On Issues That Plaintiff Failed To Demonstrate Had Been Actually Decided By The *Engle* Jury Would Violate Federal And State Due Process.

Affording the Phase I findings the same preclusive effect as any other set of findings under Florida law also adheres to the constraints that federal and state due process impose on issue preclusion. Throughout this litigation, however, plaintiff urged the lower courts to deviate from the traditional requirements of Florida preclusion law by abandoning the "actually decided" requirement. Giving such sweeping preclusive effect to the Phase I findings would be fundamentally unfair because it would allow plaintiffs to recover without the submission of proof—in at least some court somewhere—on every element of their claims. Such an arbitrary deprivation of property would violate the Due Process Clause of the Fourteenth Amendment, as well as the similar due process protections under the Florida Constitution. *See* U.S. Const. amend. XIV, § 1; art. I, § 9, Fla. Const.[10]

A. Under Federal And State Due Process, The Phase I Findings Establish Only Those Issues That The *Engle* Jury Actually Decided.

The *Engle* progeny litigation powerfully illustrates the unfairness of expanding the preclusive effect of prior findings beyond what the earlier jury is shown to have actually decided. Under the progeny plaintiffs' approach in these cases, the

[10] A court's interpretation of the procedural requirements imposed by due process is reviewed *de novo*. *State v. Myers*, 814 So. 2d 1200, 1201 (Fla. 1st DCA 2002).

Phase I findings would be given preclusive effect on issues that may not have been decided in the plaintiffs' favor by *any* jury. For example, the trial court in this case instructed the jury that the *Engle* Phase I findings had already determined that defendants sold defective cigarettes, but did not identify—because it could not—which of the numerous alternative theories of defect advanced by the *Engle* class had been adopted by the Phase I jury. In light of those alternative defect theories, and the generalized language of the Phase I findings, it is possible that Mrs. Douglas smoked cigarettes that the *Engle* jury found not to be defective at all. The Second District nevertheless upheld the jury's verdict on plaintiff's strict liability claim. In so doing, it held that *all* of the various alternative misconduct allegations that *could* have been resolved against the *Engle* defendants must now be treated as having *in fact* been resolved against them.

Affirming that grossly unfair result would violate due process. It is well established that "an extreme application of state-law res judicata principles violates the Federal Constitution." *Richards v. Jefferson Cnty.*, 517 U.S. 793, 804 (1996). The requirement that an issue have been "actually decided" in an earlier proceeding has long been one of the fundamental constitutional prerequisites to affording preclusive effect to a prior set of findings. As early as 1876, the U.S. Supreme Court explained that "the inquiry must always be as to the point or question *actually litigated and determined* in the original action, not what *might have been* thus

litigated and determined." *Cromwell v. Cnty. of Sac*, 94 U.S. 351, 353 (1877) (emphases added). Preclusion is therefore unavailable where "several distinct matters may have been litigated, upon one or more of which the judgment may have passed, without indicating which of them was thus litigated, and upon which the judgment was rendered." *Russell v. Place*, 94 U.S. 606, 608 (1877); *see also De Sollar*, 158 U.S. at 221 (courts must be "certain that the precise fact was determined by the former judgment").

In *Fayerweather*, the Supreme Court confirmed that this "actually decided" requirement is mandated by due process. In that case, a federal court dismissed a suit on the ground that the plaintiffs' claims were precluded by a prior state court judgment. The plaintiffs maintained that the state court had not decided the relevant issues. The Supreme Court heard the case in order to determine whether the plaintiffs had been "'deprived of life, liberty, or property, without due process of law[ ]' . . . by the judgment of the [federal] Court, which gave unwarranted effect to a judgment of the state courts." 195 U.S. at 297. Indeed, the basis for the Court's jurisdiction was that the case presented a federal constitutional question—"how far" the federal court's judgment could "be sustained in the view of the prohibitory language of the Fifth Amendment." *Id.* at 298.

The Court explained that it would violate due process to give "unwarranted effect to a judgment" by accepting as a "conclusive determination" a verdict "made

without any finding of the fundamental fact." *Fayerweather*, 195 U.S. at 297, 299. Although the Court ultimately upheld preclusion on the particular facts of the case—finding that "[n]othing c[ould] be clearer from th[e] record than that the question" on which preclusion was sought had been "considered and determined" in the prior suit (*id.* at 308)—it established as a constitutional rule that where

> testimony was offered at the prior trial upon several distinct issues, the decision of any one of which would justify the verdict or judgment, then the conclusion must be that the prior decision is not an adjudication upon any particular issue or issues; and the plea of *res judicata* must fail.

Id. at 307.

Thus, "*Fayerweather* . . . found that a court's providing 'unwarranted effect to a judgment' was a deprivation of due process." *Bernice Brown v. R.J. Reynolds Tobacco Co.*, 576 F. Supp. 2d 1328, 1345 (M.D. Fla. 2008), *vacated on other grounds*, 611 F.3d 1324; *see also Monagas v. Vidal*, 170 F.2d 99, 103 (1st Cir. 1948) (*Fayerweather* addressed a "question of due process of law"). *Fayerweather* makes clear that "an absolute due process prerequisite to the application of collateral estoppel is that the party asserting the preclusion must prove that the identical issue was actually litigated, [and] directly determined," in the prior proceeding. *Goodson v. McDonough Power Equip., Inc.*, 443 N.E.2d 978, 985 (Ohio 1983). This due process principle protects against arbitrary deprivations of property by ensuring that courts do not permit a plaintiff—as plaintiff did here—to

obtain a judgment without proving every element of his claims and without affording the defendant the right "to present every available defense." *Williams*, 549 U.S. at 353 (internal quotation marks omitted).

Relieving *Engle* progeny plaintiffs of the burden of proving elements of their claims that no jury may ever have decided in their favor would deny defendants their constitutional right "to litigate the issues" on which their alleged liability rests. *United States v. Armour & Co.*, 402 U.S. 673, 682 (1971). Indeed, if plaintiff had brought this suit without claiming that Mrs. Douglas was a member of the *Engle* class, the trial would have been fundamentally different. He would have been required to prove, for example, that the cigarettes smoked by Mrs. Douglas contained a defect that caused her injuries; defendants, in turn, would have been able to introduce evidence disputing plaintiff's theory of defect. Even though there is no indication in the *Engle* record that the Phase I jury actually decided any of these issues, the Second District permitted plaintiff, upon proving *Engle* class membership, to recover without proving the substantive elements that he would have been required to prove in individual litigation.

That approach violates defendants' federal due process rights because it represents an "extreme application[ ] of [preclusion] doctrine," *Richards*, 517 U.S. at 797, and "abrogat[es] . . . well-established common-law protection[s] against arbitrary deprivations of property." *Honda Motor Co. v. Oberg*, 512 U.S. 415, 430

(1994). It also effectively uses the class-action device to eliminate fundamental substantive and procedural protections that would apply to individualized adjudications of *Engle* class members' claims. *See Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 130 S. Ct. 1431, 1443 (2010) (plurality opinion) (a "class action . . . leaves the parties' legal rights and duties intact"); *Philip Morris USA Inc. v. Scott*, 131 S. Ct. 1 (2010) (Scalia, J., chambers).

B. None Of The Reasons That Courts Have Given For Rejecting Defendants' Due Process Arguments Can Withstand Scrutiny.

In holding that it did not violate due process to permit plaintiff to invoke the *Engle* Phase I findings to establish the conduct elements of his claims, the Second District relied on *Waggoner v. R.J. Reynolds Tobacco Co.*, _ F. Supp. 2d _, 2011 WL 6371882 (M.D. Fla. 2011). In *Waggoner*, an *Engle* progeny case in federal district court, the court acknowledged that granting preclusive effect on an issue that was not previously adjudicated may "violate the fundamental constitutional protection against arbitrary deprivation of property." *Id.* at *22 (citing *Fayerweather*, 195 U.S. 276). It also acknowledged that *Martin* and *Jimmie Lee Brown* had "changed" the "landscape of Florida preclusion law" when they held that *Engle* class members "need not demonstrate" that the "specific determinative facts underpinning the conduct elements of their claims were 'actually adjudicated' by the Phase I jury." *Id.* at *6, *13. *Waggoner* nevertheless ruled, in direct con-

flict with an earlier decision of the Middle District of Florida, *Bernice Brown*, 576 F. Supp. 2d 1328, that this departure from well-established requirements of Florida preclusion law was consistent with due process. None of the *Waggoner* court's rationales for that ruling is persuasive.

First, the district court asserted that applying preclusion on an issue that was not decided in a previous case violates due process only if that application, "*in and of itself*, works an arbitrary deprivation of Defendants' property." *Waggoner*, 2011 WL 6371882, at *23 (emphasis added). The court based its conclusion on *Fayerweather*'s statement that a due process violation occurs when a party is deprived of its property "without any judicial determination of the fact *upon which alone such deprivation could be justified*." *Id.* at *22 (quoting *Fayerweather*, 195 U.S. at 299) (emphasis added by district court). The district court concluded that excusing *Engle* class members from proving that defendants engaged in tortious conduct therefore does not violate due process because defendants are permitted to contest the other elements of *Engle* class members' claims—class membership, legal causation, and damages. *Id.*

The district court's reasoning rests on a misapplication of basic due process principles and a misreading of *Fayerweather*. Due process prohibits depriving a defendant of its property—such as the hundreds of millions of dollars in potential liability already assessed against defendants in *Engle* progeny litigation—without a

judicial determination of *every* element of the plaintiff's claim against that defendant. *See, e.g.*, *Rollins, Inc.*, 951 So. 2d at 874 (rejecting a class-certification order that would have "permitted [the class representatives] to establish the putative class members' claims by proof of common schemes" because the defendants would "be unable to defend against individual claims where there may be no liability," which "would amount to a violation of substantive due process").[11] Thus, where state law provides that a tort claim comprises multiple elements, due process requires that the plaintiff prove, and that the defendant have an opportunity to contest, each of those elements before damages are awarded. The failure to require proof of those elements constitutes an "arbitrary deprivation[ ] of property," *Oberg*, 512 U.S. at 430—whether the plaintiff is excused from proving all the elements of his claim, or only one of them.

Fayerweather's holding—that it violates due process to use preclusion to establish an issue that was not actually "considered and *determined*" in the prior suit, 195 U.S. at 308 (emphasis added)—gives effect to these basic constitutional prin-

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[11] *See also Scott*, 131 S. Ct. at 3 (Scalia, J., chambers) (recognizing the due process problems inherent in a ruling that "eliminated any need for plaintiffs to prove, and denied any opportunity for applicants to contest," the element of reliance); *In re Fibreboard Corp.*, 893 F.2d 706, 711 (5th Cir. 1990) (relying on due process principles to reject a class-action trial plan that would have eliminated "the requirement that a plaintiff prove both causation and damage" and would have "inevitably restate[d] the dimensions of tort liability").

ciples of fairness. The Court expressed that holding in terms of "the fact upon which alone" a deprivation of property could be justified simply because it happened, in that case, that the issue to be given preclusive effect was the only contested issue in the subsequent proceeding. *See id.* at 298-99. But the Court did not hold that a due process violation occurs *only* in those unusual circumstances, and the *Waggoner* court did not cite a single case endorsing that extraordinary—and unconstitutional—departure from settled preclusion principles.

Second, *Waggoner* asserted that *Fayerweather* had "bifurcated" its analysis of the Due Process Clause from its analysis of the common law requirements of issue preclusion, and that the Supreme Court did not hold that the "actually decided" requirement is imposed by due process. 2011 WL 6371882, at *20. That is plainly incorrect because the basis for the Court's jurisdiction in *Fayerweather* was that the case presented a federal constitutional question. *See* 195 U.S. at 297, 299. The Court was therefore interpreting the requirements of federal due process when it held that preclusive effect can be given only on issues that the party seeking preclusion demonstrates were actually decided in a prior proceeding.

Third, *Waggoner* concluded that granting preclusive effect to the Phase I findings on issues that may not have been decided by the *Engle* jury does not violate due process because defendants were able to litigate in *Engle* whether they engaged in tortious conduct, and thus have not been denied an "'opportunity to be

heard.'" 2011 WL 6371882, at *24 (quoting *Richards*, 517 U.S. at 797 n.4). But an "opportunity to be heard" has significance only as part of the process for deciding contested issues based on the evidence adduced. It cannot possibly be consistent with due process, for example, to give the defendant an "opportunity to be heard," but then to impose liability based on a coin-toss. Yet here, for all that can be gleaned from the *Engle* findings, defendants may have prevailed in Phase I on the issues relevant to plaintiff's claim. It does not comport with due process to impose liability absent any discernible resolution of those contested issues.

Finally, the district court denied defendants' due process challenge on the ground that the Phase I jury had determined "issues related to the Defendants' conduct which were common to the entire class." *Waggoner*, 2011 WL 6371882, at *26 (emphasis omitted). As explained above, however, neither the Phase I findings nor the *Engle* trial record supports the conclusion that the *Engle* jury found that defendants committed tortious conduct with respect to *every* member of the *Engle* class—and the class itself disclaimed that theory. *See* DR. 68-73:12634-13734 [App. Tab P at 24417-18]; *see also supra* pp. 33-34. In fact, the *Engle* class action combined disparate claims for personal injury by thousands of plaintiffs who smoked different brands of cigarettes, with different design features, over different periods of time. Thus, the Phase I jury's strict liability finding could have been premised on an alleged defect that was found in only a limited number of cig-

arettes produced over a limited period of time and smoked by a limited number of class members—a fact that the *Waggoner* district court recognized in another part of its opinion. *See* 2011 WL 6371882, at *15 ("The jury could have accepted the ammonia defect theory while rejecting the others (such as the allegation of misplaced ventilation holes in 'light' or 'low-tar' cigarettes), and still answered 'yes' to the defect question.").

Because the Phase I findings fail to establish that the jury actually decided any issue specific to a particular class member's claims, they cannot be invoked to relieve plaintiffs of the burden of proving each element of their claims in progeny cases. This Court's decision in *Engle* did not suggest otherwise—nor could it have done so consistent with federal and state due process.

CONCLUSION

For the foregoing reasons, this Court should answer the certified question as follows: It violates Florida preclusion law and federal and state due process to permit *Engle* class members to invoke the "res judicata effect" of the Phase I findings to establish elements of their claims that they fail to demonstrate, based on specific parts of the *Engle* trial record, were actually decided in their favor in Phase I of *Engle*. This Court should therefore quash the decision on review, and remand with instructions to vacate the judgment below on plaintiff's claim for strict liability and order a new trial.

Respectfully submitted.

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MAY 30, 2012

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

DATED: May 30, 2012

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