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

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

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INTRODUCTION

Plaintiff does not dispute that the Second District's decision permits *Engle* progeny plaintiffs to rely on the Phase I findings to establish elements of their claims that the Phase I jury may actually have decided in the *defendants'* favor. To justify that remarkable outcome, plaintiff is compelled to rely on principles of *claim* preclusion. But this position is untenable for a host of reasons—including that the Phase I "jury decided *issues*," not claims, *Engle v. Liggett Group, Inc.*, 945 So. 2d 1246, 1263 (Fla. 2006) (per curiam) (emphasis added) ("*Engle III*")—which is why *every* appellate court that has addressed the findings' preclusive effect has held that this is a matter of *issue* preclusion, not claim preclusion.

Under traditional and heretofore universal principles of issue preclusion, plaintiff must show that the *Engle* jury actually decided that the cigarettes smoked by Mrs. Douglas contained a defect that was related to her injuries. Plaintiff cannot conceivably meet that burden. He seeks to do so by contending that the *Engle* class pursued only a *single* defect theory during the year-long Phase I proceedings—that all cigarettes are defective because they are addictive and can cause disease. Throughout Phase I, however, the *Engle* class repeatedly invoked alternative defect theories that applied only to limited designs and brands of defendants' cigarettes—including the alleged use of "high nicotine tobacco" in "*certain* cigarettes" and the use of "ammonia" in "certain *other[s]*." DR. 68-73:12634-13734 [App.

Tab B at 3] (emphases added); *see also Engle v. R.J. Reynolds Tobacco*, 2000 WL 33534572, at *2 (Fla. Cir. Ct. Nov. 6, 2000) (recognizing various defect theories applicable only to "*some* cigarettes") (emphasis added). In any event, plaintiff's across-the-board defect theory is foreclosed by Florida law and preempted by federal law because it would impose liability based on inherent qualities of tobacco—and thus forbid the sale of all tobacco products. *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 137 (2000); *Liggett Group, Inc. v. Davis*, 973 So. 2d 467, 471-73 (Fla. 4th DCA 2007), *rev. dismissed*, 997 So. 2d 400 (Fla. 2008).

Accordingly, to affirm the judgment, this Court would have to give the Phase I findings far greater preclusive effect than permitted under traditional principles of Florida preclusion law. Such a ruling would create insuperable due process problems. *See Fayerweather v. Ritch*, 195 U.S. 276, 307 (1904). Plaintiff attempts to minimize these constitutional concerns by emphasizing that defendants had the "opportunity to litigate" against the class in Phase I of *Engle* and against plaintiff in this case. Pl. Br. 50. But the problem here is not the lack of opportunity to defend, but rather the lack of assurance that *any* jury, in *any* proceeding, has ever decided the defect element of this particular plaintiff's strict liability claim against defendants. Depriving defendants of their property under those circumstances is just as fundamental a violation of due process as depriving them of the right to mount any defense at all.

ARGUMENT

I. THE PHASE I FINDINGS HAVE PRECLUSIVE EFFECT ONLY ON THOSE ISSUES THAT PLAINTIFF DEMONSTRATES WERE ACTUALLY DECIDED IN *ENGLE*.

According to plaintiff, defendants are asking this Court to render the Phase I findings "meaningless" and hold that "every *Engle* progeny plaintiff must start over, as if *Engle* never happened." Pl. Br. 22. That argument is overblown. In fact, defendants *agree* with plaintiff that the *Engle* jury settled important issues that cannot be relitigated in progeny cases—including that smoking can cause twenty specific diseases and that cigarettes containing nicotine are addictive. Those issues are conclusively established between the parties in *Engle* because it is clear that the Phase I jury actually decided them. *Engle III*, 945 So. 2d at 1269.

The parties disagree, however, regarding the preclusive effect of the other Phase I findings. Plaintiff's arguments on this point are uniformly inconsistent with traditional principles of Florida preclusion law.

Issue Preclusion Applies. Plaintiff's effort to evade the traditional limitations of Florida preclusion law relies principally on the assertion that claim preclusion applies to the Phase I findings. He accordingly argues that "all issues that were litigated or *could have been litigated*" in Phase I are "forever settled" even if never actually decided by the *Engle* jury. Pl. Br. 23 (emphasis in original). But every appellate court to consider the question, including the Second District in this

case, has held that the preclusive effect of the Phase I findings is governed by *issue* preclusion, not claim preclusion.[1] Plaintiff's contrary position—which is not even endorsed by his own *amici*—is deeply flawed.

First, and most fundamentally, claim preclusion applies only if there has been a previous final judgment resolving a claim on the merits. *See Fla. Dep't of Transp. v. Juliano*, 801 So. 2d 101, 105 (Fla. 2001); *see also* Restatement (Second) of Judgments § 13 cmt. b. The Phase I findings, however, unquestionably related only to a subset of the *issues* raised by *Engle* class members' claims. This Court recognized as much when it stated that the Phase I "jury decided *issues* related to Tobacco's conduct." *Engle III*, 945 So. 2d at 1263 (emphasis added). The Court explained that certification of the class was proper "for only [those] limited liability issues," and that the remaining "individualized issues" of each class member's claims—"such as legal causation, comparative fault, and damages"—would be reserved for future individual suits. *Id.* at 1268 (citing Fla. R. Civ. P. 1.220(d)(4)(A)).

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[1] *See Philip Morris USA, Inc. v. Douglas*, 83 So. 3d 1002, 1010 (Fla. 2d DCA 2012); *Bernice Brown v. R.J. Reynolds Tobacco Co.*, 611 F.3d 1324, 1333 n.7 (11th Cir. 2010); *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). Contrary to plaintiff's assertion (Pl. Br. 36), the federal district court in *Waggoner v. R.J. Reynolds Tobacco Co.*, _ F. Supp. 2d _, 2011 WL 6371882 (M.D. Fla. 2011), also gave issue-preclusive effect to the Phase I findings. *See id.* at *18.

While plaintiff asserts that "the parties fully litigated their strict liability, negligence, warranty, and other claims" in Phase I of *Engle*, Pl. Br. 26 (emphasis omitted), all he is really doing is creatively relabeling "issues" as "conduct claims." *Id.* It is beyond dispute that plaintiff's causes of action were not fully adjudicated in *Engle*—this suit would be unnecessary if they had been—even if some of the issues on which they rested were resolved. As this Court emphasized, the Phase I jury "did *not* determine whether the defendants were liable to anyone." *Engle III*, 945 So. 2d at 1263 (internal quotation marks omitted).

Moreover, claim preclusion prevents *any* "subsequent suit between the same parties based upon the same cause of action." *Stogniew v. McQueen*, 656 So. 2d 917, 919 (Fla. 1995) (internal quotation marks omitted). Thus, if claim preclusion did apply in *Engle* progeny cases, plaintiff's claims would be barred altogether. That is plainly not what this Court intended when it stated that "[c]lass members can choose to initiate individual damages actions" in which the Phase I findings would be given "res judicata effect." *Engle III*, 945 So. 2d at 1269.

There is no legitimate basis for selectively applying an aspect of claim preclusion that favors *Engle* class members (barring subsequent litigation even on matters that may never have been decided) while discarding an aspect that favors the *Engle* defendants (preventing *either* party from maintaining a subsequent action on the claim). As plaintiff acknowledges, claim preclusion "is not a one way

street." Pl. Br. 25. Nor is it plausible that the Court, *sub silentio*, broke with decades of settled Florida law by creating an entirely new form of preclusion that applies without regard to whether plaintiff's causes of action were litigated to a final judgment in *Engle* or whether the conduct elements of plaintiff's claims were actually decided in that prior proceeding. *See Puryear v. State*, 810 So. 2d 901, 905 (Fla. 2002).[2]

Plaintiff Cannot Satisfy The Requirements Of Issue Preclusion. Because traditional principles of issue preclusion apply in *Engle* progeny cases, plaintiff could invoke the Phase I findings to establish the conduct element of his strict liability claim only if he established that the *Engle* jury actually decided that some feature of the cigarettes smoked by Mrs. Douglas rendered those products defective. Defs. Br. 19-23. Plaintiff did not—and cannot—make that showing. Certainly, the findings themselves shed no light on this issue. And, in fact, the *Engle* class presented numerous distinct theories of defect during the Phase I proceedings

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[2] The Court's use of "res judicata" to refer to claim preclusion in another section of its opinion relating to the entirely separate issue of the Florida Settlement Agreement, *Engle III*, 945 So. 2d at 1259, simply reflects the fact that "res judicata" is an umbrella term that, depending on the context, can refer either to claim preclusion or issue preclusion. *See, e.g., Taylor v. Sturgell*, 553 U.S. 880, 892 (2008). Indeed, Florida courts "often use the term '*res judicata*' to encompass both issue preclusion and claim preclusion." *Hochstadt v. Orange Broad.*, 588 So. 2d 51, 52 n.1 (Fla. 3d DCA 1991). The context of the Court's reference to the "res judicata effect" of the Phase I findings leaves no doubt that the Court was invoking issue preclusion in that portion of its opinion.

that applied only to particular designs or brands of cigarettes, rather than to every design and brand, and there is nothing in the *Engle* record that would enable plaintiff to demonstrate which of those theories the *Engle* jury actually accepted.

Plaintiff nevertheless asserts that the class proceeded in Phase I exclusively on the theory that all cigarettes are defective because they are addictive and can cause disease. Pl. Br. 31. That characterization of the class's allegations is impossible to square with the *Engle* record. Indeed, when the *Engle* trial court denied the defendants' directed verdict motion, it made clear that the class had alleged that the defendants' cigarettes "were defective *in many ways*," a number of which applied only to limited brands and designs, *Engle*, 2000 WL 33534572, at *2 (emphasis added), and the class's own proposed jury instructions expressly stated that the class was proceeding on "several *alternative*" theories of defect. DR. 68-73:12634-13734 [App. Tab A at 2.4] (emphasis added); Defs. Br. 27-28.

For example, the class offered substantial testimony and argument about alleged defects that applied only to "light" cigarettes. "Lights" have tiny ventilation holes that allow outside air to dilute inhaled smoke. DR. 68-73:12634-13734 [App. Tab E at 27650-51]. The class claimed that "lights" were defective because smokers could "compensate" by covering up the ventilation holes, inhaling more deeply, taking more puffs, or smoking more cigarettes. *Id.* at 11966-71; DR. 68-73:12634-13734 [App. Tab B at 3]. But there was no evidence that Mrs. Douglas

ever smoked "light" cigarettes, and these theories have no relevance to the non-light cigarettes that Mrs. Douglas did smoke. The class also presented evidence that certain of the defendants used ammonia at certain times to increase the pH levels of cigarette smoke in particular brands, such as Marlboro and Kool, which allegedly enhanced the impact of nicotine on the brain. DR. 68-73:12634-13734 [App. Tab E at 36183-84, 36664-65, 36729-31]; Defs. Br. 25. Mrs. Douglas, however, smoked Lark, Benson & Hedges, Virginia Slims, Winston, and Salem cigarettes—not Marlboro or Kool. While plaintiff dismissively refers to this array of alternative defect theories as "'micro'" issues, Pl. Br. 30, he cannot deny that a finding in the class's favor on *any one* of those issues would have produced a "yes" answer to the Phase I defect question, even if the jury rejected many or all of the class's other defect theories (including any allegation that all cigarettes are defective due to their addictiveness and health risks).

In fact, the *Engle* class expressly *disclaimed* the theory that the defendants should be found liable simply because they sell cigarettes that are addictive and can cause disease. *See* Defs. Br. 33-34; DR. 68-73:12634-13734 [App. Tab C at 233]. The class undoubtedly did so because that theory would have been tantamount to imposing liability on the defendants based on the inherent qualities of the tobacco found in *all* cigarettes. Both Florida law and federal law foreclose that theory of liability because, in conflict with congressional policy, it would necessi-

tate the removal of all tobacco products from the market. *Davis*, 973 So. 2d at 471-73; *see also Brown & Williamson Tobacco Corp.*, 529 U.S. at 137.[3]

Plaintiff also contends that, in ruling that certification of the *Engle* class was not an abuse of discretion as to particular issues, this Court necessarily "decid[ed] that [defendants'] wrongdoing . . . applied to all members of the class." Pl. Br. 32. But it is well settled that common issues in a class action need not apply to all class members. *See Sosa v. Safeway Premium Fin. Co.*, 73 So. 3d 91, 107 (Fla. 2011). Indeed, the *Engle* class unambiguously disavowed the notion that a "common" issue must be common to the entire class. *See* Defs. Br. 33.[4]

Plaintiff further asserts that defendants have "waived their argument that the [*Engle* Phase I] verdict form should have been more detailed" because they "never

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[3] Plaintiff's *amici* erroneously assert that "the time to raise this argument was in the *Engle* litigation, not now." Br. of *Engle* Pls. Firms 11. But, the violation of defendants' rights from giving improper preclusive effect to the Phase I findings occurred in this progeny case, not in *Engle* itself. Indeed, the class argued in opposing rehearing and certiorari that the issue of the proper scope of preclusion was "premature." DR. 68-73:12634-13734 [App. Tab D at 5]. Thus, defendants' arguments were allegedly raised too early in *Engle* but are too late here. This Catch-22 is manifestly unacceptable.

[4] Plaintiff misreads the significance of the Court's determination that the Phase I findings on fraudulent misrepresentation and intentional infliction of emotional distress were not suitable for class treatment. Pl. Br. 32. That ruling does not suggest that the Court addressed the separate question of the preclusive effect to be given the remaining Phase I findings in subsequent progeny cases—and, in so doing, departed from the general principle that a court may not "dictate" the "preclusion consequences of its own judgment." *Smith v. Bayer Corp.*, 131 S. Ct. 2368, 2375 (2011) (internal quotation marks omitted).

submitted a more detailed proposal in any proper form." Pl. Br. 29. In fact, the defendants in *Engle* submitted a detailed special-verdict form—to which the class objected—that would have required the jury to identify the theories underlying its findings. *See* Defs. Br. 23. And, plaintiff's waiver argument is misplaced in any event because this is not a direct appeal of the *Engle* Phase I proceedings in which defendants seek reversal on account of the wording of the Phase I verdict form. This is a separate *Engle* progeny case where the question of the Phase I findings' preclusive effect turns not on who was responsible for the content of the Phase I verdict form, but on whether the findings satisfy the preconditions to preclusion. Plaintiff, as the party invoking preclusion, bears the burden of demonstrating that the *Engle* jury actually decided the issues that he seeks to establish through preclusion. *Meyers v. Shore Indus., Inc.*, 597 So. 2d 345, 346 (Fla. 2d DCA 1992). It was therefore incumbent upon the class—not the *Engle* defendants—to propose a verdict form sufficient to enable individual class members to make that showing in subsequent progeny cases.[5]

[5] There is no inconsistency between defendants' argument here and their position in *Engle* that, if the Phase I jury found against the class, "then not a single Florida smoker can recover." Pl. Br. 11. If the Phase I jury had answered the generalized defect question on the verdict form in the defendants' favor, it would necessarily have found that the defendants never marketed *any* cigarettes that contained a defect and thus would have foreclosed recovery by the entire class.

This Court's Opinion Did Not Consider Defendants' Preclusion Arguments. Plaintiff is wrong to claim that this Court has already rejected defendants' arguments regarding the preclusive effect of the *Engle* findings. Pl. Br. 32-33. The question of the findings' preclusive effect was not raised by the class in its appeal and did not arise until this Court, on its own initiative, prospectively decertified the class. Moreover, this Court said nothing about the preclusive effect of the Phase I findings in its opinion other than that the findings would have "res judicata effect" in individual suits. *Engle III*, 945 So. 2d at 1269. Thus, there is no indication that this Court conducted a "review of the record" and predetermined the preclusive effect of the Phase I findings. Pl. Br. 33. Rather, consistent with well-established principles of preclusion law, the Court left that task to the courts that try individual class members' suits. *See Smith*, 131 S. Ct. at 2375.[6]

It was only in seeking rehearing that the defendants first addressed the preclusive effect of the Phase I findings. In response, the class argued that the issue was "premature" and should be decided by courts adjudicating class members' in-

[6] While the majority of the Court rejected the concerns that Justice Wells raised about the prospective decertification procedure, those concerns were grounded in his belief that permitting one jury to make findings pertaining to liability and a second jury to make a comparative-fault determination would violate the right to a jury trial guaranteed by Article I, Section 22 of the Florida Constitution. *Engle III*, 945 So. 2d at 1285-87 (Wells, J., dissenting). Neither Justice Wells nor the Court's majority addressed the scope of the Phase I findings' preclusive effect under Florida preclusion law or federal and state due process.

dividual suits. DR. 68-73:12634-13734 [App. Tab D at 5]. This Court denied the rehearing petition without commenting on the defendants' preclusion and due process arguments. That denial has no preclusive or precedential value because it could have been premised on any "number of reasons"—including, as the class argued, that the defendants' arguments were "premature." *Topps v. State*, 865 So. 2d 1253, 1257 & n.5 (Fla. 2004) (per curiam); *see also Luckey v. Miller*, 929 F.2d 618, 622 (11th Cir. 1991).

II. PLAINTIFF DID NOT PROVE LEGAL CAUSATION ON HIS STRICT LIABILITY CLAIM.

Plaintiff's argument that he proved the legal-causation element of his strict liability claim would require this Court to endorse a sea change in Florida tort law. It is well settled in Florida that a product-liability plaintiff must prove that his injury was caused not simply by the defendant's product, but by a *defect* in that product. *West v. Caterpillar Tractor Co.*, 336 So. 2d 80, 86 (Fla. 1976). Plaintiff cannot satisfy that bedrock requirement here because it is impossible, based on the generalized Phase I findings, to determine *which* theory of defect was accepted by the *Engle* jury. Accordingly, there is no way for plaintiff to prove that a defect found by the Phase I jury was the legal cause of Mrs. Douglas's injuries.

Plaintiff argues that he satisfied his legal-causation burden when he proved that Mrs. Douglas's *addiction* to defendants' cigarettes caused her injuries. Pl. Br. 38. That argument rests on the same flawed assumption that underlies plaintiff's

expansive interpretation of the preclusive effect of the Phase I defect finding—that the defect found in *Engle* was the addictive nature of defendants' cigarettes. As explained above, that assumption cannot withstand scrutiny. *See supra* pp. 7-9.

When plaintiff's erroneous assumption is set aside, it becomes clear that he cannot satisfy his burden of proving legal causation. Because the addictive nature of all cigarettes cannot be presumed to be a defect, proving that addiction caused a smoker's injuries is "separate and apart" from proving that a defect in those cigarettes caused the injuries. *See Jimmie Lee Brown*, 70 So. 3d at 715. Indeed, allowing plaintiff to recover merely by proving that Mrs. Douglas's injuries were caused by an inherent quality of all cigarettes—their addictiveness—would radically alter Florida law because it would be equivalent to making defendants "the insurer for *all* physical injuries caused by [their] products"—a result this Court has rejected. *West*, 336 So. 2d at 86 (internal quotation marks omitted).

Plaintiff asserts that "[t]o ask whether the defect caused the injury is to invite the jury to speculate about the nature of the defect and to second guess the first jury's findings in that regard." Pl. Br. 40-41. But that is a concession that, unless *all* cigarettes are assumed to be defective, plaintiff cannot prove legal causation consistent with longstanding Florida law. This Court should put an end to the arbitrary and irrational decision-making that plaintiff purports to condemn by making clear

that traditional principles of Florida preclusion law apply in *Engle* progeny suits—not by breaking with settled law on legal causation.

III. PLAINTIFF'S UNPRECEDENTED APPROACH TO PRECLUSION WOULD VIOLATE FEDERAL AND STATE DUE PROCESS.

The radical departure from traditional preclusion principles urged by plaintiff would violate defendants' federal and state due process rights. *See* Defs. Br. 40-45; *Fayerweather*, 195 U.S. at 307.[7]

Plaintiff attacks a straw man when he contends that defendants are challenging the doctrine of claim preclusion as unconstitutional. *See* Pl. Br. 45-46. Claim preclusion is not even implicated in this case. *See supra* pp. 3-6. What defendants do argue is that a departure from traditional issue preclusion principles would be fundamentally unfair because it would allow plaintiff to recover on his strict liability claim without establishing that the elements of that claim have been actually decided in his favor by any jury.

Plaintiff also argues that *Fayerweather* is inapposite because it applied principles of claim preclusion. Pl. Br. 47. But *Fayerweather* made clear that it was addressing issue preclusion when it analyzed at length whether a previous court

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[7] Plaintiff asserts that the Eleventh Circuit Court of Appeals rejected defendants' due process arguments in *Bernice Brown*. Pl. Br. 43. That is false. The Eleventh Circuit held that it "need not decide [the] constitutional issue" because it resolved the case on state-law grounds in defendants' favor. *Bernice Brown*, 611 F.3d at 1334. This Court can, and should, avoid the due process issue by applying traditional Florida preclusion law, as the Eleventh Circuit believed this Court intended.

had "*actually* determined" the issue on which preclusion was sought, 195 U.S. at 307 (emphasis added)—an inquiry that would have been irrelevant if the Court had been applying claim preclusion. *See Goodson v. McDonough Power Equip., Inc.*, 443 N.E.2d 978, 985 (Ohio 1983).

Finally, plaintiff attempts to reconcile his unprecedented approach to preclusion with the requirements of due process by emphasizing the length of the *Engle* proceedings—asserting, for example, that "[n]o defendants in the history of Florida litigation have ever had more due process." Pl. Br. 43. In fact, it is precisely the length and complexity of the *Engle* proceedings—coupled with the generality of the Phase I findings—that make it impossible for plaintiff to demonstrate the basis for the Phase I jury's defect finding. Moreover, defendants' "opportunity to litigate their case" in *Engle* and in plaintiff's individual suit (Pl. Br. 50) is beside the point because it provides no assurance that plaintiff has ever proved, to any jury in any proceeding, the elements of his strict liability claim. Imposing liability without that assurance would be fundamentally unfair and unconstitutional. *See Honda Motor Co. v. Oberg*, 512 U.S. 415, 430 (1994).

CONCLUSION

This Court should 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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CERTIFICATE OF COMPLIANCE

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: June 18, 2012

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