IN THE SUPREME COURT OF FLORIDA
CASE NO.: SC03-1856

Lower Tribunal Nos.: 3D00-3400, 3D00-3206, 3D-00-3207, 3D00-3208, 3D00-3210, 3D00-3212, 3D00-3215

HOWARD A. ENGLE, M.D., et al.,

Petitioners,

vs.

LIGGETT GROUP, INC., et al., BROOKE GROUP, LTD.; PHILIP MORRIS INCORPORATED; RJ REYNOLDS TOBACCO COMPANY; LORILLARD TOBACCO COMPANY, LORILLARD, INC.; BROWN & WILLIAMSON TOBACCO CORP., individually and as Successor by merger to the American Tobacco Company, COUNCIL FOR TOBACCO RESEARCH U.S.A., INC. and TOBACCO INSTITUTE, INC.,

Respondents.
_____/

PETITIONERS', FLORIDA ENGLE CLASS, AMENDED BRIEF ON JURISDICTION

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STATEMENT OF THE CASE AND FACTS

In 1994, Petitioners filed a class action on behalf of sick smokers against the tobacco industry. A nationwide class was certified as to all compensatory and punitive damage claims and the district court affirmed, but reduced the Class to Florida citizens and residents. *See R.J. Reynolds Tobacco Co. v. Engle*, 672 So.2d 39, 41 (Fla. 3d DCA 1996) [*Engle I*] holding that "our recent decision in *Broin v. Philip Morris Co.*, 641 So.2d 888 (Fla. 3d DCA 1994), involving a similar products liability class action against various tobacco companies clearly compels this result." Following a two-year trial and entry of final judgment, the court reversed its own decision in *Engle I*: "[E]ven though there is a common nucleus of facts concerning the defendants' conduct, this case [is] . . . unsuitable for class treatment." (A. 11, 23).

The class action was tried before a single jury. Following a favorable verdict for the Class in Phase I on liability and entitlement to punitive damages, in Phase II the jury found in favor of three class representatives awarding compensatory damages, and in Phase III, awarded punitive damages to the Class. The trial court found in its 67 page final judgment that "defendants acted in concert to misinform and deceive" the Class, and the evidence was "clear and convincing":

> If one really examined the entire record in detail of the decades of abuses committed by the defendants upon an ill-informed and unsuspecting public, one could say it was *that concerted behavior on the*

> *part of the defendants, over so many years, affecting so many people, that* "shocks the conscience of the court", *not the award itself. . . .*

Engle v. R.J. Reynolds Tobacco Co., 2000 WL 33534572 *3, 16 (Fla. Cir. Ct.). On appeal, the district court decertified the class, barred all punitive damages, found the trial plan "unconstitutional" and in violation of the *Engle I* mandate[1], ordered that judgments be entered against three class representatives, and acknowledged that "the fate. . . of close to a million Florida residents" rests on these proceedings (A.68).

SUMMARY OF THE ARGUMENT

The district court held that Florida's settlement of its lawsuit for recoupment of Medicaid expenditures barred the punitive damages claims of all Floridians, misapplying *Young v. Miami Beach*[2], *res judicata* and due process, in conflict with *Young*; *Albrecht v. State* and *Keys Citizens v. Florida Keys Aqueduct*. The post-judgment decertification, despite recognition of "a common nucleus of facts concerning defendants' conduct", and its view that filing "close to a million" individual lawsuits is preferable to class treatment of common issues, conflicts with *Tenney v. City of Miami Beach*; *Johnson v. Plantation General Hosp.* and *McFadden v.*

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[1]But in 1999 this same court ruled the opposite, denying defendants' motion to enforce mandate, in *R.J. Reynolds Tobacco Co. v. Engle*, 784 So.2d 1124 (Fla. 3d DCA 1999), having *sua sponte* vacated its earlier order that the trial plan did violate the mandate. *R.J. Reynolds Tobacco v. Engle*, 806 So.2d 503 (Fla. 3d DCA 1999).

[2]Full citations are contained within the Argument section.

Staley. Declining to follow *stare decisis* and the binding precedent of *Broin* and and *Engle I*, conflicts with *North Florida Women's Health v. State*.

The court declined to follow the holding of *Ault v. Lohr*, that a breach of duty serves as a predicate for a punitive damages award, in conflict with *Ault*, *Horizon Leasing v. Leefmans* and *Mortellite v. American Tower*, and misapplied *Bankers v. Farish* by requiring that all punitive damages awards be predicated upon underlying compensatory damages awards, in conflict with *Bankers* and *Arab Termite v. Jenkins*. Then the court failed to conduct the proper excessiveness review of the punitive damages award, in conflict with *St. John v. Coisman*, *Owens-Corning v. Ballard*, *Gore* and *State Farm*. It retroactively changed the class cut-off date, entering defense judgments against two class representatives because their lung cancers were diagnosed after 1994, violating their due process and access to courts in conflict with *Diamond v. E.R. Squibb*, *Southland v. Smith* and *Lance v. Wade*. Petitioners seek discretionary review, pursuant to Article V, Section 3(b)(3), Florida Constitution.

A. EXTINGUISHING ALL PUNITIVE DAMAGES CLAIMS OF FLORIDIANS PRESENTS CONFLICT

First, the district court required "a jury determination, on an individualized basis, as to whether and to what extent each particular class member is entitled to receive punitive damages," (A.32), but then barred all punitive damages claims because of the

settlement of Florida's Medicaid recoupment lawsuit. The decision below misapplied *res judicata* and *Young v. Miami Beach Improvement Co.*, 46 So.2d 26, 30 (Fla. 1950), where the public reasserted a right of easement in an oceanfront strip of land it had previously litigated and lost. *Young* clearly does not bar injured plaintiffs from seeking punitive damages where the State settled a different claim with different parties for recoupment of Medicaid expenses. *See*, *Agency for Health Care Administration v. Assoc. Indus.*, 678 So.2d 1239 (1996) and *American Tobacco Co. v. State*, 697 So.2d 1249, 1251 (Fla. 4th DCA 1997).

There can be no *res judicata* effect where there is no identity of parties and/or where the claims were not actually litigated in prior proceedings. Thus, the decision conflicts with *Albrecht v. State*, 444 So.2d 8, 12 (Fla. 1994). Basing its *res judicata* holding on the Florida and Master Settlement Agreements and final judgment in the Medicaid lawsuit, without considering the prior dismissal of the State of Florida's punitive damages claims, conflicts with *deCancino v. Eastern Airlines, Inc.*, 283 So.2d 97, 98-99 (Fla. 1973) (a court must review the entire court record to determine whether a judgment is *res judicata*); *Weit v. Rhodes*, 691 So.2d 1108, 1109 (Fla. 4th DCA 1997) (same), and *State v. McBride*, 848 So.2d 287, 291 (Fla. 2003) ("*Res judicata* would not be invoked where it would defeat the ends of justice."). *See also*, conflict with *Gordon v. State*, 608 So.2d 800, 801 (Fla. 1992) (only the legislature is

empowered to abolish punitive damages.)

To bar all Floridians from punitive damages based on the Florida and Master Settlement Agreements violates Art. 1, §9, Fla. Const. and U.S. Const. Amend. XIV, because those settlements were not by a party which could be said to represent the Class. *See Richards v. Jefferson County*, 517 U.S. 793 (1996) and *Hansberry v. Lee*, 311 U.S. 32 (1940). It also presents conflict with this Court's decisions explaining the meaning of due process. *See Keys Citizens for Responsible Government, Inc. v. Florida Keys Aqueduct Authority*, 795 So.2d 940, 948 (Fla. 2001).

B. DECERTIFYING THE CLASS CREATES CONFLICT

Decertification, with an invitation to Floridians to file "close to a million" (A.68), individual lawsuits, conflicts with *Tenney v. City of Miami Beach*, 11 So.2d 188, 189 (Fla. 1942) ("The very purpose of a class suit is to save a multiplicity of suits. . . to make legal processes more effective and expeditious, and to make available a remedy that would not otherwise exist"); *City of Miami v. Keton*, 115 So.2d 547, 552 (Fla. 1959) ("a quarter of a million cases. . . would create chaos in the court [and] . . . impose a useless and insufferable burden. . . [with] filing fees of $1,750,000") and *Johnson v. Plantation General Hospital Ltd. P'ship*, 641 So.2d 58, 60 (Fla. 1994) (same). Decertification is a death knell for thousands injured by tobacco companies. In *Engle I* the court had held that "[a]lthough certain individual issues will have to be

tried as to each class member. . . the basic issues of liability common to all members of the class will clearly predominate over the individual issues." 672 So.2d at 40-41. The court's about-face[3] is belied by its former opinions in *Engle I* and *Broin*, in conflict with *North Florida Women's Health & Counseling Services, Inc. v. State*, 2003 WL 21546546 at *17-19 (Fla.) ("It is an established rule to abide by former precedent. . . . the presumption in favor of *stare decisis* is at its zenith. . . [with] a watershed judgment resolving a deeply decisive societal controversy") and *In re: Rule 9.331, Etc.*, 416 So.2d 1127, 1138 (Fla. 1982) ("A three-judge panel. . . should not overrule or recede from a prior panel's ruling. . .").

There is also conflict with *McFadden v. Staley*, 687 So.2d 357, 359 (Fla. 4th DCA 1997) (permitting "claims which arise out of the same course of conduct by a defendant. . ."); *W.S. Babcock Corp. v. Myers*, 696 So.2d 776, 780 (Fla. 1st DCA 1997) (same) and *OCE Printing v. Mailers Data Serv.*, 760 So.2d 1037, 1045 (Fla. 2d DCA 2000) ("The conspiracy issue [is] the overriding predominant question").

C. CONFLICT WITH AULT V. LOHR AND ITS DCA PROGENY

The district court is in conflict with the holding in *Ault v. Lohr*, 538 So.2d 454,

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[3]Upon issuance of the mandate, the *Engle I* opinion became a final judgment, not a "conditional" class certification referred to in *Engle II*. (A.9 n.4) *See*, for conflict, *OP Corp. v. Village of North Palm Beach*, 302 So.2d 130, 131 (Fla. 1974).

456 (Fla. 1989), that "an express finding of a breach of duty should be the critical factor in an award of punitive damages . . .". The jury found that the tobacco companies acted in concert and breached duties *vis* à *vis* the Class. Those findings constitute a sufficient predicate for awarding punitive damages under *Ault* and *Lassiter v. Int'l. Union of Operating Eng'rs.*, 349 So.2d 622, 626 (1976). The district court created conflict by relying on a concurring opinion in *Ault* which differed from the Court's opinion. *See* conflict with *Horizon Leasing v. Leefmans*, 568 So.2d 73, 75 (Fla. 4th DCA 1990) (punitive damages can be awarded "where the fact finder has found a breach of duty but no compensatory or actual damages have been proven"); *Russin v. Greminger*, 563 So.2d 1089 (Fla. 4th DCA 1990) (same); *Mortellite v. American Tower, L.P.*, 819 So.2d 928, 934-35 (Fla. 2d DCA 2002) (same).

D. MISAPPLICATION OF FLORIDA LAW TO DEFENDANTS' CHALLENGE OF VERDICT AS EXCESSIVE CREATES CONFLICT

The district court, in conflict with *St. John v. Coisman*, 799 So.2d 1110, 1114 (Fla. 5th DCA 2001), failed to consider "the degree of the defendants' reprehensibility or culpability" and "the disparity between the actual or potential harm suffered by the . . . [Class] and the punitive damages award." *State Farm Mut. Auto Ins. Co. v. Campbell*, 123 S.Ct. 1513, 1521 (2003), quoting *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996). The district court held that absent individual compensatory

damages awards, it was "impossible" to determine "whether punitive damages bear a 'reasonable' relationship to the actual harm inflicted on the plaintiff, as required by . . . *Bankers Multiple Line Ins. Co. v. Farish*, 464 So.2d 530, 533 (Fla. 1985)" (A.26). *Bankers Multiple Line* said just the opposite: "We adhere to that holding . . . [that] there is no rule of law that punitive damages must bear some reasonable relationship to compensatory damages." *Id.* at 533.[4] *See also*, conflict with *Owens-Corning Fiberglas Corp. v. Ballard*, 749 So.2d 483, 484-85, 487-89 (Fla. 1999) where the jury properly considered "an amount reasonable in relation to the harm likely to result from [defendant's] conduct as well as the harm that actually has occurred [and] . . . the seriousness of the hazard to the public."[5]

Applying the wrong test and accepting as dispositive the CEOs' claimed book

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[4]*In accord*, *Arab Termite & Pest Control of Florida, Inc. v. Jenkins*, 409 So.2d 1039, 1042-43 (Fla. 1982) (citing *Lassiter*) ("Punitive damages. . . are to be measured by the enormity of the offense, entirely aside from the measure of compensation to the injured plaintiff.") *See TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 460, 465 (1993) ("both State Supreme Courts and this Court have eschewed an approach that concentrates entirely on the relationship between actual and punitive damages," noting that under West Virginia law "a defendant could be liable for punitive damages even if the jury did not award the plaintiff *any* compensatory damages.") *State Farm* does not hold differently.

[5]Class actions were excluded when Florida imposed statutory limitations for individual punitive damages awards. *See Fla. Stat. §768.73(1)(a)* (1994). The district court's repudiation of the statute's express exception in class actions, conflicts with *Holly v. Auld*, 450 So.2d 217, 219 (1984), prohibiting courts from modifying or limiting the express statutory terms as an "abrogation of legislative power."

value/net worth, conflicts with *Atlas Properties, Inc. v. Didich*, 226 So.2d 684, 690 (Fla. 1969) ("The jury could have reasonably disbelieved the financial statements. . . . entered at cost instead of the actual fair market value") and *Tennant v. Charlton*, 377 So.2d 1169, 1170 (Fla. 1979) ("It is the height of naivete to suggest that a sworn statement of one's net worth must be accepted as the final word.") The district court's role as a seventh juror, substituting its view of the evidence, conflicts with *Castillo v. E.I. DuPont De Nemours & Co., Inc.*, 854 So.2d 1264, 1277 (Fla. 2003) and *Berry v. CSX Transp., Inc.*, 709 So.2d 552, 567, 571 (Fla. 1st DCA 1998).

E. DEFENSE JUDGMENTS AGAINST TWO CLASS REPRESENTATIVES CONFLICTS WITH DIAMOND v. E.R. SQUIBB AND LANCE v. WADE.

Based upon its retroactive cut-off date for class membership, the court held: "Judgment should have been entered in favor of the defendants. . . because their [class representatives'] claims did not accrue until years after the cut-off date for class membership" (A.33, n.23). Extinguishment of their claims and the potential extinguishment of claims of Floridians with diseases diagnosed after the revised cut-off date, conflicts with *Diamond v. E.R. Squibb & Sons, Inc.*, 397 So.2d 671, 672 (Fla. 1981) (Article I, §21, Fla. Const. guarantees access to courts); *Southland Corp. v. Smith*, 426 So.2d 1182, 83 (Fla. 5th DCA 1983) (denial of due process to enter defense judgment without giving plaintiff right to prove case upon remand); *Palm*

Shores, Inc. v. Nobles, 5 So.2d 52 (Fla. 1941) (denial of due process to bar claim without providing plaintiff "an adjudication on the merits") and *Lance v. Wade*, 457 So.2d 1008, 1011 (1984) (following class decertification, "purchasers should not be subject to the defenses of the statute of limitations or laches. . .").

F. CONSTITUTIONAL CONSTRUCTION JURISDICTION

The court expressly construed the due process provisions of the Florida and U.S. constitutions holding that "state and federal guarantees of due process" and "the Due Process Clause of the Fourteenth Amendment" (a) "require class decertification" (A.24); (b) require "any award of punitive damages can only be entered after awarding damages in. . . an underlying and successful claim for actual damages" (A.36); (c) require "a punitive award. . . be proportionate to the actual harm inflicted on the plaintiff" (A.27); (d) do not permit counsel's arguments (A.58) and (e) prohibits the "excessive" punitive damages verdict (A.38 n. 27, 41 n.31).

CONCLUSION

For the foregoing reasons, this Court should exercise its discretionary jurisdiction to review the decision below.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing was served by hand delivery the 2nd day of December, 2003 to local counsel of each Respondent on the attached Service List and served by U.S. Mail the 2nd day of December, 2003 to all other counsel on the attached Service List.

_____
SUSAN ROSENBLATT

CERTIFICATE OF COMPLIANCE

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

_____
SUSAN ROSENBLATT