Case No. SC11-483

IN THE SUPREME COURT
STATE OF FLORIDA

R.J. REYNOLDS TOBACCO COMPANY,

Defendant/Petitioner,

v.

MATHILDE MARTIN, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF BENNY RAY MARTIN,

Plaintiff/Respondent.

ON DISCRETIONARY REVIEW FROM A DECISION OF THE FIRST DISTRICT COURT OF APPEAL

BRIEF ON JURISDICTION OF PETITIONER R.J. REYNOLDS TOBACCO COMPANY

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STATEMENT OF THE CASE

In *Engle v. Liggett Group, Inc.*, 945 So. 2d 1246 (Fla. 2006), this Court decertified a class action against cigarette manufacturers, but allowed former class members to bring suits (commonly described as "*Engle* progeny" cases) in which certain findings made by the *Engle* jury would have "res judicata effect." *Id.* at 1269. The Court specifically held that the *Engle* jury findings "did *not* determine whether the defendants were liable" on any individual claim, *id.* at 1263 (internal quotation marks omitted), and it nowhere suggested that its intended "res judicata effect" was greater than that provided under prior Florida preclusion law. In this case, the First District misapplied *Engle* by interpreting its res-judicata holding in a manner that conflicts with decisions of this Court and other district courts.

Respondent Mathilde Martin sued petitioner R.J. Reynolds Tobacco Company for the death of her husband from smoking. Based on its reading of *Engle*, the trial court required the jury to find Reynolds liable if it concluded that Mr. Martin was an *Engle* class member—*i.e.*, if it found that he had died from an addiction to cigarettes. A:7-8. It thus allowed the *Engle* findings to substitute for the tortious-conduct elements of all of Mrs. Martin's claims. *Id.* For example, one such finding states that the *Engle* defendants sold defective cigarettes, but does not identify either the defect or the brands that contain it. *Engle*, 945 So. 2d at 1257 n.4. Based on that finding, the court held that the Lucky Strike cigarettes smoked

by Mr. Martin were defective. A:7-8. The court thus relieved Mrs. Martin of the traditional burden of proving that the specific Reynolds conduct that allegedly harmed Mr. Martin (selling Lucky Strike cigarettes) was tortious. *Id.* Mrs. Martin prevailed on her claims and obtained a judgment for $28.3 million. A:9.

The First District affirmed. A:25. *First*, it noted that "[t]he crux of this appeal is the extent to which an *Engle* class member can rely upon the [*Engle*] findings." A:10. It interpreted the reference to "res judicata" as establishing all issues about the *Engle* defendants' alleged misconduct that *could have* been resolved in the *Engle* plaintiffs' favor, whether or not the *Engle* jury *actually* resolved those issues. A:15-16. For example, it held that the *Engle* defect finding—that the defendants had sold defective cigarettes—as a matter of law encompassed the Lucky Strike cigarettes that Mr. Martin smoked. A:15. *Second*, the court held that the *Martin* jury could "infer" reliance, a necessary element of Mrs. Martin's concealment and conspiracy claims, based on nothing more than the assertedly "pervasive" nature of Reynolds's advertising. A:18.

SUMMARY OF THE ARGUMENT

The First District's treatment of the *Engle* findings provides this Court with jurisdiction. The First District allowed Mrs. Martin to use those findings to prove the tortious nature of the conduct that allegedly harmed Mr. Martin, without requiring her to show that the *Engle* jury actually and necessarily found that

conduct to be tortious. This ruling conflicts with a long line of decisions establishing that "res judicata" precludes litigation only of fact issues that the proponent of preclusion shows to have been actually and necessarily decided in prior litigation. The ruling also misapplied *Engle*, which did not imbue the *Engle* findings with a unique "res judicata effect" *beyond* that afforded by previously well-established Florida preclusion law.

The First District's holding on reliance independently establishes this Court's jurisdiction. The First District held that Mrs. Martin proved the reliance element of her concealment and conspiracy claims even though she presented no individualized evidence that Mr. Martin himself relied to his detriment on the alleged concealment. That holding misapplied this Court's ruling in *Engle* that reliance is an individual issue requiring individualized proof. It also conflicts with other district-court decisions holding that reliance may not be inferred from the nature of a defendant's alleged misconduct, but must be proven with evidence specific to the particular plaintiff.

This Court should exercise its discretion to hear this case. Thousands of *Engle* progeny suits have been filed, and the questions presented here are central to all of them. Immediate review would ensure prompt resolution of these issues, before dozens of trials occur under unsettled and potentially erroneous interpretations of this Court's *Engle* decision.

ARGUMENT

I. THE FIRST DISTRICT'S RES-JUDICATA RULING CONFLICTS WITH DECISIONS OF THIS COURT AND OTHER DISTRICT COURTS AND MISAPPLIES *ENGLE*

In determining the "res judicata effect" of the *Engle* findings, the First District held that, "[n]o matter the wording of the findings," they "establish the conduct elements of the asserted claims" for all *Engle* progeny plaintiffs. A:11, 16. Thus, "individual *Engle* plaintiffs need not independently prove up those elements or demonstrate the relevance of the findings to their lawsuits." A:16. To reach that extraordinary result, the First District relied on the *Engle* trial judge's order denying the defendants' motion for a directed verdict. A:15-16 (citing *Engle v. R.J. Reynolds Tobacco Co.*, No. 94-08273 CA-22, 2000 WL 33534572 (Fla. 11th Cir. Ct. Nov. 6, 2000)). The First District also expressly rejected the interpretation of *Engle* adopted in *Brown v. R.J. Reynolds Tobacco Co.*, 611 F.3d 1324 (11th Cir. 2010), the only other appellate decision on the topic. A:13, 16.

This Court has jurisdiction to review the First District's interpretation of *Engle*. *See* Art. V, § 3(b)(3), Fla. Const. The decision below conflicts with well-established Florida preclusion law. *See Wallace v. Dean*, 3 So. 3d 1035, 1039 (Fla. 2009) (jurisdiction exists where holding conflicts with holdings of other district courts). And it misapplies *Engle*. *See* 945 So. 2d at 1254 (jurisdiction exists where court "misapplies" a decision of this Court).

A. The First District's holding conflicts with well-established Florida preclusion law. This Court has long held that the branch of "res judicata" known as collateral estoppel or issue preclusion applies only to the "precise facts" that "were determined by [a] former judgment." *Bagwell v. Bagwell*, 14 So. 2d 841, 843 (Fla. 1943). District courts have thus held that a factual issue on which preclusion is sought must be "identical" to one "actually" decided and a "necessary part of the prior determination." *Goodman v. Aldrich & Ramsey Enters., Inc.*, 804 So. 2d 544, 546-47 (Fla. 2d DCA 2002); *see also Acadia Partners, L.P. v. Tompkins*, 673 So. 2d 487, 489 (Fla. 5th DCA 1996); *Allstate Ins. Co. v. A. D. H., Inc.*, 397 So. 2d 928, 929-31 (Fla. 3d DCA 1981). Conversely, an issue may not be precluded "if the verdict could [have been] grounded upon an issue other than that which the [party] seeks to foreclose from consideration." *State v. Strong*, 593 So. 2d 1065, 1067 (Fla. 4th DCA 1992); *see Sun State Roofing Co. v. Cotton States Mut. Ins. Co.*, 400 So. 2d 842, 844 (Fla. 2d DCA 1981) (no preclusion where "it is impossible to determine which theory the [first] jury relied on" because the prevailing party in the first case proffered alternative theories); *Seaboard Coast Line R.R. Co. v. Indus. Contracting Co.*, 260 So. 2d 860, 865 (Fla. 4th DCA 1972) (no preclusion where "it is impossible to ascertain with any reasonable degree of certainty as to what issue was adjudicated in the former suit").

The First District adopted a different legal rule here. It did not require Mrs. Martin to establish that any conduct that injured Mr. Martin was *actually* and *necessarily* found tortious in *Engle*. A:13-16. Instead, it extended preclusion *beyond* the factual issues actually resolved in *Engle* (for example, that Reynolds sold some defective cigarettes) to all factual issues that *could have* been resolved in *Engle*. *Id.* Indeed, the very directed-verdict order cited by the First District establishes on its face that the *Engle* findings reasonably could have rested on any of a wide range of *alternative* defect and concealment allegations, many of which do *not* encompass the cigarettes smoked by Mr. Martin. For example, the directed-verdict order found legally sufficient evidence to support allegations that "some cigarettes" were defective because of misplaced air holes "in the filter" or because of glass fibers in "some filters." *Engle*, 2000 WL 33534572, at *2. Those defect theories—which could be the sole basis for the *Engle* defect finding—would have no possible application to Mr. Martin's *unfiltered* Lucky Strike cigarettes.

This conflict is confirmed by the First District's express and repeated rejection of *Brown*. A:13, 16. Contrary to the First District, *Brown* relied on longstanding Florida preclusion law, as reflected in cases like *Seaboard*, to hold that the *Engle* findings have preclusive effect only to the extent that plaintiffs can "show with 'a reasonable degree of certainty'" that the factual issues that they wish to treat as precluded were actually "determined in [their] favor." *Brown*, 611 F.3d

at 1335 (citing *Seaboard*, 260 So. 2d at 864-65). And *Brown* found "nothing in the jury findings themselves" to satisfy this standard for *Engle* progeny litigation. *Id.* In rejecting *Brown*, the First District necessarily rejected the *Seaboard* line of cases that *Brown* had directly applied.

B. The First District also misapplied *Engle*. This Court stated that the *Engle* findings should have "res judicata effect" (945 So. 2d at 1269), a phrase that has long had a "broad meaning which covers all the various ways in which a judgment in one action will have a binding effect in another" (*Wacaster v. Wacaster*, 220 So. 2d 914, 915 (Fla. 4th DCA 1969)). The Court noted that the findings resolved only issues, but "did *not* determine whether the defendants were liable" on any claim. *Engle*, 945 So. 2d at 1263 (internal quotation marks omitted). And the "res judicata" effect of fact findings, as opposed to liability determinations, is obviously a matter of *issue* preclusion (*see Bagwell*, 14 So. 2d at 843; *Utterback v. Starkey*, 669 So. 2d 304, 305 (Fla. 3d DCA 1996))—which, as explained, applies only to facts actually and necessarily determined. *Engle*'s reference to "res judicata" cannot fairly be interpreted as obliquely overruling decades of settled res-judicata precedent. *See Puryear v. State*, 810 So. 2d 901, 905 (Fla. 2002) ("[T]his Court does not intentionally overrule itself *sub silentio*.").

The First District disagreed based on this Court's characterization of the *Engle* findings as addressing "common issues" that could have been adjudicated in

an issues class. A:13. But that observation hardly establishes that *every* theory litigated in *Engle* must apply to *each* individual class member. For instance, as noted above, one of the prominent defect theories pressed in *Engle* was that "some cigarettes" contained misplaced air holes or glass fibers "in the filter." *Engle*, 2000 WL 33534572, at *2. That theory simply cannot apply to smokers of unfiltered cigarettes, regardless of how a class was certified (or, in this case, decertified).

The First District further misapplied *Engle* in holding that, to establish claims for strict liability and negligence, former class members need only prove class membership—*i.e.*, that their injuries were legally caused by an addiction to cigarettes, not by a defect or negligence. A:16-17. Nowhere did *Engle* endorse this substantial departure from settled causation rules, which require plaintiffs to prove that a defendant's *tortious conduct* caused their injuries. *See West v. Caterpillar Tractor Co.*, 336 So. 2d 80, 87 (Fla. 1976).

II. THE FIRST DISTRICT'S RELIANCE HOLDING MISAPPLIES *ENGLE* AND CONFLICTS WITH DECISIONS OF OTHER DISTRICT COURTS

The First District's holding that reliance may be "infer[red]" from evidence of "pervasive misleading advertising campaigns" (A:18) provides an independent basis for jurisdiction. That holding misapplies *Engle* and conflicts with decisions of other district courts requiring plaintiffs to present individual proof of reliance.

The First District's reliance holding cannot be squared with *Engle*. This Court decertified the *Engle* class precisely because reliance is an "individual question[]" not susceptible to class-wide proof. 945 So. 2d at 1255. In contrast, the First District, relying exclusively on non-Florida precedents, permitted reliance to be shown based only on the assertedly "pervasive" character of the concealment alleged here, absent any individualized proof that Mr. Martin himself relied on the concealment. A:18. Those respective holdings are irreconcilable.

The First District's ruling also conflicts with *Humana, Inc. v. Castillo*, 728 So. 2d 261 (Fla. 2d DCA 1999), and *Palmas y Bambu, S.A. v. E.I. Dupont de Nemours & Co.*, 881 So. 2d 565 (Fla. 3d DCA 2004). Whereas the ruling here allowed Mrs. Martin to establish reliance with inferences, *Castillo* holds that reliance may not be based on "assumptions" from class-wide proof, because "[w]hat one person may rely upon . . . may not be material to another." 728 So. 2d at 264-65 (internal quotation marks omitted). Likewise, *Palmas* holds that "reliance cannot be presumed due to a defendant's subjection of 'the whole market' to deceptive advertising." 881 So. 2d at 573 (citation omitted).

* * * *

For several reasons, the Court should exercise its jurisdiction to hear this case. Thousands of *Engle* progeny cases are presently pending in state and federal courts throughout Florida. In all of these cases, courts must address the threshold

questions presented here—how the *Engle* findings apply in an individual suit; what a plaintiff must show to use them; and how a plaintiff may prove reliance. The importance of those issues, the volume of *Engle* progeny cases, and the significant judicial disagreement about the meaning of *Engle* all underscore the need for this Court's prompt review.

The First District's decision also raises important federal constitutional questions. Precluding litigation of an issue violates due process unless the record affirmatively demonstrates that the "question was decided" in a previous suit. *Fayerweather v. Ritch*, 195 U.S. 276, 299, 307 (1904). Likewise, due process limits the use of class actions to modify substantive legal rules. *See Philip Morris USA Inc. v. Scott*, 131 S. Ct. 1, 4 (2010) (Scalia, J., in chambers). And the First District's upholding liability on a theory that all cigarettes are defective (A:15), or that the mere act of selling cigarettes is negligent (A:15-16), not only overreads the *Engle* findings, but also raises serious questions under the Supremacy Clause. As the Fourth District has held, federal law preempts state tort claims that "would necessitate all manufacturers from refraining from producing cigarettes." *Liggett Grp., Inc. v. Davis*, 973 So. 2d 467, 472 (Fla. 4th DCA 2007); *see FDA v. Brown & Williamson Tobacco Corp*., 529 U.S. 120, 137 (2000).

CONCLUSION

Reynolds requests that the Court grant review.

Respectfully submitted.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that this 24th day of March, 2011, I served a copy of the foregoing Brief on Jurisdiction of Petitioner with its Appendix by U.S. Mail on the counsel below:

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

DATED: March 24, 2011

_____
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