IN THE SUPREME COURT OF FLORIDA

R.J. REYNOLDS TOBACCO COMPANY,

Petitioner,

v.

Case No. SC11-483

MATHILDE MARTIN, as Personal Representative of the Estate of Benny Ray Martin,

Lower Tribunal Nos. 1D09-4934 and 2007-CA-2520

Respondent.

RESPONDENT'S BRIEF OPPOSING JURISDICTION

ROBERT M. LOEHR
Florida Bar No. 699667
bloehr@levinlaw.com
MATT SCHULTZ
Florida Bar No. 640328
mschultz@levinlaw.com
LEVIN PAPANTONIO THOMAS MITCHELL RAFFERTY & PROCTOR, P.A.
316 S. Baylen Street. Suite 600
Pensacola, FL 32502
Telephone: (850) 435-7140
Facsimile: (850) 436-6140

M. STEPHEN TURNER, P.A.
Florida Bar No. 095691
sturner@broadandcassel.com
DAVID K. MILLER, P.A.
Florida Bar No. 0213128
dmiller@broadandcassel.com
BROAD AND CASSEL
215 South Monroe Street, Ste. 400 (32301)
Post Office Drawer 11300
Tallahassee, FL 32302
Telephone: (850) 681-6810
Facsimile: (850) 521-1446

Attorneys for Respondent

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STATEMENT OF THE CASE AND FACTS

Engle v. Liggett Group, 945 So. 2d 1246 (Fla. 2006) (excerpted copy attached), established RJR's tortious conduct in manufacturing heavily addictive cigarettes with high levels of carcinogens during specified periods and concealing their harmful qualities from smokers. *Engle* directed that the approved findings have "res judicata effect" in subsequent actions by class members, *id*. at 1254, 1269, 1277. This allowed class members to continue pursuit of individual claims by proving individual causation, comparative fault, and damages, *id*. at 1270-71.

Respondent Mathilde Martin proved her husband Benny Martin died as a result of addiction to RJR's Lucky Strike cigarettes. Slip. op. pp. 17-18. She is therefore an *Engle* class member entitled to use the approved findings in her case. Martin did not rely solely on the *Engle* findings, but presented independent evidence to link RJR's tortious conduct as a legal cause of her husband's death (by smoking addictive and carcinogenic Lucky Strike cigarettes). The opinion recited:

> … we find the trial court correctly applied ***Engle*** and Mrs. Martin produced sufficient independent evidence to prove RJR's liability for her husband's death. Slip op. p. 3.
>
> We are satisfied Mrs. Martin produced sufficient evidence independent of the *Engle* findings to allow the jury to find RJR guilty of intentional misconduct or gross negligence. *Id*. p. 20.
>
> The evidence in the instant case demonstrates … RJR's disregard for the safety of Benny Martin and other smokers of its cigarette brands: decades-long purposeful concealment of the health risks from smoking cigarettes, refusal to take nicotine out of Lucky Strike

> because sales would decrease, and collusion with other tobacco industry entities to affirmatively mislead the public into thinking cigarettes indeed may not be harmful. *Id*. p. 22.

Martin also proved her husband's reliance on deception by RJR:

> … the record contains abundant evidence from which the jury could infer Mr. Martin's reliance on pervasive misleading advertising for the Lucky Strike brand in particular and for cigarettes in general…. *Id*. p. 18.

The First District concluded:

> Mrs. Martin produced sufficient independent evidence to prove causation, detrimental reliance, and entitlement to punitive damages. *Id*. p. 25.

The First District rejected RJR's argument that the *Engle* findings approved by this Court prove nothing relevant to any individual class member's case, as an attempt to nullify *Engle*. *Id*. pp. 10-11. The First District held the findings were binding to establish tortious conduct in Martin's claim against RJR, under any theory of preclusion:

> While we generally agree with the Eleventh Circuit's analysis of issue preclusion versus claim preclusion, we find it unnecessary to distinguish between the two or to define what the supreme court meant by "res judicata" to conclude the factual determinations made by the Phase I jury cannot be relitigated by RJR. *Id*. p. 13.

> The [*Engle* trial court] order reflects that Lucky Strike, the brand Mr. Martin primarily smoked, was one of sixteen cigarette brands named by the class representatives and that the Phase I jury findings encompassed all brands. *Id*. p. 15, citing 2000 WL 33534572.

SUMMARY OF THE ARGUMENT

The courts below scrupulously followed this Court's *Engle* opinion. Once found to be an *Engle* class member (survivor of a smoker whose addiction to cigarettes with nicotine caused his death), Martin was allowed to use the class-wide approved findings of tortious conduct with "res judicata effect." The term "res judicata effect" signifies that any dispute regarding the specified tortious conduct was put to rest for individual class member claims that this Court has chosen to treat as a continuation of the same cause of action.

Because the trial court and the First District correctly followed *Engle*, there is no misapplication of its holding, and hence, no basis for review jurisdiction in this Court. RJR simply pleads for this Court to use this case as a vehicle to rehear and nullify *Engle*. Merely because RJR would like different precedent from this Court does not establish conflict jurisdiction.

There is no conflict with cases decided to prior to *Engle*, because those cases involved separate causes of action, not the same cause of action; and did not involve a directive from this Court to give res judicata effect to common issue findings approved for class member claims.

Nor is there any jurisdictional conflict with decisions on reliance. No case holds that the facts in *Martin* do not present a jury issue.

ARGUMENT

I. *MARTIN* PROPERLY APPLIED *ENGLE'S* DIRECTION TO GIVE TORTIOUS CONDUCT FINDINGS RES JUDICATA EFFECT, AND DOES NOT EXPRESSLY AND DIRECTLY CONFLICT WITH ANY OTHER CASE.

RJR's jurisdictional argument is based on a misconception of what *Engle* decided. *Engle* decided that RJR's conduct with respect to cigarettes manufactured in the specified time periods was tortious. No exceptions were reserved for further litigation. RJR speculates that the *Engle* verdict might have been based solely on defective filters or air holes that allowed smoke to bypass filters, which were not found in unfiltered cigarettes (such as Lucky Strikes). But as the court below noted, *Engle* specifically found that Lucky Strikes, smoked by each of the *Engle* class representatives, were dangerous and defective. Slip op. p. 15, citing *Engle* trial court rulings reported at 2000 WL 33534572 at *1-*2. This alone belies any contention that *Engle* somehow exonerated or excluded Lucky Strike cigarettes.

This Court chose not to treat progeny cases like this one as wholly separate causes of action from *Engle,* but rather as individual actions arising out of the class action owing their identity and character to that action, with all parties being bound by the prior proceedings. This Court directed the approved findings have "res judicata effect" for the damage claims sought by individual class members. Res judicata precludes all issues that were raised or could have been raised, with respect to the same cause of action. *Topps v. State*, 865 So. 2d 1253, 1254-55 (Fla.

2004); *Dadeland Depot v. St. Paul Fire and Marine Ins. Co.*, 945 So. 2d 1216, 1235 (Fla. 2006). Collateral estoppel applies only for separate causes of action. *State v. McBride*, 848 So. 2d 287, 291 (Fla. 2003). This cause of action is a continuation of the cause of action in *Engle*, so res judicata effect must apply.

This Court's mandate is a judgment[1] approving certain findings as res judicata and leaving other issues to be decided in later continuation cases. The mandate judgment with res judicata effect precludes all issues that were or could have been raised regarding RJR's tortious conduct as specified in the approved findings, in progeny cases that continue the same cause of action. By analogy, *see Canal Ins. Co. v. Reed*, 666 So. 2d 888, 891 (Fla. 1996), holding a declaratory judgment is res judicata of all matters at issue. Such judgments often decide only specific issues, but are res judicata in continuation cases for supplemental relief.

Engle thoroughly and carefully considered this preclusion issue. The Court reviewed a vast trial record, with detailed trial court findings reported at 2000 WL 33534572; two opposing Third District opinions; thorough briefings by Tobacco and amici; and a thorough motion for rehearing. The Court did not carelessly confuse res judicata with collateral estoppel. *See also, Dadeland Depot,* 945 So. 2d at 1235 (using these terms correctly in a case decided the same day as *Engle*).

Engle provided clear guidance for progeny cases. At pages 1265-67, *Engle*

[1] *Martin v. Martin*, 139 So. 2d 406, 408 (Fla. 1962).

held the initial Third District opinion, *R.J. Reynolds Tobacco Co. v. Engle*, 672 So. 2d 39, 41-42 (Fla. 3d DCA 1996), properly defined the class as persons "who have suffered . . . or have died from diseases and medical conditions caused by their addiction to cigarettes that contain nicotine," for "basic issues of liability common to all members of the class will clearly predominate over the individual issues." Since common liability issues predominate, *Engle* necessarily established that tortious conduct issues were common issues for all class members.

Engle painstakingly restated the approved findings on the common tortious conduct issues, excluding other findings, *id*. at 1255, 1257 n. 4, and 1277.

Engle repeatedly prescribed that these approved common issue findings have "res judicata effect," *id*. at 1254, 1269, 1277; and defined "res judicata" to mean that the ruling "is absolute and settles all issues actually litigated … as well as those that could have been litigated." *Id*. at 1259.

To make this abundantly clear, *Engle* held that individual class member progeny cases are limited to individual issues such as individual causation, comparative fault, and damages, *id*. at 1270-71. Thus each class member need not relitigate the approved common issue findings of RJR's tortious conduct. The Court held this ruling is consistent with constitutional jury trial rights, *id*. at 1270, since a second jury would not pass on what the first jury already found.

Engle explained this was a "pragmatic solution," *id*. at 1269, meaning it is

practical and fair not to re-litigate common tortious conduct issues in the continuation, progeny cases deciding individual class members' damage claims. This is consistent with Fla. R. Civ. P. 1.220(d)(4)(A), allowing flexible issue class treatment, discussed *id.*, 945 So. 2d at 1268-69. *See Tenney v. City of Miami Beach,* 11 So. 2d 188 (Fla. 1942) (recognizing the court's equity power to fashion class-wide relief); *see also Newberg on Class Actions* § 17.28 (4th ed. 2002) (harmful conduct can be a common class-wide issue, and specific causation may be decided individually).

Engle noted "no Florida cases address whether it is appropriate under rule 1.220(d)(4)(A) to certify class treatment for only limited liability issues," *id*. at 1268; and described the case's posture as "unique," *id*. at 1270 n. 12, so prior decisions cannot control *Engle* or progeny cases. Thus, *Martin* could not possibly conflict with pre–*Engle* cases cited by RJR which limit or deny preclusion, because *Engle* itself distinguished them, as just noted. The State's highest court directed the approved findings of tortious conduct have res judicata effect in progeny cases, which are an extension or continuation of the same cause of action as *Engle*. RJR's cited cases lack these key features, so no express or direct conflict is shown.

The First District held that Mrs. Martin produced sufficient evidence independent of *Engle* to support liability. RJR cannot contend that this fact-based ruling conflicts with any other case.

Finally, RJR urges that *Martin* conflicts with *Brown v. R.J. Reynolds Tobacco Co.*, 611 F. 3d 1324 (11th Cir. 2010). But no jurisdiction exists to review a supposed conflict with a federal case applying state law. *Brown* did not decide any federal issue, but tentatively tried to predict state law, *id*. at 1334, 1336; *see McMahon v. Toto*, 311 F. 3d 1077, 1079 (11th Cir. 2002) ("when we write on an issue of state law, we write in faint and disappearing ink").

There is no express and direct conflict anyway, as *Brown* did not determine what is or is not precluded. *Brown* reviewed a preliminary trial court ruling that refused to give the *Engle* findings any effect. The appellate court vacated this ruling, saying, "The Phase I approved findings have to be given preclusive effect; they establish some facts that are relevant to this litigation," *id*. at 1335-36. It directed the trial court to review the *Engle* record with any additional evidence plaintiffs may produce, *id*. at 1335 n. 10. It is speculation what will be precluded in *Brown*. *Brown* did not have the benefit of *Martin*, but may reach the same conclusion, that the approved tortious conduct findings apply to RJR cigarettes that plaintiffs smoked in the stated time period. *Martin* determined that, under either preclusion theory, the approved findings apply to RJR's Lucky Strike cigarettes that caused Mr. Martin's death. Thus *Martin* and *Brown* cannot possibly conflict.

In sum, the lower courts conscientiously followed *Engle* and did not misapply it in any way. Nor is there conflict with prior cases, none of which

involved approved class-wide findings directed by this Court to have res judicata effect in individual claims which are a continuation of the same cause of action.

II. THE RULING BELOW PROPERLY APPLIED *ENGLE'S* DIRECTION TO DETERMINE RELIANCE BASED ON AN INDEPENDENT RECORD, AND DOES NOT EXPRESSLY AND DIRECTLY CONFLICT WITH OTHER CASES.

Reliance is a jury issue to be decided case by case. Martin proved her late husband's reliance by "abundant evidence" independent of the *Engle* findings, as the properly instructed jury, the trial court, and the First District all held.

RJR cites no case in which comparable evidence was presented, *i.e.*, a decades-long, industry-wide conspiracy to deceive cigarette smokers, induce their physical and psychological addiction, make them rationalize continued use, and maximize their continued addictive use without appreciating the danger. Mr. Martin was continuously exposed to this deception, was susceptible to it, and ultimately succumbed by remaining addicted and unable to break his addiction, no matter how much he wanted to, and finally dying, before the deception was exposed. The disinformation campaign was pervasive, and the jury was entitled to infer reliance from the circumstantial evidence presented.

RJR cites no decision holding that a jury cannot infer reliance in these circumstances. RJR cites *Humana, Inc. v. Castillo*, 738 So. 2d 261 (Fla. 2d DCA 1999), but that case holds only that reliance must be individually determined. *Engle* and *Martin* are consistent as they decide reliance individually, not classwide.

RJR also cites *Palmas Y Bambu, S.A. v. E.I. DuPont de Nemours & Co*., 881 So. 2d 565 (Fla. 3d DCA 2004), a RICO Act case predicated on statutory fraud, in which plaintiffs presented no evidence that they knew about the alleged false communications, *id*. at 573. Here there is no question that Mr. Martin was exposed to the disinformation campaign. The issue here is not whether some specific action was taken in reliance on a concrete fraudulent statement, but whether there was reliance over time on a campaign to conceal danger, keeping Mr. Martin from being able to appreciate the danger and escape his addiction. No case holds that an appellate court must step in to overrule the jury's fact finding.

CONCLUSION

After 17 years of litigation, the first *Engle* class member has plowed through RJR's endlessly repetitious defenses to obtain a fully reviewed final judgment. *Martin* did not misapply *Engle*, but followed that decision exactly as directed. There is no misapplication or express and direct conflict of decisions, so review should be denied. *See Barber v. State*, 829 So. 2d 900 (Fla. 2002) (where no misapplication or conflict appears, review dismissed as improvidently granted).[2]

[2] RJR does not seek jurisdiction based on constitutional issues, but seeks to bolster its conflict jurisdiction argument by asking the Court to rehear constitutional issues that *Engle* resolved, for which the United States Supreme Court denied review, 552 U.S. 941, 1056. The Court has no jurisdiction to rehear what *Engle* carefully decided, or to take up preemption or Supremacy Clause issues that RJR did not preserve and the First District did not rule on in this case.

Respectfully submitted this 13th day of April, 2011.

ROBERT M. LOEHR
Florida Bar No. 699667
bloehr@levinlaw.com
MATT SCHULTZ
Florida Bar No. 640328
mschultz@levinlaw.com
LEVIN PAPANTONIO THOMAS MITCHELL RAFFERTY & PROCTOR, P.A.
316 S. Baylen Street. Suite 600
Pensacola, FL 32502
Telephone: (850) 435-7140
Facsimile: (850) 436-6140

M. STEPHEN TURNER, P.A.
Florida Bar No. 095691
sturner@broadandcassel.com
DAVID K. MILLER, P.A.
Florida Bar No. 0213128
dmiller@broadandcassel.com
BROAD AND CASSEL
215 South Monroe Street, Ste. 400 (32301)
Post Office Drawer 11300
Tallahassee, FL 32302
Telephone: (850) 681-6810
Facsimile: (850) 521-1446

Attorneys for Respondent

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served by U.S. Mail upon the following on this 13th day of April, 2011:

Larry Hill
Charles F. Beall, Jr.
Moore, Hill & Westmoreland, P.A.
220 West Garden Street, 9th Floor
P.O. Box 13290
Pensacola, FL 32591-3290

Stephanie E. Parker
Jones Day
1420 Peachtree Street, N.E., Ste. 800
Atlanta, GA 30309

Attorneys for Petitioner

Attorney

CERTIFICATE OF TYPEFACE COMPLIANCE

I HEREBY CERTIFY that this brief was prepared in compliance with the font requirements of Florida Rule of Appellate Procedure 9.210(a)(2).

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Attorney