

IN THE CIRCUIT COURT OF THE THIRTEENTH JUDICIAL CIRCUIT
HILLSBOROUGH COUNTY, FLORIDA
CIVIL DIVISION

In re *Engle* Progeny Cases Tobacco Litigation

Case No. 08-CA-80000

Division D (Trial Division)

Pertains to: All Cases

**ORDER REGARDING THE EFFECT OF
THE ENGLE PHASE I FINDINGS ON PENDING CASES**

This court has reviewed the parties' submissions and heard oral argument on March 26, 2008, regarding the interpretation and effect of the *Engle* Phase I findings on *Engle* progeny cases currently pending in Hillsborough County in light of the Florida Supreme Court's decision in *Engle v. Liggett Group, Inc.*, 945 So.2d 1246 (Fla. 2006). The issue for determination by this order is basically: What did the Florida Supreme Court mean when it ruled that certain findings from the Phase I trial were to be given *res judicata* effect in subsequent, individual *Engle* progeny (Phase III) cases?

The basic tool for the manipulation of reality is the manipulation of words. If you can control the meaning of words, you can control the people who must use the words.
Philip K. Dick (1928 - 1982)

1. The Defendants have suggested this court apply an overly interpretative analysis¹ to the holding in *Engle*. In plain language, this court concludes that the Florida Supreme Court meant exactly what it said in its 2006 decisions, specifically: all issues which were or which might have been litigated and determined in *Engle* are preclusively established in every *Engle* progeny case. After a Plaintiff has initially proven that he or she is a member of the class of

¹ The Defendants argued that the Florida Supreme Court actually meant "collateral estoppel" when it repeatedly used the term "res judicata".

persons entitled to the benefits of the *Engle* conclusionary findings², a jury will determine whether or not the injuries complained of were the result of cigarette smoking or from other causes, and what if any damages resulted from that activity.

2. In order to be included in the *Engle* “class” and to benefit from the findings made by the Florida Supreme Court, a Plaintiff must establish by the greater weight of evidence that the smoker was, as of November 21, 1996, a Florida resident who suffered or died from a disease or medical condition caused by smoking cigarettes. The Florida Supreme Court authorized members of the former *Engle* class “to initiate individual damages actions” within one year of its mandate (January 11, 2007), with the Phase I common core findings having “res judicata effect” in those lawsuits. 945 So. 2d at 1269. For the findings to have preclusive effect in a particular Plaintiff’s lawsuit, a jury must first determine any disputed fact issues about whether the Plaintiff qualifies as a member of the decertified *Engle* class. *See id.* at 1256, 1276-77.

3. Assuming a Plaintiff is found to be a member of the *Engle* class, Phase I finding #1 will conclusively establish in that Plaintiff’s case that smoking cigarettes causes a variety of diseases and medical conditions listed in footnote 2 (“general causation”). This would be phrased in a proposed peremptory jury instruction similar to the following:

² The Phase I findings are that (1) smoking cigarettes causes [the following 16 general disease conditions] aortic aneurysm, bladder cancer, cerebrovascular disease, cervical cancer, chronic obstructive pulmonary disease, coronary heart disease, esophageal cancer, kidney cancer, laryngeal cancer, lung cancer (specifically, adenocarcinoma, large cell carcinoma, small cell carcinoma, and squamous cell carcinoma), complications of pregnancy, oral cavity/tongue cancer, pancreatic cancer, peripheral vascular disease, pharyngeal cancer, and stomach cancer; (2) nicotine in cigarettes is addictive; (3) the Defendants [all of them, including Liggett Group, LLC] placed cigarettes on the market that were defective and unreasonably dangerous; (4) the Defendants concealed or omitted material information not otherwise known or available knowing that the material was false or misleading or failed to disclose a material fact concerning the health effects or addictive nature of smoking cigarettes or both; (5) the Defendants agreed to conceal or omit information regarding the health effects of cigarettes or their addictive nature with the intention that smokers and the public would rely on this information to their detriment; (6) all of the Defendants sold or supplied cigarettes that were defective; (7) all of the Defendants sold or supplied cigarettes that, at the time of sale or supply, did not conform to representations of fact made by said Defendants; and (8) all of the Defendants were negligent.

The court has determined and now instructs you, as a matter of law, that smoking the Defendant(s)' cigarettes causes *[one or more of the enumerated medical conditions suffered by the Plaintiff]*

Phase I finding #2 will establish that “cigarettes that contain nicotine [are] addictive or dependence producing.” The other findings would likewise have to be explained to the jury with appropriate instructions.

4. While the Phase I findings do not establish that any Defendant is liable to any Plaintiff (see *Engle*, 945 So. 2d at 1263, holding that the Phase I findings “did *not* determine whether the defendants were liable to anyone”)(emphasis in original), the jury would be instructed along the lines of these proposed instructions:

The court has determined and now instructs you, as a matter of law, that the Defendant(s) was (were) negligent in the manufacture and sale of the cigarettes smoked by the Plaintiff, and that those cigarettes were defective and in an unreasonably dangerous condition to the Plaintiff.

The first issue for your determination on the Plaintiff's negligence claim is whether smoking cigarettes manufactured and sold by the Defendant(s) was a legal cause of injury or damage to the Plaintiff.

This would allow the jury to determine legal causation upon proof – or lack thereof – of specific medical and legal (but for) causation.

5. The Defendants have argued to this court that legal causation is different from medical causation and is therefore a separate burden of proof for the Plaintiffs to establish liability. Defendants contend that the Phase I findings are not sufficiently specific to permit a jury to find the required causal link between tortious conduct by a defendant and any progeny Plaintiff's injury. This argument may have arisen from the opinion of the Third DCS in *Liggett Group, Inc. v. Engle*, 853 So.2d 434, 453-454 (Fla. 3d DCA 2003). Regarding liability for punitive damages, the 3d DCA opinion said that “[t]he mere finding that smoking causes certain

diseases does not establish the causation elements of liability. Specific medical causation and legal causation, along with other elements of liability, must be established on an individualized basis."

Regardless of the basis for the argument, it is clear to this court that in these *Engle* progeny cases, medical causation and legal causation are one in the same. The jury in each *Engle* progeny case will have to make an individualized determination as to whether the Plaintiff's smoking was a legal (proximate) cause of the injuries based on competent medical evidence. Whether or not the res judicata findings from *Engle* Phase I, together with the proof offered in each case, persuades any given jury that legal cause has been established, will be determined on a case by case basis. But *Engle* progeny Plaintiffs will not be 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.

6. With respect to the position of Liggett Group, Inc. and Vector Group Ltd., Inc. that they cannot be held accountable under the *Engle* Phase I findings, because they were exculpated in Phase II, the court rejects that argument. It appears that the Florida Supreme Court considered and also rejected that argument.

7. This court agrees with the parties that the issue of specific jury instructions relating to the use of the Phase I findings should be addressed at a later date. To that end, **Plaintiffs and Defendants are hereby instructed** to each submit proposed jury instructions and a proposed verdict form by **July 31, 2008**, in order to create a template that will be utilized in the cases when eventually tried. These are to be submitted to the Civil Trial Division Judge (either Judge Levens or his successor). The court will thereafter schedule and convene a charge

conference to determine the format and substance of the pattern jury instructions and verdict that will be utilized in these cases when and as they are tried.

DONE AND ORDERED in Tampa, Hillsborough County, Florida this ____ day of _____, 2008.

ORIGINAL SIGNED
CONFORMED COPY

MAY - 8 2008

WILLIAM P. LEVENS
CIRCUIT JUDGE

Honorable William P. Levens
CIRCUIT JUDGE

Copies furnished to:

Liaison Counsel by Hand Delivery at the
Hearing held May 9, 2008