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IN THE SUPREME COURT OF FLORIDA

CASE NO. SC 16-_____
LOWER TRIBUNAL NO. 4D13-1703

R.J. REYNOLDS TOBACCO CO.,

Petitioner,

v.

PHIL J. MAROTTA,

Respondent.

**RESPONDENT PHIL J. MAROTTA'S
BRIEF REGARDING JURISDICTION**

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ARGUMENT

This Court should decline to exercise jurisdiction to review this case. That is because the supposed “conflict” between the Fourth District’s ruling and the Eleventh Circuit’s decision in *Graham v. R.J. Reynolds Tobacco Co.*, 782 F.3d 1261 (11th Cir. 2015), no longer exists – the Eleventh Circuit vacated its panel opinion in *Graham* exactly 15 days after the Fourth District issued its opinion in this case.

Moreover, the supposed “conflict” between the two rulings was totally contrived anyhow. In reality, *Graham* is plainly distinguishable from the case at bar, due the *Graham* plaintiff’s inexplicable failure to argue in that appeal that the tobacco defendant’s implied preemption defense had been foreclosed by the *res judicata* effect of *Engle v. Liggett Group, Inc.*, 945 So. 2d 1246 (Fla. 2006), and the stare decisis effect of *Philip Morris USA, Inc. v. Douglas*, 110 So. 3d 419 (Fla. 2013). By contrast, those arguments were presented by Mr. Marotta, and they still dictate the outcome here. Implied preemption has already been resolved by this Honorable Court in *Engle* and *Douglas*. Thus, the Fourth District’s certification that its ruling presents a question of “great public importance” is inaccurate and misleading, and this Court should exercise its discretion not to review this case.

- I. There is No Conflict Between the Fourth District’s Decision in Mr. Marotta’s Case and the Eleventh Circuit’s Panel Opinion in *Graham* Because the Latter Decision Has Been Vacated.**

On January 15, 2016 – fifteen days after the Fourth District issued its panel opinion in Mr. Marotta’s case – the Eleventh Circuit vacated its panel opinion in *Graham* and set the appeal to be reheard *en banc*. *Graham*, 2016 WL ____ (11th Cir. Jan.21, 2016) (*see* attached Exhibit A). The Eleventh Circuit has not yet scheduled the date for the *en banc* rehearing. A panel opinion that has been vacated due to a pending *en banc* rehearing is, of course, a legal nullity. *E.g.*, *Key Enterps. of Delaware v. Venice Hosp.*, 9 F.3d 893, 898 (11th Cir. 1993).

II. The Eleventh Circuit’s Vacated Decision in *Graham* was Distinguishable Anyway, Because the Plaintiffs in *Graham* Failed to Raise the Meritorious Res Judicata and Stare Decisis Arguments that Mr. Marotta Raised in this Case.

Undergirding the Fourth District’s certification was its stated belief that its reasoning and holding deviated from that of the Eleventh Circuit in *Graham*. *See RJR v. Marotta*, No. 4D13-1703, Slip Op. at 4 (“We disagree with *Graham*, and we respectfully note what we believe to be flaws in its reasoning. ”). *Id.* at 7 (“Recognizing the Eleventh Circuit’s decision to the contrary, however, we certify this latest Engle progeny defense as a question of great public importance”). However, in reality, this Court need not weigh in on whether *Graham* was correctly decided, because *Graham* is plainly distinguishable from this appeal. The Eleventh Circuit in *Graham* was not confronted with key arguments we have made in this appeal, which are that RJR’s implied preemption argument is foreclosed by the res

judicata effect of *Engle* and stare decisis effect of *Douglas*.

Specifically, as we argued in our appellate Answer Brief in the Fourth District, RJR's implied preemption defense was barred by the res judicata effect of this Court's decision in *Engle*:

The res judicata effect of *Engle* completely bars RJR's preemption argument, and thus ends RJR's appeal at the very outset. When the Florida Supreme Court *Engle* said that the *Engle* findings would have "res judicata effect" in all progeny cases, the Court meant exactly what it said—"res judicata" rather than "collateral estoppel." *Douglas*, 110 So. 3d at 432 ("At its core, the defendants' due process argument is an attack on our decision in *Engle* to give the Phase I findings res judicata—as opposed to issue preclusion—effect in class members' individual damages actions. However, res judicata is the proper term, and we decline the defendants' invitation to rewrite *Engle*."). As the Court in *Douglas* made clear, the res judicata effect of the *Engle* findings means that RJR is barred in progeny cases from asserting any defense to the conduct elements that RJR actually raised in the *Engle* trial *or could have raised* in the *Engle* trial:

Because the claims in *Engle* and the claims in individual actions like this case are *the same causes of action* between *the same parties*, res judicata (not issue preclusion) applies. As we explained in *Engle*, 945 So.2d at 1259 (quoting *Kimbrell*, 448 So.2d at 1012), res judicata prevents *the same parties* from relitigating *the same cause of action* in a second lawsuit and "is conclusive not only as to every matter which was offered and received to sustain or defeat the claim, but as to every other matter which might with propriety have been litigated and determined in that action." With the *Engle* defendants' common liability established by the Phase I findings, individual plaintiffs do not have to reprove those elements of their claims. Likewise, *Engle* defendants are precluded from arguing in individual actions that they did not engage in conduct

sufficient to subject them to liability.

Douglas, 110 So. 3d at 432-33 (italics in original; underlining supplied).

But that is precisely what RJR is attempting to do here via its preemption defense – RJR is arguing that it “did not engage in conduct sufficient to subject [it] to liability” because its claims its conduct is impliedly protected by federal law. As *Douglas* made clear, that argument is completely barred by res judicata. *Id.* at 431 (“[A]s we held in *Engle*, the Phase I jury’s verdict fully settled all arguments regarding the *Engle* defendants’ conduct.”) (emphasis added).

Marotta’s 4th DCA Answer Br. at 11-13.

Our Answer Brief in the Fourth District then argued that RJR’s implied preemption argument was further, and independently, barred by the stare decisis effect of this Court’s decision in *Douglas*:

Even if RJR could somehow surmount the res judicata bar (it cannot), its preemption argument fails anyhow because of *stare decisis*. Put simply: The Florida Supreme Court has already decided the question. Specifically, the Court held in *Douglas* that *Engle* progeny plaintiffs could indeed recover based on a strict liability claim against an *Engle* defendant. *Douglas*, 110 So. 3d at 422 (“Applying our decision in *Engle*, we answer the certified question in the negative and approve the result of the Second District’s decision *affirming the general verdict for the plaintiff based on strict liability*.”) (emphasis supplied).

Douglas reached this conclusion in the face of RJR’s argument that the smoker’s strict products liability claim was preempted. Indeed, RJR’s argument in *Douglas* was functionally identical—in some places, almost verbatim—to its initial brief in the present appeal.

Marotta’s 4th DCA Answer Br. at 15-16.

Then, after the Fourth District requested supplemental briefing on the question

of the possible effect of the *Graham* decision – a decision issued after the parties regular appellate briefs had been submitted – we reiterated yet again our position that RJR’s implied preemption defense was barred by the res judicate effect of *Engle*, as well as the stare decisis effect of *Douglas*. We further informed the Fourth District that the plaintiff in *Graham* had not raised these points, and we even attached to our supplemental brief the appellate briefs from *Graham*, showing the smoker’s failure to make the dispositive arguments in the *Graham* appeal. We thus argued explicitly that the Fourth District did not need to– and indeed should not–confront the question whether the Eleventh Circuit was correct or incorrect in *Graham*:

Thus, properly viewed, *Graham* is distinguishable from the case at bar. This Court need not wade into the question of whether *Graham* was wrongly decided. (It was.) It is sufficient for this Court to simply state that *Graham* did not involve key arguments that have been presented here, and those key arguments dictate affirming the products liability verdict in Mr. Marotta’s favor.

Marotta’s Supplemental 4th DCA Brief at p. 3-4.

Nonetheless, the Fourth District made no mention of these points in its Opinion. It addressed the correctness of *Graham* when it plainly did not need to do so – indeed when the argument accepted by the Eleventh Circuit was plainly barred.

III. Because *Graham* Has Been Vacated, and was Plainly Distinguishable from Mr. Marotta’s Case Anyhow, This Court Should Decline to Exercise Discretionary Review of this Case.

As this Court is well aware, “certification does not create mandatory

jurisdiction. The Florida Supreme Court has discretion to decline review, such as where the question is irrelevant, or where answering it would serve no purpose. On occasion, the Court also seems to have declined to answer questions it regarded as too insignificant.” G. Kogan & R. Waters, “The Operation and Jurisdiction of the Florida Supreme Court,” 18 NOVA L. REV. 1151 (1994).

We respectfully submit that a question becomes “too insignificant” is when its supposed “significance” was premised on a perceived conflict with a prior ruling of a different court, but the subsequent vacatur of the other supposedly-“conflicting” decision removes any possible conflict. That is the situation here.

Another reason not to exercise discretion to review a case is where “a decision may be certified to this Court that does decide a question of great public importance but, on examination by this Court, we may conclude that the question answered was not essential to a determination of the case and is of such nature that no useful purpose would be served by rendering a decision.” *Zirin v. Charles Pfizer & Co.*, 128 So. 2d 594, 597 (Fla. 1961). That, too, is much like the situation presented here. The Fourth District had no need to reach out and opine on the correctness of the Eleventh Circuit’s decision in *Graham* regarding the implied preemption defense, because this appeal could—and should—have been resolved on the logically preceding basis that, under *Engle* and *Douglas*, RJR was simply barred from even raising such a defense

here. As this Court phrased it in *Zirin*, the “question answered” by the Fourth District was “not essential to a determination of the case.” *Zirin*, 128 So. 2d at 597.

It also bears mention that there is no uncertainty for this Court to resolve. The Fourth District happened to be the first Florida appellate court to address *Graham*, but nearly a half-dozen Florida trial courts have done so. None of them has ever followed *Graham*. Indeed, every Florida court to confront the question has either found that the implied preemption defense accepted in *Graham* was barred (for the reasons we argued to the Fourth District), or was simply wrong. *Ryan v. R.J. Reynolds Tobacco Co.*, No. 08-022579 (19) (Fla. 17th Jud. Cir., Apr. 16, 2015); *Russo v. Philip Morris USA, Inc.*, No. 07-44469-CA-01(58) (Fla. 11th Jud. Cir. Apr. 28, 2015); *Hardin v. R. J. Reynolds Tobacco Co.*, No. 12-2900 (Fla. 11th Jud. Cir. Ct., May 13, 2015); *Gray v. R. J. Reynolds Tobacco Co.*, No. 13-2813 (Fla. 1st Jud. Cir. Ct., May 20, 2015); *Brown v. Philip Morris USA, Inc.*, No. 07-11175 (Fla. 4th Jud. Cir. Ct., Aug. 3, 2015). And now the panel opinion in *Graham* has been vacated, meaning it is a nullity and has no precedential force to any court anywhere. Thus, there is no need for this Court to accept review in order to provide guidance to the lower courts in Florida. They had already unanimously rejected the implied preemption holding of *Graham*, even before the Eleventh Circuit vacated it.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was sent by email this 3rd day of February, 2016 to: Eric Lundt, Esq. (eric.lundt@sedgwicklaw.com) and Robert C. Weill, Esq. (robert.weill@sedgwicklaw.com).

/s/ Richard B. Rosenthal

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief was prepared in Times New Roman, 14-point form, in compliance with Rule 9.100(l) of the Fla. R. App. P.

/s/ Richard B. Rosenthal

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