No. A-

IN THE

Supreme Court of the United States

PHILIP MORRIS USA INC.,

Petitioner,

v.

MARY BROWN, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF RAYFIELD BROWN,

Respondent.

APPLICATION FOR AN EXTENSION OF TIME WITHIN WHICH TO FILE A PETITION FOR A WRIT OF CERTIORARI TO THE FLORIDA FIRST DISTRICT COURT OF APPEAL

TO THE HONORABLE CLARENCE THOMAS, ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES AND CIRCUIT JUSTICE FOR THE ELEVENTH CIRCUIT:

Pursuant to this Court's Rule 13.5, Philip Morris USA Inc. ("PM USA") respectfully requests a 25-day extension of time, to and including September 21, 2018, within which to file a petition for a writ of certiorari to the Florida First District Court of Appeal.*

The First District Court of Appeal issued its opinion on April 18, 2018. *Philip Morris USA Inc. v. Brown*, No. 1D15-2337, 243 So. 3d 521 (Fla. Dist. Ct. App. 2018) (per curiam). It denied PM USA's motion for rehearing on May 29, 2018. The First

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* Pursuant to this Court's Rule 29.6, undersigned counsel state that PM USA is a wholly owned subsidiary of Altria Group, Inc. No publicly held company owns 10% or more of Altria Group, Inc.'s stock.

District's opinion is not reviewable in the Florida Supreme Court because it does not contain analysis or a citation to any other decision. *See Fla. Star v. B.J.F.*, 530 So. 2d 286, 288 n.3 (Fla. 1988). Accordingly, this Court has jurisdiction to review the First District's decision under 28 U.S.C. § 1257(a) because the First District was "the highest court of a State in which a decision could be had." *See, e.g., KPMG LLP v. Cocchi*, 132 S. Ct. 23, 24 (2011) (per curiam). Unless extended, the time within which to file a petition for a writ of certiorari will expire on August 27, 2018.

A copy of the First District's decision is attached hereto as Exhibit A; a copy of its order denying rehearing is attached as Exhibit B.

1. This case is one of approximately 8,000 individual personal-injury claims filed in the wake of the Florida Supreme Court's decision in *Engle v. Liggett Group, Inc.*, 945 So. 2d 1246 (Fla. 2006) (per curiam), which prospectively decertified a sprawling class action against the major domestic cigarette manufacturers filed on behalf of "[a]ll [Florida] citizens and residents, and their survivors, who have suffered, presently suffer or who have died from diseases and medical conditions caused by their addiction to cigarettes that contain nicotine." *Id.* at 1256 (internal quotation marks omitted). When it decertified the class, however, the Florida Supreme Court preserved several highly generalized jury findings from the first phase of the *Engle* class-action proceedings—for example, that each defendant "placed cigarettes on the market that were defective and unreasonably dangerous" in some unspecified manner and at some unspecified time over a 50-year period. *Id.* at 1257 n.4. The Florida Supreme Court stated that those findings

would have "res judicata effect" in subsequent cases filed by individual class members. *Id.* at 1269.

In each of the thousands of follow-on "*Engle* progeny" cases filed in state and federal courts across Florida, the plaintiffs have asserted that the generalized *Engle* findings relieve them of the burden of proving the tortious conduct elements of their individual claims against the defendants—for example, on a claim for strict liability, that the particular cigarettes smoked by the class member contained a defect that was the legal cause of the class member's injury. Relying exclusively on *claim* preclusion principles, the Florida Supreme Court has held that affording such broad preclusive effect to the generalized *Engle* findings is consistent with federal due process. *See Philip Morris USA, Inc. v. Douglas*, 110 So. 3d 419, 436 (Fla.) ("That certain elements of the prima facie case are established by the Phase I findings does not violate the *Engle* defendants' due process rights . . . ."), *cert. denied*, 134 S. Ct. 332 (2013).

Pursuant to the procedures established in the Florida Supreme Court's *Engle* decision, Plaintiff Mary Brown brought this wrongful-death action against PM USA to recover damages for the death of her husband, Rayfield Brown, from lung cancer, which she alleged was caused by smoking. Plaintiff asserted claims for strict liability, negligence, fraudulent concealment, and conspiracy to commit fraudulent concealment. The trial court ruled that, upon proving that Mr. Brown was a member of the *Engle* class, Plaintiff would be permitted to rely on the "res judicata effect" of the *Engle* findings to establish the conduct elements of her claims and would not be required to prove those elements at trial.

After multiple mistrials, a jury found that Mr. Brown was an *Engle* class member and found in Plaintiff's favor on her strict-liability, negligence, and conspiracy claims; that jury deadlocked on the other issues in the case, but a subsequent jury awarded Plaintiff $4.375 million in compensatory damages and awarded her daughter, Jennifer Brown, $2 million in compensatory damages.

On appeal to the First District Court of Appeal, PM USA raised several challenges to the judgment under state law. In addition, PM USA expressly preserved its position that the trial court violated federal due process by permitting Plaintiff to rely on the *Engle* findings to establish the tortious conduct elements of her claims.[1] The First District Court of Appeal affirmed in a *per curiam* opinion without citation or analysis.

2. This Court's review would be sought on the ground that the First District Court of Appeal's decision—which rejected PM USA's due-process challenge to the broad preclusive effect afforded to the *Engle* Phase I findings—conflicts with this Court's due-process precedent by depriving PM USA of its property without any assurance that any jury actually found that PM USA committed tortious conduct that was the legal cause of Plaintiff's injuries. For example, on the strict-liability and negligence claims, Plaintiff

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[1] *See* PM USA Initial Br. 44 ("The trial court also erred when it determined that Plaintiff could rely on the *Engle* findings to establish the conduct elements of her claims. That decision violates PM USA's federal due process rights because it represents an 'extreme application[ ] of the doctrine of res judicata' . . . .") (quoting *Richards v. Jefferson Cty.*, 517 U.S. 793, 797 (1996)) (citation omitted). PM USA "acknowledge[d] that the Florida Supreme Court rejected this federal due process argument in *Douglas*, 110 So. 3d at 422," but noted its intention "to preserve the issue for reconsideration by the Florida Supreme Court or review in the U.S. Supreme Court." PM USA Initial Br. 44.

was permitted to invoke the *Engle* jury's generalized findings that PM USA sold unspecified cigarettes at unspecified times that contained an unspecified defect to establish conclusively that the particular cigarettes Mr. Brown smoked were defective. The First District Court of Appeal upheld that result even though Plaintiff made no attempt to show that the *Engle* jury actually decided this issue in her favor. Nor could Plaintiff conceivably have made such a showing: In the *Engle* proceedings, the class presented many alternative theories of defect, several of which applied only to particular designs or brands of cigarettes, rather than to every design and brand, and it is impossible to determine from the *Engle* findings or the *Engle* record which of those theories the *Engle* jury actually accepted. It is possible, for example, that the defect found by the *Engle* jury was a flaw in the filters of a brand of PM USA's cigarettes that Mr. Brown never smoked, or the use of certain additives in that brand—and that the jury found that the cigarettes that Mr. Brown did smoke were *not* defective.

Likewise, to support the class's conspiracy to commit fraudulent concealment claim, the *Engle* jury was presented with numerous distinct categories of allegedly fraudulent statements by PM USA, other tobacco companies, and various industry organizations; the jury returned only a generalized finding that PM USA agreed to "conceal or omit information regarding the health effects of cigarettes or their addictive nature." *Engle*, 945 So. 2d at 1277. The *Engle* jury's verdict does not indicate which tobacco-industry statements were the basis for its finding, or whether that finding rested on the concealment of information about the health effects of smoking, the addictive nature of smoking, or both.

In these circumstances, allowing Plaintiff to invoke the *Engle* findings to establish conclusively that the particular cigarettes smoked by Mr. Brown were defective, and that any tobacco-industry statements he may have seen and read were fraudulent, violates due process. *See, e.g.*, *Fayerweather v. Ritch*, 195 U.S. 276, 299, 307 (1904) (holding, as a matter of federal due process, that where preclusion is sought based on a jury verdict that may rest on any of two or more alternative grounds, and it cannot be determined with certainty which alternative was actually the basis for the jury's finding, "the plea of res judicata must fail"); *Richards v. Jefferson Cty.*, 517 U.S. 793, 797 (1996) ("We have long held . . . that extreme applications of the doctrine of res judicata may be inconsistent with a federal right that is fundamental in character." (internal quotation marks omitted)); *Honda Motor Co. v. Oberg*, 512 U.S. 415, 430 (1994) ("[A State's] abrogation of a well-established common-law protection against arbitrary deprivations of property raises a presumption that its procedures violate the Due Process Clause."). That manifest due-process violation is being repeated in the thousands of pending *Engle* progeny cases in Florida.

3. PM USA is currently evaluating whether to file a petition for a writ of certiorari raising these due-process issues in *Philip Morris USA Inc. v. Boatright*, 217 So. 3d 166 (Fla. Dist. Ct. 2017), an *Engle* progeny case that culminated in a verdict of more than $30 million in favor of the plaintiff. The petition in *Boatright* is due on September 20, 2018. *Boatright* is a better vehicle for plenary review than this case because, unlike the *per curiam* affirmance issued by the First District Court of Appeal in this case, the Second District Court of Appeal issued a written opinion in *Boatright* affirming the

judgment. If PM USA files a petition for a writ of certiorari in *Boatright*, it plans to file a petition in this case asking the Court to hold this case pending the Court's disposition of the petition in *Boatright*. An extension of time until September 21, 2018, the day after the *Boatright* petition is due, is warranted to permit this Court to consider the petition in this case in conjunction with the petition in *Boatright*.

CONCLUSION

Accordingly, PM USA respectfully requests that an order be entered extending the time to file a petition for a writ of certiorari by 25 days, to and including September 21, 2018.

Respectfully submitted.

Miguel A. Estrada/ACT

ANDREW L. FREY
LAUREN R. GOLDMAN
MAYER BROWN LLP
1675 Broadway
New York, NY 10025
(212) 506-2500

MIGUEL A. ESTRADA
Counsel of Record
AMIR C. TAYRANI
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500
mestrada@gibsondunn.com

Counsel for Petitioner
Philip Morris USA Inc.

August 17, 2018

Exhibit A

243 So.3d 521 (Mem)
District Court of Appeal of Florida, First District.

PHILIP MORRIS USA INC.,
Appellant/Cross–Appellee,
v.
Mary BROWN, as personal representative of the Estate of Rayfield Brown, Appellee/Cross–Appellant.

No. 1D15–2337
|
April 18, 2018
|
Rehearing Denied May 29, 2018

On appeal from the Circuit Court for Duval County. Harvey L. Jay, III, Judge.

Attorneys and Law Firms

Amir C. Tayrani of Gibson, Dunn & Crutcher LLP, Washington, DC; Geoffrey J. Michael of Arnold & Porter LLP, Washington, DC; Hassia Diolombi and Kenneth J. Reilly of Shook, Hardy & Bacon LLP, Miami; and W. Edwards Muñiz of Shook, Hardy & Bacon LLP, Tampa, for Appellant/Cross–Appellee.

John S. Mills and Courtney Brewer of The Mills Firm, PA, Tallahassee; and John S. Kalil of Law Offices of John S. Kalil, P.A., Jacksonville, for Appellee/Cross–Appellant.

B.L. Thomas, C.J., and Bilbrey, J., concur; Winsor, J., dissents with opinion.

Opinion

Per Curiam.

AFFIRMED.

WINSOR, J., dissenting.

***522** The main question in this case is what happens when a deadlocked jury is instructed to reach whatever partial verdict it can—and to do so without any further deliberations. On the unusual facts of this case, I would hold that such an instruction leaves the jury incapable of producing a valid verdict. From the time jury deliberations begin until the time the jury reaches its final decision, jurors must be free to weigh and consider arguments and evidence, to consider other jurors' points of view, to attempt to persuade fellow jurors, to argue and debate—in other words, the jury must be free to deliberate until the very end. Because this jury did not have that opportunity, we should reverse and remand for a new trial.

Mary Brown filed a wrongful-death action against Phillip Morris USA, Inc., alleging that her husband died from smoking-related illnesses. She alleged strict liability, negligence, fraudulent concealment, and conspiracy to commit fraudulent concealment. The litigation lasted years: One trial was continued during jury selection, and another ended in a mistrial after this court granted a writ of prohibition, *see Philip Morris USA Inc. v. Brown*, 96 So.3d 468 (Fla. 1st DCA 2012). A third trial ended with a deadlocked jury.

In the next trial—the trial at issue here—the jury's verdict form asked (among other things) whether Philip Morris's actions legally caused the husband's death, the amount of any compensatory damages, the relative percentages of fault, and whether punitive damages were warranted. After deliberating for approximately four or five hours, the jury sent out a note saying it was "stuck on the percentage" and asking "[w]hat are our options?"

After conferring with counsel, the court told the jury to follow instructions already given. The jury continued deliberating for some two additional hours before sending out another note. This one explained that jurors "have not been able to agree on question # 4 [regarding comparative fault] and therefore we cannot go any further." After more discussion with counsel, the court delivered a standard *Allen*[1] charge, asking the jury to continue its deliberations. But after roughly an hour more, the jury sent out another note: "Now hung on question # 2 [regarding fraudulent concealment]. Some have change[d] their mind. It started out on question # 4. Some say yes, and some no. Now need white out for question # 2. Yesterday it was yes now today it hung [sic]."

1 An *Allen* charge is a supplemental instruction courts frequently give when a jury struggles to reach a verdict. *Gahley v. State*, 567 So.2d 456, 459 (Fla. 1st DCA 1990) (citing *Allen v. United States*, 164 U.S. 492, 17 S.Ct. 154, 41 L.Ed. 528 (1896)).

Lawyers for both sides offered their views on how the court should proceed. Both sides agreed the court could

not give ***523** a second *Allen* charge.[2] Philip Morris argued the court should grant a mistrial since the jury could not reach consensus after its *Allen* charge. Mrs. Brown, though, argued that the court should accept a partial verdict on the issues the jury did decide. Ultimately, the court brought the jury back and told them to return to the jury room, to white out verdict-form responses on which the jury was no longer unanimous, and to fill in answers where there was unanimity. The court specifically told the jurors to not deliberate any further in doing so.

2 In *Tomlinson v. State*, 584 So.2d 43 (Fla. 4th DCA 1991), the Fourth District followed *United States v. Seawell*, 550 F.2d 1159 (9th Cir. 1977), and adopted a per se rule that giving a second *Allen* charge is fundamental error. No other district in this state has adopted this rule, *Nottage v. State*, 15 So.3d 46, 49 (Fla. 3d DCA 2009), and many federal courts have explicitly rejected it, *see, e.g., United States v. Davis*, 779 F.3d 1305, 1313 (11th Cir. 2015) ("We have never adopted a *per se* rule against successive *Allen* charges. Other circuits have held there is *not* a *per se* rule." (collecting cases)). Florida's standard jury instructions do include a comment that the deadlock instruction "should be given only once," but that comment is based solely on *Tomlinson*, Fla. Std. Jury Instr. (Civ.) 801.3, and standard jury instructions are not binding precedent, *BellSouth Telecomms., Inc. v. Meeks*, 863 So.2d 287, 292 (Fla. 2003); *see also In re Std. Jury Instrs. in Civil Cases—Report No. 09–01 (Reorganization of the Civil Jury Instrs.)*, 35 So.3d 666, 671 (Fla. 2010) (cautioning "that any comments associated with the instructions reflect only the opinion of the Committee and are not necessarily indicative of the views of this Court as to their correctness or applicability").

After about six minutes in the jury room, the jury returned with a partial verdict, answering two of the verdict form's six questions. The jury agreed that the husband was a member of the *Engle* class, *see Engle v. Liggett Grp., Inc.*, 945 So.2d 1246 (Fla. 2006), and that Philip Morris's conspiracy to conceal was a legal cause of the husband's death. Because the jury found liability on one intentional-tort theory, its inability to provide verdicts on other theories or on comparative-fault percentages was not critical, *see* § 768.81(4), Fla. Stat. (2013); *see also Schoeff v. R.J. Reynolds Tobacco Co.*, 232 So.3d 294, 304 (Fla. 2017) ("[T]he comparative fault statute does not apply to *Engle* progeny cases in which the jury finds for the plaintiff on the intentional tort claims."). But there remained the unanswered questions of the amount of compensatory damages and whether punitive damages were warranted.

Over Philip Morris's objection (and motion for mistrial), the court accepted the partial verdict and scheduled another trial to resolve the remaining issues. At the end of that trial, the jury awarded compensatory damages but found Philip Morris not liable for punitive damages. Philip Morris appealed, contending that the trial court was wrong to accept the partial verdict.

On appeal, Philip Morris's opening position is that Florida does not recognize partial civil verdicts, that courts must declare mistrials whenever juries cannot agree on all issues. Philip Morris argues that no Florida appellate court has ever sanctioned a partial verdict like this one. But neither has Philip Morris cited a Florida appellate decision explicitly precluding the practice. Partial verdicts are routinely used in Florida criminal cases, *see, e.g., State v. Muhammad*, 148 So.3d 159, 159–60 (Fla. 1st DCA 2014); *Avila v. State*, 86 So.3d 511, 513 (Fla. 2d DCA 2012), and they have been accepted in civil cases in federal courts, *see, e.g., Kerman v. City of New York*, 261 F.3d 229, 242 n.9 (2d Cir. 2001) ("Kerman also argues that [the] decision to accept a partial verdict was error because there is no authority for this procedure. We disagree. In the absence of authority prohibiting such a partial verdict ***524** in a civil case, and Kerman cites none, we believe that at the very least a trial judge, in the exercise of sound discretion, may follow such a course."); *see also Bristol Steel & Iron Works v. Bethlehem Steel Corp.*, 41 F.3d 182, 190 (4th Cir. 1994); *Bridges v. Chemrex Specialty Coatings, Inc.*, 704 F.2d 175, 180 (5th Cir. 1983).

Regardless of whether partial verdicts are categorically prohibited, I would hold that the specific circumstances of this case warrant a new trial. With any partial verdict, there is a "risk that the jury will 'premature[ly] conver[t] ... a tentative jury vote into an irrevocable one," *United States v. Moore*, 763 F.3d 900, 911 (7th Cir. 2014); *accord United States v. Wheeler*, 802 F.2d 778, 781 (5th Cir. 1986), and when a jury had been unanimous on certain points and is later told to return to the jury room to answer whatever questions they can—without further deliberating—some jurors will feel compelled to vote consistent with their earlier position.

"It has long been the law that a trial court should not couch an instruction to a jury or otherwise act in any

way that would appear to coerce any juror to reach a hasty decision or to abandon a conscientious belief in order to achieve a unanimous position." *Thomas v. State*, 748 So.2d 970, 976 (Fla. 1999). In deciding whether a court's instructions have violated this principle, we examine de novo the totality of the circumstances to see if the instructions "create a serious risk of coercion." *Id.* at 978. Considering the totality of the unique circumstances here, a new trial is warranted.

While attorneys argued about how to handle the jury's last note, the jury, having already changed its collective mind on some issues, remained together in the jury room. And there is no reason to suppose the jurors' fluid deliberations stopped while the attorneys argued. *Cf. United States v. Byrski*, 854 F.2d 955, 962 (7th Cir. 1988) (noting that "the state of jury deliberations is ever-changing"). When later told to end their deliberations (essentially to memorialize where they left off earlier), reasonable jurors might not have understood their options. They might not have understood that they were not locked into the positions they held immediately before sending their last note—that their vote could accommodate any new view intervening discussions produced. They might not have understood that their remaining duty was more than a ministerial duty to record their earlier positions. *Cf. Harrison v. Gillespie*, 640 F.3d 888, 899 (9th Cir. 2011) (explaining that jurors' preliminary votes can play important roles in the deliberative process but that these informal polls "do not constitute a final verdict"); *cf. also Brutton v. State*, 632 So.2d 1080, 1083 (Fla. 4th DCA 1994) ("The court's questioning created an impression that the juror did not have an absolute right to recede from her vote in the jury room during the polling process.").

When the jurors' last note told the court they were "hung" on some issues, no juror was then obligated to maintain his or her tentative vote on any issue. *See United States v. Straach*, 987 F.2d 232, 243 (5th Cir. 1993) ("[A] jury has not reached a valid verdict until deliberations are over ...." (quoting *United States v. Taylor*, 507 F.2d 166, 168 (5th Cir. 1975))). Yet any juror wanting to explain (or even identify) his or her changed view would feel restricted by the court's specific instruction to cease deliberations. To the point of the final instruction, juror deliberations had been fluid—the jury found (and then lost) agreement on some issues—but by precluding further deliberations, the court precluded further opportunities for additional changed minds. *Cf. Straach*, 987 F.2d at 243 (noting that "continuing deliberations may shake views expressed on counts previously considered" (quoting *Taylor*, 507 F.2d at 168)).

***525** It is no answer to say that the jury was polled, with each juror announcing that the verdict was his or her own. The question is not whether all jurors did, in fact, vote for the ultimate verdict; the question is whether all jurors did so knowing they could change their minds—or try to change others' minds. The subsequent poll offers therefore no cure. *See Moore*, 763 F.3d at 910 (determining that trial court's error in instructing jury to return a partial verdict while deliberations were ongoing was not cured by polling of the jury).

For these reasons, I would reverse and remand for a new trial. This would make it unnecessary to address Philip Morris's independent argument that alleged juror misconduct requires a new trial. As to Mrs. Brown's conditional cross appeal, I would reject Philip Morris's *Tipsy Coachman* arguments, and I would hold that Mrs. Brown may seek punitive damages on her negligence and strict-liability claims in a new trial. *See Soffer v. R.J. Reynolds Tobacco Co.*, 187 So.3d 1219, 1221 (Fla. 2016). But Mrs. Brown asserted she would abandon her cross appeal if she prevailed in the main appeal, which—despite my view—she now has.

All Citations

243 So.3d 521 (Mem), 43 Fla. L. Weekly D813

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Exhibit B

DISTRICT COURT OF APPEAL, FIRST DISTRICT
2000 Drayton Drive
Tallahassee, Florida 32399-0950
Telephone No. (850)488-6151

May 29, 2018

CASE NO.: 1D15-2337
L.T. No.: 2007-CA-11175-BXXX-M

Philip Morris USA Inc.	v.	Mary Brown, as Personal Representative etc.
Appellant / Petitioner(s),		Appellee / Respondent(s)

BY ORDER OF THE COURT:

Appellant's motion filed May 3, 2018, for rehearing, rehearing en banc, written opinion and certification is denied.

I HEREBY CERTIFY that the foregoing is (a true copy of) the original court order.

Served:

John S. Mills
John S. Kalil
Kenneth Reilly
Geoffrey J. Michael
Leslie J Bryan
Amir C. Tayrani
Dana G. Bradford
Courtney Brewer
W. Edward Muniz
Hassia Diolombi
Michael L. Walden

jm

KRISTINA SAMUELS, CLERK

DISTRICT COURT OF APPEAL * STATE OF FLORIDA * FIRST DISTRICT * SAT CITO SI RECTE