

Case No. SC20-291
First District Case No. 1D17-2104

IN THE SUPREME COURT OF FLORIDA

LINDA PRENTICE, as Personal Representative of the
ESTATE OF JOHN C. PRICE,

Plaintiff/Petitioner,

v.

R.J. REYNOLDS TOBACCO COMPANY,

Defendant/Respondent.

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

**AMENDED BRIEF ON JURISDICTION OF RESPONDENT
R.J. REYNOLDS TOBACCO COMPANY**

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INTRODUCTION

Respondent R.J. Reynolds Tobacco Company agrees with Petitioner that the Court has jurisdiction to review the First District’s decision in this case and that the Court should exercise its discretion to accept review. The First District correctly concluded that, on the concealment and conspiracy claims, a jury in an *Engle*-progeny case must be instructed to decide whether the plaintiff (or her decedent) detrimentally relied on a tobacco-company *statement* that was false or misleading due to the concealment or omission of material information, as opposed to simply a failure to disclose such information. When the First District rendered its decision, other appellate courts had given varying responses to the same question, but it was unclear whether an express and direct conflict existed. But shortly after, the Fourth District certified a conflict with the First District’s decision, *see R.J. Reynolds Tobacco Co. v. Burgess*, No. 4D18-3014, 2020 WL 913316, at *4 (Fla. 4th DCA Feb. 26, 2020), leaving no doubt about the Court’s jurisdiction and the need for review.

This case also presents an opportunity for the Court to “correct its mistakes” by reconsidering *Engle* and *Douglas*, which constituted an “error in legal thinking” and were “unsound in principle.” *State v. Poole*, No. SC18-245, 2020 WL 370302, at *14 (Fla. Jan. 23, 2020) (quotation omitted). This Court’s decisions make clear that once the Court has jurisdiction to resolve one issue, it has jurisdiction over all issues in the case. Reynolds plans to ask the Court to reconsider its earlier decisions

permitting *Engle*-progeny plaintiffs to use the *Engle* findings to establish the conduct elements of their claims—decisions that, in thousands of pending cases, continue to deprive defendants of due process and violate traditional Florida preclusion law.

STATEMENT OF THE CASE AND FACTS

Plaintiff/Petitioner brought claims on behalf of the estate of John Price, alleging that he was a member of the class prospectively decertified in *Engle v. Liggett Group, Inc.*, 945 So. 2d 1246 (Fla. 2006) (per curiam). A.6. As relevant here, Plaintiff asserted claims against Reynolds for fraudulent concealment and conspiracy to fraudulently conceal. *Id.* At trial, Plaintiff introduced “evidence that major tobacco companies in the United States ... made fraudulent statements about the hazards of smoking” and “concealed information about the addictive nature and harmful effects of smoking while engaging in marketing efforts to encourage people to smoke.” *Id.*

Reynolds’s proposed jury instructions on the fraud claims would have required the jury to decide whether Mr. Price “relied to his detriment on a statement that concealed or omitted material information regarding the health effects of smoking cigarettes or their addictive nature.” A.7. The trial court instead instructed the jury to decide “whether the conspiracy to withhold health information or information regarding addiction and any acts proven in furtherance of that conspiracy were relied upon by John Price to his detriment and were a legal cause of John Price’s death.” A.8. The jury found in favor of Plaintiff on her conspiracy claim, but not on her

concealment claim, and awarded \$6.4 million in compensatory damages. A.6–7.

On appeal, Reynolds advanced several arguments for reversal, but the First District addressed only the instructional error. A.5–6. Based on that court’s earlier decision in *R.J. Reynolds Tobacco Co. v. Whitmire*, 260 So. 3d 536 (Fla. 1st DCA 2018), which held that *Engle* plaintiffs “must prove that they relied to their detriment on false statements from the tobacco companies,” A.9, the *Prentice* court held that the trial court erred in refusing to give Reynolds’s proposed instruction because “no other jury instruction informed the jury of the need to find that Price detrimentally relied on a false or misleading statement by RJR.” *Id.* Judge Makar dissented, contending that the panel’s decision conflicted with *R.J. Reynolds Tobacco Co. v. Martin*, 53 So. 3d 1060 (Fla. 1st DCA 2010). *See* A.16. The majority disagreed because *Martin* “should not be read to circumvent” the requirement that plaintiffs “prove [] reliance based on some evidence to support [an] inference” of reliance. A.9, n.3 (quotation omitted).

Three months after the First District’s decision here, the Fourth District certified a conflict with the decision in *Burgess*, 2020 WL 913316, at *4, holding that “[o]ur court’s precedents do not require the jury to be instructed that the smoker relied on ‘a statement.’” Reynolds invoked the Court’s jurisdiction in *Burgess*, and the Court has stayed those proceedings pending a decision on jurisdiction in this case.

SUMMARY OF ARGUMENT

I. Reynolds agrees that this Court has jurisdiction because the First District’s decision expressly and directly conflicts with the Fourth District’s decision in *Burgess*, which certified conflict. *See* Art. V, § 3(b)(4), Fla. Const. The Court should exercise jurisdiction for three reasons. *First*, if left unresolved, the conflict will yield disparate results in the thousands of *Engle*-progeny cases that remain to be tried. As it stands, plaintiffs in the Fourth District can satisfy the reliance element of their fraud claims under a less stringent standard than in the First District, and trial courts outside those districts must decide which decision to follow. *Second*, the Fourth District’s decision conflicts with this Court’s holding that *Engle*-progeny trials must adjudicate “highly individualized” elements of liability, including reliance. *Engle*, 945 So. 2d at 1254. *Third*, the Fourth District’s decision authorizes liability for concealment based on mere silence, contrary to Florida law.

II. If the Court accepts jurisdiction, it should also reconsider its prior decisions holding that the *Engle* findings can be given claim preclusive effect—decisions that departed from longstanding Florida preclusion law and that continue to impair due process rights in the thousands of still-pending *Engle*-progeny cases. *See Poole*, 2020 WL 370302, at *14 (“we will abandon a decision that is ‘unsound in principle’”) (quoting *Robertson v. State*, 143 So. 3d 907, 910 (Fla. 2014)).

ARGUMENT

I. THE COURT HAS JURISDICTION TO RESOLVE THE CONFLICT.

A. District Courts Are Divided Over The Instructional Issue.

Reynolds agrees with Plaintiff that the Court has jurisdiction to review the instructional issue decided by the First District in this case and the Fourth District in *Burgess*, either as a certified conflict or an express-and-direct conflict. *See* Art. V, § 3(b)(4), Fla. Const.; *see, e.g., State v. Vickery*, 961 So. 2d 309, 312 (Fla. 2007). The Fourth District was correct in concluding that its decision expressly and directly conflicted with the decision in this case, which reached the opposite result on substantially similar facts. *See, e.g., Aravena v. Miami-Dade Cty.*, 928 So. 2d 1163, 1166 (Fla. 2006) (conflict jurisdiction met when holdings are “irreconcilable”).

B. The Instructional Issue Warrants This Court’s Review.

The Court should exercise jurisdiction to promote uniformity in the sprawling *Engle*-progeny litigation, to ensure that lower courts conduct the individualized inquiry that *Engle* requires, and to clarify the state of the law regarding concealment.

1. The Court should resolve the conflict, lest it continue to yield disparate results in numerous cases involving substantially similar facts. *See, e.g., State v. Betz*, 815 So. 2d 627, 630 (Fla. 2002). The First District held that a jury in an *Engle*-progeny case must be instructed to find that the plaintiff (or her decedent) detrimentally relied on a tobacco-company statement for the plaintiff to prevail on her concealment and conspiracy claims. A.9. The Fourth District, by contrast, held that its

“precedents do not require the jury to be instructed that the smoker relied on ‘a statement.’” *Burgess*, 2020 WL 913316, at *4. Thus, Fourth District plaintiffs are held to a less stringent standard than First District plaintiffs, and trial courts outside those districts are forced to choose between the two in every case where the issue arises—*i.e.*, virtually every *Engle* case in which the plaintiff pursues a fraud-based claim.¹

2. The Court should exercise jurisdiction to confirm *Engle*’s holding that progeny plaintiffs must prove individualized reliance to prevail on their fraud claims. 945 So. 2d at 1255. This Court has explained that the very purpose of *Engle*-progeny trials is to adjudicate “highly individualized” elements of liability, *id.* at 1254, including reliance, *see Hess v. Philip Morris USA, Inc.*, 175 So. 3d 687, 698 (Fla. 2015) (“*Engle*-progeny plaintiffs must certainly prove detrimental reliance”). The First District’s decision vindicates the individualized inquiry this Court prescribed in *Engle* and is consistent with the theory of concealment pressed by the *Engle* class itself—that the defendants committed fraud by failing “to reveal information they knew was contrary to *that which they disseminated*” and by their “campaigns of *misinformation* about the dangers of smoking.” *Engle v. R.J. Reynolds Tobacco Co.*,

¹ Plaintiff alleges a conflict with the Second District’s decision in *Philip Morris USA, Inc. v. Duignan*, 243 So. 3d 426 (Fla. 2d DCA 2017), but that court agreed with defendants that “silence, unaccompanied by a duty to disclose, is not actionable as fraud,” *id.* at 442, and ultimately reversed because of other problems with the trial court’s instruction on reliance, *id.* at 443. In any event, the conflict with *Burgess* is clear, and the discussion of this issue in other appellate decisions confirms that it is a significant, recurring question that should be definitively answered by this Court.

No. 94-08273 CA-22, 2000 WL 33534572, at *2 (Fla. Cir. Ct. Nov. 6, 2000) (emphases added). The Fourth District permits plaintiffs to prevail on a more expansive theory of concealment, and one that does not require individualized evidence connecting a defendant's statements to the smoker's decisions.

3. The Court should exercise jurisdiction and approve of the First District's decision because authorizing liability for concealment and conspiracy without a connection to a defendant's statements distorts the law of fraud in Florida—which has significance for all fraud cases. Under longstanding Florida law, a fraud can be accomplished by a statement that is false (affirmative fraud) or a statement that is deceptive by virtue of its omission of information (fraudulent concealment). In neither case can a defendant be liable for fraud based on mere silence, because there is no freestanding duty to speak. *See* Restatement (Second) of Torts § 551(2)(b) (further disclosure required when “necessary to prevent [a] partial or ambiguous statement of the facts from being misleading”).² A “defendant's knowing concealment or nondisclosure” becomes fraud only “where there is a duty to disclose,” such as where a party “undertakes to disclose information” but fails to disclose “all material

²The one exception to this rule where there is a confidential or fiduciary relationship that gives rise to a duty to disclose, *see State v. Mark Marks, P.A.*, 698 So. 2d 533, 539 (Fla. 1997), does not apply between a manufacturer and consumer. *See, e.g., Joy v. Brown & Williamson Tobacco Corp.*, No. 96-2645CIV-T24(B), 1998 WL 35229355, at *5 (M.D. Fla. May 8, 1998). A manufacturer's duty to disclose hazards associated with its product arises under product liability and negligence, not fraud.

facts.” *Gutter v. Wunker*, 631 So. 2d 1117, 1118–19 (Fla. 4th DCA 1994).

The instruction affirmed by the Fourth District in *Burgess*, however, compelled the jury to find for the plaintiff merely if “Mr. Burgess reasonably relied to his detriment on the concealment or omission of material information ... by [Reynolds].” 2020 WL 913316, at *3, n.2. That instruction imposes a duty to speak and punishes a defendant for its mere silence, contrary to more than a century of Florida law. Before such a drastic change takes root—one that greatly expands liability for fraud—this Court should first review the merits of the question.

II. THE COURT SHOULD RECONSIDER *ENGLE* AND *DOUGLAS*.

Once the Court accepts jurisdiction over the instructional issue, it will also have jurisdiction to reconsider its “radical departure from the well established Florida law concerning claim preclusion,” *Philip Morris USA v. Douglas*, 110 So. 3d 419, 439 (Fla. 2013) (Canady, J., dissenting)—decisions that continue to encourage “*Engle*-progeny courts ... [to] rest[] their thumbs on the scales to the detriment of the unpopular *Engle* defendants,” *Graham v. R.J. Reynolds Tobacco Co.*, 857 F.3d 1169, 1194 (11th Cir. 2017) (Tjoflat, J., dissenting). In *Engle* and *Douglas*, divided panels of the Court ignored “the cardinal rule [of] claim preclusion” and held that claim preclusive effect could be given to the generic *Engle* Phase I findings, even though the basis for the findings cannot be reasonably ascertained. *Douglas*, 110 So. 3d at 439 (Canady, J., dissenting). On appeal, Reynolds preserved its argument

that Ms. Prentice should not have been able to use the *Engle* findings to establish the conduct elements of her claims. The lower court was constrained by *Engle* and *Douglas*, but this Court suffers from no such constraint, and it has recently and “repeatedly receded from erroneous precedents,” recognizing that “[p]erpetuating an error in legal thinking under the guise of stare decisis serves no one well and only undermines the integrity and credibility of the court.” *Poole*, 2020 WL 370302, at *14 (quoting *Shepard v. State*, 259 So. 3d 701, 707 (Fla. 2018)); see also *Phillips v. State*, No. SC18-1149, 2020 WL 2563476, at *8 (Fla. May 21, 2020) (overturning prior decision that “clearly erred” and had “incorrect legal analysis”).

Reynolds respectfully submits that *Engle* and *Douglas* should be abandoned. *Engle* itself “employed no analysis concerning claim preclusion and issue preclusion” and “instead simply announced the result.” *Douglas*, 110 So. 3d at 439 (Canady, J., dissenting).³ Accordingly, “progeny courts [have] had trouble understanding *Engle III*’s res judicata instruction,” *Graham*, 857 F.3d at 1192 (Tjoflat, J., dissenting), to apply “claim preclusion” in the absence of a final judgment and where the general verdict returned by the *Engle* jury (e.g., that the defendants were “negligent”) does not disclose which theories of tortious conduct the *Engle* jury accepted

³ See also *Bush v. State*, No. SC18-227, 2020 WL 2479140, at *14 (Fla. May 14, 2020) (refusing to follow “inexplicabl[e]” decisions “without analysis”). In *Engle* itself, only four Justices (Anstead, Pariente, Quince, JJ., and Lewis, C.J.) concurred in the decision to give the findings res judicata effect. *Engle*, 945 So. 2d at 1254.

and which theories it rejected or did not resolve. As the *Douglas* majority itself noted, the findings cannot be limited to issues the *Engle* jury actually decided, since that “would effectively make the Phase I findings regarding the *Engle* defendants’ conduct useless in individual actions.” 110 So. 3d at 433. Yet due process requires just such reasonable certainty about what issues were actually decided before a finding can be given preclusive effect. See, e.g., *Fayerweather v. Ritch*, 195 U.S. 276, 307 (1904). So, too, do traditional and, until *Engle* and *Douglas*, longstanding principles of Florida preclusion law. See *Prall v. Prall*, 58 Fla. 496, 505–06 (Fla. 1909); *Neapolitan Enters., LLC v. City of Naples*, 185 So. 3d 585, 591 (Fla. 2d DCA 2016).

As the conflict over the instructional issue shows, courts still struggle with the difficulties of applying *Engle* and *Douglas* because of the inability to ascertain what tortious conduct underlies the findings. This Court has discretion to consider issues raised by the respondent that would not independently qualify for review. See, e.g., *Jacobson v. State*, 476 So. 2d 1282, 1285 (Fla. 1985); *Savoie v. State*, 422 So. 2d 308, 312 (Fla. 1982). The Court should exercise that discretion because *Engle* and *Douglas* are unsound and address only rules for litigation in court, which cannot engender the sort of reliance interests necessary for stare decisis. See *Franchise Tax Bd. of Cal. v. Hyatt*, 139 S. Ct. 1485, 1499 (2019); *Poole*, 2020 WL 370302, at *15.

CONCLUSION

For these reasons, the Court should accept jurisdiction to resolve these issues.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on May 26, 2020, I electronically filed the foregoing with the Clerk of the Court by using the Florida Court's e-filing portal.

I HEREBY FURTHER CERTIFY that on May 26, 2020, a true and correct copy of the foregoing was served by e-mail on counsel listed below:

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the foregoing brief is in Times New Roman 14-point font and complies with the font requirements of Florida Rule of Appellate Procedure 9.210(a)(2).

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