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IN THE SUPREME COURT OF FLORIDA

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

Petitioner,

vs.

R.J. REYNOLDS TOBACCO COMPANY,

Respondent.

Case No. SC20-291

L.T. Case Nos. 1D17-2104
2007-CA-11551

ON REVIEW FROM THE DISTRICT COURT OF APPEAL
FIRST DISTRICT OF FLORIDA

PETITIONER'S JURISDICTIONAL BRIEF

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INTRODUCTION

In this case, the First District Court of Appeal held, in a 2-1 decision, that fraud claims sounding in concealment (not misrepresentation) require proof that a plaintiff relied on a defendant-made "statement." *R.J. Reynolds Tobacco Co. v. Prentice*, 1D17-2104 (Fla. 1st DCA Oct. 24, 2019).[1] The First District's holding creates an express and direct conflict: the Second and Fourth District Courts of Appeal have held, in cases with virtually identical facts, that a plaintiff need not show reliance on a specific statement to prevail on a fraudulent concealment claim. *See R.J. Reynolds Tobacco Co. v. Burgess*, 45 Fla. L. Weekly D421, --- So. 3d ---, 2020 WL 913316 (Fla. 4th DCA Feb. 26, 2020); *Philip Morris USA, Inc. v. Duignan*, 243 So. 3d 426, 443 (Fla. 2d DCA 2017). This led the Fourth District to recently certify conflict with *Prentice*. *Burgess*, 2020 WL 913316, at *4.

This Court should exercise its jurisdiction to resolve this conflict, which will have far-reaching consequences, both in the *Engle* context and outside of it.

STATEMENT OF THE CASE AND FACTS

This is an *Engle*-progeny case[2] stemming from a class-action lawsuit filed against Respondent, R.J. Reynolds Tobacco Co., and other major cigarette companies. (A. 6). John Price originally filed suit. (A. 6). After he died from smoking-caused COPD, this became a wrongful death case, with the Petitioner,

[1] A copy of the decision is included in the attached appendix ("A.").
[2] *See Engle v. Liggett Group, Inc.*, 945 So. 2d 1246 (Fla. 2006).

Mrs. Prentice, serving as personal representative of his estate. (A. 6). The estate brought claims for strict liability and negligence, as well as intentional-tort claims for fraudulent concealment and conspiracy to commit fraudulent concealment. (A. 6). The jury found for the estate on the product and conspiracy claims (but not on the concealment claim). (A. 6-7).

R.J. Reynolds appealed to the First District Court of Appeal, arguing (among other things) that the trial court had abused its discretion in declining to give a proposed special jury instruction on the estate's claim for conspiracy to commit fraudulent concealment. (A. 7). According to R.J. Reynolds, this claim required a showing "that Price relied to his detriment on a specific statement that concealed or omitted material information about the health risks of smoking." (A. 7).

While the case was pending on appeal, the First District issued *R.J. Reynolds Tobacco Co. v. Whitmire*, 260 So. 3d 536 (Fla. 1st DCA 2018), which addressed the elements of a fraud claim sounding in concealment. (A. 9). *Whitmire* announced that "an *Engle* plaintiff must 'prove that they relied to their detriment on false statements from the tobacco companies.'" (A. 9) (quoting *Whitmire*, 260 So. 3d at 539).

In the decision in this case, the panel majority applied *Whitmire*'s new reliance-on-a-statement requirement to Reynolds' jury-instruction issue. (A. 9). The panel majority held that the trial court reversibly erred in refusing to instruct

the jury that reliance on a specific statement was a necessary part of the estate's claim for conspiracy to conceal, and remanded the case for a new trial. (A. 9-10).

Judge Makar issued a dissenting opinion, noting that *Whitmire* and *Prentice* were inconsistent with the First District's previous decision in *R.J. Reynolds Tobacco Co. v Martin*, 53 So. 3d 1060 (Fla. 1st DCA 2010), which held that reliance on a direct statement was unnecessary to prove a claim for fraudulent concealment. (A. 14-17). Judge Makar observed that "*Martin* and *Whitmire*—like dysfunctional family members—appear to be hopelessly in conflict; and *Whitmire* is an outlier statewide on whether reliance on a specific statement is required." (A. 16).

SUMMARY OF THE ARGUMENT

This Court has the power to take this case. The First District's holding is irreconcilable with the holdings of two other District Courts of Appeal on the same question of law—namely, whether a plaintiff bringing a claim for fraudulent concealment must prove reliance on a specific defendant-made statement.

This Court should take this case. The conflict here affects fraudulent concealment cases statewide, and it particularly affects *Engle* cases—all of which involve concealment claims. Currently, proving fraudulent concealment is a jurisdiction-dependent undertaking. Some trial courts require reliance on a

statement; others do not. This Court should exercise its jurisdiction to resolve this conflict and to ensure that the law is applied uniformly.

ARGUMENT

I. This Court has conflict jurisdiction over the First District's decision.

This Court has jurisdiction because the decision below "expressly and directly conflicts with a decision of another district court of appeal . . . on the same question of law." *See* Art. V, § 3(b)(3), Fla. Const; *see also* Fla. R. App. P. 9.030(a)(2)(A)(iv). The conflict here is straightforward enough. The First, Second, and Fourth District Courts of Appeal were all presented with the same question of law: whether a jury instruction on fraudulent concealment (or conspiracy to fraudulently conceal) requires a finding of reliance on a specific statement. And the courts gave different answers.

Here, the First District answered this question in the affirmative, concluding that the trial court erred in refusing to give a proposed instruction that would have "informed the jury of the need to find that [the decedent] detrimentally relied on a false or misleading statement." (A. 5). But the First District is alone in this view.

The Second District, when considering an identical proposed instruction, "determined that a special jury instruction demanding reliance on 'a statement' was not required." *Duignan*, 243 So. 3d at 443. The Fourth District has made the same determination; its "precedents do not require the jury to be instructed that the

smoker relied on 'a statement.'" *Burgess*, 2020 WL 913316, at *3 (citing *Philip Morris USA Inc. v. McCall*, 234 So. 3d 4, 14 (Fla. 4th DCA 2017); *R.J. Reynolds Tobacco Co. v. Calloway*, 201 So. 3d 753, 766 (Fla. 4th DCA 2016)).

It is for this reason that the Fourth District, in its recent *Burgess* decision, certified conflict with *Prentice* and *Whitmire*.[3] *Id*. at *4. *Burgess* identified these decisions as aberrations. *Id*. at *2-3. Since the start of the *Engle*-progeny litigation—over a decade ago—Florida courts have allowed plaintiffs to prove reliance through "the smoker's own history coupled with the tobacco industry's pervasive advertising and creation of a false controversy," and without evidence "that the smoker relied on any specific statement." *Id*. (citing *Philip Morris USA Inc. v. Putney*, 199 So. 3d 465, 470 (Fla. 4th DCA 2016); *Evers v. R.J. Reynolds Tobacco Co.*, 195 So. 3d 1139, 1141 (Fla. 2d DCA 2015); *Philip Morris USA, Inc. v. Hallgren*, 124 So. 3d 350, 353 (Fla. 2d DCA 2013); *Philip Morris USA, Inc. v. Naugle*, 103 So. 3d 944, 947-48 (Fla. 4th DCA 2012); *Martin*, 53 So. 3d at 1069).

By breaking with this precedent, the First District created an express and direct conflict among the District Courts of Appeal. This Court has jurisdiction to resolve that conflict. *See* Art. V, § 3(b)(3), Fla. Const.; *see also State v. Betz*, 815

[3] After *Burgess* was rendered, R.J. Reynolds filed a notice to invoke this Court's jurisdiction and was assigned case number SC20-366. On March 20, 2020, this Court entered an order staying *Burgess* "pending disposition of *Linda Prentice, Etc. v. R.J. Reynolds Tobacco Company*, Case No. SC20-29."

So. 2d 627, 630 (Fla. 2002) (exercising conflict jurisdiction where district courts produced irreconcilable holdings "[o]n strikingly similar facts").

II. This Court should exercise its jurisdiction because the conflict here impacts litigants and courts around the state and will, if not resolved, lead to inconsistent results in otherwise identical cases.

Detrimental reliance is a fundamental element of a fraud claim. The manner of reliance required will change, however, based on the tortfeasor's conduct. For instance, when it comes to a claim for fraudulent misrepresentation, detrimental reliance must be tied to a defendant's false statement. *See Duignan*, 243 So. 3d at 439. A claim for fraudulent concealment, in contrast, is concerned with statements *not* made; as such, a defendant may be held liable where it made "no statement at all." *Id*. at 440.

In *Engle*-progeny cases, plaintiffs bring fraud claims that sound in concealment. That is why, historically, Florida courts have not required *Engle* plaintiffs to prove reliance on a statement. The first court to reach this conclusion was, as chance would have it, the First District; it held that plaintiffs need not present "direct evidence showing [the decedent] relied on information put out by the tobacco companies." *See Martin*, 53 So. 3d at 1069.

Since then, "Florida courts have consistently held that *Engle*-progeny plaintiffs are not required to show reliance on a statement." *Cote v. R.J. Reynolds Tobacco Co.*, 909 F.3d 1094, 1098 (11th Cir. 2018); *see Burgess*, 2020 WL

913316, at *2 ("Following *Martin*, this court and others have concluded that a jury in an *Engle*-progeny case may infer reliance . . . without the necessity of proving that the smoker relied on any specific statement."); *Duignan*, 243 So. 3d at 441-42 ("[T]he courts have refused to hold that an *Engle* progeny plaintiff must identify specific statements that he read or heard and relied upon[.]").

Now, however, the First District has changed course and, with *Prentice* and *Whitmire*, upended this previously settled law. *See* (A. 16-17) (Makar, J., dissenting) (describing intra- and inter-district conflict created by these decisions); *see also Burgess*, 2020 WL 913316, at *2-3 (noting "tension" between First District's decisions). Currently, what it takes to prove up a fraudulent concealment claim varies by location. In the First District, a fraudulent concealment claim requires a jury to find reliance on a specific statement. In the Second and Fourth Districts, a specific statement is not necessary. And in Florida's remaining jurisdictions, litigants and trial courts must make their best guess.

This inter-district uncertainty, if not resolved by this Court, will inevitably lead to additional appeals and retrials—and to a waste of already-scarce judicial resources. *Cf. In re Certification of Need for Additional Judges*, 206 So. 3d 22 (Fla. 2016) (explaining that judicial workloads have "increased due to case complexity and other judicial obligations").

This conflict is no small matter. Dozens of *Engle* cases go to trial each year, and the issue of detrimental reliance comes up in each one. Indeed, it is *the* linchpin issue that juries must decide when considering an *Engle* plaintiff's claims for fraudulent concealment and conspiracy to commit fraudulent concealment. *See Hess v. Philip Morris USA, Inc.*, 175 So. 3d 687, 691 (Fla. 2015). And it is not just *Engle* cases that are affected. As the law stands now, *any* plaintiff bringing a fraudulent concealment claim is left to guess at whether they must prove reliance on a false statement.

In short, the effects of this conflict will be felt widely—and recurrently—unless this Court provides authoritative guidance. Thus, this Court should exercise jurisdiction over this case to resolve this conflict.

CONCLUSION

This Court should grant review and set this case for oral argument.

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CERTIFICATE OF COMPLIANCE

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

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