IN THE SUPREME COURT OF FLORIDA

TERESA STARR BLUNDELL, etc.,

Petitioner,

v.

PHILIP MORRIS USA, INC. et al.,

Respondents.

Case No.: SC15-1206
L.T. No.: 1D13-6004
16-2007-CA-12167

PETITIONER'S REPLY TO RESPONSE TO ORDER TO SHOW CAUSE

Petitioner Teresa Starr Blundell, as personal representative for the estate of her mother Lucy Mae Starr ("Plaintiff"), replies to the Response to the Court's Order to Show Cause filed by Respondents Philip Morris USA Inc. and R.J. Reynolds Tobacco Co. ("Defendants"), regarding the effect of this Court's decision in *Soffer v. R.J. Reynolds Tobacco Co.*, No. SC13-139, 2016 WL 1065605 (Fla. Mar. 17, 2016).

In their response, Defendants concede that this Court has and should accept jurisdiction because the First District's decision cited *Soffer* in affirming on one of two issues presented. (Resp. 2); *Blundell v. Philip Morris USA Inc.*, 164 So. 3d 793, 794 (Fla. 1st DCA 2015). The First District also affirmed without comment an issue regarding jury instructions. *Blundell*, 164 So. 3d at 794. Plaintiff concedes that this issue was not presented in *Soffer*, nor does it provide an independent basis for review. But since this Court should, as Defendants concede, accept jurisdiction

to resolve the *Soffer* issue, "it may, at its discretion, consider any issue affecting the case." *Cantor v. Davis*, 489 So. 2d 18, 20 (Fla. 1986); *see also Murray v. Regier*, 872 So. 2d 217, 223 n.5 (Fla. 2002) ("Once this Court accepts jurisdiction over a cause in order to resolve a legal issue in conflict, we have jurisdiction over all issues."). Because of the importance of the remaining jury instruction issue, this Court should exercise its discretion to also review the non-conflict issue and quash the First District's decision on both grounds.

Briefly, the other issue for this Court's consideration regards the proper jury instruction on the fraud claims in *Engle* cases. The courts in Duval County give a "standard" jury instruction (not to be confused with the standard jury instructions approved by this Court for use in Florida civil cases generally) in *Engle* cases that requires the plaintiff to prove the smoker relied on fraudulent **statements** to prevail on the concealment and conspiracy claims. (App. 20-21.) (Example and sample of complete instructions contained at App. 1-78 (R152:30,252-90; R159:31,786-824).) Thus here, the jury was told that in order for the concealment or conspiracy to be a legal cause of Ms. Starr's death, Plaintiff had to show Ms. "Starr relied to her detriment on statements" by Defendants or their co-conspirators that "concealed or omitted material information concerning the health risks of the cigarettes or their addictive nature or both." (App. 84-85 (R230:3760-61).)

This instruction does not correctly state the law regarding the fraud at issue in these cases and undermines the distinction this Court drew in *Engle* among the intentional torts claimed by the class. There, this Court gave res judicata effect to the findings on concealment and conspiracy to conceal because the defendants' concealment applies to all class members. *Engle v. Liggett Grp., Inc.*, 945 So. 2d 1246, 1277 (Fla. 2006). The jury found that the defendants concealed material **information** regarding the health effects or addictive nature of cigarettes. *Id.*

By contrast, claims for misrepresentation and conspiracy to misrepresent were not given res judicata effect by this Court precisely because these claims depend on particular **statements** that may have been heard by only some class members. *See id.* at 1269 (finding misrepresentation claims to "involve[] highly individualized determinations"). In other words, the fraud that may be claimed in *Engle* progeny cases is not the making of fraudulent statements because this Court refused to give res judicata effect to those claims.

And yet Duval County courts and other courts around the state still require *Engle* plaintiffs to prove they relied on fraudulent statements to prevail on their concealment and conspiracy claims. The effect that this incorrect instruction has on these cases is borne out by the facts here. The jury concluded that Plaintiff failed to prove her concealment claims. (App. 87.) There was no evidence that Ms. Starr relied on any particular health-related statement by Defendants or their co-

conspirators, but there was evidence that she heard and believed the pervasive messages they communicated through their unprecedented marketing and campaigns of denial. For example, she told her daughter in the late 1960s that public health warnings about the health risks of smoking were "a bunch of malarkey" and that "[y]ou had to prove it to her." (App. 95 (R219:2902).) This jury could easily have accepted Plaintiff's ample evidence that Ms. Starr was misled by Defendants' concealment of the dangers of smoking, yet still found for the defense because—as Defendants drilled home during closing argument—the jury instructions required reliance on statements and there was no evidence of any particular statement that Ms. Starr relied on.

Because it has jurisdiction, this Court should address this additional issue to clarify the appropriate instruction on concealment claims. This Court has never had this issue before it, although it has quoted conflicting statements related to the topic from two other *Engle* progeny trials without comment. In one, the Court noted that the jury was instructed that it had to determine whether the smoker "relied to his detriment on any statements made by [PM USA] that omitted material information." *Hess v. Philip Morris USA, Inc.*, 175 So. 3d 687, 691 (Fla. 2015).[1] By contrast, in *Soffer*, this Court noted that the jury was asked to determine

[1] The very fact that this Court quoted the instruction in *Hess*, though the issue of reliance on statements was not at issue there, has been cited by the tobacco defendants as registering "apparent approval" by this Court. (App. 99.)

whether the defendant there concealed, omitted, or agreed to conceal/omit "material information about the health effects or addictive nature of smoking or both." 2016 WL 1065605, at *4. Clarifying which instruction is appropriate is important to *Engle* progeny trials around the state.

The issue necessitates immediate attention particularly because it is uncertain the Court will have another opportunity to review it any time soon. The First District has had this issue before it twice now and both times has simply affirmed the issue without comment, both here and in *Philip Morris USA Inc. v. Bowden*, 183 So. 3d 354 (Fla. 1st DCA 2016). Thus, even were a different district court to resolve the issue the other way and actually write on it, express interdistrict conflict would not exist.

The First District's repeated decision not to even state the issue in a written opinion is preventing plaintiffs from invoking this Court's jurisdiction. Yet there is clear conflict between that court's silent holdings that a class member must prove the smoker relied on a statement that was fraudulent due to an omission and this Court's holding in *Engle* that while the class misrepresentation finding does not have res judicata effect, the concealment finding does precisely because it applied the same to all class members regardless of what statements each one may have heard. This issue arises in every single *Engle* case and now that this Court has

jurisdiction over a case where the plaintiff fully preserved the issue, it should take this opportunity to decide this issue now.

Alternatively, the Court may wish to hold this case a little longer. In *R.J. Reynolds Tobacco Co. v. Calloway*, No. 4D12-3337, 2016 WL 64296, at *3-5 (Fla. 4th DCA Jan. 6, 2016), the Fourth District reversed a fraud finding because it concluded that the instruction in that case, which was the same one this Court quoted in *Soffer*, did not adequately cover reliance and that the instruction requested by the defense, which required reliance on a statement, was a correct statement of the law. That decision is pending on cross-motions for rehearing, and the plaintiff has brought the conflict with *Engle* to the panel's attention. (App. 102-07.) Both sides taking the position that their view on reliance is compelled by *Engle*, the *Calloway* case is likely to end up here regardless of which side prevails on rehearing.

Plaintiff therefore respectfully requests that the Court accept jurisdiction and set a merits briefing schedule regarding the jury instruction that required her to prove the smoker relied on fraudulent statements of Defendants and their co-conspirators to prevail on the concealment claims. She agrees with Defendants that the Court should quash the First District's opinion regarding the *Soffer* issue.

Respectfully submitted,

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