Filing # 117281206 E-Filed 11/25/2020 01:38:18 PM

RECEIVED, 11/25/2020 01:38:32 PM, Clerk, Supreme Court

SC20-1506

In the Supreme Court of Florida

R.J. REYNOLDS TOBACCO COMPANY,

Petitioner,

v.

STATE OF FLORIDA AND PHILLIP MORRIS USA, INC.,

Respondents.

RESPONDENT STATE OF FLORIDA'S JURISDICTIONAL BRIEF

ON PETITION FOR DISCRETIONARY REVIEW OF A DECISION OF THE
FOURTH DISTRICT COURT OF APPEAL
Case No. 4D18-2616

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STATEMENT OF THE CASE AND FACTS

Petitioner R.J. Reynolds moved for certification below, asserting only that this case presents a question of great public importance. Now, after the Fourth District rejected that argument, Petitioner pivots and asserts a conflict. But it does not identify a single "decision" with which the court's decision "expressly and directly conflicts" on a "question of law." *See* Art. V, § 3(b)(3), Fla. Const. Petitioner does not identify any decisions involving "substantially the same facts" that reached a different result, nor does it identify any decisions that announced "a rule of law which conflicts" with a pronouncement of law in the Fourth District's decision. *See Mancini v. State*, 312 So. 2d 732, 733 (Fla. 1975); *Wallace v. Dean*, 3 So. 3d 1035, 1039 & n.4 (Fla. 2009). Instead, Petitioner merely disagrees with how the court applied general principles of contract interpretation to the parties' *sui generis* settlement agreement. This Court lacks jurisdiction.

1. In 1997, Florida entered a settlement agreement (the Florida Settlement Agreement, or FSA) with Petitioner and other tobacco companies "to recoup healthcare costs incurred by . . . Florida due to the consumption of cigarettes." App'x 7–8. Florida agreed to release the companies from liability for past and future healthcare costs arising from their cigarette brands and, in exchange, the companies agreed to make perpetual annual payments to Florida "based on the future sales of"

the brands. *Id.* at 7. That arrangement, in contrast to one requiring a single lump-sum payment, ensured that the companies would remain solvent and that Florida would receive full compensation for ongoing costs resulting from past harms caused by the brands. *See* Fla. Ans. Br. 6–7 (citing R. 26203).

"Merged as part of the FSA was" a fee-payment agreement "in which [the companies] agreed to pay Florida's attorneys' fees." App'x 9. The amount of fees that each company must pay under the agreement is determined using the same formula used to determine the amount of each company's perpetual annual payments: a market-share formula that takes into account the "number of individual Cigarettes shipped" under the companies' brands each year. *See id.* at 8–9.

2. This case arises from Petitioner's refusal to make annual payments for four of its brands. In 2015, Petitioner sold the brands to another tobacco company, ITG Brands, for $7 billion and then stopped making payments to Florida. *Id.* at 7. It claimed that neither it nor ITG has to make payments for the brands, even though the same cigarettes (billions every year) continue to be sold across Florida and the nation, and even though Florida continues to incur healthcare costs arising from past harms caused by the brands. *See id.* According to Petitioner, it has no annual-payment obligations for the brands because they can no longer be considered "part

of [its] market share." *Id.* Even so, Petitioner "continued to include" the brands "in its Market Share for purposes of payments of attorneys' fees." *Id.* at 12–13.

In 2017, Florida moved to enforce Petitioner's payment obligations, and the circuit court entered judgment for Florida, awarding it $92,620,158.99. *Id.* at 11. Petitioner appealed, and the Fourth District affirmed in a unanimous opinion. *Id.* at 16. Applying basic principles of contract interpretation, it held that Petitioner cannot unilaterally extinguish its payment obligations for its brands. *Id.* at 12–15.

The court began its analysis by reviewing the text of the FSA, including its successors-and-assigns clause, the perpetual-annual-payments provision, the provision discussing the market-share formula, language explaining that Petitioner's "payments in perpetuity [a]re to reimburse the State of Florida for medical expenses," and language specifying that Petitioner's payment obligations for its brands "may be waived only by an instrument in writing executed by" Florida. *Id.* at 8–10.

Next, the court explained that "settlement agreements are . . . governed by contract law," and "[w]here contracts are clear and unambiguous, they should be construed as written from the words of the entire contract." *Id.* at 12. "Courts are required to construe a contract as a whole and give effect, where possible, to every provision of the agreement." *Id.*

Those principles, the court held, compel a finding that Petitioner is still liable for the four brands. *See id.* The plain language of the FSA does not allow Petitioner to unilaterally extinguish its payment obligations for the brands, and Florida never agreed to extinguish them. *Id.* The FSA requires Petitioner to "make annual payments . . . in perpetuity, with no condition of termination, in exchange for the release of liability for past and future medical costs." *Id.* And Petitioner's payment obligations "may be waived only by an instrument" executed by Florida, yet "[i]t is undisputed" that Florida never waived Petitioner's obligations for the brands. *Id.*

Petitioner's contention, the court went on, that the brands are "no longer part of its Market Share for purposes of calculating its annual payments" is "inconsistent with the clear and unambiguous language of the" FSA. *Id.* at 13–14. "Nothing in the Market Share provision establishes that assignment of the [brands] to ITG somehow extinguishes [Petitioner]'s liability in the absence of a signed written" waiver. *Id.* Petitioner remains responsible for the brands under the FSA, and they remain part of its market share, until Florida executes a waiver, or another party "assume[s] the obligation to make payments on" them. *See id.* at 14.

After holding that "the lack of any" instrument "altering or waiving" the FSA "alone compels affirmance," the court noted that the "Fee Payment Agreement also supports" it. *Id.* at 12. Petitioner's "agreement to be liable for attorneys' fees, and its continued payment of" them, the court stated, "is consistent with a finding and understanding that" Petitioner remains "liable for annual payments to Florida, as both [a]re calculated based on the same Market Share provision." *Id.* at 13.

Finally, the court observed that its interpretation of the FSA is consistent with other courts' interpretation of similar state settlement agreements. *Id.* at 14. In "[t]wo cases from Texas and Minnesota" addressing the same underlying dispute over the four brands, the courts rejected Petitioner's argument that under the market-share provision, it extinguished its liability for the brands by selling them. *Id.*

3. Petitioner requested rehearing, rehearing en banc, and certification. It raised only one basis for certification—that this case presents a question of great public importance. It did not argue that the Fourth District's decision expressly and directly conflicts with another decision. Mot. for Reh'g 4–5. The court denied the motion.

SUMMARY OF ARGUMENT

1. This Court lacks conflict jurisdiction. Petitioner asserts that this case presents a conflict because the Fourth District "transgressed" (1) the whole-text canon by ignoring the market-share provision, and (2) the "principle [on] extrinsic evidence" by relying on the brand-purchase agreement. Pet. Br. 5. But both critiques are unfounded: the court neither ignored the market-share provision nor relied on the brand-purchase agreement. And at any rate, a party cannot establish an "express[]

and direct[]" conflict on a "question of law" merely by asserting that a decision misapplies general principles of contract interpretation. *See* Art. V, § 3(b)(3), Fla. Const. In this case, the Fourth District neither relied on a legal principle rejected by another decision nor rejected any legal principle accepted by another decision. Therefore, a conflict would exist only if a decision involving "substantially the same facts" applied a legal principle differently, reaching a contrary result—and Petitioner has identified no such decision. *See Mancini*, 312 So. 2d at 733.

2. Even if the Court had jurisdiction, this case would not warrant discretionary review because it presents no legal issue of statewide importance and the Fourth District's decision is correct.

ARGUMENT

I. THE FOURTH DISTRICT'S DECISION DOES NOT EXPRESSLY AND DIRECTLY CONFLICT WITH ANOTHER DECISION ON A QUESTION OF LAW.

1. Petitioner first contends that this case presents a "conflict on whether a contract's terms must be construed in their entirety, giving effect to each term." Pet. Br. 6. But as Petitioner admits, the Fourth District recognized that general principle (the whole-text canon) and then applied it. *See id.* at 7; App'x 12–15. Before analyzing the FSA, it explained that "[c]ourts are required to construe a contract as a whole." App'x 12. Petitioner merely disagrees with how the court applied that canon to the parties' *sui generis* settlement agreement.

That is not enough to establish conflict. Showing that a decision transgresses some general principle of contract interpretation might be sufficient to establish error, but not conflict under Article V, Section 3(b)(3). When a district court "proceed[s] from the same premise" as other courts—here, that a contract must be interpreted as a whole—it does not create an express and direct conflict on a "point of law" unless it reaches a result that is contrary to another case with the same "operative facts." *See Wilson v. S. Bell Tel.*, 327 So. 2d 220, 220–21 (Fla. 1976); *Burkart v. Ft. Lauderdale*, 168 So. 2d 65, 67 (Fla. 1964); *Mapp v. State*, 71 So. 3d 776, 781–82 (Fla. 2011) (Canady, C.J., dissenting) (stating that a conflict does not exist "simply because" the Court "disagree[s] with the way" a district court applied a general rule to a discrete set of facts).

But even if a party could establish conflict by showing that a decision transgresses a general principle of contract interpretation, Petitioner has made no such showing. Petitioner asserts that the Fourth District violated the whole-text canon because it "*ignore*[*d*] the Market Share" provision. Pet. Br. 7 (emphasis in original). But the court plainly considered the provision. It concluded, for example, that "[n]othing in the" provision "establishes that assignment of the [four] brands to ITG" extinguishes Petitioner's liability, App'x at 13–14; and it stated that courts interpreting two similar agreements read the provision the same way, *id.* at 14–15.

As a result, Petitioner is left to argue not that the court failed to consider the provision, and thus transgressed the whole-text canon, but instead that the court should have interpreted the provision differently. *See* Pet. Br. 7 (complaining that the court's construction of the provision "subordinates" it "to the payments-in-perpetuity clause"). But when assessing conflict jurisdiction, this Court does not "delve into a decision" to "decide whether or not [it] agrees with" the "disposition of [the] case." *S. Fla. Hosp. v. McCrea*, 118 So. 2d 25, 28 (Fla. 1960). And the Court certainly does not have jurisdiction to correct an alleged misreading of a contract provision unique to these parties and discussed in no other Florida case. *Ansin v. Thurston*, 101 So. 2d 808, 811 (Fla. 1958) ("A limitation of review to decisions in 'direct conflict' clearly evinces a concern with decisions as precedents as opposed to adjudications of the rights of particular litigants."). Otherwise, the Court would have conflict jurisdiction over virtually any contract case, upending the "extremely limited" scope of Article V, Section 3(b)(3). *See McCrea*, 118 So. 2d at 27.

2. Petitioner next asserts that the Fourth District's decision "creates an express and direct conflict in Florida law" because the court "construed the" FSA "by reference to" a provision in the brand-purchase agreement that discusses Petitioner's attorneys' fees payments. Pet. Br. 8–9 (citing App'x 12–13). But Petitioner misconstrues the decision. The court did not rely on the brand-purchase agreement;

it expressly stated that the agreement has no bearing on the parties' obligations under the FSA. App'x 13 ("The [agreement] could not extinguish Reynolds's responsibilities and obligations under the FSA, as it was a separate agreement."). The part of the decision that Petitioner references discusses the parties' fee-payment agreement—which is part of the FSA—and Petitioner's course of conduct with respect to that agreement. *Id.* at 12–13.

But even if the court had relied on the brand-purchase agreement, this case would not present a conflict because Petitioner identifies no decisions with the same "operative facts" in which a district court or this Court held that it is improper to consider a separate agreement. *See Wilson*, 327 So. 2d at 220–21; Pet. Br. 9–10.

II. IN ANY EVENT, DISCRETIONARY REVIEW IS NOT WARRANTED.

Even if the Court had jurisdiction, this case would not warrant discretionary review. First, it presents no legal issue of statewide importance. Petitioner asks the Court to determine whether the Fourth District properly applied certain canons of construction to a novel contract that requires Petitioner to make one particular kind of payment (ongoing annual payments) to one other party (Florida). That narrow issue arising out of a unique set of facts and affecting only the parties is not of statewide importance. *See, e.g.*, *Dade Cty. Prop. Appraiser v. Lisboa*, 737 So. 2d 1078, 1078 (Fla. 1999) (declining review because the case "require[d] consideration of a narrow issue with very unique facts”); *State v. Sowell*, 734 So. 2d 421, 422 (Fla. 1999) (same where the issue had no broad public impact).

Second, the Fourth District’s decision is correct. Petitioner’s reading of the FSA cannot be reconciled with its plain text, which imposes perpetual payment obligations on Petitioner in exchange for a perpetual release. App’x 7. Under Petitioner’s reading, the FSA would provide a perpetual release while imposing only *conditional* payment obligations: Petitioner could terminate its obligations at any time by selling all its brands, while retaining all of its rights under the FSA, including its release from liability for ongoing healthcare costs arising from past harms that it caused.

The market-share provision does not rescue that indefensible reading. It does not even address whether Petitioner may unilaterally extinguish its liability, in whole or in part, by selling all or some of its business. The provision defines market share as Petitioner’s “respective share of sales of Cigarettes, by number of individual Cigarettes shipped.” *Id.* at 9. By its terms, that definition does not provide that cigarettes shipped under the four brands may not be deemed part of Petitioner’s “share of sales of Cigarettes” for purposes of computing its payments. *Id.*

CONCLUSION

This Court lacks jurisdiction to review the decision below.

Respectfully submitted,

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November 25, 2020

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