Case No. SC20-291
L.T. Case No.: 1D17-210

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 Review from the District Court of Appeal,
First District, State of Florida

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STATEMENT OF THE CASE AND FACTS

For over a century, Florida law on fraudulent concealment has been clear: Absent a fiduciary or other special relationship, a person has no fraud-based duty to speak unless he makes a statement that is misleading because it conceals material information, or he takes actions that prevent the plaintiff from discovering the truth. This case is a particularly straightforward one because the parties do not contend that a special relationship or fraudulent act is at issue here; rather, the fraudulent-concealment claim in this case consisted of allegations that manufacturers made misleading statements that denied and downplayed the known health risks of their products. The First District faithfully adhered to settled Florida law and held the trial court should have instructed the jury to determine whether the consumer detrimentally relied on one of those statements—only then could the jury impose fraud liability on the manufacturer for failing to make *additional* statements disclosing the whole truth.

Ms. Prentice's attacks on this analysis hinge on claims that certain features of the *Engle* litigation require an exception to otherwise settled and generally applicable law. Nowhere is this more apparent than in Ms. Prentice's sweeping assertion that for "*Engle* concealment and conspiracy claims"—and *only* for *Engle* claims—"the plaintiff's burden on causation is to prove *reliance on silence*." IB 29 (emphasis added). But imposing fraud liability for silence alone is just as contrary to settled

Florida law in the *Engle* context as in any other. This Court should quash the decisions of the Districts that have created an *Engle*-specific carve-out to generally applicable tort law by approving the judgment of the First District, which holds plaintiffs suing tobacco companies to the same standard as all other plaintiffs pursuing fraudulent-concealment claims in Florida.

In addition, this Court should reconsider its decisions in *Engle* and *Douglas*, which employed claim-preclusion principles to give preclusive effect to certain of the *Engle* jury's findings despite the absence of a final judgment. The Court did so even though it acknowledged the impossibility of satisfying settled principles of Florida issue-preclusion law because it could not be determined which issues the *Engle* jury actually decided. That wholly novel procedure of mixing claim-preclusion and issue-preclusion doctrines departs from longstanding Florida preclusion law and approves due-process violations in the thousands of still-pending *Engle*-progeny cases.

1. Linda Prentice filed a wrongful-death action against R.J. Reynolds Tobacco Company alleging that her mother's husband, John Price, passed away from chronic obstructive pulmonary disease caused by a smoking addiction. *See*

R.1:1521–44, R.1:1566.[1] Claiming that Mr. Price was a member of the class prospectively decertified in *Engle v. Liggett Group, Inc.*, 945 So. 2d 1246 (Fla. 2006) (per curiam), Ms. Prentice sued Reynolds for strict liability, negligence, fraudulent concealment, and conspiracy to fraudulently conceal. R.1:1521–44, 1566. The last claim involved an alleged conspiracy among tobacco companies to commit the tort of fraudulent concealment, so it was dependent on—and was governed by the same standards as—the underlying fraudulent-concealment claim.

At trial, Ms. Prentice presented the following theory of conspiracy to conceal: In the 1950s, in response to growing awareness from the public-health community about the health risks of smoking, Reynolds and other cigarette companies allegedly came together and made public statements "downplaying" research linking smoking to disease. T.2178. Ms. Prentice introduced evidence that Reynolds itself and through an organization created by tobacco companies (the Tobacco Industry Research Committee, later renamed the Council for Tobacco Research) issued public statements (often in the form of magazine articles or televised interviews) allegedly "downplaying" and "sugarcoating" the health risks of smoking. T.2186; *see also, e.g.*, T.2606–08 (playing a televised interview of the chairman of the Tobacco Industry Research Committee representing that if scientists find harmful properties in

[1] "A.#" refers to Petitioner's Appendix, "R.A.#" refers to Respondent's Appendix, "R.#" refers to the record on appeal, and "T.#" refers to the trial transcript.

cigarette smoke "we'll remove these from smoke and still retain the pleasure of your favorite cigarette"); T.2602 (describing a published paper reassuring the public "that many people were challenging the link between cigarette smoking and diseases"); T.2605 (testifying about a "publication 'Smoke Without Fear'"). These spokespersons, according to Ms. Prentice's counsel, said things like "[t]here's no life-threatening withdrawal syndrome, so it can't be a real drug. People don't get intoxicated; it can't be a real drug." T.2186; *see also* T.2462–63. While Ms. Prentice did not claim that these public statements addressing smoking and health, standing alone, were *false*, she did assert that they were fraudulent because they did not tell the "whole truth." T.2183.

Mr. Price, however, testified that he never read or heard any of these alleged half-truths from tobacco companies. In a deposition taken before his passing and played at trial, Mr. Price testified that *nothing* "that the cigarette companies said or did … influence[d] [him] to start smoking." T.4576. Mr. Price started smoking not because of any statement by a tobacco company downplaying the health risks of smoking, but rather because—as a man who spent his life working on farms and driving tractor trailers, T.4565—it was "[s]omething to do." T.4576. He testified that he saw advertisements that made smoking "look like the thing to do, the in crowd." T.4553. Yet he never read or heard any statements about "smoking and

health made by a cigarette manufacturer"—including any statement from the Tobacco Industry Research Committee (or the Council for Tobacco Research). T.4614.

Despite Mr. Price's testimony indicating that he did not listen to anything the tobacco companies said about smoking and health, Ms. Prentice repeatedly blamed Reynolds for not making *more* public statements informing Mr. Price of the health risks of smoking. She faulted Reynolds for not "tell[ing] John Price, … don't suck it in your lungs because that's the stuff that's going to get you addicted." T.5254–55. Ms. Prentice told the jury that this omission was "essential [to] this case": "They should have told him. And when they don't, they're held accountable and that's why we called you here." T.5255.

In light of the evidence and argument at trial, Reynolds proposed jury instructions that would have required the jury to find that 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" to find it liable for fraudulent concealment. R.1:7522–23. Reynolds argued that the instruction was warranted because the fraud testimony at trial involved "a series of statements that [Ms. Prentice] contended should have included more information. They were press releases, statements of tobacco spokespeople on TV, advertising, those were all statements." T.4972. Reynolds further explained that it especially made sense to require reliance on a statement because that is "the theory of fraud that went to the jury in the original

Engle case." T.4973.

In response, Ms. Prentice urged the trial court to follow the Fourth District's decision in *R.J. Reynolds Tobacco Co. v. Calloway*, 201 So. 3d 753 (Fla. 4th DCA 2016), which, according to her, held that "[t]here does not have to be proof by us of a particular statement that's relied upon." T.4968–69. Ms. Prentice proposed an alternative instruction that "instead of saying *statements* it says John Price's reliance on such a *concealment or omission* to his detriment." T.4969 (emphases added).

The trial court agreed with Ms. Prentice, T.4978, and instructed the jury to decide "whether the concealment or omission of material information concerning the health risks or addictive nature of cigarette smoking by R.J. Reynolds was relied upon by John Price to his detriment." T.5233. And for the conspiracy claim, the court likewise instructed the jury to consider "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." T.5233–34.

The jury found in favor of Ms. Prentice on her claims for strict liability, negligence, and conspiracy, but not on her concealment claim. R.2:5114–15. The jury assigned 60 percent of the fault to Mr. Price and the remaining 40 percent to Reynolds. *Id.* The jury awarded $6.4 million in compensatory damages and declined to award punitive damages. *See id.*; R.2:5130.

2. The First District reversed, holding that the trial court erred in refusing to give Reynolds's requested instruction on conspiracy to commit fraudulent concealment. *R.J. Reynolds Tobacco Co. v. Prentice*, 290 So. 3d 963, 966 (Fla. 1st DCA 2019). The court began its analysis with its prior decision in *R.J. Reynolds Tobacco Co. v. Whitmire*, 260 So. 3d 536 (Fla. 1st DCA 2018), which recognized the longstanding rule in Florida that "[l]iability for fraudulent concealment cannot be shown without reliance on a false statement, absent a fiduciary relationship." *Id.* at 538. In *Whitmire*, the First District applied that generally applicable rule to the *Engle* litigation: The court carefully reviewed the record from the original *Engle* class-action trial and observed that the *Engle* jury found fraud liability based on *statements*. *Id.* That led the court to conclude that, "even with the benefit of the *Engle* findings, plaintiffs claiming fraudulent concealment must prove that they relied to their detriment on false statements from the tobacco companies." *Id.* at 539. Based on *Whitmire's* holding requiring "individualized proof" of reliance on statements, *id.* at 541, the First District in *Prentice* 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." *Prentice*, 290 So. 3d at 966.

Turning to the remedy, the court determined that the issues of "negligence,

conspiracy, comparative fault, compensatory damages, and punitive damages are inextricably intertwined" and thus "must be retried." *Id.* at 968. The First District did not address several other issues that Reynolds raised on appeal, including Reynolds's argument that the trial court should not have permitted Ms. Prentice to use the *Engle* findings to establish the conduct elements of her claims. Although this Court rejected that argument in *Philip Morris USA, Inc. v. Douglas*, 110 So. 3d 419 (Fla. 2013), Reynolds raised the issue to preserve it for further review. *See* R.A. 455.[2]

Ms. Prentice sought this Court's review to resolve the conflict over whether *Engle*-progeny plaintiffs must prove detrimental reliance on a statement to prevail on fraudulent-concealment claims. Reynolds agreed that jurisdiction was proper, and notified the Court that it intended to seek reconsideration of this Court's decisions in *Engle* and *Douglas*. This Court accepted jurisdiction.

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[2] Reynolds also preserved this argument at several points during the trial court proceedings. *See* R.1:96–102 (explaining, in preliminary statement before answer to complaint, that the *Engle* findings "cannot be given preclusive effect in this or any other subsequent individual action" because the findings are "so generalized and nonspecific that they are inadequate to support an individualized determination of essential issues," and "because *res judicata* requires a judgment on the merits that resolves a claim or cause of action"); R.1:554–60 (same); R.1478–83 (same); R.2:5372–99 (moving for a directed verdict due to Ms. Prentice's improper reliance on the *Engle* Phase I findings); T.4749 (trial court denying directed-verdict motion); R.1:7476–81 (explaining, in proposed jury instructions, "that the jury should not be instructed regarding the *Engle* findings"); R.1:7552–7686 (proposing jury instructions that would require Ms. Prentice to prove all elements of her claims without the *Engle* findings).

SUMMARY OF ARGUMENT

I. The First District correctly determined that the trial court gave erroneous instructions on fraud and should have given Reynolds's requested instructions, which informed "the jury of the need to find that Price detrimentally relied on a false or misleading statement by RJR." *Prentice*, 290 So. 3d at 966.

A. The requirement of a misleading *statement* follows from general principles of Florida law, which instruct that mere silence cannot constitute actionable fraud. Absent a fiduciary or other special relationship, which undisputedly does not exist here, Florida courts have recognized a fraud-by-concealment claim only when the defendant makes a *statement* that is incomplete because it purports to tell the whole truth yet does not. That is precisely what Ms. Prentice accused Reynolds of doing. In her telling, tobacco companies made misleading statements downplaying research linking smoking to disease, all while failing to disclose that their own internal studies confirmed the health risks of smoking. The First District therefore correctly determined that the trial court should have instructed the jury to decide whether Mr. Price detrimentally relied on one of those incomplete statements. Only then could the jury impose liability on Reynolds for breaching a duty to disclose arising from making materially incomplete statements.

B. Ms. Prentice claims that features of the *Engle* litigation require an exception to these otherwise settled and generally applicable principles. But the *Engle*

record demonstrates that the *Engle* class pursued a fraudulent-concealment claim that depended solely on the theory that tobacco companies made misleading statements that omitted key information about the health risks of smoking. As an *Engle*-progeny plaintiff relying on the supposed preclusive effects of the *Engle* jury's findings, Ms. Prentice had to bring the same cause of action adjudicated in *Engle*, which further confirms that the trial court here should have instructed the jury to determine if Mr. Price relied on a statement before it imposed fraud liability on Reynolds. Indeed, this Court's decision in *Hess* confirms that, even with the benefit of the *Engle* findings, *Engle*-progeny plaintiffs must present individualized proof of detrimental reliance. Ms. Prentice's arguments to the contrary require reading things into this Court's *Engle* decision that simply do not exist, divorcing the *Engle* jury's finding that the defendants made misleadingly incomplete statements from the reliance element in progeny cases, or eliminating the element of individualized proof of detrimental reliance altogether.

C. By holding that Reynolds cannot be held liable for fraud based merely on its failure to speak, the First District avoided problems of express preemption. Congress has, through the Federal Cigarette Labeling and Advertising Act, expressly preempted failure-to-warn claims, which is exactly what Ms. Prentice's reliance-on-silence theory of fraudulent concealment amounts to.

D. The facts of this case necessitated Reynolds's requested instructions

because, as an *Engle*-progeny plaintiff, Ms. Prentice had to follow the same statements-based theory of fraudulent concealment pursued in the original *Engle* class action. And she did just that: Her conspiracy-to-conceal case consisted of evidence and argument that tobacco companies made *statements* "downplaying" and "mocking" research linking smoking to disease. The requested instructions were likewise necessary because without them, the jury may very well have imposed fraud liability without linking the conduct that created a duty to speak (*i.e.* incomplete statements) to Mr. Price's injury. That is also why the court's error in failing to give the requested instructions cannot pass as harmless: By omitting the correct legal standard for reliance, the trial court authorized the jury to impose fraud liability without finding that the conspiracy to fraudulently conceal caused Mr. Price's injuries.

II. Ms. Prentice also claims that the First District erred in ordering a new trial on all issues, rather than the conspiracy claim only. Not only is this alleged error fact-bound and case-specific, it lacks any merit, given that the First District acted well within its broad discretion to fashion an appropriate remedy. The conspiracy instruction was inextricably intertwined with comparative fault, given that the jury was instructed to allocate fault in light of its finding that Reynolds had conspired to conceal information from Mr. Price. Thus, the First District appropriately determined that the second trial should address all issues. That straightforward analysis does not merit this Court's review, much less reversal.

III. This Court should also reconsider its decisions in *Engle* and *Douglas*, which allow progeny plaintiffs like Ms. Prentice to rely on certain findings made by the *Engle* jury to establish the conduct elements of their claims. Fundamental dictates of fairness require that, before a defendant is subjected to liability, all elements of the plaintiff's claim must be established. Yet as a result of the Court's decisions in *Engle* and *Douglas*, juries in progeny cases *conclusively presume* that the defendants committed tortious acts against each individual plaintiff, even though—as the Court has twice acknowledged—there is no way of knowing whether the *Engle* jury so found. *Douglas* did so under the guise of claim preclusion, but claim preclusion has never been applied to bar a defendant from contesting an unadjudicated issue in ongoing litigation of an unresolved claim and could not be so applied consistent with the Due Process Clause. That is why, as then-Justice Canady stressed in dissent in *Douglas*, a claim can bind a defendant only if it has been reduced to a final judgment. The error of *Engle* and *Douglas* has perpetuated a massive and ongoing violation of the *Engle* defendants' due-process rights. This case presents an opportunity to correct course and return to longstanding preclusion principles requiring Ms. Prentice to establish the elements of her claims without using the *Engle* findings.

ARGUMENT

I. THE FIRST DISTRICT CORRECTLY DETERMINED THAT A MANUFACTURER'S LIABILITY FOR FRAUDULENT CONCEALMENT CANNOT BE BASED ON PURE SILENCE.

An instruction is erroneous and requires reversal if it "reasonably might have

misled the jury." *Aubin v. Union Carbide Corp.*, 177 So. 3d 489, 517 (Fla. 2015). The instruction given here meets that standard because it authorized the jury to impose fraud liability if it found that Mr. Price relied on "the *concealment or omission* of material information concerning the health risks or addictive nature of cigarette smoking." T.5233 (concealment) (emphasis added); *accord* T.5233–34 (conspiracy). That instruction makes little sense: How could a consumer like Mr. Price rely to his detriment on information never disclosed to him (*i.e.* the concealment or omission of information)? The instruction effectively encouraged the jury to impose fraud liability for mere silence. Ms. Prentice does not shy away from that radical result: She insists that an *Engle*-progeny plaintiff's "burden on causation is to prove reliance on silence." IB 29.

It follows that the trial court erred when it refused to give Reynolds's requested instructions, which would have clarified that the jury needed to find reliance on a *statement* in order to impose fraud liability. "To demonstrate that the trial court erred in failing to give a requested jury instruction, a party must show" that (1) "the requested instruction contained an accurate statement of the law," (2) "the facts in the case supported a giving of the instruction," and (3) "the instruction was necessary for the jury to properly resolve the issues in the case." *Aubin*, 177 So. 3d at 517 (citation omitted). Reynolds's proposed instructions would have prevented the jury from imposing fraud liability for mere silence by asking the jury whether Mr. Price

had "reasonably relied to his detriment *on a statement*" that was misleading because it "concealed or omitted material information" about the health risks of smoking. R.1:7523 (emphasis added). The requirement of a misleading *statement* derives from settled principles of Florida fraud law, reinforced by the proceedings in *Engle* itself, and by the need to avoid problems of express preemption.

A. Florida Law Generally Requires Proof Of Reliance On A Statement As An Essential Element Of Fraudulent Concealment.

Under settled Florida law, mere silence cannot constitute actionable fraud. *See State v. Mark Marks, P.A.*, 698 So. 2d 533, 539 (Fla. 1997) ("failure to disclose material information" cannot constitute fraud unless "there is a duty to disclose" (citation omitted)); *accord Pritchard v. Levin*, No. 3D19-964, 2020 WL 2050691, at *2 (Fla. 3d DCA Apr. 29, 2020); *Garofalo v. Proskauer Rose LLP*, 253 So. 3d 2, 7 (Fla. 4th DCA 2018). The Second Restatement of Torts—which this Court frequently follows, *see, e.g.*, *Aubin*, 177 So. 3d at 494; *Limones v. Sch. Dist. of Lee Cnty.*, 161 So. 3d 384, 390 (Fla. 2015); *Barnett v. Dep't of Fin. Servs.*, No. SC19-87, 2020 WL 5667286, at *5 (Fla. Sept. 24, 2020)—states the general rule: "one party to a business transaction is not liable to the other for harm caused by his failure to disclose to the other facts of which he knows the other is ignorant and which he further knows the other, if he knew of them, would regard as material in determining his course of action in the transaction in question." Restatement (Second) of Torts § 551, cmt. a (1977).

There is one limited exception to the general rule that silence does not give rise to fraud liability. A plaintiff may make out a fraud claim based solely on the defendant's failure to disclose information only if a fiduciary or other special relationship existed between the defendant and the plaintiff. *See, e.g.*, *id.* § 551(2)(a) (stating that a duty to disclose exists if matters are known to a party "that the other is entitled to know because of a fiduciary or other similar relation of trust and confidence between them"). As this Court put it, silence can constitute fraud "when one party has information that the other party has a right to know because of a fiduciary or other relation of trust or confidence between them." *Mark Marks*, 698 So. 2d at 539; *accord Friedman v. Am. Guardian Warranty Servs., Inc.*, 837 So. 2d 1165, 1166 (Fla. 4th DCA 2003). Florida courts have been "unwilling to expand the [duty to disclose] in the absence of any … fiduciary, special, or longstanding relationship." *Kovach v. McLellan*, 564 So. 2d 274, 277 (Fla. 5th DCA 1990).

Ms. Prentice has not alleged that Reynolds had any fiduciary or other relationship of trust with consumers of its cigarettes such as Mr. Price. Nor could she, because "no fiduciary duty ar[ises]" from "an ordinary commercial transaction" like the sale of a product. *Mac-Gray Servs., Inc. v. DeGeorge*, 913 So. 2d 630, 633 (Fla. 4th DCA 2005). Florida law generally holds that where "parties are dealing at arm's length, a fiduciary relationship does not exist because there is no duty imposed on either party to protect or benefit the other." *Taylor Woodrow Homes Fla., Inc. v.*

4/46-A Corp., 850 So. 2d 536, 541 (Fla. 5th DCA 2003) (per curiam); *accord N. Brevard Hosp. Dist. v. McKesson Techs., Inc.*, No. 616-cv-637, 2017 WL 951672, at *6 (M.D. Fla. Mar. 10, 2017) (collecting cases).[3]

Where, as here, no fiduciary or other special relationship exists, proving fraud requires a *statement* that is either false in and of itself (fraudulent misrepresentation) or rendered misleading by the concealment of other material information (fraudulent concealment). Although both concealment and misrepresentation involve statements, the distinction between the two claims lies in the *type* of statement involved. Fraudulent misrepresentation requires a knowingly false statement. *Butler v. Yusem*, 44 So. 3d 102, 105 (Fla. 2010). By contrast, fraudulent concealment centers on a statement that, while not necessarily false, "suppress[es] or disguise[s] the truth" or distracts "attention from the real facts." 27 Fla. Jur. 2d Fraud and Deceit § 54.

As this Court explained long ago, "concealment becomes a fraud"—and therefore an actionable tort—where "in addition to a party's silence there is any statement,

[3] This is not to say that there is no tort-based duty on manufacturers to disclose to purchasers of their products the dangers associated with the products' use. A manufacturer does have a duty to disclose hazards associated with its product under *product-liability law*, and that duty is enforceable through a failure-to-warn claim—but not under fraud law. Indeed, the very existence of a manufacturer's duty to warn in product-liability law attests to its absence in fraud law: If the duty to warn already existed in the law of fraud, there would have been little need for the development of a robust body of warnings law duplicating it. Failure-to-warn claims in the tobacco context are addressed in Section I.C.

word or act on his part which tends affirmatively to a suppression of the truth." *Joiner v. McCullers*, 28 So. 2d 823, 825 (Fla. 1947); *see also Stackpole v. Hancock*, 24 So. 914, 919 (Fla. 1898) (fraud by concealment occurs when a person makes a statement "calculated to mislead" another "and to prevent him from" discovering the "real facts"); *Bd. of Pub. Instruction of Dade Cnty. v. Everett W. Martin & Son, Inc.*, 97 So. 2d 21, 26 (Fla. 1957) (same); *ZC Ins. Co. v. Brooks*, 847 So. 2d 547, 551 (Fla. 4th DCA 2003) ("Florida law recognizes that fraud can occur by omission, and places a duty on one who undertakes to disclose material information to disclose that information fully.").

In other words, "even though a party to a transaction owes no duty to disclose facts within his knowledge, or to answer inquiries respecting such facts, if he undertakes to do so he must disclose the whole truth." *Ramel v. Chasebrook Constr. Co.*, 135 So. 2d 876, 882 (Fla. 2d DCA 1961); *accord Stackpole*, 24 So. at 918–19; *Grimes v. Lottes*, 241 So. 3d 892, 898 (Fla. 2d DCA 2018) (a party's "partial disclosure … may have triggered a duty to disclose all of the facts surrounding the situation"). The Restatement confirms that a duty to speak arises when "necessary to prevent [a] *partial or ambiguous statement* of the facts from being misleading." Second Restatement § 551(2)(b) (emphasis added). "When such a statement has been made, there is a duty to disclose the additional information necessary to prevent it from misleading the recipient." *Id.* cmt. g. Take an example from this very case:

Ms. Prentice alleged that Reynolds and other tobacco companies made public statements suggesting that light or low tar cigarettes may be healthier, which imposed a duty on those companies to add that smokers "could end up getting more tar and nicotine if they compensated" for the decreased nicotine yield by increasing smoking or inhaling more deeply. T.3514; *see also* T.2386; T.3257–58.

The Restatement suggests that acts or conduct can also provide the basis for a fraudulent-concealment claim, and the Second District likewise hypothesized that an act that prevents a party from discovering the truth could give rise to a fraudulent-concealment claim. *See* Second Restatement § 550, cmt. a.; *Philip Morris USA, Inc. v. Duignan*, 243 So. 3d 426, 440 (Fla. 2d DCA 2017). Whatever merit that theory may have in the abstract, it certainly does not authorize liability based on *silence*, or failing to disclose. All the Restatement suggests is that, in certain contexts, an act can operate like an express statement, by misleadingly implying a falsehood that needs to be corrected by disclosing additional facts. *See* Second Restatement § 550, cmt. a. For example, a defendant could be liable for fraudulent concealment "if he paints over and so conceals a defect in a chattel or a building that he is endeavoring to sell to the plaintiff, and thus induces the plaintiff to buy it in ignorance of its defective character," or "if he so stacks aluminum sheets that he is selling as to conceal defective sheets in the middle of the pile." *Id.* This simply means that an act conveying a misleading half-truth, like a misleading half-true statement, triggers a

duty to reveal the suppressed truth. But it in no way suggests an affirmative duty to disclose absent such an affirmatively misleading act, and therefore precludes liability based on silence.

Anyway, in the real world, this distinction is irrelevant in tobacco litigation. In tobacco cases, as exemplified here, the allegedly misleading action must always involve some verbal statement for it to reach and thus have an effect on an individual smoker. Indeed, Ms. Prentice has not alleged or argued that an act Reynolds committed—other than making misleading public statements—created a duty to disclose additional material information to Mr. Price. There is good reason for her chosen strategy: To our knowledge, no Florida court has recognized a fraudulent-concealment claim based purely on the theory that a defendant's actions or conduct concealed the truth from the plaintiff; the *Engle* class did not bring an acts-based theory of fraudulent concealment, and Ms. Prentice, as a putative class member, must bring the same claims pursued by the *Engle* class; and federal law would preempt any acts-based theory of fraudulent concealment. *See infra* §§ I.B.1; I.C.

The First District's decision here was therefore correct. The court relied on its earlier decision in *Whitmire*, which recognized that a duty to speak arises only when a defendant makes a misleading statement that conceals the health risks of smoking. *See Whitmire*, 260 So. 3d at 538. Ms. Prentice followed that fraudulent-concealment theory in this case. For example, she introduced evidence at trial that

Reynolds and other tobacco companies suggested light and low-tar cigarettes carried fewer health risks, while failing to disclose that consumers "could end up getting more tar and nicotine if they compensated" for the decreased nicotine yield by increasing smoking or inhaling more deeply. T.3514; *see also* T.2386; T.3257–58. Her brief to this Court confirms that her fraudulent-concealment claims depend on "public statement[s]" about "nicotine addiction and cancer" that "failed to include what the conspirators had known since the 1950s." IB 36–37. But Ms. Prentice also contended that the companies had a general duty to disclose apart from any statements they may have made. *See, e.g.*, T.5255. Because the jury's conspiracy verdict could have rested merely on silence and not on any misleading, incomplete statements made by alleged conspirators, the First District correctly determined that the jury instructions failed to inform "the jury of the need to find that Price detrimentally relied on a false or misleading statement." *Prentice*, 290 So. 3d at 966. Only then could the jury impose liability on Reynolds for breaching its duty to disclose—a duty that arose when it or its co-conspirators made materially incomplete statements. *Id.*; *see also Soler v. Secondary Holdings, Inc.*, 771 So. 2d 62, 69 (Fla. 3d DCA 2000) ("The law, however, is clear that a claim of fraudulent misrepresentation and/or concealment requires proof of detrimental reliance on a material misrepresentation."); 27 Fla. Jur. 2d Fraud and Deceit § 51 ("Liability for fraudulent concealment cannot be shown without reliance on a false statement, absent a fiduciary relationship that

would create a duty to disclose.").

The instruction given, by contrast, expanded fraud by concealment to something that does not exist under Florida law: fraud liability based on mere failure to speak without more. *See* T.5233–34. This is at odds with the very notion of reliance. One cannot "rely" on information that the defendant never conveyed. If a smoker's belief that, for example, smoking is safe is not based on a tobacco company's statement, then the smoker has not detrimentally relied on anything the tobacco company said, and thus has not been defrauded. And beliefs do not arise out of nothing. For concealment to engender a belief, there must be some circumstance that makes the plaintiff reasonably expect disclosure. *See Besett v. Basnett*, 389 So. 2d 995, 997 (Fla. 1980); *see also Mergens v. Dreyfoos*, 166 F.3d 1114, 1117 (11th Cir. 1999) ("To prove fraud under Florida law, the plaintiff must show that ... 'the plaintiff's reliance was reasonable.'" (citation omitted)). That would mean a statement that makes the plaintiff believe that tobacco companies are fully disclosing the health risks of smoking, for example, or a fiduciary or other close relationship that creates an obligation of disclosure. Mere silence—absent a fiduciary relationship authorizing one to expect affirmative disclosure—is not a basis for reliance. As this Court made clear, "*Engle*-progeny plaintiffs must certainly prove detrimental reliance in order to prevail on their fraudulent concealment claims." *Hess v. Philip Morris USA, Inc.*, 175 So. 3d 687, 698 (Fla. 2015). But the instruction given allowed the jury to

hold Reynolds liable for failing to disclose information about the health risks of smoking even if it found that Mr. Price did not listen to or rely on anything that tobacco companies said about smoking and health, as the evidence showed. *See* T.4565–76. Thus, the instruction—in addition to being incomprehensible—effectively eliminated the reliance element altogether.

B. There Is No Basis For An *Engle*-Only Exception To Settled Florida Law Requiring Reliance On A Statement As An Essential Element Of Fraudulent Concealment.

Unable to dispute these basic precepts, Ms. Prentice claims that a separate set of legal rules applies to fraudulent-concealment claims brought by *Engle*-progeny plaintiffs. As she puts it, for "*Engle* concealment and conspiracy claims … the plaintiff's burden on causation is to prove reliance on silence." IB 29. Her claim for a special rule for *Engle*-progeny plaintiffs finds no grounding in the history of the *Engle* litigation but is actually refuted by it.

1. The *Engle* class pursued only a statements-based theory of fraudulent concealment and conspiracy.

Despite Ms. Prentice's claims to the contrary, the *Engle* proceedings conformed to the settled principles discussed above and support the First District's decision. In particular, the fraudulent-concealment claim partially adjudicated in *Engle* rested entirely on the theory that the tobacco defendants made statements rendered misleading by omitting key information about the health risks of smoking.

During the original *Engle* trial, the trial court denied the tobacco companies'

directed-verdict motion on fraudulent concealment because it found that "a duty to disclose" arose when "the defendants failed to reveal information they knew was contrary *to that which they disseminated*." *Engle v. R.J. Reynolds Tobacco Co.*, No. 94-08273 CA-22, 2000 WL 33534572, at *2 (Fla. Cir. Ct. Nov. 6, 2000) (emphasis added); *see also id.* (citing "continued campaigns of *misinformation* about the dangers of smoking" (emphasis added)). The *Engle* trial court made clear that this reasoning "appl[ied] directly to the Fraud count and the Conspiracy count." *Id.* at *3. The trial court's finding that the class had presented sufficient evidence to get to the jury on its fraudulent-concealment claims was thus based on misleading statements—not silence.

The *Engle* jury instructions on fraudulent concealment likewise reflected the statements-based nature of those claims. Those instructions required the *Engle* jury to find that "one or more of the Defendants omitted or concealed material facts that would be necessary to make *statements* by said Defendants not misleading" in order to return a verdict for the class. R.A. 374 (emphasis added).[4] The conspiracy-to-conceal instruction was grounded in the same theory. *See* R.A. 376. By returning a verdict in favor of the class, the *Engle* jury found that Reynolds and other tobacco

[4] Reynolds requests that the Court take judicial notice of these court records from the *Engle* Phase I jury pursuant to §§ 90.202(6), (12) and 90.203, Fla. Stat. An appendix attached to this brief contains excerpts of the relevant transcripts and other court records from the *Engle* Phase I trial.

companies made misleading statements that concealed material information about smoking, which would give rise to a duty to disclose the information concealed in those public statements to people who would otherwise be deceived.

Moreover, the *Engle* class relied on a statements-based theory of concealment precisely to avoid the dispositive legal objection that cigarette manufacturers had no fraud-based duty to disclose information to consumers. During the charge conference, class counsel explained that the proposed fraudulent-concealment instructions concerned "concealment in connection with representations or *not telling the whole truth*," *i.e.* "misleading statements, half truths." R.A. 200, 204–05 (emphasis added). According to class counsel, if the tobacco companies "didn't open their mouths, if they did nothing, then [they] would not have had, perhaps, that duty. But we don't have to address that issue because, not only did they speak, they spoke constantly to the public; and because of that they had a duty to tell the whole truth." R.A. 201.

In sum, the arguments of class counsel, the jury instructions, and the trial court's directed-verdict order all show that the fraudulent-concealment claims adjudicated in *Engle* hinged on *statements* rendered misleading by omitting material information. Moreover, the *Engle* Phase I record forecloses the possibility that the fraudulent-concealment claim depended on acts or conduct. The *Engle* trial court's directed-verdict order does not mention acts as a separate basis for a duty to disclose, the trial court did not instruct the jury to decide whether tobacco companies took

actions that concealed the health risks of smoking, and class counsel did not make any reference to fraudulent acts in explaining the class's theory of fraudulent concealment. By resting her fraudulent-concealment claims on the *Engle* findings, Ms. Prentice necessarily limited herself to "*the same causes of action*" and same theories of liability pursued in *Engle* itself. *Douglas*, 110 So. 3d at 432 (emphasis in original); *see Soffer v. R.J. Reynolds Tobacco Co.*, 187 So. 3d 1219, 1230 (Fla. 2016) ("[T]o take advantage of the Phase I findings, progeny plaintiffs must file the same claims ... as the original class.").

2. *Engle*-progeny plaintiffs must present individualized proof of reliance on a statement to prevail on fraud claims.

Even with the benefit of the *Engle* findings, progeny plaintiffs claiming fraudulent concealment must prove that they relied to their detriment on false statements by tobacco companies. *See Whitmire*, 260 So. 3d at 539. As noted, this Court has already held that *Engle* plaintiffs "must certainly prove detrimental reliance." *Hess*, 175 So. 3d at 698. Indeed, "individual questions of reliance" are the very reason that this Court decertified the *Engle* class and required former class members to bring individual actions. *Engle*, 945 So. 2d at 1255.

Hess's holding that progeny plaintiffs must present individualized proof of detrimental reliance necessarily requires proof of reliance on *something*. *See Humana, Inc. v. Castillo*, 728 So. 2d 261, 265 (Fla. 2d DCA 1999) ("Florida law im-

poses a reliance requirement in an omissions case, which cannot be satisfied by assumptions."). Because no fiduciary or other special relationship exists between Reynolds and consumers, progeny plaintiffs must prove that the smoker heard or read a tobacco company's partially true statement about the health risks of smoking. *See Taylor v. Am. Honda Motor Co.*, 555 F. Supp. 59, 64 (M.D. Fla. 1982) (recognizing that "[n]o Florida case has gone so far as to impose upon merchants a duty to disclose information to the public at large").

Reliance on such statements is required in all *Engle*-progeny cases. The *Engle* Phase I jury found that tobacco companies made misleadingly incomplete statements; therefore, a plaintiff asserting a fraudulent-concealment claim based on the *Engle* findings must show reliance on such a statement. Ms. Prentice cannot mix and match by invoking a the *Engle* jury's finding keyed to misleading statements, but then pursuing a reliance theory keyed to mere silence in her progeny case. That would result in *Engle* defendants receiving different treatment than others accused of fraud under Florida law, despite the fact that they are entitled to "receive the same process as any civil defendant." *Douglas*, 110 So. 3d at 432.

Indeed, this Court and others have recognized in the specific context of *Engle*-progeny litigation that reliance on mere silence does not suffice, explaining that progeny plaintiffs must prove that they "detrimentally relied on the *misinformation*." *Hess*, 175 So. 3d at 691 (emphasis added). "[M]isinformation," of course, requires

dissemination of "information" through some sort of statement by the defendant. *See Calloway*, 201 So. 3d at 766 ("A 'plaintiff still must prove detrimental reliance upon the [defendant's] *misinformation*." (emphasis added, alteration in original) (quoting *R.J. Reynolds Tobacco Co. v. Buonomo*, 138 So. 3d 1049, 1051 (Fla. 4th DCA 2013))); *R.J. Reynolds Tobacco Co. v. Martin*, 53 So. 3d 1060, 1068 (Fla. 1st DCA 2010) ("To prevail on the fraud by concealment claim, the plaintiffs had to prove" that they "detrimentally relied on the *misinformation*." (emphasis added)); *see also Duignan*, 243 So. 3d at 442 (agreeing with defendants that "silence, unaccompanied by a duty to disclose, is not actionable as fraud"). As the *Whitmire* court observed, "[t]o hold a party liable for fraudulent concealment—where there was no duty established as a matter of law and no evidence of any reliance on a false statement—would allow a plaintiff to impose severe consequences on a party where the plaintiff never proved reliance on any false statements." *Whitmire*, 260 So. 3d at 541.

Ms. Prentice attacks a straw man when she argues that Reynolds's requested instruction would require her to prove reliance on a "specific" statement. *See, e.g.*, IB 27–29, 30. Reynolds's proposed instruction asked the jury to find whether Mr. Price relied to his detriment "on a statement," not on any specific statement. R.1:7522–23. No one is arguing that a progeny plaintiff must identify a specific advertisement touting the relative benefits of filtered cigarettes (for example) seen

and relied on by the smoker to allege that the smoker generally relied on advertisements in arriving at a belief that filtered cigarettes were safer. Reynolds's instruction does not require any particular form of proof other than the essential requirement of reliance "on a statement," which could mean a category of statements addressing a particular topic (*e.g.*, advertisements for filtered cigarettes). The trial court's instructions, however, failed to inform the jury of the need to connect the conduct that created the duty to speak (here, half-true statements) to the smoker's injury. The resulting verdict effectively punished Reynolds for mere silence, in contravention of longstanding Florida law on fraud.

3. Ms. Prentice's arguments for an *Engle*-only exception to Florida's fraudulent-concealment requirements fail.

Ms. Prentice makes four main arguments in favor of an *Engle*-only rule that permits progeny plaintiffs to prove fraudulent concealment by showing reliance on silence, despite the absence of a fiduciary or special relationship. All lack merit.

First, Ms. Prentice asserts that this Court in *Engle* "gave *res judicata* effect to the concealment and conspiracy to conceal findings"—but not the misrepresentation findings—because the concealment claims "do not depend on discrete statements." IB 28–29. That requires reading something into the *Engle* opinion that simply is not there. The Court's decision in *Engle* does not explain why the Court treated the concealment and misrepresentation findings differently, nor do the arguments of counsel provide any basis for the distinction. There is no justification for assuming

that the Court deemed the concealment findings to be unrelated to statements—especially given that the *Engle* jury instructions expressly tied those findings to misleading statements. *See* R.A. 374, 376. One would expect the Court to have said something had it intended to override generally applicable Florida law governing fraudulent-concealment claims and the *Engle* class's decision to litigate in conformity with those settled standards throughout the trial and appellate proceedings.[5]

Ms. Prentice's second point is that requiring a progeny plaintiff to prove reliance on a statement constitutes "relitigat[ion]" of the *Engle* class-action jury's supposed finding on duty. *See* IB 30–31. But the First District simply required the trial court to properly instruct the jury about the *reliance* element, which the *Engle* jury never reached. *See Hess*, 175 So. 3d at 694. As Ms. Prentice acknowledges, duty and reliance are "legally and factually distinct" elements, yet they are also connected. IB 30 (quoting *Duignan*, 243 So. 3d at 442). Here, the *Engle* jury found that tobacco companies made *statements* that misleadingly downplayed the health risks of smoking, which thus triggered the only type of duty to disclose that could

[5] Ms. Prentice also claims that after this Court's *Engle* decision, Reynolds and other tobacco companies "pivoted" to arguing, in progeny appeals, that "concealment counts required reliance on a specific statement." IB 10. But Reynolds's position has remained consistent throughout the *Engle* litigation: Because class counsel alleged that Reynolds made misleading statements that triggered a duty to disclose, *see* R.A. 200–01, 204–05, progeny plaintiffs must prove reliance on such a misleading statement.

have been adjudicated in *Engle*—one that required the defendants to disclose additional information to correct the omission of material facts about the risks of smoking to individuals who otherwise would have been deceived. Thus, progeny plaintiffs must prove that they relied on one of those *statements*. Only then can a jury hold Reynolds liable for breaching a duty to disclose.

That would be true in any other fraudulent-concealment case, and it must also be true in an *Engle*-progeny case. Otherwise, the procedure approved in *Engle* would circumvent the *Engle* defendants' substantive rights by effectively eliminating the plaintiff's burden to prove causation—*i.e.*, that the smoker relied on the fraud found by the *Engle* jury. *See Brooks v. Owens*, 97 So. 2d 693, 699 (Fla. 1957) (procedural rules do not "increase or otherwise alter basic *substantive* rights of either party to litigation." (emphasis in original)); *see also Boyd v. Becker*, 627 So. 2d 481, 484 (Fla. 1993) (Florida Rules of Civil Procedure are "limited to rules governing procedural matters and do[ ] not extend to substantive rights").

Ms. Prentice's third point takes issue with the First District's decision because it relied on *Whitmire*, which she claims "conflated the *Engle* class's misrepresentation and concealment claims." IB 31–32. But the *Whitmire* court simply acknowledged, correctly, that the *Engle* class pursued statements-based theories of fraud for *both* the fraudulent-misrepresentation and fraudulent-concealment claims. *Whitmire*, 260 So. 3d at 538. Class counsel adopted that theory to comply with

settled Florida law requiring, in the absence of a fiduciary or other special relationship, proof of reliance on a statement to prevail on a fraudulent-concealment claim. *See* R.A. 200–01, 204–05 (relying on a statements-based theory to avoid the problem that, under Florida law, cigarette manufacturers have no duty to disclose the health risks of smoking to smokers).

Finally, Ms. Prentice argues that something about the nature of an *Engle* case removes any need for individualized evidence of reliance on a statement. IB 34–36. In support, she cites the First District's decision in *Martin*, 53 So. 3d at 1069–70, and several cases that followed it to argue that reliance can be inferred in *Engle*-progeny cases based on the pervasiveness of misleading advertising. *See* IB 35 (collecting cases). But in reality, *Martin* acknowledged that the jury must be instructed that in "order to be a legal cause of death, plaintiff must show that [the smoker] relied on *statements* by either R.J. Reynolds Tobacco Company or any of the other companies involved in the conspiracy that omitted material information concerning the health effect [sic] of cigarettes." *Martin*, 53 So. 3d at 1065 (emphasis added). The *Martin* court simply explained that an *Engle*-progeny plaintiff can prove reliance on a statement using direct or circumstantial evidence—but still, the "circumstantial evidence must establish *individualized* reliance by the plaintiff." *Whitmire*, 260 So. 3d at 540 (emphasis added); *see also Prentice*, 290 So. 3d at 966 n.3 ("*Martin* estab-

lished that reliance can be proven by circumstantial evidence."). In short, Ms. Prentice conflates *what* a progeny plaintiff must prove (individualized reliance on a misleading statement) with *how* the plaintiff may prove that fact (through direct or circumstantial evidence).

In any event, *Martin* and other District Court decisions citing it cannot abrogate this Court's unequivocal statement that *Engle*-progeny plaintiffs must present individualized evidence of detrimental reliance. *See Engle*, 945 So. 2d at 1255; *Hess*, 175 So. 3d at 698; *Douglas*, 110 So. 3d at 427–28 (recognizing that the constitutionality of the *Engle*-progeny framework's use of conclusive findings hinged on such individualized determinations); *see also Scelta v. Boehringer Ingelheim Pharm., Inc.*, 404 F. App'x 92, 94–95 (8th Cir. 2010) (rejecting argument that for a Florida fraudulent-concealment claim, "reliance can be inferred from" a plaintiff's "exposure to the alleged misrepresentations").

C. Federal Law Preempts Ms. Prentice's Theory of Fraudulent Concealment.

Limiting progeny fraudulent-concealment claims to half-true statements is also necessary to avoid problems of express preemption. The Federal Cigarette Labeling and Advertising Act requires all cigarette labels to contain a warning, and the Act also contains a preemption provision, which provides that "[n]o requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes the packages of which are

labeled in conformity with the provisions of this chapter." 15 U.S.C. § 1334(b). The United States Supreme Court has interpreted this provision to preempt state-law claims based on a failure to warn of the health risks of smoking after July 1, 1969, but not claims for common-law fraud. *See Cipollone v. Liggett Grp., Inc.*, 505 U.S. 504, 524–29 (1992) (plurality op.). Applying *Cipollone*, the court in *Laschke v. Brown & Williamson Tobacco Corp.*, 766 So. 2d 1076 (Fla. 2d DCA 2000), held that pure-concealment claims premised on the "breach of a duty to warn of the dangers of cigarette smoking" fall on the failure-to-warn side of this line and thus are preempted. *Id.* at 1078.

Ms. Prentice's effort to recast a mere failure to speak as "fraud" runs headlong into express preemption because it effectively imposes on Reynolds an affirmative duty to provide information about the health risks of smoking. By attempting to recast the traditional reliance element from reliance on a misleading statement to "reliance" on pure silence or a failure to speak, Ms. Prentice's concealment claim is no longer a common-law fraud claim, saved from preemption under *Cipollone*. Rather, it is indistinguishable from the substantive elements of a failure-to-warn claim under Florida law. *See Aubin*, 177 So. 3d at 514, 517 n.8 (listing elements). Any potential claim that Reynolds committed fraudulent concealment through acts—such as, for example, failing to fund research on the health risks of smoking—would likewise twist the common-law reliance requirement into nothing more than mere

reliance on silence, and thus constitute a failure-to-warn claim preempted by the Labeling Act.

This Court's decision in *Carter v. Brown & Williamson Tobacco Corp.*, 778 So. 2d 932 (Fla. 2000), is not to the contrary. *Carter* concluded that the Labeling Act did not preempt claims against cigarette companies for conduct that predated the 1969 enactment of the Act's preemption provision or that involved channels of communication other than those mentioned in the preemption provision—*i.e.*, other than "advertising or promotion." *Id.* at 940–42. In contrast, *Engle*-progeny claims turn in significant part on smoking after 1969, and centrally target the impact of cigarette advertising. If progeny plaintiffs' fraudulent-concealment claims were extended from misleading statements to theories of pure concealment, they would become failure-to-warn claims, which are expressly preempted by the Labeling Act.

D. The Trial Court Erred In Failing To Give Reynolds's Requested Instructions And The Error Cannot Pass As Harmless.

For the reasons discussed, Reynolds's requested instructions accurately summarized settled Florida law requiring reliance on a statement to prove fraud. Accordingly, only two elements of the *Aubin* test remain: (1) whether the facts supported giving Reynolds's requested instructions, and (2) whether the instructions were necessary for the jury to properly resolve the issues in this case. *Aubin*, 177 So. 3d at 517. Ms. Prentice does not make any argument as to these elements, and both confirm the trial court's error in refusing to give the requested instructions.

The facts of this case warrant Reynolds's requested instructions because all *Engle*-progeny plaintiffs, including Ms. Prentice, must follow the same statements-based theory of fraudulent concealment pursued by the *Engle* class. *See Soffer*, 187 So. 3d at 1230; *Douglas*, 110 So. 3d at 432. Ms. Prentice did just that. She argued that tobacco companies conspired to make *statements* "downplaying" and "mocking" research linking smoking to disease, and "saying things like" that. *See* T.2186. Reynolds's requested instructions were also *necessary*, because without them, the jury may well have imposed liability based on a theory of pure silence. Ms. Prentice repeatedly faulted Reynolds for not "tell[ing] John Price, … don't suck it in your lungs because that's the stuff that's going to get you addicted and going to have you decades from now struggling and smoking like that every day." T.5254–55. The instruction given by the trial court heightened the possibility that the jury would impose liability based purely on silence.

Contrary to Ms. Prentice's suggestion, the trial court's error in failing to give Reynolds's requested instructions cannot pass as harmless. IB 36–37. Tellingly, Ms. Prentice's harmless-error argument is premised on her acknowledgment that her fraudulent-concealment claims depend on "public statement[s]" about "nicotine addiction and cancer" that "failed to include what the conspirators had known since the 1950s." *Id.* That alone highlights the need for an instruction regarding reliance

on a statement. She also omits the standard for finding error harmless in this circumstance, which places the burden on her, as the beneficiary of the error, to demonstrate "that there is no reasonable possibility that the error contributed to the verdict." *Special v. W. Boca Med. Ctr.*, 160 So. 3d 1251, 1256 (Fla. 2014); *see also Dockswell v. Bethesda Mem'l Hosp., Inc.*, 210 So. 3d 1201, 1213 (Fla. 2017) (applying the *Special* standard to a trial court's refusal to give a requested instruction); *Sanchez v. Martin*, 248 So. 3d 1174, 1178 (Fla. 4th DCA 2018) (same).

Ms. Prentice cannot meet that standard here. By giving Ms. Prentice's proposed instruction that omitted the correct legal standard for reliance, the trial court authorized the jury to find liability without connecting the fraudulent conduct (misleading statements) to Mr. Price's injuries. That is particularly important here because Mr. Price's sworn testimony indicates that he did *not* in fact rely on any statement by a tobacco company. Mr. Price testified that nothing "that the cigarette companies said or did … influence[d] [him] to start smoking." T.4576. He agreed that he never read or heard any statements about "smoking and health made by a cigarette manufacturer"—including any statement from the Tobacco Industry Research Committee (or the Council for Tobacco Research). T.4614. Still, because the trial court refused to give the requested instructions, Ms. Prentice repeatedly blamed Reynolds for its silence, and even argued that Reynolds's silence "is essential [to] this case": "This is a case about concealment. They should have told him. And when they

don't, they're held accountable and that's why we called you here." T.5255. In light of the evidence and argument, Ms. Prentice cannot prove that there is no reasonable possibility that the instructional error affected the verdict.

II. THE FIRST DISTRICT CORRECTLY ORDERED A NEW TRIAL ON ALL ISSUES.

This Court need not address Ms. Prentice's challenge to the First District's determination that the instructional error required a new trial on all issues. The First District's remedy holding is fact-bound and case-specific and lacks any statewide import. *See* Fla Const. art. 5, § 3(b)(3)–(4); Fla. R. App. P. 9.030(a)(2)(A)(iv)–(vi); *see also Sanchez v. Wimpey*, 409 So. 2d 20, 21 (Fla. 1982). If the Court takes up the issue, it should reject Ms. Prentice's unsupportable contention that de novo review applies. The scope of remand generally depends on an appellate court's discretionary assessment of "equity and justice" based on case-specific circumstances, and thus abuse-of-discretion review applies. *English v. Clark*, 289 So. 2d 33, 35–36 (Fla. 1st DCA 1974) (per curiam); *see also* § 59.35, Fla. Stat. (granting appellate courts discretion to set the scope of new trials); *Yates v. St. Johns Beach Dev. Co*., 165 So. 384, 385 (Fla. 1935) (appellate courts have broad power "to make such disposition of the cases as justice may require"). The case Ms. Prentice cites for de novo review has nothing to do with the scope of a retrial. *See Bosem v. Musa Holdings, Inc.*, 46 So. 3d 42, 44 (Fla. 2010) (addressing availability of prejudgment interest).

The First District acted well within its discretion in ordering a new trial on all

issues. A limited retrial is inappropriate where the issues sought to be excluded are "too interwoven" with the issue that is to be retried. *City of Winter Haven v. Allen*, 541 So. 2d 128, 138 (Fla. 2d DCA 1989); *see Engle*, 945 So. 2d at 1270–71 (recognizing that trying related issues to separate juries would violate the right to a jury trial under the Florida Constitution). Here, the trial court's error in instructing the jury on the conspiracy claim is inextricably intertwined with comparative fault, which included an allocation of fault to Reynolds based on the error-infected conspiracy claim, *see* R.2:5114–15, T.7704, and therefore with the strict-liability and negligence claims, which are necessarily relevant to the jury's allocation of fault, and determination of damages. *See, e.g.*, *Foreline Sec. Corp. v. Scott*, 871 So. 2d 906, 911 (Fla. 5th DCA 2004).

Contrary to Ms. Prentice's argument, Reynolds did not seek a new trial only on conspiracy liability. IB 43–44. Reynolds made an unqualified request for a new trial covering all issues that were not resolved in its favor in the trial court. *See Prentice*, 290 So. 3d at 967 n.4; *see also* R.A. 455 ("The Court should order a new trial ...."); R.A. 499 (Ms. Prentice acknowledging that Reynolds sought "a complete new trial"); R.A. 582 n.2. Reynolds did not concede that a new trial should be limited to the conspiracy claim at oral argument. IB 44–45. Rather, it responded to questions from the First District panel that *presupposed* that the instructional issue would result in a new trial on the conspiracy claim only. R.A. 623–25. Nor does

the two-issue rule apply here. IB 39. That rule concerns *preservation—i.e.*, what to do when a party fails to properly object to a general-verdict form—and has nothing to do with the scope of a new trial on an admittedly preserved issue. *See Whitman v. Castlewood Int'l Corp.*, 383 So. 2d 618, 619 (Fla. 1980). Finally, although Ms. Prentice's request should be denied, if this Court narrows the scope of the retrial, it should also require the First District to rule first on the other errors that Reynolds raised on appeal but that the court did not reach as a result of its disposition.

III. THIS COURT SHOULD RECONSIDER *ENGLE* AND *DOUGLAS*.

The dispute over the content of the reliance instruction in this case arises only because this is an *Engle* case—*i.e.*, a case in which some of the class-action jury's findings from Phase I of the *Engle* trial have been given "res judicata" effect due to this Court's decisions in *Engle*, 945 So. 2d at 1259, and *Douglas*, 110 So. 3d at 427–29. Ms. Prentice does not dispute that the trial court's reliance instruction would be erroneous in any other type of case, and in crucial respects her argument hinges on the res judicata effect a bare majority of the Court gave the *Engle* findings in 2006. *See* IB 10, 27. Thus, there is another—and more fundamental—reason why her appeal should fail: The decisions in *Engle* and *Douglas* departed from longstanding Florida preclusion law. This Court has discretion to resolve this case on these grounds, *see, e.g.*, *Kopel v. Kopel*, 229 So. 3d 812, 818, 818 n.5 (Fla. 2017); *Savoie v. State*, 422 So. 2d 308, 312 (Fla. 1982), and it should exercise that discretion given

that the preclusion issue affects not only this case, but the cases of almost two thousand other *Engle*-progeny plaintiffs whose claims remain to be tried.

As this Court recently explained, its "job is to apply th[e] law correctly to the case before us. When we are convinced that a precedent clearly conflicts with the law we are sworn to uphold, precedent normally must yield." *State v. Poole*, 297 So. 3d 487, 507 (Fla. 2020); *see also Gamble v. United State*s, 139 S. Ct. 1960, 1983 (2019) (Thomas, J., concurring) ("When a 'former decision is manifestly absurd or unjust' or fails to conform to reason, it is not simply 'bad law,' but 'not law' at all." (quoting 1 W. Blackstone, Commentaries on the Laws of England 70 (1765)). The reliance interests generated by prior, erroneous decisions can be a reason for adhering to those decisions, but the Court's decision to allow progeny plaintiffs to litigate their claims on the theory approved in *Douglas* that the findings have so-called claim preclusive effect is exactly the sort of "procedural [or] evidentiary rule[ ]" that does not engender reliance interests that count for purposes of stare decisis. *Poole*, 297 So. 3d at 507; *see Lawrence v. State*, No. SC18-2061, 2020 WL 6325895, at *6 (Fla. Oct. 29, 2020) (where the rule would not cause parties to "alter their [out-of-court] behavior," reliance interests were "low to nonexistent"). Reynolds does not challenge the Court's separate holding that progeny plaintiffs could file suit within one year of the *Engle* mandate, thus tolling the statute of limitations for plaintiffs who

establish class membership. *Engle*, 945 So. 2d at 1246. Reconsidering the res-judicata holdings of *Engle* and *Douglas* would therefore leave intact all pending *Engle*-progeny cases, but would require progeny plaintiffs to prove each element of their claims with evidence independent of the findings—just like any other plaintiff.

Thus, the pertinent question is whether *Engle* and *Douglas* "clearly erred" because they are founded on an "incorrect legal analysis." *Phillips v. State*, 299 So. 3d 1013, 1023 (Fla. 2020). *Engle* itself "employed no analysis concerning the differences between claim preclusion and issue preclusion" and "instead simply announced the result." *Douglas*, 110 So. 3d at 439 (Canady, J., dissenting); *see also Bush v. State*, 295 So. 3d 179, 200 (Fla. 2020) (refusing to follow "inexplicabl[e]" decisions "without analysis"). Notably, only four Justices (Anstead, Pariente, Quince, and Lewis) concurred in the decision to give the findings res judicata effect. *Engle*, 945 So. 2d at 1254. And in *Douglas*, the majority "cited no authority" for dispensing with the "fundamental prerequisite for the application of claim preclusion—a final judgment on the merits." *Douglas*, 110 So. 3d at 439 (Canady, J., dissenting).

The time has come to abandon these clearly erroneous precedents. The violation inflicted by the *Engle* preclusion regime is straightforward: Traditional preclusion law and due process require that, before a defendant is subjected to liability, the elements of the plaintiff's claim must be adjudicated. Yet *Douglas*'s "claim

preclusion" rationale gives res judicata effect to any issue that was or could have been raised in the *Engle* trial, even if—as the theory assumes—the *Engle* jury never decided the issue. That holding violates traditional Florida preclusion law by giving res judicata effect in the absence of a final judgment to individual issues rather than claims, and to facilitate further litigation rather than to bar it. These departures are so extreme that they violate Reynolds's due-process rights. *See Richards v. Jefferson Cnty.*, 517 U.S. 793, 797 (1996) (explaining that "extreme applications of the doctrine of res judicata" may violate due process); *Honda Motor Co. v. Oberg*, 512 U.S. 415, 430 (1994) ("[A]brogation of a well-established common-law protection against arbitrary deprivations of property raises a presumption that its procedures violate the Due Process Clause."). As then-Justice Canady observed in his *Douglas* dissent, the "application of claim preclusion in such circumstances is a radical departure from the well established Florida law concerning claim preclusion." *Douglas*, 110 So. 3d at 439 (Canady, J., dissenting).

A. Defendants Cannot Be Precluded From Contesting Liability.

It "hardly seems to need explication that a hearing which excludes consideration of an element essential to the decision … does not meet [the due process] standard." *Bell v. Burson*, 402 U.S. 535, 542 (1971). If a court simply *assumes* that an element of a plaintiff's claim is satisfied—and does not give the defendant a fair chance to contest it—the defendant is deprived of property without due process of

law. In other words, "a presumption … that operates to deny a fair opportunity to repel it, violates the due process clause." *W. & Atl. R.R. Co. v. Henderson*, 279 U.S. 639, 642 (1929); *see also Dep't of Law Enf't v. Real Prop.*, 588 So. 2d 957, 960 (Fla. 1991) ("Procedural due process under the Florida Constitution … contemplates that the defendant shall be given fair notice[ ] and afforded a real opportunity to be heard and defend [ ] in an orderly procedure, before judgment is rendered against him." (second and third alterations in original) (citation omitted)).

To be sure, a prior adjudication can suffice. If a defendant had a fair opportunity in a prior action to contest the fact in question—*and it was resolved against him*—there is no constitutional difficulty with treating that finding as preclusive in later litigation. That is why issue preclusion is consistent with due process. A core requirement of that doctrine, therefore, has always been that the issue was *actually decided* in the prior adjudication. *See, e.g.*, *Cromwell v. Cnty. of Sac*, 94 U.S. 351, 353 (1876) ("[T]he inquiry must always be as to the point or question *actually litigated and determined in the original action*, not what might have been thus litigated and determined." (emphasis added)); *Prall v. Prall*, 50 So. 867, 870 (Fla. 1909) ("It is of the essence of estoppel by judgment that it be made certain that the precise facts were determined by the former judgment."); *Fulton v. Gesterding*, 36 So. 56, 59 (Fla. 1904) (where "several distinct matters may have been litigated, upon one or more of which the judgment was rendered, the whole subject-matter of the action

will be at large, and open to a new contention, unless the uncertainty be removed by extrinsic evidence showing the precise point involved and determined"); Restatement (Second) of Judgments § 27, cmt. e (1982). That must be the rule, because if the fact was not actually decided in the prior case, there is no basis to assume its truth or to prevent a party from contesting it anew.

It is this commonsense and long-established principle that is directly offended by the use of the *Engle* jury findings to conclusively establish, in every progeny case, that the defendants engaged in tortious conduct *against the particular plaintiff*. That link is an indispensable component of plaintiffs' claims, and it is one that the *Engle* jury did not necessarily decide. In Florida as elsewhere, there is no tort liability unless the defendant violated a duty owed to the plaintiff. "[N]egligence in the air, so to speak, will not do." *Gehr v. Next Day Cargo, Inc.*, 807 So. 2d 189, 191 (Fla. 3d DCA 2002) (quoting *Palsgraf v. Long Island R.R. Co.*, 162 N.E. 99, 99 (N.Y. 1928)). Thus, a claimant advancing strict-liability and negligence theories must not only identify a defective product and breach of a duty of care, but also prove that the defect and breach actually affected *him*. *See Aubin*, 177 So. 3d at 513; *Williams v. Davis*, 974 So. 2d 1052, 1056 (Fla. 2007). It is not enough, in other words, to show that the defendant *did a bad thing*—that bad thing must actually *have been done to the plaintiff*.

But, as the Court itself recognized in *Douglas*, it is impossible to say that the

Engle jury determined any such thing. 110 So. 3d at 433. Its findings establish that each tobacco defendant engaged in *some* tortious act at *some* point in time with respect to *some* cigarettes. The *Engle* jury did not specify *how* the torts were committed, or *when*, or with respect to *which* types of cigarettes. *See id.* at 436–37 (Canady, J., dissenting) (defect finding "is sufficient to establish that the defendants sold *some* cigarettes that were defective and unreasonably dangerous," but not that "*all* of the cigarettes sold by the defendants were defective" or that any "*particular brands* of cigarettes ... were defective and unreasonably dangerous"). Without those details, it is impossible to link the tortious conduct to any individual smoker.

That is because the *Engle* plaintiffs "pursued their claims in Phase I based on several alternative theories of defect, some of which applied only to certain brands and designs." *Id.* at 437 (Canady, J., dissenting). For example, the class presented evidence and argument that: unfiltered cigarettes are defective because they yield higher levels of tar and nicotine (R.A. 37–46, 137–38); filtered cigarettes are defective because of misplaced ventilation holes in some brands, loose filter fibers in others, or glass filter fibers in still other brands (R.A. 26–29, 89–100, 134–35); specific brands marketed as light or low tar were defective because they cause smokers to increase smoking or inhale more deeply in order to "compensate" for the decreased nicotine yield (R.A. 40–43, 56–57, 59–66, 67–69, 79–80, 83); certain brands with specific ingredients—such as Y-1 tobacco or ammoniated tobacco—were defective

because of those ingredients (R.A. 104–32, 251–53); and cigarettes made with artificially manipulated levels of nicotine were defective (R.A. 35–36, 55–56, 70–71, 75–77, 85–87, 102, 250–53). The *Engle* verdict form allowed the jury to return verdicts against the defendants if it found in favor of the class on *any one* of those many theories—even if the jury rejected (or simply did not reach) the other theories. Consequently, there is no way to know whether a finding was made that would be relevant to Ms. Prentice's claims.[6]

The same uncertainty underlies the *Engle* jury's negligence and fraud findings. The class's negligence evidence included theories that tobacco companies negligently marketed certain brands of cigarettes to minors at various times between 1953 and 1994, that light cigarettes are defective because they cause smokers to smoke more and inhale more deeply, and that unfiltered cigarettes have unduly high tar and nicotine yields. *See, e.g.*, *Engle*, 2000 WL 33534572, at *16; R.A. 18–20, 37–43, 45–47, 49–54, 56–57, 59–69, 79–80, 83, 137–38, 240–43. More generally, the class pursued generic negligence allegations that all "cigarettes were defective because they are addictive and cause disease," but also allegations of "brand-specific defects" not applicable to all cigarettes. *Douglas*, 110 So. 3d at 423–24. The class's

[6] In *R.J. Reynolds Tobacco Co. v. Marotta*, 214 So. 3d 590 (Fla. 2017), the Court detailed the "many ways" in which the *Engle* jury *could* have found defendants' cigarettes defective, including several that demonstrably apply only to certain brands of cigarettes. *Id.* at 603 (quoting *Engle I*, 2000 WL 33534572, at *2).

fraudulent-concealment evidence addressed, among other things, the *Engle* defendants' alleged incomplete statements about the disease-causing compounds in cigarette smoke (R.A. 248–49), the addictive nature of nicotine and its alleged manipulation by the defendants (R.A. 243–45), and the identity and health effects of cigarette additives (R.A. 247). Many of the class's distinct fraudulent-concealment theories applied to only a subset of class members. For example, the class alleged that defendants concealed the fact that low-tar cigarettes allegedly present the same health risks and are just as addictive as full-flavor cigarettes (R.A. 283–85)—but many class members and *Engle*-progeny plaintiffs never smoked low-tar cigarettes (*see* R.A. 73 (percentage of "the overall cigarette market" made up of low-tar cigarettes is in "high 40s, 48, 50 percent")).

Despite this menu of liability theories, the jury was never asked to *make a selection*. *See Douglas*, 110 So. 3d at 423 (explaining that "the class action jury was not asked … to identify specific tortious actions"). As three Eleventh Circuit judges recognized, the *Engle* record makes it impossible to determine whether the *Engle* jury in fact decided anything relevant to the claims of any particular *Engle*-progeny plaintiff. *See Graham v. R.J. Reynolds Tobacco Co.*, 857 F.3d 1169, 1192, 1217 (11th Cir. 2017) (en banc) (Tjoflat, J., dissenting); *see also id.* at 1191 (Carnes, Julie, J., concurring in part and dissenting in part); *id.* at 1314–15 (Wilson, J., dissenting). Accordingly, *Engle* plaintiffs cannot demonstrate that the issues for which they

claim preclusive effect were "actually litigated and determined" in the earlier lawsuit. The *Douglas* majority recognized this when it admitted that limiting preclusion to issues the *Engle* jury actually decided "would effectively make the [findings] useless in individual actions." 110 So. 3d at 433. Yet due process prohibits courts from applying preclusion to issues being litigated where it cannot be shown what was actually decided in the prior litigation. *Fayerweather v. Ritch*, 195 U.S. 276, 307 (1904); *De Sollar v. Hanscome*, 158 U.S. 216, 221 (1895); *see also, e.g.*, *Russell v. Place*, 94 U.S. 606, 608 (1876).

B. The *Engle* Findings Cannot Be Given Claim-Preclusive Effect.

The *Douglas* majority purported to circumvent these insurmountable problems with issue preclusion by applying claim preclusion, because that doctrine "has no 'actually decided' requirement" and encompasses any issue that "could have been" decided in *Engle*. 110 So. 3d at 435, 425. Without question, the Court's choice to invoke claim preclusion over issue preclusion was "unorthodox" and "inconsistent with the federal common law about those doctrines." *Walker v. R.J. Reynolds Tobacco Co.*, 734 F.3d 1278, 1289 (11th Cir. 2013). In fact, traditional Florida law gives claim-preclusive effect only to final judgments and then only to cut off and not to facilitate further litigation.

With the exception of *Douglas*, claim preclusion in Florida and every other jurisdiction has never been employed to impose preclusion in connection with claims

still being litigated. *Douglas*, 110 So. 3d at 439 (Canady, J., dissenting). The basic error underlying *Douglas*'s unprecedented analysis and result was its clearly erroneous conclusion that claim preclusion can be applied against a *defendant* in a subsequent action to claims that were never finally adjudicated in the original proceeding. Under the universally recognized scope of claim preclusion, it is an "affirmative defense" that can be raised by defendants to preclude plaintiffs from attempting to re-litigate in a second proceeding claims that were or should have been adjudicated in the first. *Rivet v. Regions Bank of La.*, 522 U.S. 470, 476 (1998).

When claim preclusion fulfills its traditional, defensive function, it merely requires a plaintiff to litigate a dispute in full the first time around. If the claim presented in the subsequent litigation is one that was or should have been decided in the prior litigation, re-litigation of the claim is barred regardless of the basis of the prior disposition, subject only to the requirement that the prior proceeding satisfied minimum due-process requirements of notice and an opportunity to be heard. *Douglas*, 110 So. 3d at 438 (Canady, J., dissenting). This is fair because precluded parties have no one but themselves to blame if they fail to vindicate their rights fully the first time. But when, as in this litigation, preclusion is sought as to particular issues in an *offensive* fashion to establish elements in follow-on litigation, a party could prevail in a second action based on claims that were never adjudicated in the first action—a transparently unfair and unconstitutional result. The danger is heightened

in mass-tort litigation, like this one, where it is practically impossible to litigate every theory applicable to every plaintiff.

The constitutional analysis employed in *Douglas* and by the Eleventh Circuit in *Graham* to affirm this result reflects a basic mistake. Both courts stated that the constitutional test is whether the original proceeding giving rise to preclusion met due-process requirements of notice and opportunity to defend. *Id.* at 431; *Graham*, 857 F.3d at 1184. But while the original proceeding's satisfaction of minimum procedural due-process requirements is necessary to support issue preclusion, it is not and never has been constitutionally sufficient for that purpose. Rather, when the question is whether a party may be precluded from litigating a particular issue, the constitutional test is embodied in the requirement of an actual decision on that issue. *Fayerweather*, 195 U.S. at 297–98. Restoring Florida preclusion law to its pre-*Douglas* state, which respected that constitutional requirement, merely means that progeny plaintiffs, like Ms. Prentice, must try their cases with independent evidence to support each element of their claims under neutral and generally applicable law—instead of a special set of rules applicable only to *Engle* claims.

CONCLUSION

This Court should approve the judgment of the First District Court of Appeal. As to the scope of the retrial, the Court should require Ms. Prentice to prove the elements of her claims without the use of the *Engle* findings.

Respectfully submitted,

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Pursuant to Florida Rule of Appellate Procedure 9.210(a)(2), I certify that this brief complies with the applicable font requirements because it is written in 14-point Times New Roman font.

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