

Case No. SC12-437

**IN THE SUPREME COURT
STATE OF FLORIDA**

R.J. REYNOLDS TOBACCO COMPANY,

Defendant/Petitioner,

v.

MELBA SHERMAN, AS PERSONAL REPRESENTATIVE OF
THE ESTATE OF JOHN SHERMAN, DECEASED,

Plaintiff/Respondent.

ON DISCRETIONARY REVIEW FROM A DECISION
OF THE FOURTH DISTRICT COURT OF APPEAL

**DEFENDANT/PETITIONER R.J. REYNOLDS TOBACCO COMPANY'S
AMENDED BRIEF ON JURISDICTION**

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STATEMENT OF THE CASE AND FACTS

In *Engle v. Liggett Group, Inc.*, 945 So. 2d 1246 (Fla. 2006) (per curiam), this Court decertified a class action against cigarette manufacturers, but allowed individual class members to bring subsequent “progeny” suits in which certain jury findings from *Engle* would have “res judicata effect.” *Id.* at 1269. In *R.J. Reynolds Tobacco Co. v. Jimmie Lee Brown*, 70 So. 3d 707 (Fla. 4th DCA 2011)—a case this Court is currently considering for review (No. SC11-2201)—the Fourth District Court of Appeal held that those findings “preclusively establish the conduct elements of the strict liability and negligence claims,” such that “individual post-*Engle* plaintiffs need not prove the conduct elements.” *Id.* at 715 (citing *R.J. Reynolds Tobacco Co. v. Martin*, 53 So. 3d 1060, 1069 (Fla. 1st DCA 2010)).

This *Engle* progeny suit comes to this Court on the heels of *Jimmie Lee Brown*. Plaintiff/Respondent Melba Sherman sued Defendant/Petitioner R.J. Reynolds Tobacco Company for the death of her husband from smoking.¹ She pleaded claims for strict liability, fraudulent concealment, conspiracy to fraudulently conceal, and negligence. The trial court did not require the jury to find that any conduct that injured Mr. Sherman was tortious. Instead, it instructed

¹ Claims against several other cigarette manufacturers named as defendants in the complaint (Lorillard Tobacco Company, Liggett Group LLC, Vector Group Ltd., and Philip Morris USA Inc.) were dismissed by agreement of the parties.

the jury that the *Engle* findings conclusively established the conspiracy and other tortious-conduct elements of Mrs. Sherman's individual claims. The jury found for Mrs. Sherman on the conspiracy to fraudulently conceal claim, but found for Reynolds on the negligence, strict liability, and fraudulent concealment claims. Mrs. Sherman ultimately obtained a \$775,000.00 judgment.

On appeal in the Fourth District, Reynolds argued, as in *Jimmie Lee Brown*, that the trial court had given inappropriately broad preclusive effect to the *Engle* findings. The Fourth District upheld the verdict with a per curiam affirmance citing its earlier decision in *Jimmie Lee Brown*. *See Appendix*.

SUMMARY OF THE ARGUMENT

If this Court should accept *Jimmie Lee Brown* for review, it will have jurisdiction over this case under the settled rule that it may review a per curiam affirmance that cites as precedent a decision pending review by this Court. The Court should accept review of this case and stay its resolution until it has resolved *Jimmie Lee Brown*.²

² Defendant/Petitioner R.J. Reynolds Tobacco Company has filed a separate motion requesting that the Court stay the resolution of this case pending resolution of *Jimmie Lee Brown*.

ARGUMENT

I. THE COURT WILL HAVE JURISDICTION OVER THIS CASE IF IT ACCEPTS REVIEW OF *JIMMIE LEE BROWN* AND THUS SHOULD STAY PROCEEDINGS UNTIL IT DISPOSES OF *JIMMIE LEE BROWN*.

Thirty years ago, this Court recognized that it has discretionary jurisdiction to review a per curiam affirmance with citation if the cited decision is pending review by this Court. *Jollie v. State*, 405 So. 2d 418, 421 (Fla. 1981) (per curiam). Since then, the Court has routinely exercised that jurisdiction to ensure that similar cases receive similar treatment. *See, e.g., Collins v. State*, 26 So. 3d 1287 (Fla. 2009) (per curiam).

The Fourth District's *Sherman* decision is a per curiam affirmance citing *Jimmie Lee Brown*. *See Appendix*. At present, this Court is considering whether to grant review in *Jimmie Lee Brown*. Upon a grant of review in *Jimmie Lee Brown*, the Court would automatically obtain jurisdiction over *Sherman*, because *Sherman* would then be a per curiam affirmance citing a decision that is pending review by the Court. *See Jollie*, 405 So. 2d at 421. Consistent with its established practice in this procedural posture, the Court should stay all proceedings in *Sherman* until such time as it disposes of *Jimmie Lee Brown*. *See, e.g., Int'l Paper Co. v. Fla. Dep't of Revenue*, No. SC04-238 (Fla. May 20, 2004) (order staying proceedings in a tag case that was filed before the lead case was accepted for review); *Reuter v. McKenzie Check Advance of Fla., LLC*, No. SC02-2192 (Fla. Mar. 10, 2003)

(same). Depending on how the Court disposes of *Jimmie Lee Brown*, it would then quash *Sherman* and remand to the Fourth District for reconsideration in light of *Jimmie Lee Brown*, or take some other appropriate action. *See, e.g., Kanarek v. Sullivan*, No. SC10-1196 (Fla. June 2, 2011).

CONCLUSION

For the foregoing reasons, if this Court should accept review in *Jimmie Lee Brown*, it will have jurisdiction over this case. It should follow its normal practice in these circumstances by staying proceedings in *Sherman* until it has disposed of *Jimmie Lee Brown*, and then issuing a further order in this case in accordance with *Jimmie Lee Brown*'s disposition.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on March 9, 2012, a copy of Defendant/Petitioner R.J. Reynolds Tobacco Company's Amended Brief On Jurisdiction was served by electronic mail and U.P.S. overnight delivery on:

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CERTIFICATE OF COMPLIANCE

Pursuant to Florida Rule of Appellate Procedure 9.210(2), counsel for Defendant/Petitioner hereby certifies that the foregoing brief complies with the applicable font requirements because it is written in 14-point Times New Roman font.
