IN THE SUPREME COURT OF FLORIDA

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

Petitioner, Case No. SC20-291

vs. L.T. Case Nos. 1D17-210
2007-CA-11551

R.J. REYNOLDS TOBACCO COMPANY,

Respondent.
_____/

PETITIONER'S MOTION FOR REHEARING

Petitioner, Linda Prentice, as Personal Representative of the Estate of John C. Price ("Plaintiff"), moves for rehearing of this Court's Opinion issued on March 17, 2022. In the Opinion, this Court addressed a certified conflict and resolved it in favor of Respondent, R.J. Reynolds Tobacco Company ("RJR"). Plaintiff does not move for rehearing on that holding. Instead, Plaintiff's motion is directed at this Court's decision to not address Plaintiff's "fallback argument that the First District erred by vacating the entire judgment, not just the verdict on the concealment conspiracy count." Op. at 7-8.

Given the other weighty issues involved in this appeal, it would have been easy to overlook or misapprehend the significance of this error. *See* Fla. R. App. P. 9.330(a). But it deserves this Court's

attention. The First District's decision to grant overbroad relief is not just wrong, it is also contrary to this Court's precedent, which holds that an error on one count cannot result in reversal when other unaffected counts were also presented to the jury. Rehearing is warranted to correct the First District's aberrant holding.

ARGUMENT

Following a three-week trial, Plaintiff prevailed on three counts: negligence, strict liability, and conspiracy. In the decision below, the First District concluded that the trial court had erred in instructing the jury on the conspiracy count. But the First District granted relief extending far beyond that count. The First District held that a new trial was needed on *all* issues—"on the negligence and conspiracy claims, and on compensatory damages, comparative fault, and punitive damages." *R.J. Reynolds Tobacco Co. v. Prentice*, 290 So. 3d 963, 969 (Fla. 1st DCA 2019).

That holding was wrong as a matter of common sense: the "conspiracy claim against RJR would have no effect on, and provide no basis for negating, the negligence and strict liability claims against RJR for which the jury found liability and damages[.]" *Prentice*, 290 So. 3d at 971 (Makar, J., dissenting). The holding was also wrong as

a matter of law. This Court has long held that "an appellate claim of error raised by the defendant as to one cause of action cannot be the basis for reversal where two or more . . . causes of action . . . were presented to the jury." *Barth v. Khubani*, 748 So. 2d 260, 261 (Fla. 1999) (citing *Whitman v. Castlewood Int'l Corp.*, 383 So. 2d 618, 619 (Fla. 1980); *Colonial Stores, Inc. v. Scarbrough,* 355 So. 2d 1181, 1186 (Fla. 1977)).

Florida's district courts of appeal have come down the same way, holding that an error on one theory of liability cannot result in reversal if a plaintiff can recover "the same measure of damages under other theories." *Marriott Int'l, Inc. v. Perez-Melendez*, 855 So. 2d 624, 627 (Fla. 5th DCA 2003); *see also Liggett Grp., Inc. v. Davis*, 973 So. 2d 467, 469, 473 (Fla. 4th DCA 2007) (reversing negligence claim against tobacco-company defendant on preemption grounds but concluding that "the jury's verdict of damages may be sustained on the strict liability claim").

"[I]n *Engle* progeny cases," each cause of action provides an independent basis for the same measure of damages, because "the same injuries—a smoker's illness or death and survivors' damages—are the result of both negligence and intentional torts." *Schoeff v. R.J.*

Reynolds Tobacco Co., 232 So. 3d 294, 302 (Fla. 2017). This case was no exception. Mrs. Price sought damages for her husband's wrongful death. As far as those damages were concerned, what caused his death was immaterial. Mrs. Price did not feel the loss of her husband differently depending on whether it was RJR's conspiracy or RJR's product that killed him. Her husband died the same either way.

That is why the verdict form provided a single line for damages. (R2:5114-15). That is why the jury was instructed that Plaintiff, if she prevailed on "one or more" of her counts, could recover "the total amount of loss, injury, or damage [Plaintiff] sustained as a result of John Price's COPD and death." (R3:5236-37). And that is why "RJR *didn't even ask* for" a new trial on all issues in its briefing, *see Prentice*, 290 So. 3d at 971 (Makar, J., dissenting), and in fact affirmatively conceded, at oral argument, that a reversal on the conspiracy count would result only in a reduction of the jury's verdict and not in an entire new trial. *See* IBR at 43-45.

The First District erred in ignoring RJR's concession. RJR was entitled to the relief it asked for, nothing more. *See Pasha v. State*, 225 So. 3d 688, 703 (Fla. 2017) (affirming on issue that "appellate counsel conceded at oral argument"); *Coolen v. State*, 696 So. 2d 738,

742 n.2 (Fla. 1997) (noting that the "failure to fully brief and argue" a point "constitutes a waiver").

But even without that concession, the First District should have known that RJR was not entitled to a new trial on all issues. Indeed, the First District had, not long before it issued *Prentice*, granted RJR appropriately narrow relief in a nearly identical case. In *R.J. Reynolds v. Whitmire*, 260 So. 3d 536 (Fla. 1st DCA 2018), the First District reversed the trial court's denial of a directed verdict on plaintiff's fraudulent concealment and conspiracy counts. But the trial court had committed no errors impacting the plaintiff's negligence and strict-liability counts, and so *Whitmire* "remand[ed] for an order granting the directed verdict and reducing the compensatory damage award to deduct the decedent's comparative fault." *Id.* at 541.

Plaintiff asks for the same relief here.[1] The First District refused to grant that relief, insisting that a new trial on all issues was

[1] The jury awarded $6.4 million in compensatory damages. (R2:5114-15). Now that the jury's conspiracy verdict has been taken away, Plaintiff has not prevailed on any intentional torts; as a result, the jury's comparative-fault finding—which put 60% of the fault on Mr. Price—will apply to reduce the jury's verdict to $2.56 million. *See Whitmire*, 260 So. 3d at 541. Plaintiff will forego her argument that R.J. Reynolds waived its right to seek the application of comparative fault. *See* IBR at 45-49.

necessary. Although its reasoning is difficult to parse, the First District seemed concerned that Plaintiff's three counts were "intertwined" thanks to the jury's comparative-fault finding:

> [T]he verdict on comparative fault reflected the jury's finding that RJR was liable for the claims of negligence and conspiracy. The jury was not instructed to and did not separate out the amount of fault assigned to each claim. This also holds true for the jury's award of damages. On remand, a second jury could find that RJR did not conspire to conceal fraudulent information. In that event, it is unclear how the second jury could apportion fault between RJR and Price without reconsidering the findings of the first jury on the negligence claim.

Prentice, 290 So. 3d at 967-68.

There are many problems here. To start with, it would not have been proper—or even possible—for the verdict form to "separate out the amount of fault assigned to each claim." *Id.* Comparative fault is not claim-dependent. It is an affirmative defense "focused entirely on whether, and to what extent, the plaintiff's conduct was a legal cause of his own injuries." *Sowers v. R.J. Reynolds Tobacco Co.*, 975 F.3d 1112, 1136 (11th Cir. 2020). Even more importantly, the jury's answer to that question did not implicate the conspiracy verdict. Conspiracy is an intentional tort. And in Florida, comparative fault does not apply to intentional torts. *Schoeff*, 232 So. 3d at 304-06. As a

result, the jury's finding of comparative fault could not—and did not—"reflect" the jury's finding that RJR was liable for conspiracy. *Prentice*, 290 So. 3d at 968.

Thus, the First District erred in granting RJR overbroad and never-asked-for relief. This Court may correct that error. *See Savoie v. State*, 422 So. 2d 308, 312 (Fla. 1982). There is good reason to do so here. As discussed above, the First District's decision to grant an entire new trial is an aberration and conflicts with well-established Florida law.

And that is to say nothing of the decision's effect on Plaintiff. As the First District recognized, remand directions are supposed to "turn upon some basic postulate of fairness" and should be tailored "as justice requires." *Prentice*, 290 So. 3d at 967. Here, the jury heard heartbreaking evidence about how Mrs. Price cared for her husband as she watched him slowly and painfully die from COPD. *See, e.g.,* (R3:4446-55). The jury then awarded Mrs. Price damages for her loss. Now, the First District has taken all of those damages away—with no legal basis for doing so—and has left Plaintiff with nothing. That is not fair. And it surely is not justice.

CONCLUSION

For these reasons, Petitioner respectfully requests that this Court grant rehearing on whether "the First District erred by vacating the entire judgment, not just the verdict on the concealment conspiracy count." Op. at 7-8.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served via the Florida Courts E-Filing Portal on all counsel in the attached service list on this 1st day of April 2022.

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