IN THE SUPREME COURT OF FLORIDA

LINDA PRENTICE, as Personal Representative of the Estate of John C. Price,

Petitioner,

v.

Case No. SC20-291
L.T. Case No. 1D17-2104

R.J. REYNOLDS TOBACCO COMPANY,

Respondent.

RESPONDENT R.J. REYNOLDS TOBACCO COMPANY'S RESPONSE TO PETITIONER'S MOTION FOR REHEARING

The Court should deny Petitioner Linda Prentice's motion for rehearing on the scope of the First District's new-trial order. To begin with, it is not clear that Rule 9.330 permits a motion for rehearing where, as here, the Court exercised its discretion to decline to "address Prentice's fallback argument that the First District erred by vacating the entire judgment, not just the verdict on the concealment conspiracy count." Slip Op. 7–8; *see* Fla. R. App. P. 9.330(d)(2) ("No motion for rehearing or clarification may be filed in the supreme court addressing . . . the grant or denial of a request for the court to exercise its discretion to review a decision described in rule 9.030(a)(2)(A)[.]").

In any case, the Court did not "overlook or misapprehend the significance of this" issue (Mot. at 1): the Court expressly declined to consider it after it was extensively briefed by Ms. Prentice. *See* Initial Br. 37–49. Indeed, the motion for rehearing repeats the same arguments presented to the Court at the merits stage, confirming that the significance of the issue is no greater now than it was then. Ms. Prentice stills seeks case-specific relief on a discretionary issue based on no actual conflict or question of statewide importance.

ARGUMENT

I. THE CASE-SPECIFIC REMEDIAL QUESTION CONCERNING THE SCOPE OF THE NEW TRIAL DOES NOT WARRANT REHEARING.

The Court was not obligated to consider the remedial holding of the First District's decision in this case. Nor did the remedial issue independently qualify for discretionary review: The remedial holding creates no conflict with either a decision of another District Court of Appeal or of this Court, and Ms. Prentice did not assert jurisdiction in this Court based on an alleged conflict related to the scope of the First District's disposition. *See generally* Pet'r's Br. on Juris. (Apr. 23, 2020). As Ms. Prentice notes, the Court had discretion to consider the remedial aspect once it accepted jurisdiction to review

the First District's instructional holding. *See* Mot. at 7 (citing *Savoie v. State*, 422 So. 2d 308, 312 (Fla. 1982)). But discretion to consider is equally discretion not to consider: "This authority to consider issues other than those upon which jurisdiction is based is discretionary with this Court and should be exercised only when these other issues have been properly briefed and argued and are dispositive of the case." *Savoie*, 422 So. 2d at 312; *see also, e.g.*, *Sanchez v. Wimpey*, 409 So. 2d 20, 21 (Fla. 1982) (declining to consider question outside of conflict issue "[i]n the exercise of our discretion").[1]

The Court acted well within its discretion when it declined to address the First District's disposition because that remedial question itself is committed to the discretion of the district court. *See* § 59.35, Fla. Stat. ("An appellate court may, in reversing a judgment of a lower court brought before it for review by appeal, by the order

[1] Ms. Prentice does not argue that the remedial question is "dispositive of the case"—nor could she. Reversing the First District's disposition would not end the case, but would rather require the First District to consider several other grounds for a new trial raised by Reynolds on appeal. *See* R.A. 39. And in any event, this Court's holding on the instructional issue—which Ms. Prentice does not challenge—requires further proceedings.

of reversal, if the error for which reversal is sought is such as to require a new trial, direct that a new trial be had on all the issues shown by the record or upon a part of such issues only."); *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 workaday, discretionary remedial decisions of the district courts may be important to particular litigants, but the issue here is not "essential to the settlement of issues of public importance and the preservation of uniformity of principle and practice," justifying a departure from the usual rule that "review by the district courts [is] in most instances [ ] final and absolute." *Ansin v. Thurston*, 101 So. 2d 808, 810 (Fla. 1958).

Ms. Prentice does not argue that the First District's remedial holding has wider significance beyond the facts of her case. She complains instead that the decision is an "aberration" and "conflicts with well-established Florida law." Mot. at 7. That is incorrect for the reasons explained below, and in any event, Ms. Prentice has not renewed the argument from her initial brief that de novo review applies. *See* Initial Br. 37. That assertion was incompatible with the governing statute and case law, which confirms the appellate courts'

discretion to shape the appropriate remedy. *See* Ans. Br. 37. Thus, Ms. Prentice has not challenged the well-established legal standard used by the First District, but merely its application to the facts of this case.

As if to illustrate the fact-bound, case-specific nature of her request, Ms. Prentice again argues that Reynolds did not ask for "a new trial on all issues in its briefing" to the First District "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." Mot. at 4. Not only is this argument repeated from Ms. Prentice's merits brief, where it was made at some length, *see* Initial Br. 43–45, but it invites the sort of record-intensive, fact-dependent supervision that is inconsistent with the Court's role in Florida's constitutional system. *Ansin*, 101 So. 2d at 810.

Also, the argument is wrong. Reynolds did ask for a complete new trial in its initial brief (R.A. 187) and in its reply brief (R.A. 261), as recognized by Ms. Prentice herself when the issue was before the First District (R.A. 261). Nor did Reynolds waive that request during oral argument. Instead, in the exchange on which Ms. Prentice relies, Reynolds answered questions from the bench concerning when and

how the original jury's comparative-fault determination would be applied in the event of a new trial on the conspiracy claim. That is, the panel's questions *presupposed* that the instructional issue would result in a new trial of only the conspiracy claim. That explains why no member of the First District panel—even Judge Makar, who dissented from the majority's opinion—has suggested any such concession. Ms. Prentice is again asking this Court to disagree with the panel majority's conclusion that Reynolds did "not so limit its prayer for relief" as to its "claim of error regarding the jury instruction on the conspiracy claim." *R.J. Reynolds Tobacco Co. v. Prentice*, 290 So. 3d 963, 967 n.4 (Fla. 1st DCA 2019).

II. ON THE MERITS, THE FIRST DISTRICT DID NOT ABUSE ITS DISCRETION AND THERE IS NO CONFLICT.

A. The First District's remedial holding is not an "aberration" but rather follows from well-settled principles governing the scope of new trials. Florida courts, including this one, have recognized that 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 also Engle v. Liggett Grp., Inc.*, 945 So. 2d 1246, 1270–71 (Fla.

2006) (recognizing that trying related issues to separate juries would violate the right to a jury trial under Florida's constitution); *Howell v. Winkle*, 866 So. 2d 192, 196 (Fla. 1st DCA 2004) (collecting cases holding that liability, comparative fault, and damages should be tried together before the same jury); *Lawson v. Swirn*, 258 So. 2d 458, 459 (Fla. 1st DCA 1972) (ordering new trial on both liability and damages because the two issues were "inextricably interlaced").

Here, the trial court's error in instructing the jury on the conspiracy claim is inextricably intertwined with the issue of comparative fault and, through comparative fault, the issues concerning liability on the non-intentional tort claims and damages. Ms. Prentice argues that "comparative fault does not apply to intentional torts." Mot. at 6. (citing *Schoeff v. R.J. Reynolds Tobacco Co.*, 232 So. 3d 294, 301–05 (Fla. 2017)). That is a *legal rule* governing the trial court's use of the comparative-fault finding *after it has been rendered*. But, *as a factual matter*, the jury's comparative fault finding in this case included an allocation of fault to Reynolds based on the error-infected conspiracy claim: (1) the jury instructions invited the jury to consider any and all of Plaintiff's successful claims in making the comparative fault determination (R.7704 ("one or more

of claimant's claims")); (2) the verdict form placed the comparative fault question directly after the conspiracy question, without instructing the jury to exclude conspiracy from its comparative-fault determination (R.5115); and (3) Ms. Prentice's counsel repeatedly argued to the jury that the intentional-tort claims were part of the comparative-fault analysis (*e.g.*, R.2160, 2176, 5272, 5285–87, 5466, 7935).[2] Factual issues underlying the first jury's comparative fault decision also overlap with the non-intentional torts because in *Engle*-progeny cases like this one, class membership turns on whether the smoker "smoked cigarettes because of addiction," rather than "for some other reason" such as "enjoyment of cigarettes," *Philip Morris USA, Inc. v. Douglas*, 110 So. 3d 419, 432 (Fla. 2013), which speaks directly to the smoker's share of fault.

B. Given these factual justifications for its ruling, Ms. Prentice is incorrect that the First District's decision "conflicts with

[2] For the same reason, Ms. Prentice's offer to accept the comparative-fault reduction (Mot. at 5 n.1) does not remedy the problem caused by the first jury's consideration of Reynolds's alleged intentional misconduct as part of the comparative-fault analysis. And, in any event, Ms. Prentice cannot offer away Reynolds's remaining arguments, which the First District must address if this Court's holding on the instructional issue does not result in a complete new trial.

well-established Florida law." As noted, Ms. Prentice did not allege an express and direct conflict on this issue as a basis for jurisdiction. Her motion's lead cases are repeated from her merits brief and involve the two-issue rule—a rule of preservation, not the scope of a new trial on an admittedly preserved issue. Mot. at 3; *see* Ans Br. 38–39. She also cites the First District's decision to accord different relief in *Whitmire*. The reason is simple: Reynolds requested different relief. In *Whitmire*, Reynolds primarily sought "a directed verdict on the concealment and conspiracy claims" and an accompanying "comparative-fault reduction in the amount of the judgment." Am. Initial Br. of Appellant R.J. Reynolds, in *R.J. Reynolds Tobacco Co. v. Whitmire*, No. 1D17-1986, 2018 WL 1043446, at *13 n.3 (Jan. 8, 2018); *see also id.* at *13 (as a fallback alternative, arguing that Reynolds was entitled to a new trial "at the very least"). The remedial holding in this case therefore does not conflict with the remedial ruling in *Whitmire*—which is presumably why neither Judge Thomas nor Judge Makar remarked on any such conflict, despite sitting on the panels for both cases.

CONCLUSION

The Court should deny rehearing. If, however, the Court grants rehearing, Reynolds requests that the Court also reconsider its decision not to "take up RJR's renewed challenge to this Court's decisions, in *Engle III* and later in *Douglas*, to give 'res judicata effect' to the approved Phase I findings." Slip Op. 8. For the reasons explained in Reynolds's merits brief and its brief on jurisdiction, that issue warrants this Court's review and presents a far more significant legal question than the remedial issue presented in Ms. Prentice's motion.

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CERTIFICATE OF SERVICE

I certify that on April 18, 2022, I electronically filed the foregoing with the Clerk of the Court by using the E-Filing Portal.

I further certify that a true and correct copy of the foregoing was served by E-Mail on counsel listed below on April 18, 2022.

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