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IN THE SUPREME COURT OF FLORIDA

Case No. SC17-563
L.T. Case No. 4D14-3867

GWENDOLYN E. ODOM,
Personal Representative of the Estate of Juanita Thurston

Petitioner,

v.

R.J. REYNOLDS TOBACCO COMPANY

Respondent.

BRIEF OF AMICUS CURIAE FLORIDA JUSTICE REFORM INSTITUTE IN SUPPORT OF RESPONDENT

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PREFACE

Amicus Curiae The Florida Justice Reform Institute is referred to as "the Institute." Petitioner/Plaintiff Gwendolyn E. Odom is referred to as Petitioner or "Ms. Odom." Respondent/Defendant R.J. Reynolds Tobacco Company is referred to as Respondent or "RJR." With respect to quoted material, unless otherwise indicated, emphasis is supplied and citations and internal quotations are omitted.

IDENTITY OF AMICUS CURIAE AND STATEMENT OF INTEREST

The Institute is Florida's leading organization of concerned citizens, business owners, business leaders, doctors, and lawyers who seek the adoption of fair legal practices to promote predictability and personal responsibility in the civil justice system. Since its founding, the Institute has advocated practices that build faith in Florida's court system. It represents a broad range of participants in the business community who share a substantial interest in a balanced litigation environment that treats plaintiffs and defendants evenhandedly.

The Institute and its members have a deep interest in ensuring that courts carefully observe the limits on their jurisdiction and that this Court exercises its discretionary review in compliance with the Florida Constitution. The Institute and its members are concerned that, as in times past, the Court has extended its conflict jurisdiction beyond constitutional bounds, and that the Institute's members are no longer assured of finality in the decisions of the district courts of appeal, but are confronted with costly litigation that exceeds the limits drawn by the people of the State of Florida.

SUMMARY OF THE ARGUMENT

This Court's role is a limited one, embodied in the narrow grant of jurisdiction given by the people of this state in article V, section 3(b) of the Florida

Constitution. Absent an express basis for jurisdiction found in article V, section 3(b), this Court has no jurisdiction to hear a case.

Through section 3(b)(3), the people of the state have narrowly circumscribed the exercise of this Court's discretionary review to "any decision of a district court of appeal . . . that ***expressly and directly conflicts*** with a decision of another district court of appeal or of the supreme court on the same question of law." Indeed, this provision was amended in 1980 to reaffirm this goal—that this Court reach only those cases containing true, direct, and express conflicts of law found within the four corners of the decision under review. Despite this amendment to section 3(b)(3), its reach has been extended from time to time beyond those constitutionally prescribed limits.

The Florida Constitution vests plenary appellate jurisdiction in the district courts of appeal. Thus, in most instances, the decision of a district court should be final and absolute. Florida's business litigants rightly expect that in most cases the district court's decision will end the litigation. In granting review in cases that do not fall within the precise parameters of article V, section 3(b)—including the grant of conflict review under section 3(b)(3)—this Court risks depriving litigants of the finality that the district courts are meant to bring. The Institute respectfully submits that this Court must, in this case and all others, limit the exercise of its

discretionary review to only those cases that contain express and direct conflicts in line with the constitutional demand of the people of Florida.

Specifically here, nothing within the four corners of the Fourth District's decision in *R.J. Reynolds Tobacco Co. v. Odom*, 210 So. 3d 696 (Fla. 4th DCA 2016), expressly and directly conflicts with any decision of this Court or another district court on the same question of law. The Fourth District properly articulated and applied the appropriate level of deference given by the appellate court to the trial court and jury when reviewing the denial of RJR's motion for remittitur. Furthermore, the Fourth District did not hold that there is a specific monetary cap on noneconomic damages to surviving adult children in tobacco-related wrongful death cases nor did it order the jury's award in this case be reduced to any particular amount when it instructed the trial court to grant RJR's motion for remittitur.

Accordingly, this Court should decline to exercise is discretionary conflict review and discharge jurisdiction as having been improvidently granted.

ARGUMENT

I. This Court should restrict its interpretation of article V, section 3(b)(3) of the Florida Constitution to reach only those decisions that expressly and directly conflict with a prior decision on the same question of law.

A. *Section 3(b)(3) was amended in 1980 to limit this Court's conflict review to express and direct conflicts in decisions regarding the same question of law.*

The Florida Constitution vests plenary appellate jurisdiction in the state's

district courts of appeal. *See* art. V, § 4(b), Fla. Const. Consequently, a district court's decision in a case should be "final and absolute" in most instances. *Ansin v. Thurston*, 101 So. 2d 808, 810 (Fla. 1958). In contrast, "the powers of this Court to review decisions of the district courts of appeal are limited and strictly prescribed." *Id.* This is because "[i]t was never intended that the district courts of appeal should be intermediate courts." *Id.* Thus, this Court's role is to "exercis[e] appellate power in certain specified areas essential to the settlement of issues of public importance and the preservation of uniformity of principle and practice." *Id.*

As part of that role, since 1956, this Court has possessed some form of jurisdiction to review and resolve legal conflicts that develop in the district courts of appeal. From 1956 until 1980, article V, section 3(b)(3) of the Florida Constitution provided that this Court could review district court of appeal decisions "in direct conflict with a decision of any district court of appeal or of the supreme court on the same question of law." Art. V, § 3(b)(3), Fla. Const. (1979). This "limitation of review to decisions in 'direct conflict' clearly evince[d] a concern with decisions as precedents as opposed to adjudications of the rights of particular litigants." *Ansin*, 101 So. 2d at 811.

And yet, despite that focus on resolving conflicting precedents and not individual disputes, prior to 1980 the Court at times accepted discretionary conflict review although the basis for such review was not apparent. *See, e.g.*, *Midwest*

Mut. Ins. Co. v. Santiesteban, 287 So. 2d 665, 666 (Fla. 1973) (holding that district court had "misapplied and misconstrued" a supreme court decision by applying it to a case in which one operative fact in the supreme court's decision was missing); *Spivey v. Battaglia*, 258 So. 2d 815, 816-17 (Fla. 1972) (accepting review of a battery case in which the district court's decision was a "misapplication" of another district court's decision involving unsolicited kisses to a case involving unsolicited hugs). Deemed "misapplication conflict"[1] in some cases, such review was often granted simply when the Court disagreed with the way in which a district court had analyzed the facts of a case or applied certain precedent to those facts.

Several justices were quick to point out that the Court was straying from the express language of article V, section 3(b)(3) regarding the Court's conflict review. For example, when the Court granted review of a "per curiam affirmed" opinion based on conflict, Justice B. Campbell Thornal explained the detriment it would have on the finality of district court decisions:

> All of this simply means that the District Court decision[s] are *no longer final* under any circumstances. It appears to me that the majority view is an open invitation to every litigant who loses in the District Court, to come on up to the Supreme Court and be granted a second appeal—the very thing that many feared would happen—and the very thing which we assured the people of this state would *not*

[1] Harry Lee Anstead et al., *The Operation and Jurisdiction of the Supreme Court of Florida*, 29 Nova L. Rev. 431, 517 (2005).

> happen when the judiciary article was amended in 1956.
>
> . . . If I were a practicing lawyer in Florida, I would never again accept with finality a decision of a District Court. Under the majority decision today, there is always that potential opportunity to obtain another examination of the record by the Supreme Court with the hope that it will in some way differ with the District Court.

Foley v. Weaver Drugs, Inc., 177 So. 2d 221, 234 (Fla. 1965) (Thornal, J., dissenting). More than 10 years later, as this practice continued, Justice Arthur England wrote: "[T]he district courts have more and more been regarded by a majority of this Court simply as inconvenient rungs on the appellate ladder." *Fla. Greyhound Owners & Breeders Ass'n v. W. Flagler Assocs. Ltd.*, 347 So. 2d 408, 411 (Fla. 1977) (England, J., dissenting).

As a result of this "jurisdiction creep"[2] and other issues, including the Court's burgeoning caseload, section 3(b)(3) was amended by Florida's voters in 1980 to reorient the Court's conflict review to only those written decisions that contain an ***express and direct conflict*** with a prior decision on the same question of law. *See Jackson v. State*, 926 So. 2d 1262, 1266 (Fla. 2006); *Jenkins v. State*, 385 So. 2d 1356, 1358-59 (Fla. 1980). As the Court stated in reviewing the 1980 constitutional amendment:

> The pertinent language of section 3(b)(3), as amended April 1, 1980, leaves no room for doubt. This Court may only review a decision of a district court of appeal that expressly and directly

[2] Thomas C. Marks, Jr., *Jurisdiction Creep and the Florida Supreme Court*, 69 Alb. L. Rev. 543, 543 n.* (2006).

> conflicts with a decision of another district court of appeal or the Supreme Court on the same question of law. The dictionary definitions of the term "express" include: "to represent in words"; "to give expression to." "Expressly" is defined: "in an express manner." . . . As stated by Justice Adkins in *Gibson v. Maloney*, 231 So. 2d 823, 824 (Fla. 1970), "(i)t is conflict of decisions, not conflict of opinions or reasons that supplies jurisdiction for review by certiorari."

Jenkins, 385 So. 2d at 1359 (some citations omitted).

Since the 1980 amendment to section 3(b)(3), this Court has affirmed the principle that "express and direct" conflict with a prior decision must be found within the four corners of the majority opinion of the district court decision being reviewed and nowhere else. *Reaves v. State*, 485 So. 2d 829, 830 (Fla. 1986). The overarching purpose of this Court's conflict review remains the elimination of inconsistent views within the district courts about the ***same*** question of law, not the righting of perceived wrongs in district courts' decisions. *See, e.g.*, *Wainwright v. Taylor*, 476 So. 2d 669, 670 (Fla. 1985).

B. *The broad use of conflict review deprives litigants of finality and certainty.*

Despite the clear mandate found in article V, section 3(b)(3) and the overarching goal of eliminating inconsistency, "jurisdiction creep" appears in recent years to have returned, as the Court has accepted review of cases that do not involve an express and direct conflict on the same question of law. *See, e.g.*, *Paton v. GEICO Gen. Ins. Co.*, 190 So. 3d 1047, 1053 (Fla. 2016) (Quince, J., dissenting) (stating the Court should not have accepted jurisdiction because the decision under

review did not address the same question of law as the prior decision with which it was said to be in conflict); *Aguilera v. Inservices, Inc.*, 905 So. 2d 84, 86-87 (Fla. 2005) (granting review based on misapplication conflict).

Such expansive use of conflict review risks depriving decisions of the district courts of appeal of their finality. By amending section 3(b)(3) in 1980, Florida's voters confirmed that this Court's role was limited to resolving express conflicts, with Florida's district courts of appeal serving as the final appellate courts in most instances. Absent actual, direct, and express conflict on the same question of law, or another basis for jurisdiction under article V, section 3(b), this Court should have no role to play in the "adjudications of the rights of particular litigants." *Ansin*, 101 So. 2d at 811. Indeed, petitioners invoking this Court's discretionary review power should be "fighting against a presumption that the Court cannot hear the case."[3] That the Court may disagree with the result reached by a district court is no basis for this Court to exercise jurisdiction under article V, section 3(b)(3). *See Mancini v. State*, 312 So. 2d 732, 733 (Fla. 1975).

To comply with the plain and intended meaning of article V, section 3(b)(3), the Court should accept conflict review only when the decisions at issue involve actual conflicting decisions on the same question of law that cannot be reconciled. In other words, when the decision under review actually produces a result that truly

[3] Anstead, *supra*, at 483.

cannot be harmonized with preexisting law, conflict review is appropriate so that this Court may resolve such an inconsistency.

II. This Court should discharge jurisdiction of *R.J. Reynolds Tobacco Co. v. Odom*, 210 So. 3d 696 (Fla. 4th DCA 2016), because the Fourth District's decision does not expressly and directly conflict with a prior decision on the same question of law.

The continuing pattern of accepting any case that is of interest to a majority of this Court under the guise of conflict review is demonstrated here. In *Odom*, the Fourth District held that the trial court abused its discretion when it denied RJR's motion for remittitur because the jury's award of $6 million in noneconomic damages was excessive when considering "the philosophy and general trend of decisions" in other tobacco-related wrongful death cases with awards to surviving adult children. 210 So. 3d at 699-701. Accordingly, the Fourth District reversed the award and remanded the case with directions to the trial court to grant the motion for remittitur or order a new trial on damages. *Id.* at 703.

Unsatisfied with this result, Petitioner invoked this Court's conflict jurisdiction under article V, section 3(b)(3) on the grounds that the Fourth District's decision "directly conflicts with decisions of this Court and other district courts of appeal requiring deference to trial courts in rulings on motions for remittitur, and deference to juries in awarding noneconomic damages." Pet. Jur. Br. at 4. However, even a cursory review of *Odom* demonstrates that no such conflict appears within the four corners of that decision. *See Reaves*, 485 So. 2d at

830 ("Conflict between decisions must be express and direct, i.e., it must appear within the four corners of the majority decision.").

First, the Fourth District properly articulated the appropriate level of deference given by the appellate court to the trial court and jury when reviewing the denial of a motion for remittitur. At the outset of its analysis, the Fourth District stated that it reviews such orders "under an abuse of discretion standard," and that "great deference is given the jury's estimation of the monetary value of the plaintiff's mental and emotional pain and suffering." *Odom*, 210 So. 3d at 699. Furthermore, the Fourth District explained that an award of noneconomic damages is excessive "if it is so large that it exceeds the maximum limit of a reasonable range." *Id.* These are precisely the standards outlined in the cases cited by Petitioner as a basis for obtaining conflict review. *See, e.g.*, *Lassitter v. Int'l Union of Operating Eng'rs*, 349 So. 2d 622, 628 (Fla. 1976); *Lorillard Tobacco Co. v. Alexander*, 123 So. 3d 67, 71 n.2 (Fla. 3d DCA 2013). Thus, conflict does not exist because the Fourth District did not announce any contrary points of law regarding appellate review of a trial court's denial of a motion for remittitur.

Second, the Fourth District properly applied the abuse of discretion standard when reviewing the trial court's order denying RJR's motion for remittitur in this case. Petitioner's attempt to draw a distinction between *Odom* and the alleged "conflict" cases by arguing that the Fourth District actually conducted a de novo

review demonstrates a fundamental misunderstanding of the abuse of discretion standard of review.

It is well-settled that "reasonableness" is the test used to determine whether a trial court has exceeded the bounds of its discretion. *See, e.g., Canakaris v. Canakaris*, 382 So. 2d 1197, 1203 (Fla. 1980). As this Court has explained:

> [T]hat test requires a determination of whether there is logic and justification for the result. The trial courts' discretionary power was never intended to be exercised in accordance with whim or caprice of the judge nor in an inconsistent manner. Judges dealing with cases essentially alike should reach the same result. Different results reached from substantially the same facts comport with neither logic nor reasonableness.

Id. Thus, to determine whether a trial court's discretionary ruling is reasonable, the appellate court must consider it in light of other similar cases.

That is exactly the approach taken by the Fourth District in *Odom* when the court compared the award for damages in this case to awards to other surviving adult children in tobacco-related wrongful death cases. And it is an approach that is supported by case law from other district courts, not one that is in conflict with the law from those same courts. *See, e.g., R.J. Reynolds Tobacco Co. v. Webb*, 93 So. 3d 331, 337 (Fla. 1st DCA 2012) ("In reviewing an award of damages for excessiveness, the court may consider the philosophy and general trend of decisions in comparable cases."); *Aills v. Boemi*, 41 So. 3d 1022, 1028 (Fla. 2d DCA 2010) (explaining that "comparison of verdicts is a recognized method of

assessing whether a jury verdict is excessive or inadequate").

Petitioner does not dispute that such comparisons are relevant to determine whether an award is excessive, but instead argues that conflict exists because the Fourth District substituted its own judgment and made no inquiry into whether the trial court's ruling was reasonable. Pet. Jur. Br. at 7-8. This argument is meritless and not supported by the face of the Fourth District's decision in *Odom*.

The Fourth District clearly accepted the facts regarding the closeness of Petitioner's relationship with her mother as stated in the trial court's order denying remittitur. *Odom*, 210 So. 3d at 701 (acknowledging that the evidence established that "Plaintiff and her mother had a very close and unique relationship" and that "Plaintiff took her mother to many of her appointments and was devastated by her decline and subsequent death"). But the court determined that even on those facts the $6 million award of noneconomic damages was excessive in light of other appellate decisions overturning multi-million dollar awards where, as here, the adult child did not live with and was not financially dependent upon the parent during the parent's smoking related illness. *Id.* at 699-702 (citing *Webb*, 93 So. 3d at 339 ($8 million excessive), and *Philip Morris USA Inc. v. Putney*, 199 So. 3d 465 (Fla. 4th DCA 2016) ($5 million excessive)).

In other words, the Fourth District determined that it was unreasonable (i.e., an abuse of discretion) for the trial court to not have given proper consideration to

relevant case law when reviewing RJR's motion for remittitur. Therefore, the Fourth District afforded the trial court's ruling the appropriate amount of deference it was due, and Petitioner's attempt to cast the court's reasoning as a de novo review is without merit and does not support invoking this Court's conflict jurisdiction.

Finally, the Fourth District did not announce "a bright-line rule that caps the noneconomic damages of independent, adult survivors in wrongful death cases to something less than a 'multi-million dollar' award." Pet. Jur. Br. at 7. Pursuant to Florida's remittitur statute, a trial court is vested with the responsibility to review an award for noneconomic damages "in light of the facts and circumstances which were presented to the trier of fact." § 768.74(1), Fla. Stat. The Legislature has explicitly stated that such review must be conducted "in light of a standard of excessiveness or inadequacy" so as to "provide[] an additional element of soundness and logic to our judicial system[, which] is in the best interests of the citizens of this state." § 768.74(6), Fla. Stat. As clearly articulated by the Fourth District in *Odom*, the appellate court then reviews the trial court's decision regarding remittitur for an abuse of discretion. 210 So. 3d at 699.

Here, the Fourth District's ultimate holding was that the $6 million award to Petitioner was excessive "in light of the facts and circumstances which were presented to the trier of fact," § 768.74(1), and it properly reached this conclusion

after considering "the philosophy and general trend of decisions in comparable cases." *Odom*, 210 So. 3d at 699 (citing *Webb*, 93 So. 3d at 337). The Fourth District did not hold that there is a specific monetary cap on noneconomic damages nor did it order the jury's award in this case be reduced to any particular amount (i.e., something less than a "multi-million dollar" award) when it instructed the trial court to grant RJR's motion for remittitur. Appellate courts routinely reverse denials of motions for remittitur with the understanding that "[i]f the party adversely affected by such remittitur . . . does not agree, the court shall order a new trial in the cause on the issue of damages only." § 786.74(4), Fla. Stat.; *see Odom*, 210 So. 3d at 703 (reversing and remanding "with directions that the trial court grant the motion for remittitur ***or order a new trial on damages only***"); *Webb*, 93 So. 3d at 340 (same). As such, the decision in *Odom* does not contain a precedential holding that would foreclose a higher award to a surviving adult child for noneconomic damages in another tobacco-related wrongful death case with different facts.

Even if this Court in the first instance may have reached a different conclusion than that of the Fourth District in this case, "[s]uch a difference of view, however, is not the measure of [this Court's] appellate jurisdiction to review decisions of Courts of Appeal because of alleged conflicts with prior decisions of this Court on the same point of law." *Aguilera*, 905 So. 2d at 99 (Wells, J.,

dissenting); *see also Mancini*, 312 So. 2d at 733 ("Our jurisdiction cannot be invoked merely because we might disagree with the decision of the district court nor because we might have made a factual determination if we had been the trier of fact."). If this Court retains jurisdiction over this case, which so clearly lacks an express and direct conflict with another decision on the same question of law, it will be regarding the Fourth District as nothing more than an "inconvenient rung[] on the appellate ladder." *Fla. Greyhound Owners & Breeders Ass'n*, 347 So. 2d at 411 (England, J., dissenting).

Accordingly, this Court should discharge jurisdiction of the Fourth District's decision in *Odom* as improvidently granted.

CONCLUSION

For these reasons, the Institute respectfully submits that jurisdiction was improvidently granted and should be discharged.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 5th day of March, 2018 a true and correct copy of the foregoing was furnished by e-mail to all counsel listed below.

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the font requirements set forth in Florida Rule of Appellate Procedure 9.210 because it was prepared using Times New Roman 14-point font.

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