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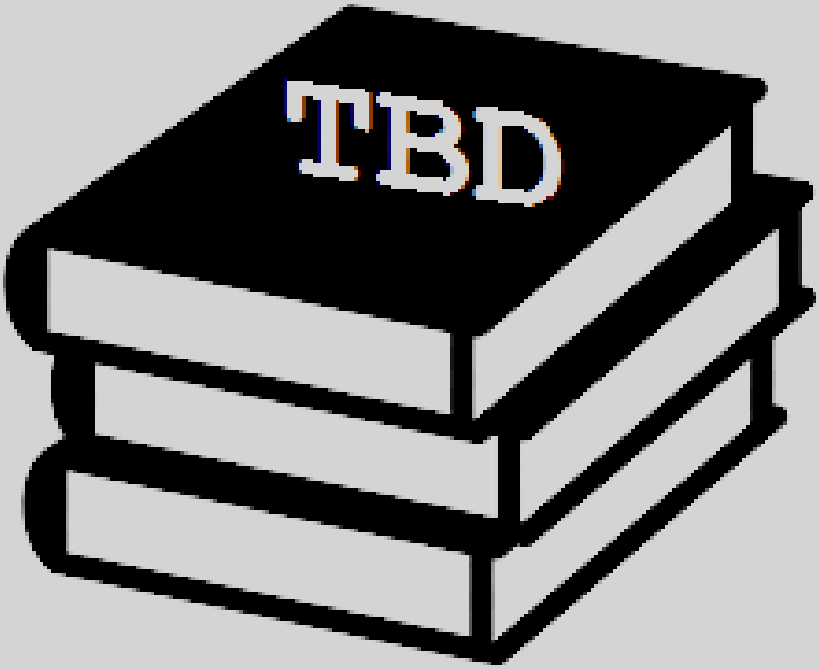

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IN THE SUPREME COURT OF FLORIDA

VICKIE MCKEEVER, etc.,
Petitioner,

v.

Case No. SC17-198
L.T. No. 4D15-2493

PHILIP MORRIS USA, INC.,
Respondent.

PETITIONER'S UNOPPOSED MOTION FOR REINSTATEMENT OR, ALTERNATIVELY, FOR LEAVE TO SEEK REHEARING

Without opposition from Respondent,[1] Petitioner Vickie McKeever respectfully seeks reinstatement of this case because it appears that the Court's staff inadvertently entered the order intended for Case No. SC17-160, not this case. Otherwise, the incongruous result of the order being entered in this case is to **deny** review for the stated reason that the decision below is controlled by a contrary decision of this Court. The result is also a manifest injustice as both parties agreed in their show cause order that the decision below is due to be quashed. This is obviously some sort of clerical mistake. Even if it were instead a judicial oversight, the prohibition rehearing motions should be lifted because this is a rare dismissal order that includes a finding that a contrary authority controls.

In the decision below, the Fourth District summarily reversed a judgment in favor of Petitioner based on its conclusion that Respondent Philip Morris USA,

[1] Undersigned counsel has conferred with Geoffrey J. Michael, counsel for PM, and is authorized to represent that PM takes no position on the relief requested and does not intend to file a response.

Inc. "is entitled to a reduction in the compensatory damages award in proportion to [decedent's] share of fault." (Appendix ("App.") 4.) It relied entirely on *R.J. Reynolds Tobacco Co. v. Schoeff*, 178 So. 3d 487 (Fla. 4th DCA 2015) ("*Schoeff I*"), though it noted that this Court had granted review of that decision. (*Id.*) The district court otherwise affirmed the judgment, noting that it rejected an unrelated preemption defense based on its decision in *R.J. Reynolds Tobacco Co. v. Marotta*, 182 So. 3d 829 (Fla. 4th DCA 2016) ("*Marotta I*"), though it noted that this Court had also granted review of that decision. Both parties then invoked this Court's conflict jurisdiction: PM invoked in Case No. SC17-160 on the hope that the Court would quash *Marotta*, while McKeever invoked in this case (No. SC17-198) on the hope that the Court would quash *Schoeff*. Both proceedings were stayed pending *Marotta* and *Schoeff*.

This Court subsequently quashed the Fourth District's decision in *Schoeff I*, but approved its decision in *Marotta I. Schoeff v. R.J. Reynolds Tobacco Co.*, 232 So. 3d 294 (Fla. 2017) ("*Schoeff II*"); *R.J. Reynolds Tobacco Co. v. Marotta*, 214 So. 3d 590 (Fla. 2017) ("*Marotta II*"). The Court then ordered the parties to show cause why these decisions did not control this case. PM filed a response in both cases in which it agreed that this Court's decisions in *Schoeff II* and *Marotta II* controlled and advised,

> Based on the holding in *Schoeff [II]*, the Court should accept jurisdiction in this case, summarily quash the decision being

> reviewed, and remand to the Fourth District for reconsideration in light of *Schoeff [II]*.

(App. 8.) In her reply, McKeever agreed with everything PM said except she contended that the trial court's judgment awarding full damages with no reduction should simply be reinstated because there were no disputed issues warranting any further consideration as PM conceded that *Schoeff II* controls. (App. 11-13.)

On June 25, 2018, this Court entered the instant order, which states that the Court declines jurisdiction "because" its decisions in *Schoeff II* and *Marotta II* are controlling. (App. 15.) This order is clearly appropriate for Case No. SC17-160, the case in which PM invoked this Court's jurisdiction because it was challenging *Marotta I*, but the Court ultimately approved *Marotta I* in *Marotta II*. Indeed, an identical order was entered in Case No. SC17-160. However, it appears that the entry of that order in **this** case was the result of a clerical error and that the Court intended to grant the relief that the parties had not only agreed to, but that is warranted by the Court's own conclusion that this case is controlled by *Schoeff II*.

Further indicating that a clerical error resulted in the wrong order being entered here, a very different order was entered the same day in the identically postured (as it relates to *Schoeff*) case of *Grossman v. R.J. Reynolds Tobacco Co.*, No. SC17-688, 2018 WL 3097036, at *1 (Fla. June 25, 2018). That order states in its entirety:

> This Court accepts jurisdiction in this case, summarily quashes the decision under review, and remands to the Fourth District Court of Appeal with instructions that this case be further remanded for reinstatement of the jury verdict in light of our decision in *Schoeff v. R.J. Reynolds Tobacco Co.*, 232 So. 3d 294 (Fla. 2017).

(App. 17.) It thus appears that the Court must have intended to enter the same order in this case as it is fully consistent with the position of both parties[2] and the Court's recognition that *Schoeff II* is controlling. Thus, McKeever suspects the order was entered inadvertently as the result of a clerical error by Court staff or some other mix-up other than a judicial determination that jurisdiction should be declined, errors that may be remedied by a motion to reinstate. *E.g.*, *Knize v. Guenther*, No. SC16-471, 2016 WL 2347418, at*1 (Fla. May 4, 2016); *White v. Deutsche Bank Nat'l Trust Co.*, No. SC13-609, 2013 WL 6839931, at *1 (Fla. Dec. 26, 2013); *Harris v. State*, No. SC06-2396, 2008 WL 2908335, at *1 (Fla. June 30, 2008)

Alternatively, to the extent there was no clerical error, the face of the order finding *Schoeff II* controls demonstrates that the Court must have overlooked or misapprehended the posture of the case, so McKeever respectfully requests the Court to relieve her from the prohibition against motions for rehearing in Rule 9.330(d)(2) and accept this as a motion for rehearing. McKeever recognizes that the decision of whether to accept jurisdiction over a case such as this is within the Court's discretion even where there is clear conflict providing jurisdiction. If that

[2] The parties' responses to the Court's show cause order in *Grossman* were materially the same as the responses in this case. (App. 17-27.)

had been the Court's intent, she concedes it would not be proper to ask for rehearing, but she files this motion because there does not appear to be any reason for the Court to have intended to treat her differently from the identically situated plaintiff in *Grossman* and arbitrarily deprive her of the full recovery[3] to which *Schoeff II* makes clear she is entitled. Thus, this is not a standard order that summarily declines review, but one that declines review after making a contradictory finding. Asking the Court to correct such a patent order does not implicate any of the policies behind prohibiting a motion for rehearing when the Court simply declines review without making any findings.

WHEREFORE, this case should be reinstated so that the Court may dispose of it as it clearly intended, consistent with its contemporaneous ruling in *Grossman* and the disposition that the parties agreed was appropriate. Alternatively, the Court should relieve McKeever from Rule 9.330(d)(2), accept this as a motion for rehearing, and summarily grant review, quash the decision below, and remand for the district court to reinstate the judgment it reversed.

Respectfully submitted,

/s/ Thomas D. Hall

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[3] The decedent was 40% at fault and compensatory damages were $5,798,170.45, so the amount at stake is $2,319,268.18 plus three-years of interest.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to the following counsel for Respondent Philip Morris USA, Inc., by e-mail on June 29, 2018:

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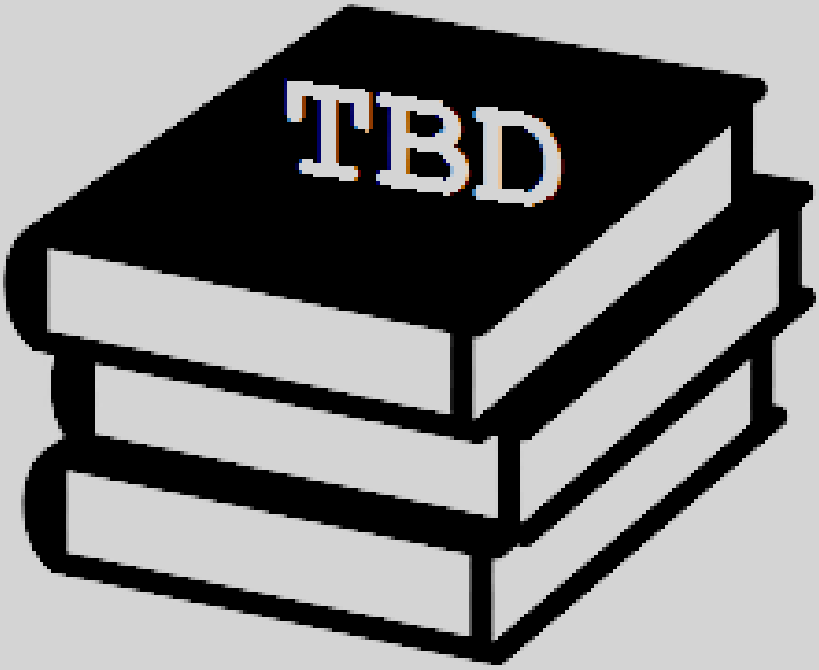

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