Filing # 145233609 E-Filed 03/07/2022 07:09:01 PM

RECEIVED, 03/07/2022 07:09:20 PM, Clerk, Supreme Court

IN THE SUPREME COURT OF FLORIDA

BRINDA COATES, etc.,

Petitioner,

v.

R.J. REYNOLDS TOBACCO COMPANY,

Respondent.

Case No.: SC21-175
L.T. Nos.: 5D19-2549
1997-CA-004541-O

ON DISCRETIONARY REVIEW FROM THE FIFTH DISTRICT COURT OF APPEAL

PETITIONER'S REPLY BRIEF

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REPLY ARGUMENT

As demonstrated in the initial brief, no Florida law applicable in this case nor constitutional provision imposes an absolute restriction on the amount of punitive damages that may be awarded for killing a human being based on the amount of compensatory damages recovered by the decedent's estate and survivors.

In over 160 pages of combined argument, Reynolds and its cadre of supporting amici have been unable to get past three critical points. First, the applicable statutory cap on punitive damages in section 768.73(1)(b), Florida Statutes (1998), does not apply (a point they do not seriously challenge).

Second, to whatever extent section 768.74(5)(d), Florida Statutes (1998), addresses the issue, it requires consideration of the amount awarded not solely to "the amount of damages proved," as they contend, but also to "the injury suffered," as the statute expressly provides.

Finally, the "substantive due process" limitation the United States Supreme Court crafted for punitive damage awards speaks not to the mathematical relationship between the dollar amounts of the two awards but to the relationship between the punitive award

and the "the actual or potential harm suffered by the plaintiff." *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 418 (2003).

While this summary should suffice to confirm that the certified question should be answered in the negative, this reply brief demonstrates the specific flaws in the various arguments offered in the answer and amicus briefs. To avoid a scattershot response to those six briefs, this brief follows the same organizational structure as the initial brief.

I. The narrow certified question accurately depicts the only issue before the Court, and though the primary focus should be on the applicable written laws, the relevant court decisions likewise support the award.

Reynolds's attempts to raise new issues challenging the premises of the district court's certified question (AB 55-62) come too late as its statement of the issues in its jurisdiction brief insisted on this Court's jurisdiction being confined to the certified question. (JAB 1); *see* Fla. R. App. P. 9.210(f) ("Respondent, in its statement of the issues, shall clearly identify any affirmative issues … that respondent intends to raise on cross-review.").

Similarly, the attempts by amici to insert new issues beyond the certified question violate this Court's repeated warnings that it will not consider issues not raised by the parties. *See generally Westphal v. City of St. Petersburg*, 194 So. 3d 311, 315 n.2 (Fla. 2016) (collecting cases).

Instead, the parties' actual disagreement and the only issue presented to this Court is whether the mathematical ratio between the dollar amounts of the punitive and compensatory damage awards is determinative even where the relationship of the punitive award is reasonable in comparison to the actual injury and all other factors support the award.[1]

Turning from the issue before the Court to the manner in which it is analyzed, Reynolds criticizes Ms. Coates's suggestion that this Court focus on the applicable written laws in deciding whether any hard cap limits the mathematical ratio between the awards. (AB 20-22.) But she never suggested the Court should look

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[1] Should the Court nonetheless elect to consider further issues, the only way for Rule 9.210(f) to have any meaning and to afford due process to Ms. Coates would be issuance of an order identifying those issues and allowing for supplemental briefing.

to written laws in order to ignore binding precedent. To the contrary, her initial brief demonstrates that the relevant state and federal precedents do not support Reynolds's position. (IB 41-43, 47-63.)

Ms. Coates's suggestion that statutes and constitutional provisions be parsed differently (and more strictly) than judicial opinions is not novel. "[R]eading caselaw differs fundamentally from reading statutes" because, though a judge will "construe or interpret a statute," a judge will "analyze a judicial precedent." Bryan A. Garner et al., The Law of Judicial Precedent 5-6 (2016). "Although analyzing an opinion involves delving into the judge's words, you must go beyond the judge's words—which in themselves are of no great significance, as opposed to what they denote." *Id.* A judge "must also understand the opinion's legal background, the facts of the case, and the relationship between those facts and the outcome." *Id.*

II. In this case, Florida law imposes no cap on the ratio between the punitive and compensatory damage awards.

Reynolds accepts without challenge Ms. Coates's primary point that the applicable statutory cap on punitive damages in section 768.73(1)(b), Florida Statutes (1998),[2] does not apply in this case. (AB 30-31.) It instead argues that the remittitur statute, section 768.74, Florida Statutes (1998), imposes an additional cap on the ratio between compensatory and punitive damage awards. (AB 23-30.)

Contrary to Reynolds's suggestion, Ms. Coates is not suggesting this Court should ignore the relationship between the punitive and compensatory awards, nor has she argued that section 768.74 "is displaced" by section 768.73 or should be ignored. (AB 30.) She contends that all of the criteria of section 768.74 support the punitive damage award here and that none require a specific ratio between punitive and compensatory damages.

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[2] The 1999 amendments to that statute would have applied had Ms. Stucky died after October 1, 1999. *Sheffield v. R.J. Reynolds Tobacco Co.*, 329 So. 3d 114, 116 (Fla. 2021). In that event, there would still be no hard cap on the ratio of punitive to compensatory damages, but because the ratio exceeds 4:1, a flat cap of $2 million would apply. § 768.73(b), Fla. Stat. (1999).

Although Reynolds is correct that comparing the punitive award to the amount of compensatory damages is relevant to the analysis, it continues to ignore the statutory command that the award bear a reasonable relation not just to "the amount of damages proven," but also to the "the injury suffered." § 768.74(5)(d), Fla. Stat. While the relationship just to the dollar amount of the damages proven might call the punitive award into some initial question, the relationship to the injury suffered – lung cancer and death – more than compensates for any such deficiency.

Reynolds offers no argument that the punitive damage award was not reasonably related to the injury suffered, but instead seeks to break section 768.74(5)(d)'s command that courts consider whether the award "bears **a** reasonable relation to the amount of damages proved **and** the injury suffered" (emphasis added) to a command that the courts remit an award unless it bears both of two separate relationships – one to the amount of damages proved and a second one to the injury suffered. (AB 28.) Reynolds offers no citation for this kind if parsing. In any event, this statutory text is just not reasonably susceptible to such a cramped reading,

especially when read in context with section 768.73, which directly governs the ratio between the two awards.

Any suggestion that courts should not consider the death itself to be the injury would make no sense given that this is a wrongful **death** lawsuit; it is the death that triggers the ability to recover the damages allowed under the Florida Wrongful Death Act. Death is the main injury here, and the compensatory award merely reflects the monetary damages that the Legislature determined may be recovered as a result of that injury. The act does not reflect any legislative determination that death is not the most serious of injuries, but instead the public policy judgment that "any recovery should be for the living and not for the dead" and, thus, a monetary recovery for the decedent's pain and suffering leading up to her death should be replaced by recovery for certain survivor's pain and suffering. *Martin v. United Sec. Servs., Inc.*, 314 So. 2d 765, 769 (Fla. 1975).

Indeed, when other courts have compared a punitive damage award to the harm suffered in a wrongful death case, they have focused on the death itself, not limiting their consideration to the particular kinds of compensatory damages flowing from that death.

See Schwarz v. Philip Morris USA, Inc., 355 P.3d 932, 942-44 (Or. Ct. App. 2015) (emphasizing in rejecting similar claim that punitive damage award was excessive in a wrongful death tobacco case that "the compensatory damages did not account for all of the harm directly suffered as a result of the actions of defendant. Rather, defendant's conduct caused harm for which defendant was not required to pay"); *see also Gen. Motors Corp. v. Johnston*, 592 So. 2d 1054, 1063-64 (Ala. 1992) (focusing on the death of the decedent as the harm in reviewing the reasonableness of a punitive damage award).

Reynolds makes passing suggestions that Ms. Coates somehow "waived" any argument that section 768.74 supports the punitive damage award by not making certain points in her answer brief in the district court. (AB 26. 27-28.) This fails legally and factually. Reynolds cites no case for the proposition that in briefing the answer to a certified question before this Court, the parties are limited to the points they made in the district court. Moreover, Ms. Coates was the appellee below, so under the tipsy coachman doctrine, "an appellee need not raise and preserve alternative grounds for the lower court's judgment in order to assert them in

defense when the appellant attacks the judgment on appeal." *Dade Cty. Sch. Bd. v. Radio Station WQBA*, 731 So. 2d 638, 645 (Fla. 1999); *see also Aberdeen Golf & Country Club v. Bliss Const., Inc.*, 932 So. 2d 235, 239 n.6 (Fla. 4th DCA 2005) (noting that it is "inconsequential" if an appellee fails to make an argument in the answer that would require affirmance based on the record).

Regardless, Ms. Coates did argue in her answer brief that the punitive damage award was not excessive "pursuant to section 768.73 **and 768.74**" (DCA:145-50 (emphasis added)). Reynolds's challenge to the amount of the punitive damage award was the last of three issues it raised below and it only devoted ten of its thirty-four pages of argument to that issue (DCA:52-86), so neither party had the room in their briefs to address this issue in the same amount of detail as before this Court. "It is the issue that must be preserved, not the details of the argument on the issue." Philip J. Padovano, *Florida Appellate Practice* § 8:4 (2018 ed.).

Reynolds cites *Schoeff v. R.J. Reynolds Tobacco Company*, 232 So. 3d 294, 308 (Fla. 2017), for the proposition that Reynolds's ability to pay, due to its large net worth, is not a factor that is considered alongside the other factors, but instead is an

independent element. (AB 35 n.8.) Nothing in *Schoeff* suggests that a defendant's ability to pay is independent, and this Court in *Schoeff* considered it alongside the other statutory "factors." *Id.* at 308-09 (discussing each of the statutory factors and, in the same paragraph, concluding that "[i]n **addition**, there is no suggestion that RJR does not have the ability to pay" (emphasis added)). In other words, though it is true that if a defendant is found to not have the ability to pay, then the award would likely need to be remitted, that does nothing to stop a court from finding an award all the more reasonable if that factor favors upholding the award, as this Court did in *Schoeff*. This is especially so here where the defendant profited off its misconduct to the tune of billions of dollars, given that a punitive damage award should be high enough to meaningfully deter a defendant. *Bould v. Touchette*, 349 So. 2d 1181, 1186-87 (Fla. 1977).

Contrary to Reynolds's argument (ironically, made for the first time in this Court even though it was the appellant below), the Excessive Fines Clause of the Florida Constitution does not apply to punitive damage awards in civil cases between private parties. *Horizon Leasing, A Div. of Horizon Fin., F.A. v. Leefmans*, 568 So. 2d

73, 75 (Fla. 4th DCA 1990). As Reynolds admits, the federal Excessive Fines Clause does not apply to punitive damage awards. *Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257 (1989). The language of the federal and Florida Excessive Fines Clauses are substantively the same, and so there is no reason to interpret them differently. *Compare* Art. I, § 17, Fla. Const. ("Excessive Fines … are forbidden.") *with* Amend. VIII, U.S. Const. ("Excessive bail shall not be required, nor excessive fines imposed.").

Besides, both the federal and Florida Excessive Fines Clause are applicable only when the "fine" is payable "to a sovereign." *Wright v. Uniforms for Indus.*, 772 So. 2d 560, 561 (Fla. 1st DCA 2000). Reynolds can hardly dispute the fact that Ms. Coates is not a sovereign entity. In any event, section 768.73 already forbids excessive punitive damages awards, and so even if Florida's Excessive Fines Clause applied here, it would add nothing.

Finally, citing *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 502–15 (2008), Reynolds erroneously claims that deeply rooted in the common law is a hard cap on the size of the ratio between punitive and compensatory damages. (AB 35-36.) Putting aside the fact that

the *Exxon* decision simply does not support Reynolds's assertion, as aptly stated by the First District in *R.J. Reynolds Tobacco Co. v. Martin*, 53 So. 3d 1060, 1072 (Fla. 2010), the *Exxon* decision based its reasoning on the unique considerations of federal maritime jurisdiction that do not apply here and "did not invoke due process principles." *Exxon*, 554 U.S. at 501-02.

III. The punitive damage award complies with the federal Due Process Clause and Supreme Court precedent.

Reynolds and its amici fare no better in asking this Court to answer the certified question in the affirmative under the United States Constitution than they do under Florida law. The thrust of their argument is that the second "guidepost" judicially crafted out of the Due Process Clause should undergo further judicial revision to go from being "the disparity between **the actual or potential harm** suffered by the plaintiff and the punitive damages award" that the United States Supreme Court has repeatedly announced, *e.g.*, *Campbell*, 538 U.S. at 418 (emphasis added), to be more exacting and, instead, focus solely on "the ratio of punitive to compensatory damages." (*E.g.*, AB 37.) This approach distorts the Due Process Clause beyond all recognition, particularly in a state

like Florida where the Legislature has regulated the relationship between the two amounts and in light of today's legal environment focusing on the primacy of constitutional text. Even if this Court believed public policy would support such a rule, it should reject this invitation to engage in judicial lawmaking.

To be clear, Ms. Coates should not be understood to suggest that the ratio of the dollar amounts is irrelevant under this guidepost. In many cases — especially those involving purely economic injuries as in *Campbell* and *Gore* — the dollar amount of the compensatory award may end up being the primary focus as it may be the only way of assessing the actual or potential harm threatened by the defendants' misconduct. But not so in a case like this where the foreseeable injury is death. We have countless opinions demonstrating that the potential damage award of these injuries exceeds $10 million and upholding even larger punitive damage awards.

This Court should likewise reject Reynolds's position that the second guidepost is actually not a guidepost but instead is a decisive element requiring reversal of a punitive damage award if not satisfied, regardless of the other two factors. (AB 37-38.) The

Supreme Court could not have been clearer that these "guideposts" are merely each an "indicium" of an award's reasonableness and are thus each factors to consider, not elements of a three-part test. *Campbell*, 538 U.S. at 418-19. If each guidepost were independently determinative, then it would make no sense for the Court to constantly reiterate that the reprehensibility of a defendant's conduct is the most important indicium of reasonableness. *E.g.*, *id.* at 419. If that guidepost cannot outweigh any shortcomings in one of the other two, then they would all be equal.

Reynolds and its amici further distort this framework by arguing for what the United States Supreme Court has "consistently rejected": "the notion that the constitutional line is marked by a simple mathematical formula, even one that compares actual and potential damages to the punitive award." *BMW of North Am., Inc. v. Gore*, 517 U.S. 582, 582 (1996). The Court has refused "to impose a bright-line ratio which a punitive damages award cannot exceed." *Campbell*, 538 U.S. at 425; *see also Mendez-Matos v. Municipality of Guaynabo*, 557 F.3d 36, 54 (1st Cir. 2009) (explaining that "the focus of our inquiry is not the ratio itself, but whether 'the measure of punishment is both reasonable and proportionate to the amount

of harm to the plaintiff and to the general damages recovered' ") (quoting *Campbell*, 538 U.S. at 426).

Even accepting the general proposition that a single-digit ratio in damage awards may be the limit in "all but the most exceptional of cases" as Reynolds contends (AB 39), these wrongful-death tobacco cases are truly exceptional. As the Eighth Circuit explained that "[i]t is not that" a ratio exceeding single digits "violates the Constitution. Rather, the mathematics alerts the courts to the need for special justification. **In the absence of extremely reprehensible conduct** against the plaintiff … awards in excess of ten-to-one cannot stand." *Williams v. ConAgra Poultry Co.*, 378 F.3d 790, 799 (8th Cir. 2004) (emphasis added).

These are exceptional cases involving extremely reprehensible conduct because they depend on evidence demonstrating that the defendant intentionally designed a product in a way that it knew would kill millions of people, that it concealed the truth to ensure consumer expectations did not account for the products' deadliness, and that the object of this scheme was to generate billions of dollars in profits. That there are many similar cases given how many people this conduct has killed does not make Reynolds's

misconduct any less exceptional or deserving of severe punishment. It makes it more so. A single course of intentional conduct that will certainly result in the death of millions is about as exceptional as it gets.

Reynolds and its amici misstate the law when they claim that the jury and this Court cannot consider any of Reynolds's intentional and wantonly reckless conduct in designing its cigarettes because Ms. Coates prevailed on only her strict liability claim, but not on her fraud claim. Reynolds's conduct is the same as to both kinds of claims. The strict liability claim required Ms. Coates to prove defective design, including that Reynolds's "product fails to perform as safely as an ordinary consumer would expect when used as intended or when used in a manner reasonably foreseeable by the manufacturer" and whether Reynolds could have used a "reasonable alternative design." (2R:19,765.) Indeed, in briefing the sufficiency of the evidence to support her strict liability claim below (the first issue Reynolds raised on appeal and one rejected by the district court without comment), Ms. Coates pointed to the same evidence underlying the punitive damage award. (*Compare* DCA:122-28 *with* DCA:151-53.)

The only difference between the claims was whether Ms. Coates could escape a comparative fault reduction by proving that Ms. Stucky – who is dead and therefore unable to testify about her motivations – relied on some fraudulent representations by Reynolds or its coconspirators. (2R:19,767, 19,769.)

That Ms. Coates did not need to prove recklessness or intentionality to recover compensatory damages on her strict liability claim did not prevent the jury from considering Reynolds's reckless and intentional acts in creating the design defect that caused Ms. Stucky's death on the issue of punitive damages. The jury's award reflects its finding that those reckless and intentional acts not only supported the elements of the strict liability claim, but the much higher test for imposing punitive damages. As aptly stated by this Court:

> [T]he legal standard for establishing entitlement to punitive damages—that is, that the plaintiff must prove by clear and convincing evidence that the conduct causing the damage was either "intentional" or "grossly negligent"—does not vary depending on the underlying legal theory. Even if negligence **or strict liability** constitutes the underlying cause of action, the plaintiff must prove that the defendant's conduct was "so reckless or wanting in care that it constituted a conscious disregard or indifference to the life, safety, or rights of persons exposed to such conduct."

Soffer v. R.J. Reynolds Tobacco Co., 187 So. 3d 1219, 1222 (Fla. 2016) (emphasis added). As long as Reynolds's intentional and reckless conduct has a nexus to Ms. Coates's design defect claim — such as its intentional manipulation of the nicotine levels, willful decision to forego safer alternative designs, or intentional course of conduct to manipulate consumer expectations about the safety of its product — then that conduct is proper evidence for the jury and this Court to consider to determine whether the evidence supports the punitive damage award.

Reynolds also argues that the potential for a $10+ million compensatory damage award for killing a human being somehow cannot be considered because its egregious misconduct was not "thwarted" turns the analysis on its head. (AB 46-47.) The absurd premise of this argument is that the award would not be excessive had Ms. Stucky not been injured at all, or had merely been sickened but not killed. Nothing in the case law, much less the text of the Due Process Clause, even remotely suggests that a defendant must be punished less when the victim of its misconduct succumbs to her injuries than when she survives. To the contrary, the actual or potential harm that must be considered in a personal injury or

wrongful death case must take into account the wide range of potential non-economic damages that any given jury might award. As demonstrated in this initial brief and inherent in the district court's determination that the compensatory damages awarded by this jury were "modest" and the certified question itself, the potential damages in this case would have yielded an acceptably low, single-digit ratio no matter what level of granularity one gives to the potential award. (IB 58-59.) *R.J. Reynolds Tobacco Co. v. Coates*, 308 So. 3d 1068, 1074 n.7, 1076 (Fla. 5th DCA 2020)

The litany of cases on which Reynolds and its amici rely share one fatal common feature – none involve either conduct of this level of reprehensibility or the ultimate injury of the death of a human being. *E.g..*, *Masters v. City of Indep., Missouri*, 998 F.3d 827 (8th Cir. 2021); *Payne v. Jones*, 711 F.3d 85, 103 (2d Cir. 2013); *Allam v. Meyers*, 906 F. Supp. 2d 274, 293 (S.D.N.Y. 2012); *Mendez-Matos v. Guaynabo*, 557 F.3d 36, 54–55 (1st Cir. 2009).

As for the third guidepost, which focuses on comparable penalties in comparable cases, Reynolds points to the 3:1 ratio cap from section 768.73, but Reynolds omits that the very same

provision provides an exception that completely eliminates the cap, thereby allowing any ratio.

Then Reynolds cherry picks a quote from *Schoeff* to support its erroneous claim that this Court in *Schoeff* "compared the punitive-to-compensatory ratio in" that case "with the punitive-to-compensatory ratios in comparable cases" in performing its analysis of the third guidepost. (AB 56.) This is misleading because, although this Court did consider the size of the ratio between punitive and compensatory damages in other cases in performing its analysis of the second guidepost, it did not repeat that analysis for the third guidepost. Instead, the only civil penalty that the Court compared in *Schoeff* was the statutory cap from section 768.73 which, as explained above, supports the award in this case.

The fact remains that *Schoeff* — involving the same conduct resulting in the same injury — is undoubtedly one of many comparable cases in which even higher punitive sanctions have been imposed.

In sum, the much higher punitive damage award this Court unanimously upheld in *Schoeff* demonstrates that the award here was not excessive. The jury was free to find — without offending

Florida law or the Constitution — that any lesser award would be insufficient punishment for corporate misconduct that earned Reynolds billions of dollars at the expense of millions of lives.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the foregoing brief complies with the font requirements of Florida Rule of Appellate Procedure 9.045(b) and the word limit requirements of Rule 9.210(a)(2).

/s/ John S. Mills
Attorney