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IN THE SUPREME COURT OF FLORIDA

JOAN SCHOEFF, etc.,

Petitioner,

v.

Case No.: SC15-2233
L.T. No.: 4D13-1765

R.J. REYNOLDS TOBACCO CO.,

Respondent.

ON REVIEW FROM THE DISTRICT COURT OF APPEAL FOURTH DISTRICT, STATE OF FLORIDA

PETITIONER'S BRIEF ON JURISDICTION

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STATUTES, CONSTITUTIONAL PROVISIONS, AND RULES OF COURT

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STATEMENT OF THE CASE AND OF THE FACTS

Joan Schoeff invokes this Court's conflict jurisdiction to resolve two questions: (1) When must a plaintiff's recovery on an intentional tort claim be reduced by comparative fault? (2) When is a jury's award of punitive damages in an amount of less than three times compensatory damages unconstitutional in a wrongful death case? In an *Engle* progeny decision with legal holdings extending far beyond cigarette litigation, the district court held that the jury's $10.5 million compensatory award must be reduced by comparative fault and its $30 million punitive award against R.J. Reynolds Tobacco Company was too much.

In an opinion written by Judge Damoorgian over Judge Taylor's dissent, the Fourth District held that a trial court's decision that the intentional tort exception in the comparative fault statute applies in a particular case is reviewed de novo and the exception does not apply to fraud claims in *Engle* cases because they are, in the district court's judgment, "based on conduct grounded in negligence." (Opinion 11-12.) It acknowledged conflict with contrary holdings on both points in *R.J. Reynolds Tobacco Co. v. Sury*, 118 So. 3d 849 (Fla. 1st DCA 2013). (Opinion 12.) It also held that Mrs. Schoeff waived the exception by telling the jury that she conceded her decedent bore some responsibility, but only as to the non-intentional tort claims without making it clear that this meant her damages would not be reduced if the jury found for her on her fraud claims. (*Id.* 7-10.)

Without analyzing the factors it acknowledged the First District explained were mandatory, the court held that the punitive damage award was "unconstitutionally excessive" because it exceeded the $25 million awards approved in three other *Engle* cases, including an award another First District decision upheld that was more than five times compensatory damages. (*Id.* 5-6 (citing *R.J. Reynolds Tobacco Co. v. Townsend*, 90 So. 3d 307 (Fla. 1st DCA 2012), and *R.J. Reynolds Tobacco Co. v. Martin*, 53 So. 3d 1060 (Fla. 1st DCA 2010).) Though it recognized the verdict was "NOT infected by bias, prejudice, passion or any other sentiment against" RJR, it held remittitur was also required because Mrs. Schoeff had "begged" the jury not to award more than $25 million and there was no "logical basis" for the jury not to defer to her request. (*Id.* 3, 6.)

SUMMARY OF ARGUMENT

The Court has conflict jurisdiction because the decision openly conflicts with *Sury* in the most express and direct way possible on the comparative fault issue. This Court should grant review to establish when, if ever, comparative fault reduces a plaintiff's recovery on an intentional tort claim. This is important not just to *Engle* cases, but any case with both intentional and negligence tort claims and any case with claims of negligently failing to prevent a third-party from committing an intentional tort. The alternative waiver analysis independently warrants review because it is based on the assumption that the jury will ignore its

instructions and that the plaintiff bears the burden of telling the jury that intentional tort damages are not reduced by comparative fault. This Court has held directly to the contrary on both points.

The punitive damage holdings warrant review so this Court can decide whether there should be a constitutional cap in *Engle* cases and, if so, how much. The decision below conflicts with decisions requiring the focus to be on the defendant's conduct and that a 3:1 ratio to compensatory damages is constitutional in *Engle* cases. It also conflicts with another district court's decision that the jury has the independence to award more than the plaintiff requested.

ARGUMENT

I. APPLICATION OF SECTION 768.81, FLORIDA STATUTES

The clearest conflict involves the interpretation of the intentional tort exception in the comparative fault statute, section 768.81(4), Florida Statutes. In *Sury*, the trial court concluded that the exception applies and compensatory damages are not reduced by comparative fault when an *Engle* plaintiff prevails on an intentional tort. 118 So. 3d at 852. After concluding that section 768.81(4) "allows for some discretion" in determining whether the exception for intentional torts applies in a case where the plaintiff alleged both negligence and intentional torts, the First District held,

> [W]e find no abuse of discretion in the trial court's determination that although the plaintiff pled negligence and strict liability, the additional

> allegations of the intentional torts and the proof of affirmative, calculated misrepresentations in the tobacco companies' advertising and other publications supported the conclusion that this action "actually had at its core an intentional tort by someone."

Id. (quoting *Merrill Crossings Assocs. v. McDonald,* 705 So. 2d 560, 563 (Fla. 1997)).

The Fourth District rejected both of these holdings in terms that could not be more express and direct:

> We disagree with the *Sury* court to the extent it reviewed the trial court's "core" analysis under the abuse of discretion standard. Instead, we "review *de novo* the legal question of whether certain conduct qualifies as negligence or intentional tort." Applying the de novo standard, we agree with the trial court and hold that at its core, Plaintiff's suit is a products liability suit based on conduct grounded in negligence.

(Opinion 12 (citation omitted).)

Review is urgently needed to resolve these conflicts because of their impact not just on *Engle* litigation, where hundreds of cases remain to be tried, but also on tort litigation generally. Whether comparative fault applies to intentional torts brought in an *Engle* case is a dispositive issue in nearly every case where the plaintiff prevails on a fraudulent concealment or conspiracy claim. But it also arises outside the *Engle* context any time a plaintiff includes both intentional and non-intentional torts in the same lawsuit, whether that be products liability cases that include fraud claims, as is common in cigarette, asbestos, and other products liability litigation, or cases involving other conduct that is at least negligent but

might rise to the level of intentional wrongdoing, such as civil rights cases. *See, e.g., Mazzilli v. Doud*, 485 So. 2d 477, 480 (Fla. 3d DCA 1986) (affirming refusal to reduce damages by comparative fault where plaintiffs proved that police officer was liable for both negligence and battery in shooting them).

The impact goes even beyond those cases and threatens the interests of anyone who might be sued for negligently failing to prevent an intentional crime because the district court based its interpretation of section 768.81 on a clear misapplication of this Court's decision in *Merrill Crossings*. The plaintiff there was shot in a parking lot and sued both Wal-Mart and Merrill Crossings for negligently failing to maintain security. 705 So. 2d at 561. The jury apportioned fault between Wal-Mart and Merrill Crossings 75%-25%. *Id.* Wal-Mart appealed because the jury was not allowed to also apportion fault to the non-party shooter. *Id.* This Court rejected that argument and found held that the comparative fault statute did not allow for negligent defendants to reduce their liability by the fault of the intentional tortfeasor they failed to stop because the "core" of the "entire action" was the shooter's intentional tort. *Id.* at 563 (quoting *Slawson v. Fast Foot Enters.*, 671 So. 2d 255, 258 (Fla. 4th DCA 1996)).

The district court twisted that sound logic to hold that an intentional tortfeasor is entitled to have its liability reduced by the negligence of others if the "core" of the "entire action" is grounded in negligence. (Opinion 11.) Thus, the

district court reasoned, if the core of the entire action is grounded in negligence, then comparative fault applies; if the core is intentional conduct, then comparative fault does not apply. (*Id.*) But if that were correct, then in *Merrill Crossings* and any other negligent case ground on the failure to prevent an intentional tort, comparative fault would not apply to reduce the liability of one negligent defendant by the fault of another negligent defendant. Not only does this fly in the face of the plain language of section 768.81 to the detriment of property owners and security companies across the state, but it conflicts with the actual result in *Merrill Crossings*, which was that Wal-Mart's liability to the plaintiff **was** reduced by the fault of the other negligent defendant, but not by the fault of the shooter.

Even if this Court were to ultimately agree to this approach, the district court's conclusion that *Engle* progeny cases are "based on conduct grounded in negligence" cannot withstand even mild scrutiny. Oblivious to the irony,[1] the

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[1] Equally ironic is that this is the same court (and judge) that held that *Engle* plaintiffs cannot recover punitive damages at all without overcoming a statute of repose defense that applies only to the fraud claims. *Philip Morris USA, Inc. v. Hess*, 95 So. 3d 254 (Fla. 4th DCA 2012), *quashed*, 175 So. 3d 687 (Fla. 2015). No reasonable jurist could conclude that cases where the amount of damages are frequently tripled (or more) when the plaintiff prevails on fraud claims are really just founded on negligent conduct.

This is doubly so because *Engle* progeny cases involve **no** presentation of evidence of merely negligent conduct as that is established simply by proving that the plaintiff was a class member. *See Philip Morris USA, Inc. v. Douglas*, 110 So. 3d 419, 430 (Fla. 2013) ("Like the strict liability claim, the Phase I jury already determined that the defendants' conduct subjects them to liability to *Engle* class

decision quotes the trial court's double-speak that it is "to argue in the theater of the absurd" to suggest that these cases are not founded on mere negligence, which is immediately followed by a passage describing the conduct underlying the negligence claims, which can only be described as intentional, such as how the defendants "manipulated the nicotine in cigarettes" and "produced advertisement and marketing strategies destined to mislead the public." (Opinion at 12.) As other district courts have emphasized, these cases are premised both on the defendants' intentional decision to design their cigarettes to be as addictive as possible, foregoing available and safer alternative designs, and on their relentless efforts over decades to conceal from the public the dangers their own research proved. *Lorillard Tobacco Co. v. Alexander*, 123 So. 3d 67, 80-83 (Fla. 3d DCA 2013); *Martin*, 53 So. 3d at 1070. This is clearly intentional conduct.

The legal analysis behind district court's alternative waiver holding[2] only provides more reason to grant review and to do so on an expedited basis. While

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members under this negligence theory."). **All** the evidence presented to these juries regarding the defendants focuses on their intentional misconduct to prove that information they fraudulently concealed would have allowed the plaintiff to avoid injury and that punitive damages are warranted.

[2] The waiver finding is also meritless in fact. If the Court grants jurisdiction, it will find that the record belies the district court's conclusion that "a reasonable jury would not possibly understand that its comparative fault determination was going to have no effect whatsoever on its compensatory damages award." (Opinion 10.) RJR told the jury exactly that in its closing

this analysis is consistent with waiver decisions from other district courts, all of those decision conflict with settled precedent from this Court and denigrate our jury system. These courts hold that unless the plaintiff makes it clear to the jury that its compensatory damage award will not be reduced by comparative fault if the jury finds for the plaintiff on the fraud claims, the plaintiff is deemed to have waived the intentional tort exception. *Philip Morris USA, Inc. v. Green*, 175 So. 3d 312, 314-15 (Fla. 5th DCA 2015); *R.J. Reynolds Tobacco Co. v. Hiott*, 129 So. 3d 473, 481 (Fla. 1st DCA 2014); *R.J. Reynolds Tobacco Co. v. Buonomo*, 138 So. 3d 1049, 1053 n.3 (Fla. 4th DCA 2013). These holdings are founded on the assumption that the jury might disregard the instruction to award the total amount of damages irrespective of fault[3] and, instead, choose to "inflat[e] the damages to account for the reduction due to application of comparative fault." *Green*, 175 So. 3d at 315.

First, these decisions conflict with this Court's settled precedent that the jury is presumed to follow its instructions, *e.g., Carter v. Brown & Williamson Tobacco Corp.*, 778 So. 2d 932, 942 (Fla. 2000), and they represent a cynical acceptance – if not outright encouragement – of jury nullification that this Court should dispel.

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argument and said the jury had to answer "no" on the intentional tort claims if it did not believe RJR should be "100 percent responsible." (R65:2328-29.)

[3] This jury was instructed to award "the total amount of any damages sustained by Joan Schoeff" without regard to comparative fault. (Opinion 10.)

Second, they conflict with the holding in *Hill v. Department of Corrections*, 513 So. 2d 129 (Fla. 1987), that an erroneous instruction that damages will be reduced by comparative fault does not require reduction unless the defendant had insisted on a correct instruction. *Id.* 133-34. Thus, to the extent the jury's knowledge that damages will not be reduced is material, it is the defendant, not the plaintiff, that must request the jury be told that to avoid waiver.

II. THE PUNITIVE DAMAGE AWARD.

The Court should also review the punitive damage holdings. Though conflict is not required for the Court to review them in light of the conflict on the comparative fault issue, *e.g., Basulto v. Hialeah Automotive*, 141 So. 3d 1145, 1157 (Fla. 2014), they present their own conflicts. More importantly, they warrant this Court's review because of their wide-ranging application.

In reviewing the constitutionality of the award, the court acknowledged the factors the First District explained govern the inquiry, but failed to even address most of them. (Opinion 5-6 (citing *Townsend*, 90 So. 3d at 313.) Most concerning, it failed to examine the reprehensibility of RJR's conduct, which the Third District has held is the most important. *Alexander*, 123 So. 3d at 82. Instead, it simply surveyed other large *Engle* punitive awards and noted that the award here fell "somewhere between" the $25 million awards affirmed in *Martin*, *Alexander*, and *Buonomo* and the $40.8 million award reversed in *Townsend*. (Opinion 5-6.) The

court recognized that the ratio of punitive to compensatory damages is an important factor and that the $25 million award approved by the First District in *Martin* was well over 3 times the compensatory award. (*Id.*) In conflict and without explanation, it held that $30 million award "falls on the excessive side of the spectrum" because the compensatory award was $10.5 million. Thus, the less than 3:1 ratio was too much for the district court.

As *Engle* progeny cases involve the same general defense conduct, a bright-line cap may be defensible, but it should be tied to the plaintiff's damages and not an arbitrary across-the-board cap of $25 million. A treble award should always pass muster given the heinous nature of the defendants' conduct. Prompt resolution of this issue is needed, especially if the remedy for an excessive award is to be a new trial, as the district court ordered here instead of simply reducing the award. There are so many *Engle* cases to be tried that new trials are especially disruptive.

The court's alternative reliance on the fact that Mrs. Schoeff had "begged" the jury not to award more than $25 million, directly conflicts with *Philip Morris USA, Inc. v. Cuculino*, 165 So. 3d. 36, 39 (Fla. 3d DCA 2015), that a jury is free to award more than the upper limit requested by the plaintiff. This Court should affirm the independence of juries to decline to defer to a party's request.

CONCLUSION

For all of these reasons, this Court has jurisdiction and should grant review.

Respectfully submitted,

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