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Case No. SC15-2233

IN THE SUPREME COURT OF FLORIDA

JOAN SCHOEFF, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF JAMES SCHOEFF,

Petitioner,

v.

R.J. REYNOLDS TOBACCO CO.,

Respondent.

ON DISCRETIONARY REVIEW FROM A DECISION
OF THE FOURTH DISTRICT COURT OF APPEAL

RESPONDENT'S BRIEF ON JURISDICTION

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STATEMENT OF THE CASE AND FACTS

In this *Engle*-progeny case, Petitioner Joan Schoeff sued Respondent R.J. Reynolds Tobacco Company for the death of her husband from smoking. The jury found for Mrs. Schoeff on her claims for strict liability, negligence, fraudulent concealment, and conspiracy. Slip Opinion ("Op.") 2 (Pet'r Br. App.). The jury fixed compensatory damages at $10.5 million, assigned 25% of the fault to Mr. Schoeff, and awarded $30 million in punitive damages. *Id.* 2-3. The trial court reduced the compensatory award to $7,875,000 in order to account for the jury's allocation of comparative fault, but it refused to reduce the punitive award. *Id.* 3.

On appeal, the Fourth District affirmed the reduction of the compensatory award on two independent grounds. First, applying *R.J. Reynolds Tobacco Co. v. Hiott*, 129 So. 3d 473 (Fla. 1st DCA 2014), the court concluded that Mrs. Schoeff had waived any statutory right to an unreduced compensatory award through various arguments made by her counsel to the jury. In particular, the court highlighted Mrs. Schoeff's argument to the jury to "consider" her "concession" of partial fault and to "find Mr. Schoeff less at fault due to RJR's fraudulent concealment." Op. 10. The Fourth District reasoned that "[i]t would be inequitable to allow Plaintiff to use 'the admission that [Mr. Schoeff] was partly at fault as a tactic to secure an advantage with the jury throughout the trial' and then completely avoid comparative fault after the verdict." *Id.* (quoting *Hiott*, 129 So.

3d at 481) (alteration by the Fourth District).

Second, and in the "alternative," the court held on the merits that Mrs. Schoeff was not entitled to an unreduced compensatory award. *Id.* 11. Applying this Court's precedents, the Fourth District explained that the applicability of the comparative-fault statute turns on the nature of the "'entire action . . . at its core,'" rather than on individual claims within the case. *Id.* (quoting *Merrill Crossings Assocs. v. McDonald*, 705 So. 2d 560, 563 (Fla. 1997) (internal quotation omitted)). The court then concluded that this case was "at its core" a negligence action subject to apportionment, rather than an intentional-tort action not subject to apportionment. *Id.* 12. The court further explained that the applicability of the comparative-fault statute involved a legal question subject to *de novo* review on appeal, rather than a discretionary determination subject to deferential review. *Id.* The court stated that its conclusions regarding the applicability of the comparative-fault statute, and the appropriate standard of review for that question, conflicted with those of the First District in *R.J. Reynolds Tobacco Co. v. Sury*, 118 So. 2d 849 (Fla. 1st DCA 2013). Op. 12.

The Fourth District also held that the $30 million punitive award should be remitted. The court set forth the various statutory and other factors bearing on remittitur of punitive damages, including "the degree of reprehensibility of the defendant's conduct" and "the ratio between compensatory and punitive damages."

Op. 4-5. Applying those various considerations, the court carefully considered the punitive award in this case relative to punitive awards in various other *Engle*-progeny cases. *Id.* 5-6. The court concluded that the punitive award here was excessive because it was the highest one in any progeny case (not counting awards already set aside as excessive), because it was stacked on top of a high $10.5 million compensatory award, and because it was rendered even though "Plaintiff's counsel begged the jury not to award her more than $25 million." *Id.* 6.

SUMMARY OF ARGUMENT

The Court should decline to exercise jurisdiction in this case. Before this Court, any conflict with *Sury* regarding the applicability of the comparative-fault statute would be entirely academic. The decision below affirming the reduction of the compensatory award rests principally on a waiver rationale that, as even Mrs. Schoeff herself acknowledges, does not conflict with the decisions of any other district. In fact, because the Fourth District's waiver holding does not conflict with any other decision, it provides no independent basis for jurisdiction. It is also both highly factbound and clearly correct, and thus would not warrant review even if jurisdiction did exist. If the Court does wish to consider the statutory question, it should do so not by rendering an advisory opinion in this case, nor by taking up a waiver determination unworthy of review, but by taking up the statutory question in another case where it is dispositive. Finally, with regard to punitive damages,

Mrs. Schoeff identifies no conflict or any other basis for review of the Fourth District's factbound remittitur ruling.

ARGUMENT

I. The Court Should Decline To Exercise Discretionary Jurisdiction Over The Fourth District's Comparative-Fault Holdings

A. Mrs. Schoeff's primary contention is that the decision below expressly and directly conflicts with *Sury* on the applicability of the comparative-fault statute. However, the Fourth District's decision affirming the reduction of the compensatory award rests on what even Petitioner recognizes are two "alternative" and independent grounds. Pet'r Br. 7. First, the court held that Mrs. Schoeff had waived any contention that the statute entitles her to an unreduced compensatory award, based on various arguments made by her counsel to the jury. Op. 7-10 (section of opinion titled "Waiver"). Second, on the merits, and expressly in the "alternative," *id.* 11, the court held that the comparative-fault statute applies to this case even though Mrs. Schoeff prevailed on intentional-tort claims as well as on claims for strict liability and negligence. *Id.* 11-12 (section of opinion titled "Applicability of the Comparative Fault Intentional Tort Exception to this Suit").

This case does not cleanly present the primary conflict that Mrs. Schoeff alleges. The alleged conflict with *Sury* implicates only the second, merits ground of decision. Pet'r Br. 3-7. It does not implicate the first, alternative and independent waiver ground of decision. *Id.* 8-9. Thus, a decision resolving the

putative conflict with *Sury* on the meaning of the statute would be entirely advisory, unless this Court *also* reviewed the waiver decision. And, as explained below, the Fourth District's affirmance of the trial court's waiver ruling as not an abuse of discretion does not remotely warrant this Court's attention. If the Court wishes to address the substantive scope of the comparative-fault statute, it should do so in a case where, unlike here, that question might control the outcome.

Mrs. Schoeff engages in an extended attack on the merits of the Fourth District's statutory ruling. *See id.* 5-8. However, that attack has nothing to do with the question whether this Court has jurisdiction to address the statutory question or, if so, whether this case is a good vehicle for resolving it. In any event, Mrs. Schoeff's arguments are unpersuasive even on their own terms.

First, Mrs. Schoeff contends that the Fourth District erred in concluding that the applicability of the comparative fault statute turns on the nature of the overall case. However, all of the relevant statutory terms are keyed to the nature of the overall "action" rather than to individual claims: the statute mandates a comparative-fault reduction in any "negligence action," § 768.81(1)(c), Fla. Stat.; excepts from the comparative-fault reduction any "action based on an intentional tort," *id.* § 768.81(4); and classifies as a covered "negligence action" any "products liability action," broadly defined to include "a civil action" for damages caused by the "manufacture, construction, design, formulation, installation, preparation, or

assembly of a product," *id.* § 768.81(1)(d). Based on these statutory terms, this Court in *Merrill Crossings* held that the applicability of the intentional-tort exception does not turn on whether the action includes an intentional-tort *claim*, but rather on "whether an action comprehending one or more negligent torts actually has *at its core* an intentional tort." 705 So. 2d at 563 (emphasis added and internal quotation omitted). Moreover, applying that rule, the First District in *Sury* itself recognized—in an *Engle*-progeny case—that the applicability of the comparative-fault statute turns on whether the overall "action" is a negligence action or an intentional-tort action "'at its core.'" 118 So. 3d at 852 (quoting *Merrill Crossings*, 705 So. 2d at 563). Mrs. Schoeff's position is thus inconsistent with the text of the governing statute, with the decisions of this Court, and even with the very decision that she principally invokes in order to allege a conflict.

Second, Mrs. Schoeff argues that *Engle*-progeny cases are not properly categorized as negligence actions at their core. She describes the Fourth District's contrary views as "[o]blivious" and "double-speak." Pet'r Br. 6-7. But that harsh invective—directed specifically at one distinguished former Chief Judge of the Fourth District, *see id.* 6 n.1, whose majority opinion was joined by another—is not remotely justified. For one thing, the comparative-fault statute *expressly defines* products-liability actions as negligence actions rather than actions based on an intentional tort, *see.* § 768.81(1)(d), Fla. Stat., and *Engle*-progeny cases are

plainly products-liability actions. For another, a plaintiff cannot invoke the "res judicata" effect of the jury findings from *Engle* without first proving membership in the *Engle* class, *see Engle v. Liggett Grp., Inc.*, 945 So. 2d 1246, 1277 (Fla. 2006), which is itself sufficient, under this Court's decisions, to establish liability on claims for strict-liability and negligence, *see Philip Morris USA, Inc. v. Douglas*, 110 So. 3d 419, 430 (Fla. 2013). In other words, a plaintiff cannot even pursue an *Engle*-progeny claim for concealment or conspiracy without first establishing liability on *Engle*-progeny claims for negligence—which further confirms that progeny cases are negligence actions at their core.

Finally, we note that Mrs. Schoeff significantly exaggerates the breadth and implications of the decision below. As explained above, the argument for classifying this case as a negligence action for comparative-fault purposes turns on the specific nature of products-liability actions brought under *Engle*. That belies Mrs. Schoeff's hyperbolic suggestion that the decision below will impact everything from "tort litigation generally" to "civil rights cases" to "anyone who might be sued for negligently failing to prevent an intentional crime." Pet'r Br. 4-5.

B. The Fourth District's waiver ruling does not remotely warrant this Court's attention. As even Mrs. Schoeff acknowledges, that ruling is "consistent with waiver decisions from other district courts," Pet'r Br. 8, which have uniformly held that a plaintiff can waive any statutory right to an unreduced compensatory

award through its jury arguments, through the jury instructions it proposes, or both. *See*, *e.g.*, *Philip Morris USA, Inc. v. Green*, 175 So. 3d 312, 314-16 (Fla. 5th DCA 2015); *R.J. Reynolds Tobacco Co. v. Buonomo*, 138 So. 3d 1049, 1053 n.3 (Fla. 4th DCA 2013); *Hiott*, 129 So. 3d at 479-82; *Foreline Sec. Corp. v. Scott*, 871 So. 2d 906, 911 (Fla. 5th DCA 2004).

Mrs. Schoeff makes a perfunctory allegation that these unanimous decisions "conflict" with *Carter v. Brown & Williamson Tobacco Corp.*, 778 So. 2d 932 (Fla. 2000), and *Hill v. Department of Corrections*, 513 So. 2d 129 (Fla. 1987). Pet'r Br. 8-9. That is incorrect. Mrs. Schoeff cites *Carter* for the basic proposition that a jury is presumed to follow its instructions, and *Hill* for the basic proposition that a party waives a challenge to a jury instruction when it fails to proffer a correct instruction. Neither proposition undercuts the waiver rulings in the *Hiott* line of cases. And none of those cases even arguably conflicts "expressly and directly" with *Carter* or *Hill*—a jurisdictionally necessary allegation, *see* Fla. Const. Art. V, § 3(b)(3), that Mrs. Schoeff cannot even bring herself to make.

Moreover, even apart from questions of jurisdiction, the Fourth District's waiver ruling is not worthy of review. As explained above, the district courts unanimously have concluded that a party *can* waive any statutory right to a compensatory award not reduced for comparative fault. And the question whether waiver occurred in any particular case is highly factbound—which is why waiver

determinations in this context, like those in other contexts, are reviewed only for abuse of discretion. *See* Op. 7; *Hiott*, 129 So. 3d at 479. For example, in this case, the Fourth District evaluated a totality of the pleadings, the jury instructions, and Mrs. Schoeff's jury arguments—including statements that seemed to cut in different directions as well as "the overall theme of [her] representations to the jury." Op. 8-10. After doing so, it held only that "the trial court did not abuse its discretion when it found that Plaintiff waived her intentional tort exception argument." *Id.* 10. Surely this Court has better things to do than to scour the record in this case to determine whether the Fourth District was correct.[1]

II. The Court Has No Jurisdiction Over The Fourth District's Remittitur Of The Punitive Award

In ordering remittitur of the jury's $30 million punitive-damages award, the Fourth District carefully addressed the various considerations set forth in the Florida remittitur statute, Op. 4-5, as well as the various judge-made considerations set forth in *Engle* and *BMW v. Gore*, 517 U.S. 559 (1996), including "the degree of reprehensibility of defendant's conduct" and "the ratio between compensatory and punitive damages." Op. 5. The Fourth District compared the punitive award in

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[1] Mrs. Schoeff invites this Court to do just that, by citing to record materials not referenced in the Fourth District's opinion. Pet'r Br. 7-8 n.2. However, in "all petitions seeking this Court's discretionary jurisdiction pursuant to article V, section 3(b)(3)," this Court is "confined to consider only those facts contained within the four corners of the district court's majority opinion." *Wells v. State*, 132 So. 3d 1110 (Fla. 2014). Thus, we will not seek to rebut Mrs. Schoeff's erroneous factual contentions.

this case to the punitive awards in other *Engle*-progeny cases, which are particularly significant because, as Mrs. Schoeff herself notes, "*Engle* progeny cases involve the same general defense conduct." Pet'r Br. 10. After doing so, the court concluded that the award here was excessive based on a variety of different considerations: it was the largest punitive award in any progeny case (not counting those already set aside on appeal); it was stacked on top of an already-large compensatory award of $10.5 million; and it was rendered even though "Plaintiff's counsel begged the jury not to award her more than $25 million." Op. 5-6.

This Court lacks jurisdiction to review that factbound excessiveness determination. Mrs. Schoeff suggests that the decision below conflicts with *Philip Morris USA, Inc. v. Cuculino*, 165 So. 3d 36 (Fla. 3d DCA 2015), on whether "a jury is free to award more than the upper limit requested by the plaintiff." Pet'r Br. 10. This argument wrongly assumes that the decision below adopts a bright-line rule that juries may never do so. Rather, it simply holds the fact that the jury here awarded $5 million more than what the plaintiff "begged the jury" not to exceed was one factor supporting an excessiveness determination. Op. 6.[2]

CONCLUSION

The Court should decline to exercise jurisdiction.

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[2] In contrast, the plaintiff in *Cuculino* told the jury that it "could award more or less" than the suggested $10 million amount. *See* 165 So. 3d at 39.

Respectfully submitted,

/s/ Eric L. Lundt

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CERTIFICATE OF SERVICE

We certify that on January 11, 2016, we electronically filed this Respondent's Brief on Jurisdiction with the Court and emailed a copy to:

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CERTIFICATE OF COMPLIANCE

Pursuant to Florida Rule of Appellate Procedure 9.210(a)(2), counsel for Respondent hereby certifies that the foregoing brief complies with the applicable font requirements because it is written in 14-point Times New Roman font.

DATED: January 11, 2016

/s/ Eric L. Lundt