IN THE SUPREME COURT OF FLORIDA

JOAN SCHOEFF, as Personal Representative of the Estate of JAMES SCHOEFF,

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 JOAN SCHOEFF'S INITIAL BRIEF ON THE MERITS

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INTRODUCTION

By virtue of a 2-1 district court decision that conflicts with holdings of this and other appellate courts, Respondent R.J. Reynolds Tobacco Company ("RJR") has thus far managed to avoid the punishment required by policies established by the Legislature and facts found by a rational jury. The majority substituted its judgment for the jury's finding that RJR's conduct warranted imposition of $30 million dollars in punitive damages, which is less than the treble damages benchmark set by the Legislature, and nullified the legislative judgment that an intentional tortfeasor cannot reduce its liability by blaming the victim. Joan Schoeff asks this Court to reinstate the punitive damage award and hold that she is entitled to recover the full amount of her compensatory damages.

STATEMENT OF THE CASE AND OF THE FACTS

This Court accepted review without limitation after Mrs. Schoeff asserted conflict on two questions:[1] (1) 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? and (2) When must a plaintiff's recovery on an intentional

[1] The district court acknowledged and RJR conceded conflict with *R.J. Reynolds Tobacco Co. v. Sury*, 118 So. 3d 849 (Fla. 1st DCA 2013), as to the second question, so the Court clearly has jurisdiction even if Mrs. Schoeff were mistaken that there is conflict on the first question. *See, e.g.*, *Basulto v. Hialeah Automotive*, 141 So. 3d 1145, 1157 (Fla. 2014) (recognizing that when this Court has conflict jurisdiction based on one issue, it has discretionary jurisdiction over other properly briefed issues regardless of whether each poses a conflict).

tort claim be reduced by comparative fault? Mrs. Schoeff contends that (1) where the defense conduct that killed the decedent even approaches the level of reprehensibility exhibited by RJR and its coconspirators and the defendant is not faced with financial destruction, treble damages can never offend due process, and (2) comparative fault should never apply to an intentional tort absent clear invitation by the plaintiff.

Procedural History in the Trial Court

As personal representative of the estate of her deceased husband, Mrs. Schoeff brought this wrongful death lawsuit against RJR asserting claims for strict liability, negligence, fraudulent concealment, and conspiracy. (R4:623-31.) She admitted that Mr. Schoeff bore partial responsibility for his death by not trying harder to quit smoking, and she sought apportionment of fault on her strict liability and negligence claims, but not on her fraud and conspiracy claims. (R4:627.)

The case was tried in two phases before Circuit Judge Jack Tuter in Broward County. The first phase took eight trial days from opening statements to verdict and included seven plaintiff's witnesses and one defense witness. (R53:500-R65:2378.) The jury concluded that Mr. Schoeff was a member of the class approved by this Court in *Engle v. Liggett Group, Inc.*, 945 So. 2d 1246 (Fla. 2006), because he died from lung cancer caused by his addiction to cigarettes containing nicotine. (R39:7572.) It also found that RJR's cigarettes, in particular,

caused Mr. Schoeff's lung cancer and death and apportioned 75% of the fault to RJR and 25% to Mr. Schoeff. (R39:7572-73.) It further found that Mr. Schoeff had reasonably relied on RJR's concealment of the dangers of smoking, both individually and through a conspiracy with others. (R39:7573.) It awarded Mrs. Schoeff $10.5 million in compensatory damages and, after the second phase, found that $30 million in punitive damages were warranted. (R39:7574, 7590.)

RJR claimed the compensatory and punitive damage awards were excessive and sought a remittitur. (SR:442-75.) It asserted that the compensatory damages award should be remitted to $750,000 and that the punitive damages award was "grossly out of line with the evidence presented at trial" and would violate RJR's due process rights. (SR:442-43.) It argued that the court should not award any punitive damages but barring that outcome, the court should reduce the punitive damages award to "substantially less than the remitted compensatory award." (SR:467.) It never stated an amount of punitive damages it would accept.

The trial court denied this motion, addressing compensatory and punitive damages separately. (R44:8474-80.) It refused to remit the punitive damages award because it "specifically [found] the jury's verdict was NOT infected by bias, prejudice, passion or any other sentiment against the Defendant." (R44:8479.) The court noted that the amount was within the "sustainable" ratio when compared to the compensatory damages award, but examined the issue closer because it could

"find no logical or sound reason" for the jury to have awarded $30 million when Mrs. Schoeff had asked the jury not to exceed her request for $25 million. (R44:8478-79.) It suggested that it would be inclined to remit the award to $25 million if there were a legal basis to do so, but declined to do so because RJR would then have a right to demand a new trial, relief "which the Court specifically finds the Defendant is not entitled to." (R44:8480.) Thus, the trial court denied the motion for remittitur in its entirety. (R44:8477, 8480.)

After Mrs. Schoeff proposed a judgment that would have awarded her the full amount of compensatory damages determined by the jury with no reduction based on the comparative fault finding, RJR filed an objection. (R42:8117-25.) It argued that whether the comparative fault statute applies must be determined based on the overall character of the lawsuit, regardless of whether any particular claim is based on an intentional tort, and that the overall character of *Engle* progeny lawsuits is a claim for negligence, not intentional misconduct. (R42:8117-25.)

Mrs. Schoeff argued that the comparative fault statute's exception for intentional torts codified the common law rule that damages are not reduced for comparative fault as to intentional tort claims. (R43:8365-68.) She further argued that, unlike plaintiffs in some other *Engle* progeny cases, Mrs. Schoeff had limited her admission of fault to the negligence and product defect claims and never

suggested to the jury that its comparative fault findings would apply to the intentional tort claims. (R43:8368-70.)

The trial court granted RJR's request to reduce the damage award. (R44:8477-79.) It was persuaded that it would be "misleading" to the jury for the court to award the full damages because Mrs. Schoeff had admitted Mr. Schoeff bore some degree of fault on her negligence and strict liability claims. (R44:8477-78.) Also, the jury had been instructed to attribute some percentage of fault to Mr. Schoeff and not to make any reduction "due to the fault of the smoker as that matter would be left to the court." (R44:8477-78.) It reasoned:

> To argue the genesis of *Engle* was not founded in tort, and thus comparative fault not subject to reducing the verdict is to argue in the theater of the absurd. An attorney sued "Big Tobacco" in *Engle* and argued the defendants negligently designed cigarettes; manipulated the nicotine in cigarettes; produced advertisement and marketing strategies destined to mislead the public; and other non intentional "tortuous" misconduct, specifically sounded in negligence and product liability.
>
> Concurrent with the negligence and strict liability claims plaintiffs brought intentional tort claims for fraud and misrepresentation which have led to several juries awarding punitive damages on the intentional tort claims.

(R44:8477-78.)

The court therefore reduced the jury's award of compensatory damages by 25%, and entered final judgment for Mrs. Schoeff for $7.875 million in compensatory damages plus $30 million in punitive damages. (R44:8481.) RJR

appealed the judgment (R44:8488), and Mrs. Schoeff cross-appealed the comparative fault reduction (R44:8492).

Fourth District's Opinion

In an opinion written by Judge Damoorgian and joined by Judge May, the majority recognized that the constitutional standard for reviewing a punitive damage award should be analyzed using three guideposts:

> 1) the degree of reprehensibility of defendant's conduct, 2) the ratio between compensatory damages and punitive damages, and 3) civil and criminal penalties for the same conduct.

R.J. Reynolds Tobacco Co. v. Schoeff, 178 So. 3d 487, 491 (Fla. 4th DCA 2015) (citing *R.J. Reynolds Tobacco Co. v. Townsend*, 90 So. 3d 307, 313 (Fla. 1st DCA 2012), and *BMW of N. Am. v. Gore*, 517 U.S. 559, 562 (1996)). The majority made no further mention of the first or last factors, but did address the ratios of compensatory to punitive damages in four other *Engle* progeny cases that reviewed large punitive damage awards. The court noted that $25 million awards had been approved in three other cases, including two with a larger ratio than here. *Id.* at 491-92 (citing *R.J. Reynolds Tobacco Co. v. Buonomo*, 138 So. 3d 1049 (Fla. 4th DCA 2013) ($5.235 million compensatory award reduced by 22.5% comparative fault), *Lorillard Tobacco Co. v. Alexander*, 123 So. 3d 67 (Fla. 3d DCA 2013) ($10 million reduced by 20%), and *R.J. Reynolds Tobacco Co. v. Martin*, 53 So. 3d 1060 (Fla. 1st DCA 2010) ($5 million reduced by 34%)). The court recognized that

the award here fell between those awards and a $40.8 million that had been found excessive. *Id.* at 491 (citing *Townsend*, 90 So. 3d 307 ($10.8 million compensatory award reduced by 49% comparative fault)). Without further explanation, the court concluded: "In light of the $10.5 million compensatory damages award, we hold that the $30 million punitive damages award falls on the excessive side of the spectrum." *Id.* at 491.

The majority alternatively held that remittitur was required under state law even if the award was constitutional. *Id.* at 491-92. It acknowledged the test was

> whether 1) the amount is so excessive as to be "out of all reasonable proportion" to the conduct, 2) the award bears some relationship to ability to pay, and 3) there is a reasonable relationship between compensatory and punitive damages.

Id. at 491 (citing *Townsend*, 90 So. 3d at 313). But it did not purport to apply this analysis. It acknowledged and did not dispute the trial court's finding that the verdict was "NOT infected by bias, prejudice, passion or any other sentiment against" RJR. *Id.* at 490. It found remittitur was required, however, because Mrs. Schoeff had "begged" the jury not to award more than $25 million and the trial court had concluded there was no "logical basis" for the jury not to defer to her request. *Id.* at 491-92 (citing § 768.74(5)(e), Fla. Stat., and noting that it provides that one factor for remittitur is whether the award "could be adduced in a logical manner")). The majority held that the remedy was for the trial court "to grant

RJR's motion for remittitur, and, if RJR does not agree with the remitted amount, to hold a new trial on punitive damages." *Id.* at 492.

The majority rejected Mrs. Schoeff's cross-appeal for two reasons. First, it held that she had waived the intentional tort exception to the comparative fault statute by telling the jury that she conceded her decedent bore some responsibility on 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 and conspiracy claims. *Id.* at 494-95. It concluded 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." *Id.* at 494.

Second, it held that a trial court's decision that the intentional tort exception applies in a particular case is reviewed de novo and that the exception does not apply to fraudulent concealment and conspiracy claims in *Engle* cases because they are, in the district court's judgment, "based on conduct grounded in negligence." *Id.* at 495-96. It acknowledged conflict with a First District decision that held that the issue is reviewed for an abuse of discretion and an Engle trial court has discretion to apply the exception. *Id.* at 495-96 (citing *R.J. Reynolds Tobacco Co. v. Sury*, 118 So. 3d 849 (Fla. 1st DCA 2013)).

Judge Taylor dissented on all of these issues. As for punitive damages, she concluded that the jury's award was supported by a

> record [] replete with evidence of the tobacco company's continued attempts to discredit scientific research revealing the potential harm caused by its products, its costly campaign to mislead the public about the hazards of smoking, and its manipulation of nicotine levels in cigarettes to make them even more addictive.

Id. at 496. She noted that the Fourth District had long recognized a jury's prerogative to "award damages equal to or in excess of those requested by counsel in closing argument." *Id.* at 497 (quoting *Lopez v. Cohen*, 406 So. 2d 1253, 1256 (Fla. 4th DCA 1981)). Finally, she explained that no decision had found $30 million to be excessive and the 2.9-to-1 ratio was particularly reasonable "[i]n light of the historical use of treble damages as a punitive remedy." *Id.* Thus, she would have affirmed the punitive damage award. *Id.*

On the other hand, she would have reversed on Mrs. Schoeff's cross-appeal. Though agreeing that the standard of review is de novo, she concluded that Mrs. Schoeff's claims sounded in intentional torts:

> The gravamen of the charge is that the tobacco company intentionally designed its products in a defective manner and pursued a callous and intentional course of tortious conduct by fraudulent concealment.

Id. She found "the record does not show that plaintiff did anything to invite the court to apply comparative fault to her intentional tort claims." *Id.* at 498.

Evidence and Closing Arguments Regarding Punitive Damages

At trial, Mrs. Schoeff presented the same kind of evidence presented by other recent plaintiffs suing RJR and its co-conspirators, including in *Engle* progeny litigation. Because neither RJR nor the majority suggested even remote

disagreement with Mrs. Schoeff's recitation of this evidence in her brief below, it is reproduced here:

> In response to increasing public health information that cigarettes were deadly and addictive, executives from RJR and the other major tobacco companies convened a meeting in late 1953 that spawned a 50+ year conspiracy to combat these messages by denying the addictiveness and other dangers of smoking, asserting the link between smoking and disease had not been proven and required more research, and otherwise creating doubt about solid evidence regarding their product. (R54:725-R56:1010.) These companies clung to these goals even though they well knew from their own exhaustive research that the nicotine in their cigarettes was as addictive as heroin and cocaine, that smoking their cigarettes causes cancer, and that cigarette filters were merely an "illusion" that did not, in fact, limit the amount of nicotine and tar ultimately delivered to the smoker. (R55:786-87, 826-30; R56:902, 904-08, 931.) Indeed, they purposefully designed their cigarettes in ways to ensure addiction, including manipulating nicotine levels and adding other chemicals to make nicotine even more addictive. (R56:894, 896, 920-24.) RJR capitalized on the illusion of filtration to create a false sense of security among smokers. (R56:826-29.) All the while, RJR was conducting research confirming that filters did not make cigarettes safer. (R54:714.)
>
> Through the conspiracy, RJR and its cohorts (1) purported to accept responsibility for the health of their consumers and made false public promises that they would diligently research the safety of cigarettes and remove any components they found harmful; (2) created sham scientific bodies that were touted as impartial tobacco research centers but in fact operated as industry mouthpieces; (3) employed tactics like payments, research grants, infiltrating public health laboratories, and paying what was essentially hush money to co-opt doctors and scientists to conduct and publish friendly research; (4) manipulated the media to be more industry-friendly; (5) issued profoundly misleading public statements, propaganda pieces, and media interviews in which they denied smoking was hazardous, accused the federal government (in order to blunt the Surgeon General's reports on the hazards of smoking) of misleading the American people, and generally invented their own facts to hoodwink

the public into believing it was safe to continue (or take up) smoking; (6) disparaged scientific research and reports that linked cigarettes to addiction and disease; (7) lied under oath to Congress about the addictiveness and dangers of cigarettes; (8) published false articles about cigarettes under false names; (9) threatened to boycott companies that produced cigarette alternatives; and (10) employed massive and deceptive advertising campaigns that generally portrayed smoking as glamorous, safe, and enjoyable in order to "normalize" cigarettes and encourage the public to start and continue smoking. (R54:681-90, 717-46; R55:754-64, 771-79, 783-87, 794-801, 822, 857-59, 863-87; R56:894-931, 935-41, 965, 979-83, 985; R58:1183; R60:1522-1556.)

The industry's campaign of denial created a culture in which smoking was normalized, routine, and very prevalent in the 1930s through as late as the 1970s. (R64:665-66, 687.) Mrs. Schoeff testified that when she and Mr. Schoeff were teenagers in the late 1940s, advertisements were "everywhere," and no thought was given to smoking being harmful because it was "glamorized," "sophisticated," and portrayed as a method to make one more powerful and accepted. (R61:1705-06.) The marketing campaign spread to placement in the movies, sponsorship of TV shows, and famous ads in Times Square, with advertisements bragging about which brands doctors preferred. (R54:666-69, 678-80, 690-94, 699.) The pervasiveness of the industry's campaign was confirmed by an FTC report from 1967 that stated it was "virtually impossible for Americans of almost any age to avoid cigarette advertising." (R55:841-48.)

The tobacco industry's marketing campaign worked; as mass marketing spread, there was an "extremely rapid rise of the smoking rate." (R54:708; R56:803) For example, in 1954, the industry ran a full page ad called "A Frank Statement to Cigarette Smokers," in which RJR and its coconspirators told the world,

> We accept an interest in people's health as a basic responsibility paramount to every other consideration in our business. We believe the products we make are not injurious to health.

(R55:736-37; Exh. PT00307.) They not only denied that there was any proof that smoking causes lung cancer (despite their own research showing that smoking did cause cancer), but also promised to conduct

further research and let the world know of any dangers that could be proven. (R55:736-40.) After the Frank Statement, the cigarette smoking rate in this country rapidly increased to a peak consumption year in 1964; still more cigarettes were sold every year until a peak sales year in 1982. (R54:658, 665.) Polls showed that the majority of smokers thought that filters reduced the health risks of cigarettes. (R55:824-25.)

RJR and its coconspirators also sought to conceal the addictiveness of their products not only because people might be discouraged from starting to smoke, but also because they knew it would lead to legal liability in lawsuits just like this one. The jury heard that internal documents warned that industry research showing that nicotine is more addictive than heroin was not just an "academic" question because the industry's lawyers

> remind us … that the entire matter of addiction is the most potent weapon a prosecuting attorney can have in a lung cancer/cigarette case. We can't defend continued smoking as free choice if the person is addicted.

(R56:931; Exh. PT00214.)

The industry's studies showed that its propaganda created doubt about Surgeon General reports. (R55:877.) As late as the 1980s, after Mr. Schoeff had been smoking for at least three decades, the conspiracy had been so effective that still only a quarter of smokers believed smoking was addictive. (R56:934.) The continued prevalence of smoking and its dangers are reflected by the fact that smoking-related diseases kill more than 440,000 Americans every year. (R57:1010.)

Like the majority of the American public, Mr. Schoeff was among those deceived by RJR and its cohorts about the dangers of cigarettes. (R55:824-25, 829.) Consistent with what the tobacco industry wanted him to believe, Mr. Schoeff smoked filtered cigarettes because he thought they were safer. (R61:1712.) It was not until the late 80s or 90s that Mr. Schoeff had a firm awareness of the health hazards of RJR's cigarettes, 30 to 40 years after the tobacco industry knew and made their false promise to the public that consumers' health would be their paramount concern. (R61:1712-13.)

It was precisely because of the industry's marketing that Mr. Schoeff doubted the cigarettes he smoked would cause him cancer. (R61:1713-14.)

RJR and the industry's marketing efforts included a wildly effective appeal to youths. (R54:664.) According to one government report, this advertising constituted a "strong force" that persuaded "teenagers to overcome their initial distaste for cigarettes." (R55:846.) The trial court initially prohibited evidence of youth marketing after 1953, when Mr. Schoeff was no longer a youth, and no such evidence was introduced in the first phase. (R50:100-01.) But because RJR argued that it was a changed company that did not warrant substantial punishment (*e.g.*, R65:2334, 2337-41; R66:2420, 2423-28, 2439-40, 2448-49, 2452-59), the trial court allowed Mrs. Schoeff to rebut those arguments. It let her expert testify that RJR's documents showed its youth marketing continued into the 1970s and 1980s and allowed her to introduce during the second phase, a 2012 Surgeon General report showing that RJR had not changed and continued to direct its marketing efforts to target youth even today. (R58:1193; R66:2394-97, 2508-09.)

RJR did not admit until the year 2000 that nicotine was addictive or that smoking cigarettes causes cancer. (R55:706; R56:982-83.) RJR and its cohorts have yet to admit that they marketed to children, that they lied to the American public about their product, that filters and light cigarettes are not really safer, that they manipulated nicotine, or that people have died because of their product. (R56:984-85.)

In closing argument during the second phase, Mrs. Schoeff's counsel advised that Mrs. Schoeff did not want more than $25 million in punitive damages and urged the jury not to award more than that even though the evidence might lead the jury to "think that's too low." (R66:2512.) In its closing argument, RJR's only recommendation as to the proper amount of punitive damages was "zero." (R66:2524.) This was a continuation of its argument rejected by the jury in the first phase that "there's no need to deter future conduct" because RJR was a changed company. (R65:2334, 2337-41.)

(Answer Br./Initial Br. on Cross-Appeal in 4th DCA at 14-20.)

Counsel's Arguments and Court's Instructions on Comparative Fault

Before opening statements, the trial court explained Mrs. Schoeff's position on comparative fault to the jury as follows:

> Plaintiff will seek apportionment of fault on the counts for negligence and strict liability. However, not with respect to the counts for fraud by concealment and conspiracy to commit fraud by concealment.

(R53:480.)

Mrs. Schoeff's counsel reiterated to the jury in both opening statement and closing argument that Mrs. Schoeff's admission that her husband bore some responsibility for his death was only in relation to RJR's negligent conduct and the strict liability claim, and not as to RJR's intentional actions. (R53:538; R64:2239-40.) Mrs. Schoeff's counsel repeatedly made this point, and RJR never objected during trial that she said anything to lead the jury into believing that she accepted responsibility for RJR's fraud and conspiracy. (R53:531, 538; R64:2216-17, 2219, 2228, 2240-45.) She never said anything to suggest her damages would not be reduced by comparative fault if she prevailed on her fraud or conspiracy claims.

RJR took full advantage of Mrs. Schoeff's position by arguing that the jury should answer "no" to the fraud and conspiracy claims unless it intended to hold RJR "100 percent responsible":

> The last point on these two forms – these two interrogatories that I want to make is Plaintiffs take zero responsibility for any of this. When they stand up here and tell you that they take some

> responsibility in this case, Mr. Paige told you that the way they see this case, the way they think they've pled it and the way they've asked the Court to organize the verdict form, they don't take any responsibility on the claims of fraud and concealment. And what that means on the issues about what Mr. Schoeff knew about smoking and when he knew it, Plaintiffs claim Reynolds is 100 percent responsible. That's Plaintiff's position.
>
> You don't have the ability to allocate fault on those claims. If you think Mr. Schoeff bears any responsibility for what he knew about smoking and when he knew it, you have to put no on both of those forms. There's no other way around. That's the burden Plaintiffs have chosen for themselves in this case.

(R65:2328-29.)[2]

Mrs. Schoeff proposed a verdict form that placed the apportionment of fault question prior to the fraud and conspiracy liability questions. (R39:7506-07, 7573.) The trial court was hesitant to use this atypical order of questions, but agreed to it based on Mrs. Schoeff's arguments that it would counter any contention by RJR that she had waived her position that comparative fault only applies to the non-intentional tort counts. (R64:2115-25.)

The jury was also instructed at the end of the case that Mrs. Schoeff "admitted that on the claims for negligence and defective product [Mr.] Schoeff bears some percentage of fault." (R64:2184-85.) The court further instructed the jury: "In determining the total amount of any damages sustained by Ms. Schoeff,

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[2] RJR also confirmed to the jury in the second phase that it fully understood that the jury's first phase findings would result in a judgment for the full amount because it told them that the $10.5 million compensatory award was punishment enough. (R66:2513.)

you should not make any reductions because of the responsibility of James Schoeff." (R64:2186.) The verdict form included a similar direction (R39:7574), which represented a departure from the standard verdict form because it **omitted** the following sentence that appears right after that direction in the model form:

> If you find that (claimant) (decedent) or (identify additional person(s) or entit(y)(ies)) [was] [were] negligent [or at fault], the court in entering judgment will make an appropriate reduction in the damages awarded.

Fla. Stds. Jury Instr. (Civ.) Form 1. RJR never asked for an instruction that the court would not reduce damages if Mrs. Schoeff prevailed on her fraud or conspiracy claims.

SUMMARY OF ARGUMENT

The jury's award of $30 million in punitive damages should be reinstated because it is not excessive under the standards imposed by either the Constitution or Florida law. Under both standards, the most important consideration is the degree of reprehensibility of the defendant's conduct, and RJR's conduct proven in this and other *Engle* cases is the worst of the worst. RJR and its coconspirators took an already dangerous product and intentionally designed it to make it even more dangerous. They engaged in a decades-long, sophisticated conspiracy to fraudulently conceal all of that, knowing that millions would die just so these companies could make more money. The award bears a reasonable relationship to

the actual harm caused in this case; even more so when compared to the potential harm the defendants' conduct threatens to cause every plaintiff.

And the punitive award is less than the treble amount the Legislature contemplated juries may award without additional findings. The trial court expressly found the jury was not swayed by passion and prejudice, a finding the majority below did not question. The majority instead ordered a remittitur because the amount was more than Mrs. Schoeff requested. But the law clearly gives the jury the right to do exactly that.

Alternatively, RJR did not request a new trial as a remedy. And, in any event, the jury was not swayed by bias, prejudice, passion, or any other improper sentiment. Thus, even if $25 million were the maximum amount that can ever be entered against RJR, the remedy would be to reduce the award to that amount, not grant a new trial.

The majority also erred in affirming the reduction of Mrs. Schoeff's damages on her fraud and conspiracy claims by Mr. Schoeff's percentage of fault. The record makes clear that Mrs. Schoeff did not invite this reduction or otherwise waive the intentional tort exception to the comparative fault statute. The majority's contrary finding rests on an impermissible assumption that the jury defied its instructions and awarded more damages than the evidence allowed so that a reduced award would fully compensate Mrs. Schoeff. Its interpretation of the

intentional tort exception as inapplicable to intentional torts brought in cases with negligence at their "core" is unsupported by the statutory language. That analysis is also contrary to the statute's underlying policies and a number of Florida decisions.

And even if this "core" analysis applied, the core of these cases is clearly intentional misconduct by RJR and its co-conspirators. Mrs. Schoeff is entitled to the full amount of compensatory and punitive damages awarded by the jury.

ARGUMENT

I. THE JURY'S ASSESSMENT OF THE AMOUNT OF PUNITIVE DAMAGES SHOULD BE RESPECTED.

Standard of Review. Whether the amount of a punitive damage award offends due process is reviewed de novo, but whether it requires a remittitur under Florida law is reviewed only for an abuse of discretion. *Engle v. Liggett Grp., Inc.*, 945 So. 2d 1246, 1263 (Fla. 2006).

A. The Award Does Not Violate the Due Process Clause.

This Court explained the required constitutional analysis in *Engle* itself:

> The United States Supreme Court has stated that a review of a punitive damages award must include consideration of three guideposts to determine whether the award is unconstitutionally excessive:
>
> > (1) the degree of reprehensibility of the defendant's misconduct; (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award; and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases.

> *State Farm Mutual Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 418, 123 S. Ct. 1513, 155 L.Ed.2d 585 (2003) (citing *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 575, 116 S. Ct. 1589, 134 L.Ed.2d 809 (1996)).

Id. at 1264. Each guidepost not only supports the jury's award here, but would support a much higher award in any case based on this corporate misconduct.

1. Reprehensibility. Although the Supreme Court has made clear that the first guidepost – reprehensibility – is "the most important indicium of the reasonableness of a punitive damages award," *BMW*, 517 U.S. at 575, the majority below gave this factor no explicit consideration. Had it done so, it should have seen that the only limit to the amount of punitive damages in a case like this should be to avoid financially destroying RJR.

The Supreme Court has explained how this guidepost is to be applied:

> We have instructed courts to determine the reprehensibility of a defendant by considering whether: the harm caused was physical as opposed to economic; the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; the target of the conduct had financial vulnerability; the conduct involved repeated actions or was an isolated incident; and the harm was the result of intentional malice, trickery, or deceit, or mere accident.

Campbell, 538 U.S. at 419. Applying this analysis to RJR's conduct shows that it is perhaps the most reprehensible corporate conduct in the nation's history and that the award in this case has no trouble passing constitutional scrutiny.[3]

[3] Numerous courts have already summarized the mountains of evidence of heinous misconduct by RJR and its co-conspirators in various degrees of detail.

In a nutshell, RJR took the traditional cigarette, a product it knew could cause cancer at high doses, and went about intentionally designing it through additives, such as simple sugar, to make it more mild and inhalable so that each dose would go deep into the lungs of the consumer, delivering carcinogens and other chemicals to the bloodstream. And then it added other chemicals and went to great lengths to manipulate naturally occurring nicotine, precisely calibrating how much each cigarette contains, to design a "modern cigarette" that would addict consumers such that they would voluntarily pay money to buy and smoke multiple packs of 20 poisonous cigarettes each day. It thereby guaranteed that millions of people every year would be exposed to repeated doses of carcinogens that would cause hundreds of thousands to die horrible deaths every year.

RJR designed features like filters to create false consumer expectations of a safer product when it knew they were illusory and provided no protection. And it targeted youth, including teenagers, because it knew through years of study that

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E.g., *Alexander*, 123 So. 3d at 80-83; *Martin*, 53 So. 3d at 1070-72; *see also Williams v. Philip Morris Inc.*, 127 P.3d 1165, 1168-70 (Or. 2006) (detailing evidence before concluding a $79.5 million punitive award comports with due process), *vacated on other grounds* 549 U.S. 346 (2007), *adhered to on remand*, 176 F.3d 1255 (Or. 2008), *cert. granted*, 553 U.S. 1093 (2008), *cert. dismissed as improvidently granted*, 556 U.S. 178 (2009). In perhaps the most exhaustive judicial opinion in the modern era, Judge Kessler made detailed and incredibly damning findings of fact on this kind of evidence covering hundreds of pages. *United States v. Philip Morris USA, Inc.*, 449 F. Supp. 2d 1, 34-143, 146-383, 561-691, 801-39 (D.D.C. 2006), *aff'd in relevant part, reversed on other grounds*, 566 F.3d 1095 (D.C. Cir. 2009), *cert. denied*, 130 S. Ct. 3502 (2010).

they are most vulnerable both to marketing in general and the addictive nature of nicotine on a still-forming brain. The industry needed these "replacement smokers" because it knew that as current smokers died from lung cancer and other horrifying diseases, it would go out of business without vulnerable new recruits. And all of that conduct is simply the basis for the negligence and strict liability claims.

This case also involves punitive damages awarded for fraud and conspiracy claims. Those claims encompass all of that conduct and then add in over fifty years of not just RJR's fraudulent statements denying the dangers and addictiveness of its product, but also sophisticated and coordinated efforts with its cohorts and sham "scientific" organizations to affirmatively conceal those dangers and all that it had done in its design decisions. It did so through suppression and intimidation of the government and scientific community to create a false controversy that would be the crutch to keep addicted smokers from quitting and to entice young people to be like the "cool" movie stars, athletes, and doctors it paid to advertise its products.

RJR certainly did not do this for the purpose of maiming and killings its customers. Instead, it did all of this to make billions of dollars with the full knowledge that these profits would come at the cost of suffering and death of millions of its customers and their loved ones. Internal documents even show RJR and its co-conspirators joking about its customers being like rats pressing levers to get nicotine or Pavlov's dogs. What could be more reprehensible?

In short, unlike the economic harms at issue in *Campbell* and *BMW*, these cases involve the most serious kind of physical harm there is, a shocking and widespread indifference to the safety of millions of people, and repeated conduct over decades. It was all done on purpose to make money. It is no "mere accident" that Mr. Schoeff died; it was a certainty that millions and millions would die. While RJR's customers might not all be "financially vulnerable," they were vulnerable in an even more reprehensible sense. They were seduced into ingesting what should have been forbidden fruit, and then became so addicted that, at least with regard to *Engle* class members, their addiction caused them to keep smoking until they suffered all nature of diseases and medical conditions.

2. Relationship to Actual or Potential Harm to Plaintiff. While this was the only guidepost even remotely addressed in the majority's opinion, it provides no support for the majority's conclusion. As the face of the opinion reveals, the majority invalidated a punitive damage award in this case that bears a lower ratio to compensatory damages than $25 million awards affirmed in two other cases to date, including one from the Fourth District itself. *Schoeff*, 178 So. 3d at 491-92 (citing *Buonomo*, 138 So. 3d 1049 ($5.235 million compensatory award reduced by 22.5% comparative fault), and *Martin*, 53 So. 3d 1060 ($5 million reduced by 34%)). Even in cases where the injury is merely economic, the Supreme Court has noted that a ratio exceeding 4-to-1 was only "close to the line

of constitutional impropriety." *Campbell*, 538 U.S. at 425 (citing *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 23-24 (1991)).

> While these ratios are not binding, they are instructive. They demonstrate what should be obvious: Single-digit multipliers are more likely to comport with due process, while still achieving the State's goals of deterrence and retribution ….

Id.

Though it may not make a difference in this case given the high compensatory award even after a comparative fault reduction and that damages should not have been reduced in any event as argued in the next section, the relevant comparison should not take comparative fault into account. Most Florida district court of appeal decisions, including decisions by the Fourth District, apply the gross award. *E.g.*, *Philip Morris USA, Inc. v. Kayton*, 104 So. 3d 1145, 1152 (Fla. 4th DCA 2012), *quashed on other grounds*, Nos. SC13-171, SC13-243 (Fla. Feb. 1, 2016); *Philip Morris USA, Inc. v. Cohen*, 102 So. 3d 11, 16 (Fla. 4th DCA 2012), *quashed on other grounds*, No. SC13-35, 2016 WL 375143 (Fla. Jan. 29, 2016); *Townsend*, 90 So. 3d at 314; *but see Martin*, 53 So. 3d at 1072 (applying net award after comparative fault without analysis).

The reason comparative fault should play no role is that the guidepost does not require comparison to the actual harm suffered by the plaintiff, but to the actual **or potential harm** the defendant's conduct threatened to cause the plaintiff. In *Williams* and several other cases, the Supreme Court of the United States has made

clear that the relevant harm to the plaintiff for punitive damages purposes is not limited to the actual harm suffered, but also includes potential harm that the Defendants' conduct could have caused:

> We have said that it may be appropriate to consider the reasonableness of a punitive damages award in light of the **potential** harm the defendant's conduct could have caused. But we have made clear that the potential harm at issue was harm potentially caused the **plaintiff**. *See State Farm*, *supra*, at 424, 123 S. Ct. 1513 ("[W]e have been reluctant to identify concrete constitutional limits on the ratio between harm, or potential harm, **to the plaintiff** and the punitive damages award" (emphasis added)).

549 U.S. at 354 (alteration in original); *see also TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 460 (1993) (Stevens, J., for the Court in a plurality opinion) ("[T]his Court [has] eschewed an approach that concentrates entirely on the relationship between actual and punitive damages. It is appropriate to consider the magnitude of the **potential harm** that the defendant's conduct would have caused to its intended victim if the wrongful plan had succeeded … ." (emphasis added)); *see also Clark v. Chrysler Corp.*, 436 F.3d 594, 614 (6th Cir. 2006) (Kennedy, J., concurring) ("Punishing Chrysler a lesser amount based on its level of comparative fault does not appropriately punish Chrysler for the risk that results from its unsafe design, nor does it serve the goal of deterring similar future conduct by Chrysler.").

The potential harm in this and every other *Engle* case is tremendous; variations are based entirely on circumstances unrelated to the defendants' conduct. Even putting aside economic damages from medical bills, lost wages, and

such, a smoker may suffer years of pain and suffering and the spouse may suffer tremendous consortium damages as a result. For example, the biggest damage award known to the undersigned was affirmed without opinion where the living smoker plaintiff in one of the first post-*Engle* cases to go to trial was awarded $24.5 million in pain and suffering and his spouse $12.5 million for loss of consortium. *Philip Morris USA, Inc. v. Lukacs*, 34 So. 3d 56 (Fla. 3d DCA 2010). It is no stretch to conclude that the potential harm in these cases therefore exceeds the $30 million this jury awarded in punitive damages.[4]

3. Civil Penalties Authorized or Imposed in Comparable Cases. The Supreme Court has directed that "a reviewing court engaged in determining whether an award of punitive damages is excessive should 'accord "substantial deference" to legislative judgments concerning appropriate sanctions for the conduct at issue.' " *Gore*, 517 U.S. at 587 (quoting *Browning-Ferris Indusits. Of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 301 (1989) (O'Connor, J., concurring in part)). While the majority below ignored this factor, the Fourth District has previously recognized that for causes of action accruing before 1999,

[4] Even where the smoker dies and the claim for pain and suffering is extinguished, replaced by non-economic awards for survivors' emotional losses, the damages can exceed those awarded here. For example, in *Calloway*, the Fourth District affirmed awards of $9 million and $7.1 million to the smoker's surviving spouse and child. *R.J. Reynolds Tobacco Co. v. Calloway*, No. 4D12-3337, 2016 WL 64296, at *1-2 (Fla. 4th DCA Jan. 6, 2012) (pending on rehearing).

which is necessarily the case in any *Engle* case where the disease had to manifest prior to 1996, the Legislature has decreed that punitive damages can be as high as three times compensatory damages and that special circumstances found by the trial court can justify even higher awards. *Buonomo*, 138 So. 3d at 1052-53 (citing § 768.73(1), Fla. Stat. (1995)). As Judge Taylor noted in dissent, "the historical use of treble damages as a punitive remedy" fully supports this guidepost.

****

For the foregoing reasons, there should be no question that a $30 million award in an *Engle* progeny case with compensatory damages exceeding $10 million passes constitutional muster. An award of three times compensatory damages or less should always be constitutional.

Given the thousands of *Engle* cases waiting to go to trial, this Court might conclude that this case presents an opportunity to announce a threshold under which no punitive award will be invalidated due to its amount, absent evidence that the award – individually or cumulatively with prior awards offered into evidence – will financially destroy the defendant. Indeed, Judge Van Nortwick suggested that the limit should be the same for all *Engle* cases because the evidence of defense conduct "is essentially the same" in each case. *Townsend*, 90 So. 3d at 315. Stated another way, a court in these cases will "find nothing in the record to suggest that RJR's conduct toward [one plaintiff] was any more wanton or reprehensible than it

was toward [another]."[5] *Id.* This is especially true given the Supreme Court's direction that the relevant ratio is not simply to the damages awarded, but potential harm the conduct threatened to cause the plaintiff. That potential harm is enormous in each case, supporting damage awards that could exceed $33 million.

Thus, a $100 million presumptive ceiling to escape constitutional scrutiny would make far more sense than the $25 million cap the majority below apparently sought to impose – an arbitrary hard cap that can result in a less than one-to-one ratio. Regardless of what might happen in future cases, however, it should be clear that the $30 million award here was constitutional.

B. Regardless of Whether the Award Was Constitutional, the Trial Court Reasonably Declined a Remittitur.

The majority below alternatively rested its holding on Florida law regarding excessive punitive damages awards. It cited, but did not apply, the governing factors: (1) whether the amount is "out of all reasonable proportion" to the conduct, (2) whether it bears "some relationship to ability to pay," and (3) whether "there is a reasonable relationship between compensatory and punitive damages." *Schoeff*, 178 So. 3d at 491 (citing *Townsend*, 90 So. 3d at 313). There is no evidence or contention by RJR that $30 million comes close to exceeding its ability

[5] As Judge Van Nortwick noted, other "protections exist against successive punitive damage awards that RJR presumably will be able to raise in future cases" if and when it elects to disclose to a jury evidence of the amounts prior juries have awarded. *Id.* at 314 (citing *Owens-Corning Fiberglas Corp. v. Ballard*, 749 So. 2d 483, 488 n.7 (Fla. 1999)).

to pay, and the other two factors support the award based on the analysis in the preceding section.

Instead of applying this test from the case law for punitive damages in particular, the majority below rested its holding on a single factor listed in the remittitur statute for reviewing damage awards generally. Specifically, it latched onto the trial court's statement that it could find "no logical or sound reason" for the jury not to have deferred to Mrs. Schoeff's request not to award more than $25 million. *Id.* at 492. While the remittitur statute does say that a factor is whether the award "could be adduced in a logical manner," § 768.74(5)(e), Fla. Stat., the majority's conclusion is wrong on the law and the facts.

As a matter of law, the courts of this state have long held "that a jury might properly award damages equal to or in excess of those requested by counsel in closing argument." *Lopez v. Cohen*, 406 So. 2d 1253, 1256 (Fla. 4th DCA 1981) (citing *Braddock v. Seaboard Air Line R.R. Co.*, 80 So. 2d 662 (Fla. 1955)); *see also Philip Morris USA, Inc. v. Cuculino*, 165 So. 3d 36, 39 (Fla. 3d DCA 2015) (holding that $12.5 million compensatory award was not excessive even if plaintiff asked the jury to not exceed $10 million because "a jury may properly award damages equal to or in excess of those requested by counsel in closing argument"). Indeed, Mrs. Schoeff's counsel advised the jury that the evidence could lead it to conclude that $25 million was "too low." (R66:2512.) Once RJR's counsel

suggested that the only amount RJR believed would be appropriate was "zero" in the face of a finding that punitive damages were warranted (R65:2334-41), the jury was free to conclude that only a larger award could grab RJR's attention and serve the twin purposes of deterrence and punishment.

As a matter of fact, the jury's math is far more logical than what Mrs. Schoeff proposed. The jury chose a nice round number that was almost three times its compensatory award. Indeed, the Legislature applied the same logic in coming up with the presumptive cap discussed above. In contrast, the "logic" behind Mrs. Schoeff's request not to exceed $25 million had to have escaped the jury. The jury had no way to know that this was the highest "safe" number counsel could request in light of the $25 million awards affirmed by the Fourth District in *Buonomo* and other courts in *Alexander* and *Martin*.

None of the other elements in section 768.74 are even remotely present in this case. Indeed, the trial court made an express finding that was quoted, but never rejected by the majority, regarding the first and most important factor. Judge Tuter, who sat through the trial, watched this jury, and possessed the discretion regarding remittitur decisions, found that the punitive damage award "was NOT infected by bias, prejudice, passion or any other sentiment." (R44:8479.) In short, he did not abuse his discretion in denying a remittitur even though he made clear that if he had been on the jury, he would have deferred to Mrs. Schoeff's request.

C. Alternatively, the Remedy for an Excessive Award Is Reduction of the Award, Not a New Trial.

Finally, even if the cap selected by the majority below was appropriate under the constitution, the remedy should be to reduce the award to the cap without requiring a new trial. Unless a remittitur is appropriate for other reasons under Florida law, no reason in law or policy requires a new trial when a jury exceeds an amount courts find to be constitutionally permissible. Otherwise, juries should be instructed on the constitutional analysis, lest a continuous set of new trials is required until a jury blindly picks a number that meets judicial approval.

As the Fourth District's opinion makes clear, similar remedies are consistently imposed by the appellate court, based entirely on Florida's remittitur/additur statute. That statute requires trial courts, on motion, to review a money damage award to determine if the "amount is excessive or inadequate in light of the facts and circumstances which were presented to the trier of fact." § 768.74(1), Fla. Stat. (1994). If the court finds the award to be excessive or inadequate, it should order a remittitur or additur as the case may be. *Id.* § 768.74(2). The relevant subparagraph states:

> If the party adversely affected by such remittitur or additur does not agree, the court shall order a new trial in the cause on the issue of damages only.

Id. § 768.74(4). This Court has interpreted this language to give the party in whose favor a remittitur or additur was granted the right to a new trial if it disagrees with

the new amount. *See generally Waste Mgmt., Inc. v. Mora*, 940 So. 2d 1105 (Fla. 2006). But *Mora* does not support the remedy applied here for two reasons.

First, *Mora* did not apply any constitutional limit to damages and, instead, simply applied section 768.74. RJR has not identified any case from any court suggesting a defendant has the right to a "do over" if it does not accept a punitive damage amount reduced to comply with the constitution.

Second, *Mora* would not even support RJR's argument as to a remittitur under that statute. In *Mora*, the trial court imposed an additur on a plaintiff who had only sought a new trial based on the fact that the jury's award of damages was inadequate under the evidence. 940 So. 2d at 1106-07. It was because the plaintiff had only demanded a new trial and never even asked for an additur that the court concluded it was a "party adversely affected" and therefore entitled to elect a new trial under section 768.74(4). *Id*. at 1109.

Although RJR's motion for remittitur cited cases for the proposition that "remittitur or new trial on damages is the remedy" for an excessive jury award, it never sought the remedy of a new trial based on excessive damages in any of its motions; it elected to only seek a remittitur. (SR:457 (noting that remedies for excessive damages under Florida law are either remittitur or new trial), 473 (concluding that relief sought was for trial court to remit the damage awards).) Because the only remedy RJR ever requested regarding the amount of damages

was a remittitur and because it never asked the trial court to grant a new trial instead, it waived any right to a new trial or to reject a remitted amount that is supported by the evidence. *Alexander*, 123 So. 3d at 77-78.

II. THE TRIAL COURT ERRED IN REDUCING COMPENSATORY DAMAGES BASED ON COMPARATIVE FAULT.

Standard of Review. The trial court did not make an express finding of waiver, although its reasoning could be read to include an implicit finding that Mrs. Schoeff waived the intentional tort exception to the comparative fault statute. To that extent, Mrs. Schoeff does not disagree with the district courts to address the issue, which have concluded the standard of review is for abuse of discretion. *Schoeff*, 178 So. 3d at 492; *R.J. Reynolds Tobacco Co. v. Hiott*, 129 So. 3d 473, 479 (Fla. 1st DCA 2014).

But whether the intentional tort exception applies in a given case is a pure issue of law that should be reviewed de novo. On this limited point, Mrs. Schoeff agreed with the majority below and disagrees with the First District's contrary holding on the standard of review. *Compare Schoeff*, 178 So. 3d at 496, *with R.J. Reynolds Tobacco Co. v. Sury*, 118 So. 3d 849, 852 (Fla. 1st DCA 2013). *Sury* provides no real reasoning for why a trial court should have discretion in whether to apply the comparative fault statute, and Mrs. Schoeff can perceive no justification. Both Mrs. Schoeff and Judge Taylor in dissent below agree that *Sury* got to the right result based on imperfect reasoning. *Schoeff*, 178 So. 3d at 497.

A. Mrs. Schoeff Did Not Invite the Application of Comparative Fault to Her Intentional Tort Claims.

The majority's conclusion that "the trial court did not abuse its discretion when it found that Plaintiff waived her intentional tort exception argument" is belied by the record and law on multiple fronts.

At the outset, the trial court had no authority to find waiver because RJR never made such an argument. *E.g.*, *Walls v. Sebastian*, 914 So. 2d 1110, 1111 (Fla. 4th DCA 2005); *Mutchnik, Inc. Constr. v. Dimmerman*, 23 So. 3d 809, 810 (Fla. 3d DCA 2009). Waiver depends on the specific facts developed in the record; this Court has made clear that the tipsy coachman doctrine cannot be used to affirm a ruling in such circumstances. *Robertson v. State*, 829 So. 2d 901, 906-08 (Fla. 2002); *see also Meyer v. Meyer*, 25 So. 3d 39, 42-43 (Fla. 2d DCA 2009) (improper to use tipsy coachman to affirm based on an estoppel argument not raised below because appellant did not have the chance to develop the record on the issue). Indeed, the rule that trial courts cannot base a ruling on an unpled theory leaves no room for application of the tipsy coachman doctrine. Whether an unpled theory is correct is not a defense; otherwise, trial courts would be free to rule based on whatever issues they chose to raise so long as they did not err in doing so.

Moreover, it is far from clear that the trial court found a waiver. The record shows that Mrs. Schoeff raised her argument in her pleadings, asserted it in opening statement, used it to convince the trial court to change the order of

questions on the verdict form, and repeated it in closing statement. While the trial court made a statement that the jury could have been misled, that does not equate to waiver.

More importantly in terms of cleaning up the law on this important issue that arises in every *Engle* progeny case, even if RJR had raised waiver and the trial court accepted, that ruling would be a clear abuse of discretion. The majority based its holding on its conclusion that the jury was led to believe that its damage award would be reduced by Mr. Schoeff's percentage of fault. But that is wrong as a matter of fact. Not only was the standard verdict form language stating the judge would reduce damages removed and there was no suggestion in the record the damages would be reduced on the intentional tort claims, but RJR itself took strategic advantage of making sure the jury knew they would not. After reminding the jury that Mrs. Schoeff's admission of comparative fault only applied to the negligence and strict liability claims, RJR told the jury in closing:

> And what that means on the issues about what Mr. Schoeff knew about smoking and when he knew it, Plaintiffs claim Reynolds is 100 percent responsible. That's Plaintiff's position.
>
> You don't have the ability to allocate fault on those claims. If you think Mr. Schoeff bears any responsibility for what he knew about smoking and when he knew it, you have to put no on both of those forms. There's no other way around. That's the burden Plaintiffs have chosen for themselves in this case.

(R65:2328-29.)

The record aside, a plaintiff's failure to make clear to the jury that damages will not be reduced on intentional tort claims cannot be a waiver for two reasons. First, this Court has already held that when a jury is potentially misled on this issue, it is the defendant who waives the issue unless it requested a jury instruction. *Hill v. Dep't of Corr.*, 513 So. 2d 129,133-34 (Fla. 1987). In that case, the verdict form told the jury that the trial court would reduce the damages, but this Court held that the trial court properly refused to reduce the damages because (1) the plaintiff prevailed on an intentional tort and (2) the defendant not only did not object to the verdict form, but had proposed it. *Id.* Here, the parties agreed to and jointly presented the verdict form to the trial court. (R64:2109-11.) The only disagreement was over the order of the questions – again, based on Mrs. Schoeff's assertion of the intentional tort exception – and whether a statute of repose question should be asked. (*Id.*) Thus, it was RJR, not Mrs. Schoeff, who waived any issue regarding whether the jury was misled on the effect of its comparative fault finding.

Second, whether the jury believed the damages would be reduced or not is irrelevant. That is a pure question of law for the court and should be of no concern to the jury. The jury's role was to make findings of fact – specifically, it was required to find the allocation of fault and the total amount of damages. The basis for RJR's argument and the majority's holding below is apparently that the jury may have disregarded its instruction to determine 100% of the damages and

instead manipulated its findings by awarding more damages than the evidence supported so that the reduced amount would be the end result the jury desired. That is jury nullification, and Florida courts are not supposed to speculate that a jury may disregard its instructions and ignore the law. *See, e.g., Carter v. Brown & Williamson Tobacco Corp.*, 778 So. 2d 932, 942 (Fla. 2001) ("Absent a finding to the contrary, juries are presumed to follow the instructions given them."). As Judge Pearson explained long ago on this issue:

> The fallacy of the Pratses' argument is that it assumes that the jury is legally permitted to – and indeed will – disobey the trial court's instructions despite the legal presumption to the contrary. The special interrogatory verdict and the corresponding instructions simply told the jury to assess the damages incurred by Mr. Prats and Mrs. Prats. While the jury was separately instructed not to reduce Mr. Prats' damages because of his negligence, the failure to so instruct the jury in the case of Mrs. Prats does not mean either that the uninstructed jury irresponsibly reduced her **actual** damages by the percentage of Mr. Prats' comparative negligence or would have wrongfully inflated her **actual** damages to accommodate Mr. Prats' comparative negligence. The jury is presumed to have followed the court's instructions. Those instructions told the jury to determine the total amount of damages due to Mrs. Prats. Had the jury been instructed that the court was going to reduce the amount awarded by the percentage of Mr. Prats' negligence, and, taking that into account, awarded more than its actual damage assessment, it would have acted wrongfully.

City of Coral Gables v. Prats, 502 So. 2d 969, 973 (Fla. 1987) (Pearson, J., concurring).

The majority was correct that it was simply following the lead of other district courts in holding that comparative fault must be applied where the jury may

have inflated its award believing it would be reduced. The First and Fifth District have, indeed, committed the same error of presuming jury nullification. *Philip Morris USA, Inc. v. Green*, 175 So. 3d 312, 315 (Fla. 5th DCA 2015); *Hiott*, 129 So. 3d at 481. Both of those decisions, in turn, relied on *Foreline Security Corp. v. Scott*, 871 So. 3d 906 (Fla. 5th DCA 2004), where the Fifth District reversed a trial court's decision to award full damages after telling the jury it was going to reduce them. That court's reasoning was an unabashed embrace of jury nullification: "The jury may have reached a different verdict on damages had it known that Foreline would bear the entire amount." *Id.* at 911.

For these reasons, in addition to rejecting the majority's waiver holding here, the Court should take this opportunity to disapprove *Green*, *Hiott*, and *Foreline* to the extent they hold that damages must be reduced by comparative fault when the jury was led to believe they would. Any other result reflects judicial tolerance, if not approval, of jury nullification.

B. Regardless of the "Core" of the Entire Case, Comparative Fault Does Not Apply to Intentional Tort Causes of Action.

Turning to the merits, Mrs. Schoeff respectfully submits that both the majority and dissent below, as well as the First District in *Sury* misinterpreted section 768.81(4), Florida Statutes, as providing that when the same case includes both intentional and non-intentional torts, whether comparative fault applies depends on whether an intentional tort forms the "core" of the case. *Schoeff*, 178

So. 3d at 495 (majority); *id.* at 497 (dissent); *Sury*, 118 So. 3d at 852. This is in contrast to the common understanding of the statute as simply providing that whether the intentional tort exception applies is determined separately for each cause of action, such that damages are reduced on negligence claims, but not reduced on intentional tort claims, even if brought in the same lawsuit. Thus, where negligence and intentional tort claims are both brought in the same products liability case, comparative fault should apply to the former and not the latter. *Sorvillo v. Ace Hardware Corp.*, No. 2:13-cv-629-FtM-29DNF, 2014 WL 3611147, at *4-5 (M.D. Fla. July 22, 2014).

This was unquestionably the case at common law. *E.g.*, *Mazzilli v. Doud*, 485 So. 2d 477, 480 (Fla. 3d DCA 1986). And the common law was codified by section 768.71. *See Am. Home Assur. Co. v. Nat'l R.R. Passenger Corp.*, 908 So. 2d 459, 469 (Fla. 2005) ("Nothing in the legislative history of this statute indicates an intention other than a direct codification of this Court's adoption of comparative liability."); *see also Dep't of Corr. v. McGhee*, 653 So. 2d 1091, 1101 (Fla. 1st DCA 1995) (Ervin, J., concurring and dissenting in part) (concluding that the statute "expressed an intent to retain the common law rule forbidding an intentional tortfeasor from reducing his or her liability by the partial negligence of the plaintiff in an action based on intentional tort"). Moreover, this Court has held that the statute must be strictly construed to the extent it is in derogation of the

common law. *Merrill Crossings Assocs. v. McDonald*, 705 So. 2d 560, 561 (Fla. 1997). Thus, the question is whether the plain language of section 768.81 compels the conclusion that recovery on an intentional tort claim must be reduced by comparative fault if the "core" of the lawsuit is a claim of negligence.

The 1992 version of that statute, which the district court correctly held controls in this case,[6] *Schoeff*, 178 So. 3d at 492 n.3, applies as follows:

> **(4) Applicability.—**
>
> (a) This section applies to negligence **cases**. For purposes of this section, "negligence cases" includes, but is not limited to, civil actions for damages based upon theories of negligence, strict liability, products liability, professional malpractice whether couched in terms of contract or tort, or breach of warranty and like theories. In determining whether a case falls within the term "negligence cases," the court shall look to the substance of the action and not the conclusory terms used by the parties.
>
> (b) This section does not apply ... to any **action** based upon an intentional tort … .

§ 768.81(4), Fla. Stat. (1992) (emphases added). While subsection (a) governs whether the statute applies to the entire case in the first instance, subsection (b) clearly provides that even when the statute applies in a given case, it does not apply to the intentional tort claims within the case. The Legislature must have

[6] A subsequent amendment deleted the subsection that provided that the statute applies to "negligence cases" and now provides that comparative fault applies to negligence and product liability "actions," but not to "any action based upon an intentional tort." Ch. 2011-215, § 1, Laws of Fla., codified at § 768.81(3), (4). If anything, this revision merely confirms that whether comparative fault applies may vary for each cause of action brought within the same case.

intended different meanings when it used the word "case" in subsection (a) but "action" in subsection (b). *E.g.*, *Maddox v. State*, 923 So. 2d 442, 446 (Fla. 2006). This language is easily harmonized with the common law rule by interpreting it to mean that comparative fault does not apply to any cause of action for an intentional tort, even if brought in a products liability or other case with negligence at its core.

Even if the word "action" is ambiguous and can be interpreted in the abstract to mean an entire lawsuit and not an individual cause of action within a lawsuit, there is no justification for doing so here. To allow an intentional tortfeasor, especially a fraudster, to reduce its recovery because its victim was negligent in falling for the fraud is an absurd result contrary to the patent purpose of the intentional tort exception. This Court noted after the statute's enactment that the distinction in application of comparative fault principles is justified because intentional wrongs "differ[] from simple negligence 'not merely in degree but in the kind of fault … and in the social condemnation attached to it.' " *Merrill Crossings*, 705 So. 2d at 562 (quoting *Wal-Mart Stores Inc. v. McDonald*, 676 So. 2d 12, 21 (Fla. 1st DCA 1996) (in turn, quoting *Prosser and Keeton on the Law of Torts*, § 65, at 462 (5th ed. 1984))).

Indeed, the intentional tort exception furthers the Legislature's policy "that intentional tortfeasors should be required to pay damages as a means of deterring them from future wrongdoing, regardless of whether a plaintiff had been partially

negligent." *Dep't of Corr. v. McGhee*, 653 So. 2d 1091, 1101 (Fla. 1st DCA 1995) (Ervin, J., concurring in part, and dissenting in part) (citing *Blazovic v. Andrich*, 590 A.2d 222 (N.J. 1991)); R. David De Armis & Edward L. White, III, *Judge Ervin's Step in the Right Direction: Apportioning Fault Between the Negligent and Intentional Tortfeasor*, 69 Fla. B.J. 92, 93-94 (Oct. 1995) ("This is a sound public policy precept: A person who intentionally harms another should not benefit from the allocation of fault or receive contribution from joint tortfeasors. That person should be held jointly and severally liable for his or her culpable acts, without regard to the negligence of others."). As the Supreme Court of Illinois explained after canvassing decisions from across the country,

> Because of the qualitative difference between simple negligence and willful and wanton conduct, and because willful and wanton conduct carries a degree of opprobrium not found in merely negligent behavior, we hold that a plaintiff's negligence cannot be compared with a defendant's willful and wanton conduct.

Burke v. 12 Rothschild's Liquor Mart, Inc., 593 N.E.2d 522, 532 (Ill. 1992).

The concept that whether comparative fault applies depends on the "core" of the entire case comes not from the language of the statute or any legislative policy, but from a single passage penned by Judge Farmer in *Slawson v. Fast Food Enterprises*, 671 So. 2d 255 (Fla. 4th DCA 1995), that was made in an entirely different context. The plaintiff in that case was raped in a Burger King restroom and sued both the rapist and also Burger King for negligently failing to prevent the

rape. *Id.* at 256. The question was whether Burger King's liability should be reduced by the "fault" of the rapist. *Id.* In the course of reaching the unremarkable conclusion that a negligent tortfeasor's liability cannot be reduced by the fault of the person it was negligent for failing to stop, Judge Farmer stated,

> [L]ooking "to the substance of the action and not the conclusory terms used by the parties," we conclude that the substance of this action was an intentional tort, not merely negligence. In limiting apportionment to negligence cases, the legislature expressly excluded actions "**based upon** an intentional tort." The drafters did not say **including** an intentional tort; or **alleging** an intentional tort; or **against parties charged with** an intentional tort. The words chosen, "based upon an intentional tort," imply to us the necessity to inquire whether the entire action against or involving multiple parties is founded or constructed on an intentional tort. In other words, the issue is whether an action comprehending one or more negligent torts actually has at its core an intentional tort by someone.

Id. at 258. This Court quoted this language with approval in *Merrill Crossings*, 705 So. 2d at 563, when it held that two defendants who were negligent for failing to prevent a shooting were not entitled to have their liability reduced by the fault of the shooter.

If RJR and the majority below were correct in interpreting this language to mean that comparative fault either applies or does not apply to an entire case, one would presume that comparative fault would not apply in those kinds of cases. But, in fact, comparative fault **was applied** in *Merrill Crossings* to reduce the liability of each of the negligent tortfeasors (Merrill Crossings and Wal-Mart) even though

their liability was not reduced by the fault of the shooter.[7] Ironically, the same district court that issued the decision below emphasized exactly this point in making clear that comparative fault does apply to allocate fault among negligent tortfeasors even though it does not apply **in the same case** to allocate the fault of an intentional tortfeasor. *Burns Int'l Sec. Servs. Inc. of Fla. v. Phila. Indem. Ins. Co.*, 899 So. 2d 361, 366 (Fla. 4th DCA 2005).

Mrs. Schoeff's position is consistent with the fact that *Merrill Crossings* and *Burns* contemplated that in the same lawsuit, the comparative fault defense would apply to reduce a defendant's liability due to the fault of other negligent tortfeasors, but would not reduce the same defendant's liability by the fault of an intentional tortfeasor. Stated differently, these two decisions foreclose RJR's all-or-nothing argument that comparative fault either applies to all of the claims in a lawsuit or to none of them. Florida law is not so inflexible. Because the comparative fault statute cannot reasonably be read to compel such a bizarre result at direct odds with the legislative policy embodied by the intentional tort exception, the majority below erred in affirming the reduction of RJR's damages.

C. Regardless, Intentional Torts Do Form the Core of *Engle* Cases.

Even if Florida followed the rigid, all-or-nothing rule, this Court should follow *Sury* in finding that the "core" of *Engle* progeny actions is intentional

[7] There was only one negligent tortfeasor in *Slawson*.

misconduct. The majority below never came to grips with the fact that at the core of the negligence and strict liability claims is that RJR intentionally designed its products in a defective manner. Juries in these cases do not hear any evidence about simple mistakes made by these defendants. These juries award millions of dollars in punitive damages because all of the evidence, regardless of which particular claim it is offered to support, demonstrates a callous and intentional course of tortious conduct. Where, as here, the jury found that the smoker was fooled by the defendant's fraud, there can be no doubt that the core of the smoker's claims was fraud. But the defendant's tortious conduct is no less intentional in cases where the smoker was not fooled and the defendant therefore prevails on the fraud and concealment claims.

The trial court's puzzling analysis only highlights the degree to which these cases are about intentional misconduct – whether one is talking about the fraud and conspiracy claims or the gravamen of the negligence and strict liability claims:

> To argue the genesis of *Engle* was not founded in tort, and thus comparative fault not subject to reducing the verdict is to argue in the theater of the absurd. An attorney sued "Big Tobacco" in *Engle* and argued the defendants negligently **designed** cigarettes; **manipulated** the nicotine in cigarettes; **produced advertisement and marketing strategies destined to mislead** the public; and other non intentional "tortuous" misconduct, specifically sounded in negligence and product liability.
>
> Concurrent with the negligence and strict liability claims plaintiffs brought **intentional tort claims for fraud and**

> **misrepresentation** which have led to several juries awarding punitive damages on the intentional tort claims.

(R44:8478 (emphases added).) This analysis provides no cogent reason for any conclusion that the core of these cases is merely negligent conduct by these defendants. These defendants intended every bad thing they did, and the fact that the law would have held them liable even if their conduct was merely negligent does not change the core of this litigation. *See R.J. Reynolds Tobacco Co. v. Calloway*, No. 4D12-3337, 2016 WL 64296, at *6 (Taylor, J., concurring specially) ("Even though strict liability and negligence claims are included in the complaint, the lawsuit essentially alleges intentional misconduct: that the tobacco company intentionally designed its products in a defective manner and pursued a callous and intentional course of tortious conduct by fraudulent concealment."). To the extent a contrary conclusion can be divined from the trial court's order, it is unreasonable.

One final irony of this case demonstrates the absurdity of the suggestion that the fraud and conspiracy claims were not at the core of this case. Consistent with a Fourth District decision that is no longer good law, *R.J. Reynolds Tobacco Co. v. Ciccone*, 123 So. 3d 604, 616-67 (Fla. 2013), *quashed*, 190 So. 3d 1028, 1041 (Fla. 2016) (citing *Soffer v. R.J. Reynolds Tobacco Co.*, 187 So. 3d 1219 (Fla. 2016)), the jury in this case was only allowed to consider punitive damages on the fraud and conspiracy claims. (*See* R39:7573 (directing jury it could answer punitive

damages question only if it found for Mrs. Schoeff on the fraud or conspiracy claims).) How the majority could find that claims and allegations that literally quadrupled the damages were not at the "core" of this lawsuit defies explanation.

CONCLUSION

For all of these reasons, the Court should quash the decision below as to its holdings regarding punitive damages and comparative fault. It should disapprove *Townsend* to the extent it holds that a punitive damage award of any amount less than $100 million in an *Engle* progeny case violates due process. It should disapprove *Foreline*, *Green*, and *Hiott* to the extent they hold a plaintiff waives the intentional tort exception to comparative fault by not making it clear the plaintiff's damages will not be reduced by the allocation of fault. The Court should remand with directions for the trial court to enter judgment for the full amount of compensatory and punitive damages awarded by the jury.

Respectfully submitted,

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