Supreme Court of Florida

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

JOAN SCHOEFF,
as Personal Representative of the Estate of James Schoeff,
Petitioner,

v.

R. J. REYNOLDS TOBACCO CO.,
Respondent.

BRIEF OF AMICUS CURIAE
FLORIDA JUSTICE ASSOCIATION
SUPPORTING PETITIONER

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The Florida Justice Association (*nee* Florida Academy of Trial Lawyers) is a voluntary organization committed to upholding the civil justice system for asserting individual rights. It is dedicated to the proposition that access to courts is fundamental in our democracy. All individuals must be able to seek justice and defend their natural rights in Court as citizens and residents of Florida.

The Florida Justice Association was founded in 1961 to represent consumers. It seeks to ensure that commerce and industry accept fair responsibility for their actions when they are negligent and irresponsible. It tries to protect consumers in all branches of government, and in the political and public arenas.

Today the FJA continues to strive to advocate and defend Florida citizens' rights – even when opposing the most powerful special interests.

Issue of Concern

> *Under this Court's construction in* Merrill Crossings Associates v. McDonald, 705 So.2d 560 (Fla. 1997), *and* Stellas v. Alamo Rent-A-Car Inc., 702 So.2d 232 (Fla. 1997), *does apportionment under the Comparative Fault Statute, § 768.81, Fla. Stat. (1992), apply in an action alleging* **and proving** *intentional torts of fraudulent concealment and conspiracy to conceal life-threatening product dangers, as well as negligence in marketing a dangerous product*?

Discussion

One issue in this case concerns the following provisions from the Comparative Fault Statute, § 768.81, Florida Statutes (1992), applying in cases after *Engle v. Liggett Group, Inc*., 945 So.2d 1246 (Fla. 2006) (*Engle* progeny cases):

> (1)(c) As used in this section, the term … ***Negligence action****" means*, without limitation, *a* ***civil action*** for damages based upon *a theory of negligence*, strict liability, products liability, professional malpractice whether couched in terms of contract or tort, or breach of warranty and like theories. *The substance of an* ***action****,* not conclusory terms used by a party, *determines whether an* ***action*** *is a* ***negligence action***.
>
> …
>
> (3) **Apportionment of damages**.– *In a* ***negligence action***, the court shall enter judgment against each party liable on the basis of such party's percentage of fault and not on the basis of the doctrine of joint and several liability.
>
> …
>
> (4)(a) This section applies to ***negligence cases***. For purposes of this section, "***negligence cases***" includes … *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 … .*" [e.s.]

The ordinary tools for discerning the meaning of legal terminology are text, context and plain meaning of words used. *QBE Ins. Corp. v. Chalfonte Condo. Apt. Ass'n*, 94 So.3d 541 (Fla. 2012). One cardinal rule of statutory construction is to give effect to all words touching the specific intention the Legislature expressed in the statute. *City of Tampa v. Thatcher Glass Corp.*, 445 So. 2d 578, 579 (Fla. 1984). In applying these tools here, it is obvious that the one – the indisputably plain – intention made manifest throughout this statute is just this: to bar apportionment for intentional torts while requiring it solely for negligence claims.

The Comparative Fault statute uses different terms for *claims* and *suits*, thereby

insinuating possible divergences in meaning. In subsections (1), (2) and (3), the term "***negligence*** *action*" is defined as "***a civil*** *action for damages*." Then in subsection (4) the term "*negligence* ***cases***" is defined to include "*civil* ***actions*** *for damages*." Reynolds argues these terms mean that damages for the entire case comprising all claims decided must be apportioned, even when both negligence torts and intentional torts have been tried and adjudicated. Reynolds is certifiably wrong because that would eliminate the statute's express exclusion of intentional torts from apportionment whenever an intentional tort is tried with negligence torts.

Many years ago, this Court observed that:

> "In any legal sense '*case*,' '*cause*,' '*action*,' and '*suit*' are convertible[1] terms, each meaning a proceeding in a court … and this court … has held that the words '*case*' or '*cause*,' when used in legal terms, are generally understood as meaning a judicial procedure for the determination of a controversy between parties where rights are enforced and protected or wrongs are prevented or redressed." [e.s.]

State Road Dep't v. Crill, 128 So. 412, 415 (Fla. 1930). Hence the generally understood meanings of these terms has long been deemed flexible, subject to changing context. So it is useful to look for analogues to aid in interpretation.

One reasonably suitable interpretative device could be case decisions where more than a single theory of liability is presented – as here*!* – and issues are raised that may apply to only one theory but not the other. In *Crump v. Gold House*

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1 COLLINS ENGLISH DICT. (search term *convertible*) *adjective* "changeable, interchangeable, exchangeable, adjustable, adaptable".

Restaurants Inc., 96 So.2d 215 (Fla. 1957), this Court held that "the word '*action*' as used in the two-dismissal Rule of Civil Procedure[2] denotes the entire controversy, whereas '*claim*' refers to what has traditionally been termed '*cause of action*.'" 96 So.2d at 218. Significantly the construction in rule 1.420(a)(1), "***based on*** … *the same claim*," is identical to the Comparative Fault Statute's term in § 768.81(4)(b), namely, "*action* ***based upon*** *an intentional tort*."

In the context of this statutory "two-issue rule," a reviewing Court must focus on the separate theories of liability, variously called *claims*, *causes of action* or *defenses*, and not on the entire action.[3] Under *Crump*, the Comparative Fault Statute should be construed to be based on only individual "*claims*" or "*causes of action*," and not to entire actions, thus apportioning only negligence claims but not intentional tort claims.

It is of course axiomatic under article V, section 2, Florida Constitution (1972), that this Court alone has the power to adopt rules of procedure for the Court system. Thus the terms used in the Comparative Fault Statute must be construed in harmony

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[2] Fla. R. Civ. P. 1.420(a)(1) (dismissal operates as an adjudication on the merits when plaintiff has once dismissed *an* ***action based on*** *the same* ***claim***).

[3] *See Barth v. Khubani*, 748 So.2d 260, 261-2 (Fla. 1999) ("When a general verdict for the plaintiff is on review, the rule is applied by focusing on the causes of action, such that an appellate claim of error raised by the defendant as to one cause of action cannot be the basis for reversal where two or more theories of liability (or causes of action) were presented to the jury); and *Whitman v. Castlewood Int'l Corp*., 383 So.2d 618, 619 (Fla. 1980) (appellant unable to establish prejudice, and reversal improper, when no objection made to form of verdict and no error shown in one of two issues decided by jury).

with the Florida Rules of Civil Procedure adopted by this Court for such provisions.

In that Statute, *actions* may be either *civil actions* or *cases* or both. But rule 1.010 says that the Florida Rules of Civil Procedure apply to "all *actions* of a civil nature," and rule 1.040 states there is "one form of *action*, to be known as a civil *action*" meaning the entire proceeding. [e.s.] As for theories of liability raised in an *action*, rule 1.110(a) requires that "[a] pleading which sets forth a ***claim*** *for relief*, whether an original ***claim***, counter***claim***, cross***claim***, or third-party ***claim*** must state a ***cause of action***." [e.s.] Clearly the Rules of Civil Procedure use the terms ***claims*** *and* ***causes of action*** to describe individual theories of liability, rather than ***cases*** or ***actions***. Thus the statutory terms ***negligence actions*** and ***negligence cases*** should properly and reasonably be understood to equate with – and mean – ***negligence claims*** and ***negligence causes of action***.

In connection with the Comparative Fault Statute, in *Grobman v. Posey*, 863 So.2d 1230, 1234 (Fla. 4th DCA 2003), as to the issue whether the statute applies, the Court held that the decision demands "more than determining whether the ***case*** at hand is a negligence ***case***; one must examine the ***cause of action*** asserted …." [e.s.]. So under the Comparative Fault Statute, the Court must examine each individual *claim* or *cause of action* to ascertain whether it is based on negligence or instead on intentional tort. Cases involving mixed theories of claims or causes of action in both negligence and intentional tort can only then be properly analyzed as to decide whether the damages awarded apply exclusively to the one or the other

or both.

Textually and contextually the statutory terms reveal that its purpose is to apply its provisions to discrete causes of action rather than entire actions because alternative claims have different theories of liability. If – despite the statute's phrasing – apportionment were to be applied to an entire action comprising damages for both negligence claims and intentional tort claims, that would defeat its essential purpose to build a barrier between negligence and intentional torts on apportionment. Negligence claims must be apportioned; intentional tort claims must be left alone.

Again, it is perfectly obvious that the defined statutory purpose is to restrict apportionment to only those damages awarded in *claims* or *causes of action* alleging negligence and lacking any intentional tort at the base or as an element. At the same time the purpose is to equally forbid any apportionment of damages awarded in a *claim* or *cause of action* based on intentional tort. It follows that apportionment cannot possibly apply to entire actions. It is restricted to specific claims or causes of action in which there is no intentional tort being directly or indirectly compensated.

This interpretation of § 768.81 is compelled by a long-established principle of statutory construction. Statutes in derogation of the common law must be strictly construed and should not be interpreted to displace the common law any more than is necessary. *Major League Baseball v. Morsani*, 790 So.2d 1071, 1077-78 (Fla.

2001) (statute enacted in derogation of the common law must be strictly construed); *R.J. Reynolds Tobacco Co. v. Sury*, 118 So.3d 849 (Fla. 1st DCA 2013) (same). Even after Florida adopted comparative negligence, intentional wrongdoers could not use comparative fault to reduce the recovery. The common law long recognized that intentional torts are different; e.g., a landowner could not escape liability for failing to prevent a foreseeable assault by claiming the intentional conduct of the assaulter was an intervening act.[4]

Reynolds argument that the statute should be liberally construed to extend to an entire action with multiple claims or causes of action of both negligence and intentional torts tried jointly would not be consistent with the narrow construction fitting the statute's purpose. Doing as Reynolds argues would effectively read the exception for intentional tort claims right out of statute and out of the common law.[5]

This Court's holding in *Merrill Crossings Associates v. McDonald*, 705 So.2d 560 (Fla. 1997), cannot possibly support the argument of Reynolds:

> "the language excluding actions 'based on an intentional tort' from the statute gives effect to a public policy that *negligent tortfeasors … should not be permitted to reduce their liability by shifting it to another tortfeasor* whose intentional criminal conduct was a foreseeable result of their negligence."

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[4] *Holley v. Mt. Zion Terrace Apts. Inc*., 382 So.2d 98 (Fla. 3rd DCA 1980).

[5] *Island City Flying Service v. General Electric Credit Corp*., 585 So.2d 274 (Fla. 1991).

705 So.2d at 562-63. It held that the trial Court properly accepted the argument of plaintiff ("*contention*") that the substance of the action arose from "being intentionally shot and therefore was based on an intentional tort." 705 So.2d at 561. Courts should give no weight to protestations the case is based solely on negligence because tortfeasors "should not be permitted to reduce their liability *by shifting it to another tortfeasor whose intentional criminal conduct* was a foreseeable result of their negligence." [e.s.] 705 So.2d at 562.

The theoretical nature of a cause of action is question of law. The only cause of action alleged in *Merrill Crossings* was simple negligence in failing to keep its premises safe for its business invitees. But as a matter of law that single claim was based on an intentional tort. Quoting *Slawson v. Fast Food Enterprises*, 671 So.2d 255 (Fla. 4th DCA 1996), this Court said:

> "[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.' [e.s.] The drafters did not say *including* an intentional tort; or *alleging* an intentional tort; or *against parties charged with* 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."
>
> … "it would be irrational to allow a party who negligently fails to provide reasonable security measures to reduce its liability because there is an intervening intentional tort, where the intervening intentional tort is exactly what the security measures are supposed to protect against." [e.s.]

705 So.2d at 563.[6]

And so despite the statute and its authoritative construction by this Court, Reynolds argues it is entitled to apportion all damages for intentional torts of fraudulent concealment and conspiring to hide its false representations. Doing so transforms the statute into its antithesis.

And the District Court's transformation of the statute conflicts with *Merrill Crossings* and *Slawson*. It did so without suggesting any error in legal analysis in *Merrill Crossings*, or any significant change in circumstances, nor that a doctrinal change is necessary for stability, predictability and respect for judicial authority. It's reasoning is not coherent with the facts resolved by the Jury and relevant legal authorities on claims seeking punitive damages.

R.J. Reynolds Tobacco Co. v. Sury, 118 So.3d 849 (Fla. 1st DCA 2013), rightly holds that the "core" of *Engle* cases ***is*** the intentional misconduct of tobacco companies in continuing to market their products under a shroud of secrecy within a conspiracy to hide their grave dangers to human consumers. An array of reported cases show tobacco companies repeatedly defending against large awards of ***punitive*** damages. Punitive damages are especially appropriate when given for dishonesty and malicious greed of a kind the most reprehensible.[7]

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[6] *See also Stellas v. Alamo Rent-A-Car Inc.*, 702 So.2d 232 (Fla. 1997) (also approving and following *Slawson*).

[7] Reynolds has lost repeatedly on this issue. The holding that an *Engle* progeny case is based on a cause of action *in negligence* must have come as colossal news

So when an intentional tort has been actually pleaded in the case, there is no basis to hold that the case or cause of action is based on negligence. Indeed, as *Merrill Crossings* shows, it is not necessary even to allege a claim or cause of action in intentional tort at all for a case to be based on intentional tortious conduct. On the other hand, when the case includes a claim or cause of action for an intentional tort, as a matter of law that case or cause of action must be deemed based on intentional tort under the Comparative Fault Statute.

Both the rationale and result of Judge Tuter and the Fourth District pervert the statute, as well as public policy and defy contrary precedent. If one accepts the logic of Judge Tuter and the Fourth District Court, it implies that all past comparable *Engle* decisions should have been based on negligence. And that would be ludicrous because no trial Judge can allow a Jury to consider punitive damages when the action is based only on simple negligence. Indeed Judge Tuter had properly allowed the punitive claims to go to the Jury and then had properly refused to disturb the Jury's award of punitive damages. Only in post trial motions did he somehow decide that he had not sat in trial on any intentional torts; the case had morphed into negligence only, thus to apportion damages accordingly.

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to this repeat intentional offender. One imagines it reacting like the guilty perp at the lineup when the witness points to the wrong man: slowly release very bated breath, quickly assume mien of Saint Francis … .

Not so long ago this Court stated its dedication to the ancient doctrine of *stare decisis* and the policy of not changing legal rules from case to case:

> "In Florida, the 'presumption in favor of stare decisis is strong' … [but] not unwavering. The doctrine … bends where there has been a significant change in circumstances since the adoption of the legal rule or where there has been an error in legal analysis.'
>
> *Stare decisis does not yield based on a conclusion that a precedent is merely erroneous. The gravity of the error and the impact of departing from precedent must be carefully assessed*. …
>
> And of course reliance interests are of particular relevance because [*adherence*] *to precedent promotes stability, predictability, and respect for judicial authority*." [e.s.]

Brown v. Nagelhout, 84 So.3d 304, 309 (Fla. 2012). The Courts below defied *Merrill Crossings*, gave short shrift to *Slawson*, and flouted stare decisis. Respondent will doubtlessly employ all of Thor's thunderbolts to save the erroneous decisions in this case. But if the construction this Court has placed on the Comparative Fault Statute is not what the Legislature intended, let them enact corrective legislation. Until then, the Florida Justice Association prays that this Court stand by its earlier decision.

Conclusion

This case presents an opportunity to remove all doubts. The Comparative Fault Statute means exactly what it says. A case or claim alleging an intentional tort is based on an intentional tort in the same way that a marble palace is made of marble. Many *Engle* progeny actions are based on intentional or grossly negligent acts so

that Juries may consider punitive damages.[8] No diminution of damages is proper when Reynolds was both intentionally culpable and negligent.

Certificate re Font

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Certificate of Service

I hereby certify that on this 22nd day of July, 2016, this Brief was filed electronically in compliance with Fla. R. Jud. Adm. 2.515 and 2.516(e).

I further certify that on this 22nd day of July, 2016, this Brief was served electronically in compliance with Fla. R. Jud. Adm. 2.516(b)(2)(A) on all persons on the Service List.

Respectfully submitted,
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[8] *See Sofer v. R.J. Reynolds Tobacco Co.*, 187 So.3d 1219, 1222 (Fla. 2016) (individual members of *Engle* class are not prevented from seeking punitive damages on all claims properly raised in individual actions; plaintiffs must prove intentional or grossly negligent conduct so reckless or wanting in care that it constituted a conscious disregard or indifference to life, safety or rights of persons exposed to such conduct).

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