Case No. SC15-2233

SUPREME COURT OF FLORIDA

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

Plaintiff/Petitioner,

v.

R.J. REYNOLDS TOBACCO CO.,

Defendant/Respondent.

On Review from a Decision of the
Fourth District Court of Appeal

ANSWER BRIEF OF RESPONDENT R.J. REYNOLDS TOBACCO COMPANY

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STATEMENT OF THE CASE

This appeal presents the question whether Florida's comparative-fault statute applies to *Engle*-progeny cases in which the plaintiff has prevailed on an intentional-tort claim. The Fourth District held that the statute applies, and we submit that its decision was correct. However, this Court need not address that issue because, as both courts below concluded, the plaintiff here waived any right to an unreduced award through her conduct at trial. Still less does the Court need to address the Fourth District's separate, highly factbound holding that the punitive award in this case must be set aside as excessive. That holding does not implicate a conflict, and would require resolving arguments that were neither raised nor decided below.

A. *Engle* Class Proceedings

1. In 1994, the *Engle* class action was filed against various cigarette manufacturers, including defendant R.J. Reynolds Tobacco Company. The class definition included all Florida smokers who had contracted diseases caused by an addiction to cigarettes. The class raised various tort claims, including ones for strict liability, negligence, fraudulent concealment, and conspiracy to conceal. *Engle v. Liggett Grp., Inc.*, 945 So. 2d 1246, 1255–57 & n.4 (Fla. 2006).

The trial court developed a three-phase trial plan. In Phase I, the jury found that the defendants marketed defective cigarettes, were negligent, and concealed and agreed to conceal information about the health or addiction risks of smoking.

Id. at 1277. In Phase II, the same jury found that the defendants were liable to three class representatives and awarded the entire class about $145 billion in punitive damages, including about $36 billion against Reynolds alone. *Id.* at 1257; *Liggett Grp. Inc. v. Engle*, 853 So. 2d 434, 457 n.29 (Fla. 3d DCA 2003). The defendants appealed before Phase III, in which new juries were to determine liability to the remaining class members. *Engle*, 945 So. 2d at 1258.

2. On appeal, the Third District decertified the class and held that the punitive awards were excessive. *Engle*, 853 So. 2d at 442–58.

This Court affirmed in part and reversed in part. It agreed that the punitive awards were excessive, 945 So. 2d at 1265 n.8, and that continued class treatment was infeasible "because individualized issues such as . . . comparative fault . . . predominate," *id.* at 1268. The Court nevertheless authorized former class members to file individual actions and held that some of the Phase I findings—including those of defect, negligence, concealment, and conspiracy—would have "res judicata" effect in those actions. *Id.* at 1269, 1270 n.12, 1277. In the wake of that decision, "*Engle*-progeny" cases were filed on behalf of more than 8,000 plaintiffs claiming to be *Engle* class members.

B. Proceedings In This Case

1. In 2007, Plaintiff Joan Schoeff sued Reynolds for the death of her husband, James Schoeff, from smoking. R.1:1–10. She alleged that he had been an

Engle class member, and she raised claims for strict liability, negligence, concealment, and conspiracy. R.4:623–29. In her complaint, she acknowledged that her husband bore partial responsibility for his injuries, and she committed to "seek apportionment of fault" on her strict-liability and negligence claims. *Id.* at 627.

The trial proceeded in two phases. The first phase addressed issues of class membership, liability, comparative fault, compensatory damages, and entitlement to punitive damages. Like other progeny plaintiffs, Mrs. Schoeff relied entirely on the *Engle* Phase I findings to establish the conduct elements of her claims. *See* T.19:2213–16.

Before the jury, Mrs. Schoeff repeatedly emphasized her admission of partial fault and her acceptance of an apportionment. *See*, *e.g.*, T.3:216 (voir dire); T.5:480, 531 (opening); T.19:2193–94, 2196, 2216–17, 2219, 2228, 2239–46 (closing). For example, she reminded the jury in closing that she had taken the position from "the very first pleading" that her husband "bear[s] some responsibility." T.19:2193–94. She then contrasted that position with Reynolds's refusal to admit liability, at one point telling the jury, "Just because we accept responsibility and they don't, that doesn't mean they're not responsible. They don't accept responsibility, they don't. They have to be found responsible." *Id.* at 2216. And she urged the jury to allocate fault by comparing her husband's negligence with Reynolds's alleged intentional misconduct, asking them on one occasion, "How do you

divide the responsibility between . . . somebody who thinks that filters are helping them, [and] the other parties who know that filters are a scam?" *Id.* at 2242–43.

The jury found for Mrs. Schoeff on all her claims, and it assigned 25% of the fault to her husband and 75% to Reynolds. R.39:7572–74. In addition, even though Mrs. Schoeff told the jury that an award of $9.5 million in noneconomic compensatory damages would be "reasonable and fair in light of the evidence," T.19:2269, the jury awarded her $10.5 million, R.39:7574. Finally, the jury found that Mrs. Schoeff was entitled to punitive damages. *Id.*

The second phase of the trial addressed the amount of the punitive award. Mrs. Schoeff's counsel asked the jury to "award $25 million" in punitive damages and repeatedly urged the jury to award no more: "[Y]ou may think that's too low, but we urge you not to go above that. Please do not go above 25 million. Do not. She doesn't want that. Do not go above that." T.21:2512. Nonetheless, the jury awarded her $30 million. R.39:7590.

2. Despite her earlier commitment to seek apportionment, Mrs. Schoeff proposed a final judgment of $40.5 million that did not account for the jury's finding of comparative fault. Reynolds opposed this proposal, explaining that her compensatory award must be reduced by 25% under Florida's comparative-fault statute. R.42:8117–26. In response, Mrs. Schoeff filed a memorandum contending

both that the comparative-fault statute did not apply and that she had not waived the right to a full award through her conduct at trial. R.43:8365–71.

The trial court granted the motion and reduced the compensatory award to $7,785,000. R.44:8477–79. It found that Mrs. Schoeff's statements to the jury barred her from seeking an unreduced award. *Id.* at 8478. As it noted, from "the onset of trial . . . through closing, [Mrs. Schoeff] acknowledged [her husband] bore some degree of fault on the negligence and strict liability claims." *Id.* at 8477. For example, "[t]he prospective jury members were told this in voir dire," and "[b]oth sides argued the degree of fault of the smoker." *Id.* at 8477–78. The court thus found that the "direct admissions by the Plaintiff's attorney admitting that the plaintiff bears some degree of fault" would be "misleading" absent a reduction. *Id.* at 8478. The court also held that the comparative-fault statute applies to this action, for to contend otherwise would be "to argue in the theater of the absurd." *Id.*

Reynolds also moved for a remittitur of the punitive award. SR:457–73. The trial court agreed with Reynolds that the punitive award was excessive. R.44:8479–80. As it explained, Mrs. Schoeff's "counsel specifically asked the jury NOT to award punitive damages which exceeded 25 million dollars," and the court could "find no logical or sound reason for the jury to have exceeded the award sought by [her] counsel." *Id.* at 8479. It was therefore "inclined to remit the punitive damages verdict to what was asked for (25) million dollars." *Id.* at 8480.

The court nonetheless denied the motion because it did not want to give Reynolds the option of a new trial on punitive damages. It acknowledged that in *Waste Management, Inc. v. Mora*, 940 So. 2d 1105 (Fla. 2006), this Court had "held either the Plaintiff or Defendant can claim to be a 'party adversely affected'" by a remittitur—and thus can insist on a new trial on damages, rather than a remittitur, as a remedy for excessiveness. R.44:8479. The court nevertheless declared that, despite *Mora*, it did "NOT believe the Defendant is entitled to a new trial on punitive damages and would NOT be the party adversely affected by a remittitur." *Id.* The court thus ruled that it had "no alternative but to DENY the request to remit the punitive damages verdict." *Id.* Accordingly, it entered a final judgment awarding Mrs. Schoeff $7.875 million in compensatory damages and $30 million in punitive damages, for a total of $37.875 million. *Id.* at 8481.

3. On appeal, the Fourth District affirmed the reduction of the compensatory award on two independent grounds. First, it held that the trial court had not abused its discretion in finding that Mrs. Schoeff, through her conduct at trial, waived any right to an unreduced award. It explained that her counsel had "argued that the jury should consider [her] concession [of partial fault] when coming up with its figure for comparative fault and should find Mr. Schoeff less at fault due to RJR's fraudulent concealment." *R.J. Reynolds Tobacco Co. v. Schoeff*, 178 So. 3d 487, 494 (Fla. 4th DCA 2015) (App. A). Therefore, "reversing would unfairly allow

Plaintiff to 'have it both ways,'" as "[i]t would be inequitable to allow Plaintiff to use 'the admission that Mr. Schoeff was partly at fault as a tactic to secure an advantage with the jury throughout the trial' and then completely avoid comparative fault after the verdict." *Id.* at 495 (quoting *R.J. Reynolds Tobacco Co. v. Hiott*, 129 So. 3d 473, 481 (Fla. 1st DCA 2014)) (brackets omitted). Second, and in the "alternative," the court held that the comparative-fault statute required a reduction. Citing *Merrill Crossings Associates v. McDonald*, 705 So. 2d 560 (Fla. 1997), it explained that the applicability of the statute turns on the nature of "the entire action . . . 'at its core,'" rather than on individual claims within the action. 178 So. 3d at 495. It then agreed with the trial court that this action "at its core" was "a products liability suit," but noted a conflict with *R.J. Reynolds Tobacco Co. v. Sury*, 118 So. 3d 849 (Fla. 1st DCA 2013), on this point. 178 So. 3d at 495–96.

The Fourth District also held that the $30-million punitive award must be set aside as excessive. Applying the relevant factors under Florida and federal law, it explained that this was the largest punitive award rendered in any progeny case (not counting those already set aside on appeal), was stacked on top of an already sizeable $10.5-million noneconomic compensatory award, and was rendered even though "Plaintiff's counsel begged the jury not to award her more than $25 million and the trial court found that there was 'no logical or sound reason for the jury to

have exceeded'" that request. *Id.* at 490–93. The Fourth District thus ordered the trial court to grant a remittitur or hold a new trial on punitive damages. *Id.* at 493.[1]

Mrs. Schoeff sought review in this Court primarily on the basis of the conflict between the decision below and *Sury*. Pet. Juris. Br. 1–7. Over two dissents, this Court granted review.

SUMMARY OF ARGUMENT

I. For two independent reasons, the Fourth District correctly affirmed the reduction of Mrs. Schoeff's compensatory award for comparative fault.

A. The trial court did not abuse its discretion in finding that Mrs. Schoeff had waived any right to an unreduced award. The record contains ample support for that finding, which was based on her frequent reminders to the jury, from voir dire through closing, that she had admitted partial responsibility. Through this strategy, she sought to gain added credibility with the jurors, to increase the likelihood of a larger compensatory award, and to obtain a more favorable allocation of fault. Accordingly, the trial court was well within its discretion to find that she could no longer request a full award after trial.

B. In any event, Florida's comparative-fault statute requires a reduction of the award. As its text makes clear, and as this Court's construction confirms,

[1] Judge Taylor dissented on the issues of comparative fault and remittitur, 178 So. 3d at 496, but agreed with the majority that the comparative-fault statute requires a court to view an action "in its entirety," *id.* at 497.

whether the statute applies turns on the nature of an entire "action" as opposed to individual claims within it. Moreover, *Engle*-progeny cases are most properly classified as negligence or products-liability "actions" covered by the statute.

II. This Court should not disturb the Fourth District's punitive-damages ruling.

A. There is no good reason for this Court to exercise its discretionary power to review the Fourth District's ruling that the punitive award must be set aside as excessive. That highly factbound ruling does not implicate a conflict, and, in soliciting a sweeping precedent on punitive damages, Mrs. Schoeff advances various arguments that were neither raised nor resolved below.

B. If this Court reaches the merits, it should affirm the Fourth District. The trial court itself found that the punitive award here was excessive because it could discern no logical basis, on the facts of this case, for the jury to have awarded more than $25 million. Although the trial court then refused to give that determination any legal effect because of its disagreement with *Mora*, that error does not render the underlying excessiveness finding an abuse of discretion. Moreover, the $30-million award cannot stand, as awards of this magnitude would become clearly excessive in the aggregate given the thousands of progeny cases pending against Reynolds. Finally, the award here, stacked on top of an exceedingly generous compensatory award of $10.5 million, is excessive even considered in isolation.

C. Under Florida's remittitur statute and this Court's precedent, Reynolds is entitled to elect, as a remedy for excessiveness, either remittitur of the punitive award or a new trial on punitive damages.

ARGUMENT

I. THE FOURTH DISTRICT CORRECTLY AFFIRMED THE TRIAL COURT'S COMPARATIVE-FAULT REDUCTION

Both the trial court and the Fourth District concluded that a comparative-fault reduction was warranted here for two independent reasons: (1) Mrs. Schoeff had waived any right to an unreduced compensatory award through her conduct at trial; and (2) the comparative-fault statute requires a reduction of the award. As Mrs. Schoeff correctly notes, the waiver finding is reviewed for an abuse of discretion, and the statutory issue is addressed *de novo*. Pet. Br. 32.

A. The Trial Court's Waiver Finding Was Within Its Discretion

1. A Party May Waive Any Right To An Unreduced Award Through Its Conduct At Trial

"'A party may waive any right to which he is legally entitled, whether secured by contract, conferred by statute, or guaranteed by the Constitution.'" *DK Arena, Inc. v. EB Acquisitions I, LLC*, 112 So. 3d 85, 97 (Fla. 2013) (alteration omitted). Although waivers are often express, a party may also "waive[]" a right by "taking action inconsistent with that right" during litigation. *O'Keefe Architects, Inc. v. CED Constr. Partners, Ltd.*, 944 So. 2d 181, 185 n.4 (Fla. 2006). For example, a defendant who "seek[s] affirmative relief" from a court "waives a chal-

lenge to personal jurisdiction," as "such requests are logically inconsistent with an initial defense of lack of jurisdiction." *Babcock v. Whatmore*, 707 So. 2d 702, 704 (Fla. 1998). Likewise, a party "waive[s]" the right to challenge an "invited error," as it would be improper for a party to "'invite error at trial and then take advantage of the error on appeal.'" *Universal Ins. Co. of N. Am. v. Warfel*, 82 So. 3d 47, 65 (Fla. 2012). In this respect, waiver doctrine mirrors the well-settled estoppel rule that "a party cannot . . . in the course of litigation . . . occupy inconsistent positions." *Hodkin v. Perry*, 88 So. 2d 139, 140 (Fla. 1956); *accord* 22 Fla. Jur. 2d *Estoppel and Waiver* § 57 (2016). Any other rule would allow litigants to "'mak[e] a mockery of justice'" by "'playing fast and loose with the courts.'" *Carter v. State*, 980 So. 2d 473, 484 (Fla. 2008).

Applying these basic principles, all three district courts of appeal to consider the issue have held that progeny plaintiffs may waive any right to an unreduced award through their conduct at trial. In this case, the Fourth District followed *Hiott*, where the First District affirmed a waiver determination because the plaintiff had not only "failed to inform the jury that she intended to reserve her right to assert the inapplicability of comparative fault to any of her claims," but had "encouraged the jury, from voir dire through closing argument, that she had accepted that her deceased husband was partially at fault for his smoking-related illness and death." 129 So. 3d at 480–81. As the First District explained, the plaintiff "'used

the admission that [her husband] was partly at fault as a tactic to secure an advantage with the jury throughout the trial,'" and thus "'cannot now seek to have it both ways by avoiding comparative fault after the verdict.'" *Id.* at 481.

The Fifth District agrees. In *Philip Morris USA, Inc. v. Green*, 175 So. 3d 312 (Fla. 5th DCA 2015), that court reversed a trial court's failure to reduce for comparative fault. The court held that the plaintiff's "repeated, explicit, tactical directions encouraging the jury to find [the smoker] partially at fault and to determine what percentage of fault was to be shared by each of the parties will be given binding effect as to all claims." *Id.* at 315; *see also id.* ("Appellee's repeated statements, inviting the jury to find shared responsibility, could not have left the jury with any other impression than that Appellee was accepting some measure of fault with respect to each of her claims."). The court explained that, "whether labeled 'estoppel' or 'waiver,'" allowing the plaintiff to change course after the verdict would be "misleading, unfair, and unacceptable." *Id.* at 314.

2. The Waiver Finding Here Was Not An Abuse Of Discretion

Given this legal background, the trial court was well within its discretion in finding waiver here. As that court explained, from "the onset of the trial . . . through closing," Mrs. Schoeff repeatedly told the jury that her husband "bore some degree of fault." R.44:8477; *see id.* at 8477–78. It further found that by pursuing this strategy during trial but then resisting any reduction following the ver-

dict, Mrs. Schoeff "misle[d]" the jury and thus waived any right to an unreduced award. *Id.* at 8478. That finding, which "require[d] a factual inquiry" and "evaluate[d] the impact of a potential waiver based on an extensive trial, merits due deference." *Hiott*, 129 So. 3d at 479. Because "waiver is [a] question of fact," the finding can "be reversed only if there is no competent, substantial evidence to support [it]." *Bolin v. State*, 793 So. 2d 894, 897 (Fla. 2001). Here, there is ample support: During voir dire, for example, Mrs. Schoeff's counsel explained to prospective jurors that Mrs. Schoeff had "accepted partial responsibility" on behalf of her husband, and that "[w]hat she is saying is that he's at fault, he's at fault, but in combination with the acts of the tobacco company." T.3:216. Counsel then repeatedly stressed this concession of partial responsibility from the beginning until the end of the first phase of the trial. *See*, *e.g.*, T.5:480, 531; T.19:2193–94, 2196, 2216–17, 2219, 2228, 2239–46.

This oft-repeated concession secured for Mrs. Schoeff several significant tactical benefits.[2] To start, it allowed her to imply that she, but not Reynolds, was taking a reasonable and measured position. For instance, as her counsel told the jury during closing arguments, "Just because we accept responsibility and they

[2] In tobacco cases, the benefits to plaintiffs of asserting partial fault are so significant that some plaintiffs have successfully fought for the right to raise comparative fault themselves—even when defendants sought to disavow that defense. *See Philip Morris USA, Inc. v. Arnitz*, 933 So. 2d 693 (Fla. 2d DCA 2006).

don't that doesn't mean they're not responsible. They don't accept responsibility, they don't. They have to be found responsible." T.19:2216; *see also id.* at 2245 ("Reynolds should be willing to accept 85 percent of the responsibility here."). By repeatedly contrasting her acceptance of partial responsibility with Reynolds's defense of the case, Mrs. Schoeff sought to shade the jury's view of both parties' credibility—a critical issue that pervades all aspects of tobacco litigation.

This strategy also increased the likelihood that the jury would skew two particular determinations in her favor. First, it invited the jurors to award higher compensatory damages, on the expectation that they would be reduced for comparative fault. *See*, *e.g.*, *Green*, 175 So. 3d at 315; *Hiott*, 129 So. 3d at 481. Second, it invited the jurors to allocate fault favorably to her, by comparing her husband's *negligence* with the alleged *intentional* actions underlying her concealment and conspiracy claims. Thus, in closing argument, her counsel began by contrasting Mr. Schoeff, who at some "point should [have done] something differently," with cigarette manufacturers, "with all their money and all the power, all their manipulation of nicotine, all their marketing, all their lies." T.19:2217. Counsel then urged the jury to remember that cigarette manufacturers "were the ones who lied"; asked the jury "[h]ow do you divide the responsibility between . . . somebody who thinks that filters are helping them, [and] the other parties who know that filters are a scam"; and contended that "[e]very addict should try harder and bear their share of

responsibility, but not when you get lied to over and over and over and over again." *Id.* at 2241, 2242–43, 2244. This extended comparison would make no sense if the only claims subject to a reduction were those for strict-liability and negligence. Having secured for herself these various tactical benefits, Mrs. Schoeff could not fairly reverse course post-verdict.

3. Mrs. Schoeff's Contrary Arguments Lack Merit

Despite the substantial evidence supporting the waiver finding, Mrs. Schoeff insists it was an abuse of discretion. Pet. Br. 33–37. She is mistaken.

a. After claiming that the waiver issue cried out for resolution to secure this Court's review (Pet. Juris. Br. 2–3, 7–9), Mrs. Schoeff now seeks to prevent the Court from addressing it. But her opening salvo on this front—that Reynolds never raised waiver before the trial court (Pet. Br. 33)—falls short, as the trial court found waiver only after Mrs. Schoeff herself affirmatively argued that there was no waiver. R.43:8368–69; R.44:8477–78; *accord* Pet. Br. 4–5.[3]

[3] In pursuing this argument, Mrs. Schoeff references the "tipsy coachman doctrine" (Pet. Br. 33), which concerns alternative justifications for a lower court ruling, not actual ones. But even if this doctrine applied, Reynolds still could press its waiver argument, for "'an appellee need not raise and preserve alternative grounds for the lower court's judgment in order to assert them in defense when the appellant attacks the judgment on appeal.'" *Malu v. Sec. Nat. Ins. Co.*, 898 So. 2d 69, 73 (Fla. 2005) (alteration omitted). To be sure, "there must have been support for the alternative theory . . . in the record before the trial court," and the appellant must have had "an opportunity to present evidence or arguments" on the alternative ground. *Robertson v. State*, 829 So. 2d 901, 907–08 (Fla. 2002). However, those conditions were met here. The relevant facts—Mrs. Schoeff's conduct *dur-*

Mrs. Schoeff also quibbles that the trial court may not have actually made a finding of "waiver" because it did not use that word. Pet. Br. 33–34. But the court's finding cannot be anything else, given its reasoning that the "direct admissions by the Plaintiff's attorney . . . [that] the plaintiff bears some degree of fault" would be "misleading" if she were later allowed to resist apportionment. R.44:8478. Indeed, Mrs. Schoeff recognized as much below, in arguing that "[t]he trial court erred in finding Mrs. Schoeff waived the intentional tort exception" and that "the trial court's finding of waiver was an abuse of discretion." Pet. 4th DCA Cross-Reply Br. 1, 2. In any event, nothing turns on the question of nomenclature: whether the trial court's ruling is best classified as one of waiver or estoppel, the court was well within its discretion to find that her litigation conduct disabled her from resisting a comparative-fault reduction. *See Green*, 175 So. 3d at 314.

Invoking *Hill v. Department of Corrections*, 513 So. 2d 129 (Fla. 1987), Mrs. Schoeff also argues that a defendant cannot raise a comparative-fault waiver unless it requests jury instructions on the subject. Pet. Br. 35. She is mistaken. In *Hill*, the defendant "prepared and submitted" a verdict form with a comparative-fault instruction accepted by both parties. 513 So. 2d at 133. But "after the time

(continued…)

ing trial—were already fully developed when the court addressed this issue *post-verdict*. R.44:8477–78. And Mrs. Schoeff had ample opportunity to address waiver in the trial court, as she herself raised the issue. R.43:8368–69.

had run for a motion for new trial," the defendant sought a new trial on the ground that its submission had been "misleading." *Id.* at 130, 134. This Court held that because the defendant had made "no objection . . . to the form of the verdict," it had waived any challenge to it. *Id.* at 134. Thus, *Hill* at most stands for the obvious proposition that a party cannot challenge its own jury instructions or verdict form, which Reynolds does not seek to do here. It has no bearing on whether *Mrs. Schoeff*, through *her* conduct, waived any right to resist apportionment.

b. On the law, Mrs. Schoeff offers a radical theory that would make waiver impossible. In her view, *no matter how much she may have misled the jury*, her conduct is "irrelevant" because the applicability of the comparative-fault statute is a question of law. Pet. Br. 35. That amounts to an assertion that a plaintiff can *never* waive a statutory right through its litigation conduct, which is both senseless and incorrect. *See DK Arena*, 112 So. 3d at 97. Even *Sury*, which affirmed a finding of no waiver on the facts before it, did not go so far. 118 So. 3d at 851.

Mrs. Schoeff also contends that both courts below, and two other district courts of appeal, improperly presumed "jury nullification" by acknowledging that a jury might award higher damages if it expects the award to be reduced for comparative fault. Pet. Br. 35–37. But in selecting an appropriate amount of compensatory damages, juries can and do take into account their own determination of related issues such as comparative fault and punitive damages. *See*, *e.g.*, *Roginsky v.*

Richardson-Merrell, Inc., 378 F.2d 832, 841 (2d Cir. 1967) (Friendly, J.) ("Many awards of compensatory damages doubtless contain something of a punitive element, and more would do so if a separate award for exemplary damages were eliminated.").[4] Moreover, having urged the jury to skew its decisionmaking based on her admission of partial fault, Mrs. Schoeff can hardly object that the jury might have resisted her own incitement. In any event, the possibility of increased compensatory damages is only one of several advantages that she sought to gain from admitting fault, any one of which amply supports waiver. *See supra* pp. 13–15.

c. On the subject of her own litigation conduct, Mrs. Schoeff has little to say. She understandably does not invoke *Sury*, the only appellate decision to resolve the waiver issue presented here in favor of a progeny plaintiff. In *Sury*, the First District affirmed a finding of no waiver because the plaintiff there—unlike Mrs. Schoeff—had "never argued to the jury . . . that the damages for [the smoker's] terminal illness should be reduced by his portion of fault." 118 So. 3d at 851.

Instead, Mrs. Schoeff insists that her jury was not moved by her various strategic arguments. Despite conceding that she "fail[ed] to make clear to the jury that

[4] Despite Mrs. Schoeff's erroneous contentions to the contrary, such holistic decisionmaking does not involve the jury violating instructions by making the comparative-fault reduction itself, and does not necessarily involve the rendering of a legally excessive compensatory award. Against the firm view of at least three district courts of appeal on this point, she can muster only a single concurring opinion from the Third District, which she mistakenly cites as one from this Court. Pet. Br. 36; *see City of Coral Gables v. Prats*, 502 So. 2d 969 (Fla. 3d DCA 1987).

damages w[ould] not be reduced on intentional tort claims" (Pet. Br. 35), she notes that the trial court did not specifically instruct the jury that the verdict would be reduced, and that Reynolds once mentioned to the jury that she admitted no responsibility on her intentional-tort claims. *Id.* at 34. But the instructions were a wash on this point, as they did not inform the jury one way or the other whether the award would be reduced if Mrs. Schoeff prevailed on an intentional-tort claim. T.19:2184–87. And the single comment she highlights must be considered together with the "recurring theme in Plaintiff's closing—counsel referred to the fact that Mr. Schoeff bore responsibility for his actions no less than ten times." *Schoeff*, 178 So. 3d at 494. The trial judge, who sat through the entire trial and witnessed the jurors' reactions to *all* of the arguments from *both* sides, specifically found that the jury was led to believe the verdict would be reduced. R.44:8478. As the Fourth District later confirmed, such comments were simply drowned out: "[A] reasonable jury would not possibly understand that its comparative fault determination was going to have no effect whatsoever on its compensatory damages award" in light of "the overall theme of Plaintiff's representations," including her plea to the jury to "consider this concession when coming up with its figure for comparative fault and . . . [to] find Mr. Schoeff less at fault due to [Reynolds's] fraudulent concealment of certain facts." 178 So. 3d at 494–95. In finding waiver on these facts, the trial court did not abuse its discretion.

B. The Comparative-Fault Statute Applies To This Action

In any event, the comparative-fault reduction was correct on the merits. Florida's comparative-fault statute requires such a reduction in negligence or products-liability "actions," and this *Engle*-progeny case qualifies as both such actions.

1. The Comparative-Fault Statute Applies To Negligence And Products-Liability Actions, Not To Individual Claims

The applicability of Florida's comparative-fault statute turns on the nature of overall *actions*, not individual *claims* within an action.

a. The comparative-fault statute provides that "[i]n a negligence action, the court shall enter judgment against each party liable on the basis of such party's percentage of fault." § 768.81(3), Fla. Stat.[5] It broadly defines the term "negligence action" to mean, "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." *Id.* § 768.81(1)(c). The statute then further defines the term "products liability action" as "a civil action based upon a theory of strict liability, negligence, breach of warranty, nuisance, or similar theories for damages caused by the manu-

[5] Unless otherwise noted, all citations are to the 2011 version of the statute, which the Florida Legislature expressly made retroactive. *See* Ch. 2011-215, §§ 2, 3, Laws of Fla. Mrs. Schoeff thus errs in contending that the 1992 version of the statute applies, but, as explained below, the result is the same under both versions. For the Court's convenience, Reynolds has included copies of the 2011 and 1992 versions of the statute in the attached Appendices B and C respectively.

facture, construction, design, formulation, installation, preparation, or assembly of a product." *Id.* § 768.81(1)(d). Finally, the statute contains several exceptions: it "does not apply to any action brought by any person to recover actual economic damages resulting from pollution, to any action based upon an intentional tort, or to any cause of action as to which application of the doctrine of joint and several liability is specifically provided by" an enumerated set of statutes. *Id.* § 768.81(4).

Accordingly, every relevant term in the statute—"negligence action," "products liability action," and "action based upon an intentional tort"—is keyed to the nature of the "action" as a whole rather than to individual claims or counts within it. Indeed, the statute uses the term "action" no fewer than 19 times, but does not use any words such as "claim" or "count." And the two references to a "cause of action," *id.* § 768.81(1)(b) & (4), simply confirm that the Legislature knew how to distinguish between terms keyed to the overall case ("action") and terms keyed to individual claims within the case ("cause of action"). *See State v. Mark Marks, P.A.*, 698 So. 2d 533, 541 (Fla. 1997) ("use of different terms in different portions of the same statute is strong evidence that different meanings were intended").

Mrs. Schoeff's opposing theory—that the statute applies to claims rather than cases—cannot be reconciled with this statutory text. She invokes the 1992 version of the statute, which uses the operative term "negligence cases" as opposed to "negligence action," and rests her textual theory on the contrast between covered

"negligence cases" and excluded "action[s] based upon an intentional tort." Pet. Br. 39–40. But as an initial matter, the operative statute is the 2011 version. *See supra* note 5. In applying the 1992 statute, the Fourth District mistakenly invoked *Basel v. McFarland & Sons, Inc.*, 815 So. 2d 687 (Fla. 5th DCA 2002), which held that an earlier amendment to the comparative-fault statute applied only prospectively because "the legislature provided no explicit indication that retroactive application was intended." *Id.* at 696; *see Schoeff*, 178 So. 3d at 492 n.3. Here, in contrast, the Legislature made its 2011 amendment expressly retroactive.[6]

In any event, Mrs. Schoeff's textual argument is no more persuasive under the 1992 statute. In pertinent part, that statute "applies to negligence *cases*" but "does not apply . . . to any *action* based upon an intentional tort." § 768.81(4)(a)–(b), Fla. Stat. (1992) (emphases added). Consistent with ordinary usage, the term "action" must apply to cases rather than individual claims, because the 1992 statute uses the terms "cases" and "actions" interchangeably. In particular, it defines "negligence *cases*"—a term Mrs. Schoeff concedes "applies to the entire case" (Pet. Br. 39)—to encompass "civil *actions* for damages based upon theories of . . . products liability." § 768.81(4)(a), Fla. Stat. (1992) (emphases added).

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[6] The retroactive application of the 2011 amendments poses no constitutional problem, as a statute "affect[ing] only the measure of damages" does "not work any modification of fundamental substantive rights." *Walker & LaBerge, Inc. v. Halligan*, 344 So. 2d 239, 243 (Fla. 1977).

With no textual foothold, Mrs. Schoeff asserts that "the statute must be strictly construed to the extent it is in derogation of the common law." Pet. Br. 38–39. But that canon requires some ambiguity to be construed, and here there is none. In addition, the 2011 amendments—including the explicit definition of covered "products liability action[s]"—were intended to *overrule* the common-law decision in *D'Amario v. Ford Motor Co.*, 806 So. 2d 424 (Fla. 2001), which the Legislature viewed as having taken an overly restrictive view of what cases should be subject to apportionment. *See* Ch. 2011-215, § 2, Laws of Fla. Moreover, Mrs. Schoeff fails to cite a single common-law decision supporting her claim that "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." Pet. Br. 38. Her sole authority for that proposition, *Mazzilli v. Doud*, 485 So. 2d 477 (Fla. 3d DCA 1986), involved not a negligence or products-liability action, but a battery arising from a police shooting. Furthermore, in holding that no comparative-fault offset was available on those facts, the court gave no indication that apportionment should apply on a claim-by-claim basis. *See id.* at 478–80. And because *Mazzilli* was decided some three months before the comparative-fault statute was even enacted, it sheds no light on the construction of its specific statutory terms.

b. This Court's precedent confirms that the statute means what it says. In *Merrill Crossings*, the Court, construing the 1992 version of the statute, held that

the applicability of the intentional-tort exception does not turn on whether the action includes an intentional-tort claim, but rather on "'whether an action comprehending one or more negligent torts actually has at its core an intentional tort.'" 705 So. 2d at 563 (quoting *Slawson v. Fast Food Enters.*, 671 So. 2d 255, 258 (Fla. 4th DCA 1996)). The Court explained that the exception "'did not say *including* an intentional tort; or *alleging* an intentional tort; or *against parties charged with* an intentional tort,'" but used the words "'based upon an intentional tort,'" which "'imply to us the necessity to inquire whether the entire action . . . is founded or constructed on an intentional tort.'" *Id.*

Following this precedent, every appellate judge to consider the issue has concluded that the statute applies to cases and not claims. Although the First District parted ways with the court below over whether progeny suits are necessarily negligence or products-liability "actions," it agreed that the applicability of the statute turns on whether the overall "action" is, "'at its core,'" based upon such theories. *Sury*, 118 So. 3d at 852. So did the dissent below, which considered this action "in its entire[t]y" and decided that "the 'core' of *Engle* progeny cases is intentional misconduct." 178 So. 3d at 487 (Taylor, J.) .

In response, Mrs. Schoeff asserts that "both the majority and dissent below, as well as the First District in *Sury* misinterpreted" the statute. Pet. Br. 37. To justify this bold assertion, she contends that *Merrill Crossings* is inapposite because it

involved a combination of negligent and intentional *tortfeasors* rather than a combination of negligent and intentional *torts*. *Id.* at 41–43. That argument misses the point. In *Merrill Crossings*, this Court held that the phrase "based upon an intentional tort" requires an inquiry into "the entire action" because of the plain meaning of that phrase—"'[t]he drafters did not say *including* an intentional tort; or *alleging* an intentional tort; or *against parties charged with* an intentional tort.'" 705 So. 2d at 563. This textual analysis applies no less to cases involving a mix of torts rather than tortfeasors. Mrs. Schoeff asks this Court to give the same statutory phrase—"based upon an intentional tort"—a different meaning depending on whether parties or claims are involved. But "'adopting different meanings for the same word depending on the situation can only result in confusion and inconsistency'" and "would in effect require [this Court] to rewrite this provision." *State v. McFadden*, 772 So. 2d 1209, 1213 (Fla. 2000).[7]

c. Finally, Mrs. Schoeff complains that this Court's view of the statute makes for bad policy. Pet. Br. 40–41. But, she presents only one side of the policy debate. On the question whether the statute should be keyed to cases rather than

[7] Mrs. Schoeff's assertion that "comparative fault was applied in *Merrill Crossings* to reduce the liability of each of the negligent tortfeasors" (Pet. Br. 42 (emphasis omitted)) overlooks this Court's decision. Although *the jury* apportioned fault between the two defendants, *this Court* held that "the doctrine of joint and several liability applie[d]" because both defendants were involved in "an action based upon an intentional tort." 705 So. 2d at 560–61.

claims, one could argue that some forms of negligence are very culpable, some intentional torts are only moderately culpable (for instance, a reckless concealment of a barely material product specification), and juries should be trusted to make case-by-case assessments of both. And on the question whether apportionment should be available for products-liability actions, one could argue that reducing defendants' exposure is sensible given the volume of claims often faced by product manufacturers, plus the fact that plaintiffs in the products context (unlike most others) can establish liability without having to prove fault. In any event, the only policy judgment that counts is that of the Florida Legislature. And in *its* most recent pronouncement on the subject, the Legislature characterized unapportioned liability as "inequitable and unfair," and concluded that "in a products liability action as defined in this act, fault should be apportioned among all responsible persons." Ch. 2011-215, § 2, Laws of Fla. It is that policy determination, not ones expressed in the law-review pieces and out-of-state decisions quoted by Mrs. Schoeff, that matters here.[8]

[8] The only Florida case cited by Mrs. Schoeff on policy points—Judge Ervin's concurrence in *Department of Corrections v. McGhee*, 653 So. 2d 1091 (Fla. 1st DCA 1995)—cuts strongly against her position. She misleadingly quotes that opinion as stating 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." Pet. Br. 40–41. But she fails to note that this statement appeared in a discussion of "early cases" that Judge Ervin did *not* find persuasive. *See* 653 So. 2d at 1101. To the contrary, he was "greatly per-

2. *Engle*-Progeny Cases Are Actions Based Upon A Theory of Negligence, Strict Liability, Or Products Liability

a. At their core, *Engle*-progeny cases are actions "based upon a theory of negligence, strict liability, [or] products liability" rather than actions "based upon an intentional tort." § 768.81(1)(c) & (4), Fla. Stat. In *Philip Morris USA, Inc. v. Douglas*, 110 So. 3d 419 (Fla. 2013), this Court held that membership in the *Engle* class—the first question addressed by a progeny jury and the irreducible minimum for proceeding as a progeny plaintiff—itself establishes liability on claims for strict liability and negligence. *See id.* at 429–30. Thus, a progeny plaintiff necessarily prevails on her strict-liability and negligence claims before she can even pursue concealment or conspiracy claims. And a progeny plaintiff need not pursue concealment or conspiracy claims at all. In other words, a progeny action is necessarily "based upon a theory of negligence [and] strict liability," § 768.81(1)(c), Fla. Stat., but is not necessarily "based upon an intentional tort," *id.* § 768.81(4). It therefore plainly qualifies as a "negligence action" covered by the statute.

Similarly, progeny cases fall squarely within the statutory definition of a covered "products liability action," which covers any "civil action based upon a theory of strict liability, negligence, breach of warranty, nuisance, or similar theo-

(continued…)

suaded" by the *opposite* argument—that "the more just result was to allow comparative negligence as to both negligent and intentional tortfeasors." *Id.*

ries for damages caused by the manufacture, construction, design, formulation, installation, preparation, or assembly of a product." *Id.* § 768.81(1)(d). As explained above, every progeny action is irreducibly "based upon" theories of "strict liability" and "negligence." Moreover, every progeny action rests on the theory that the defendant "placed cigarettes on the market that were defective and unreasonably dangerous," that it was "negligent" in doing so, and that a smoker contracted specific diseases or medical conditions as a result. *See Engle*, 945 So. 2d at 1276–77. Progeny actions thus seek "damages caused by the manufacture, construction, design, formulation . . . preparation, or assembly of a product"—namely, cigarettes. Thus, every progeny *action*—whether or not it includes intentional-tort *claims*—meets the statutory definition of a "products liability action."[9]

Statutory history and context confirm the point. Before 2011, the comparative-fault statute required apportionment in "actions for damages based upon theories of . . . products liability," but left that term undefined. *See* § 768.81(4)(a), Fla. Stat. (1992). The term thus would have been assigned its ordinary meaning, *see Koile v. State*, 934 So. 2d 1226, 1230–31 (Fla. 2006), which covers cases seeking

[9] Even intentional-tort claims in progeny actions rest on the same basic theory. Those claims allege that the defendant concealed or agreed to conceal health-related information about its product—cigarettes—which caused the plaintiff to smoke and become ill as a result. *See Engle*, 945 So. 2d at 1276–77. Thus, these claims also seek damages caused by the "manufacture, construction, design, formulation, . . . preparation, or assembly" of cigarettes.

damages from the use of a consumer product, regardless of whether the cases include fraud claims in addition to defect claims. For example, in *Engle* itself, the Third District began its class-certification decision by describing the case as "a products liability action," despite individual claims of "fraud and misrepresentation [and] conspiracy to commit fraud and misrepresentation." *R.J. Reynolds Tobacco Co. v. Engle*, 672 So. 2d 39, 40 (Fla. 3d DCA 1996). Since then, this Court has likewise used the same terminology. *See R.J. Reynolds Tobacco Co. v. Ciccone*, 190 So. 3d 1028, 1038 (Fla. 2016) (suggesting progeny suits are "products liability" cases for limitations purposes); *see also Frazier v. Philip Morris USA Inc.*, 89 So. 3d 937, 946–47 (Fla. 3d DCA 2012) ("appellees' [argument] is . . . more pertinent to a products liability case involving a bodily injury other than a disease").[10]

In 2011, when the Florida Legislature added an explicit definition of "products liability action" to the comparative-fault statute, it did not *narrow* the common understanding of that term. Rather, "'the legislature is presumed to have adopted

[10] Many other cases reflect the same usage. *See*, *e.g.*, *Palmas Y Bambu, S.A. v. E.I. Dupont De Nemours & Co.*, 881 So. 2d 565, 569, 583 n.14 (Fla. 3d DCA 2004) (describing case as "products liability action" despite misrepresentation and concealment claims); *Laschke v. Brown & Williamson Tobacco Corp.*, 766 So. 2d 1076, 1077 (Fla. 2d DCA 2000) (describing case as "based on product liability theories," despite claim for "conspiracy to commit fraud, including allegations of both misrepresentation of material facts and concealment of material facts"); *Sharp v. Leichus*, No. 2004-CA-643, 2006 WL 515532, at *6 (Fla. 2d Cir. Ct. Feb. 17, 2006) (finding it "abundantly clear that the Plaintiffs' case is, in fact, a products liability case," despite fraud claims alleging "representations" about "dangers of the underlying *product*"), *aff'd per curiam*, 952 So. 2d 555 (Fla. 1st DCA 2007).

prior judicial constructions of a law unless a contrary intention *is expressed* in the new version.'" *Fla. Dep't of Envtl. Prot. v. ContractPoint Fla. Parks, LLC*, 986 So. 2d 1260, 1269–70 (Fla. 2008). Moreover, the 2011 amendments were expressly designed to *expand* the availability of comparative fault in products-liability cases. In particular, the Legislature added an express definition of "products liability action" to overrule *D'Amario*, which had held that comparative fault was unavailable in "crashworthiness" or enhanced-injury cases. *See* Ch. 2011-215, § 2, Laws of Fla. More generally, the Legislature passed the 2011 amendments to avoid what it saw as the "inequitable and unfair results" of not permitting comparative-fault offsets in products-liability cases. *Id.*

b. Mrs. Schoeff spends little time disputing this analysis. Rather than invoke *Sury*, the lone decision in her favor, she criticizes it for addressing actions rather than claims and for adopting an abuse-of-discretion standard of review. Pet. Br. 32, 37. In fact, *Sury* did not even mention the controlling "products liability" prong of the statute. Instead, it invoked only *Mazzilli*—which, as discussed above, was a common-law decision that did not involve anything akin to a products-liability action. 118 So. 3d at 852–53. *Sury* thus offers no support for her position.

Instead, Mrs. Schoeff asserts that all progeny actions are "based upon an intentional tort" because "the evidence, regardless of which particular claim it is offered to support, demonstrates a callous and intentional course of tortious conduct."

Pet. Br. 44. She thus argues that defendants in *Engle*-progeny cases are *never* entitled to a comparative-fault reduction—even if *they* prevail on the intentional-tort claims. *See id.* But that radical view would contradict this Court's holding in *Engle* that "individualized issues such as . . . comparative fault" remained live and precluded continued class treatment. 945 So. 2d at 1268.[11] Even her own amici rush to disavow this point by insisting that all other progeny plaintiffs "have refrained from overreaching" by "agree[ing] to a comparative fault reduction" if the jury "has found against them on the fraud counts." *Engle* Plaintiffs' Firms Br. 2.

II. THE FOURTH DISTRICT CORRECTLY HELD THAT THE PUNITIVE AWARD MUST BE SET ASIDE AS EXCESSIVE

Rather than devote her brief to the only issue over which there is a clear conflict, Mrs. Schoeff leads with an attack on the Fourth District's assessment of her punitive award. This Court need not, and should not, address that factbound ruling, as it neither implicates a conflict nor otherwise warrants an exercise of the

[11] Moreover, this Court in *Engle* reversed a judgment against two Liggett defendants found to be "'zero percent at fault with respect to each of the named plaintiffs.'" 945 So. 2d at 1276. Even though the plaintiffs had prevailed against these defendants on their intentional-tort claims, *id.* at 1256–57, this Court explained that "[a] defendant who is found to be zero percent at fault for a plaintiff's damages cannot be held jointly and severally liable for those damages," *id.* at 1276. That ruling cannot be explained based only on the lack of brand usage, for the Liggett defendants had been found liable on the conspiracy counts as well as the substantive ones. *See Rey v. Philip Morris, Inc.*, 75 So. 3d 378 (Fla. 3d DCA 2011). Rather, this Court's reasoning and disposition make sense only if comparative fault applies in *Engle*-progeny cases even where the plaintiff has prevailed on an intentional-tort claim.

Court's discretionary review. In any event, the Fourth District correctly decided to give effect to the trial court's finding of excessiveness.

A. This Court Should Decline To Review The Excessiveness Ruling

Given the absence of any conflict that would give this Court jurisdiction over the Fourth District's punitive-damages ruling (*see* Resp. Juris. Br. 9–10), Mrs. Schoeff opens her brief with a reminder that this Court has "discretion[]" to address that ancillary issue. Pet. Br. 1 n.1. She never explains, however, why the Court should exercise that discretion, and there is good reason for it not to do so.

Although this Court has the "discretionary" authority to address "issues other than those upon which jurisdiction is based," it does not exercise that discretion lightly. *Savona v. Prudential Ins. Co. of Am.*, 648 So. 2d 705, 707 (Fla. 1995). Instead, the Court "[a]s a rule . . . eschew[s] addressing a claim that was not first subjected to the crucible of the jurisdictional process set forth in article V, section 3, Florida Constitution." *Major League Baseball v. Morsani*, 790 So. 2d 1071, 1080 n.26 (Fla. 2001). Accordingly, the Court routinely declines to tackle questions "beyond the scope of the conflict on which [it] granted review." *DK Arena*, 112 So. 3d at 97; *see*, *e.g.*, *Barlow v. N. Okaloosa Med. Ctr.*, 877 So. 2d 655, 657 n.3 (Fla. 2004) (declining to address validity of an award of zero economic damages for lost earning capacity); *cf. Auto-Owners Ins. Co. v. Pozzi Window Co.*, 984 So.

2d 1241, 1246 n.6 (Fla. 2008) (declining to address validity of ruling setting aside punitive award after answering other question certified by the Eleventh Circuit).

There is no good reason to afford discretionary review here. Addressing the excessiveness ruling is unnecessary to "avoid a piecemeal determination of the case"—the principal justification for this form of discretionary review. *Savoie v. State*, 422 So. 2d 308, 312 (Fla. 1982). Regardless of how this Court should decide the comparative-fault issue, the lower courts will have no need to resolve further issues stemming from that discrete ruling. Instead, the only thing left to be done will be for the trial court to remit the punitive award or hold a new trial on punitive damages. *See Schoeff*, 178 So. 3d at 492.

On the other hand, expanding the scope of review would require the Court to address a factbound ruling that does not merit its attention. As a general matter, the determination whether a punitive award is excessive is a highly fact-dependent inquiry. *See Engle*, 945 So. 2d at 1265 ("The precise award in any case . . . must be based upon the facts and circumstances of the defendant's conduct and the harm to the plaintiff." (quoting *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 425 (2003)). Accordingly, this Court would have to review the entire trial record to assess the trial court's finding that there was "no logical or sound reason" for the jury's punitive award of $30 million. R.44:8479.

Despite all of this, Mrs. Schoeff urges the Court to issue a sweeping decision affecting punitive damages in every *Engle*-progeny action. She seeks nothing less than a ruling that in progeny cases, "[a]n award of three times compensatory damages or less should always be constitutional" (Pet. Br. 26), as should an award of "any amount less than $100 million." *Id.* at 46. However, this Court addresses ancillary questions "only when these other issues have been properly briefed and argued," *Savona*, 648 So. 2d at 707, and will refuse to address questions "'not directly addressed by the district court,'" *Chames v. DeMayo*, 972 So. 2d 850, 853 n.2 (Fla. 2007). In the courts below, neither party briefed—and neither court addressed—the far-reaching theories that Mrs. Schoeff now peddles. Rather, she *opposed* bright-line rules, in maintaining that "there is no concrete or bright-line ratio limit." Pet. 4th DCA Ans. Br. 47. And, while she briefly asserted that *R.J. Reynolds Tobacco Co. v. Townsend*, 90 So. 3d 307 (Fla. 1st DCA 2012), was wrongly decided, she primarily argued that, "if there is to be a cap, it should be no higher than the amount in *Townsend*"—*i.e.*, $40.8 million. Pet. 4th DCA Ans. Br. 50. Thus, this case is a particularly poor vehicle for considering the sweeping rules that she now advocates. Moreover, doing so would encourage other litigants to replicate her jurisdictional gamesmanship of securing this Court's review over an actual conflict only to make an entirely different issue the centerpiece of the case.

B. The Fourth District Correctly Held The Punitive Award Excessive

If it reaches the question, this Court should affirm the Fourth District's ruling that the jury's $30-million punitive award was excessive. To decide whether a trial court abused its discretion in finding an award excessive under Florida law, this Court must ensure that the punitive award bears some "reasonable relationship" to the defendant's conduct, the defendant's ability to pay, and the compensatory award. *See Engle*, 945 So. 2d at 1263–64. Similarly, to decide whether a punitive award complies with federal due process, this Court must consider *de novo* "'(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.'" *Id.* at 1264 (quoting *Campbell*, 538 U.S. at 418). Under these principles, the punitive award here clearly qualifies as excessive.

1. The Trial Court Permissibly Found The Award Excessive

First and foremost, the trial judge, "who sat through the trial, watched this jury, and possessed the discretion regarding remittitur decisions" (Pet. Br. 29), found that the punitive award in this case *was excessive*. Specifically, it found "no logical or sound reason for the jury to have exceeded," on the facts of this case, the $25-million award that Mrs. Schoeff had begged the jury not to exceed.

R.44:8479. Thus, the punitive award must be set aside unless Mrs. Schoeff can show that the trial court's factual determination of excessiveness, which the Fourth District affirmed, was an abuse of discretion. She cannot.

Mrs. Schoeff understandably makes no effort to defend the trial court's actual reason for denying remittitur despite finding the award excessive—its disagreement with this Court's decision in *Mora*. Although the trial court acknowledged that *Mora* had "held either the Plaintiff or Defendant can claim to be a 'party adversely affected'" within the meaning of the remittitur statute, and thus can demand a new trial on punitive damages as a remedy for excessiveness, the trial court declared, with no explanation, that it did "NOT believe the Defendant is entitled to a new trial on punitive damages and would NOT be the party adversely affected by a remittitur." R.44:8479. *But see Mora*, 940 So. 2d at 1109. The trial court's defiance of *Mora* is of course indefensible, but does not undermine its underlying finding of excessiveness.[12]

[12] If the trial court somehow thought that the punitive award in this case was excessive for purposes of remittitur, but not for purposes of a new trial, its reasoning would be equally indefensible. Such an award cannot exist, as remittitur and a new trial on damages are simply "alternative means of redress" for an excessive damages award. *Adams v. Wright*, 403 So. 2d 391, 395 (Fla. 1981). Moreover, a trial court has no discretion to refuse to remit an excessive award. To the contrary, the remittitur statute provides that "[i]f the court finds that the amount awarded is excessive . . . it *shall* order a remittitur." § 768.74(2), Fla. Stat. (emphasis added).

Instead, Mrs. Schoeff highlights the trial court's additional finding that the punitive verdict was not infected by jury passion. Pet. Br. 29 (citing R.44:8479). However, an excessiveness determination does not require a finding of jury passion, which is not necessary for a finding of constitutional excessiveness, *see Campbell*, 538 U.S. at 418, and which is only one of six different considerations under the Florida remittitur statute, § 768.74(5), Fla. Stat. Accordingly, in setting aside as excessive the classwide punitive awards in *Engle* itself, this Court never so much as even mentioned jury passion as one of the considerations underlying its decision. *See* 945 So. 2d at 1263–65. In this case, moreover, the trial court refused to give any legal effect to its excessiveness ruling not because of the absence of jury passion, but because it did not wish to follow *Mora*. R.44:8479. The finding of no jury passion is thus beside the point.

Mrs. Schoeff also notes that juries sometimes may award a higher amount of punitive damages than what the plaintiff has requested. Pet. Br. 28–29. But the trial court here did not adopt a categorical rule that juries may *never* give more than the requested amount; instead, it found "no logical or sound reason" for *this* jury to do so given everything it had witnessed at trial—including but not limited to the fact that she repeatedly pleaded that any punitive award not exceed $25 million. R.44:8479. Such reasoning is neither unusual nor problematic. *See*, *e.g.*, *R.J. Reynolds Tobacco Co. v. Webb*, 93 So. 3d 331, 339 (Fla. 1st DCA 2012) (or-

dering remittitur after jury "awarded double the amount of compensatory damages requested by [plaintiff]"); *Glabman v. De La Cruz*, 954 So. 2d 60, 62 (Fla. 3d DCA 2007) (ordering remittitur after jury returned award of "$2,000,000 more than what plaintiffs' counsel argued . . . would be a reasonable award").

Mrs. Schoeff speculates that it was "logical" for the jury to have chosen a "nice round number" approximating a 3-to-1 ratio between her punitive and compensatory awards. Pet. Br. 29. But neither a "nice round number" nor a 3-to-1 ratio is enough to render a punitive award constitutional, much less to establish that the trial court's excessiveness ruling was an abuse of discretion. It was not such an abuse, particularly given the unusual generosity of the compensatory award (which *also* exceeded the requested amount) and the unusual adamancy of her trial counsel in urging the jury not to award more than $25 million, *see* T.21:2512 ("[Y]ou may think that's too low, but we urge you not to go above that. Please do not go above 25 million. Do not. She doesn't want that. Do not go above that.").

2. Reynolds's Aggregate Exposure To Punitive Damages In Progeny Cases Makes This Award Excessive

Even if this Court were to consider the excessiveness issue *de novo*, and to look beyond the trial court's reasoning that an excessive award should be left in place to end-run *Mora*, the Court still should affirm the Fourth District. Mrs. Schoeff primarily contends that $30 million—or even $100 million—is not excessive punishment for the entire course of conduct in which Reynolds engaged. Pet.

Br. 26–27. This argument misses the point because, as she herself acknowledges, this lawsuit is but one of "thousands of *Engle* cases" seeking to impose punitive damages on Reynolds for the same course of conduct. *Id.* at 26.

In assessing the appropriate amount of a punitive award under Florida law, courts must consider "the total punishment" that a defendant "has *or will probably* receive from other sources"—including its "past *and future* liability in [similar] cases." *Owens-Corning Fiberglas Corp. v. Ballard*, 749 So. 2d 483, 485, 488 (Fla. 1999) (emphases added); *accord* Restatement (Second) of Torts § 908 cmt. e (1982) (noting propriety of considering "the punitive damages that have been awarded in prior suits and those that may be granted in the future"). Federal due process requires the same broad inquiry, in light of the danger of excessive punishment inherent in allowing each jury to impose punishment based on the totality of the defendant's conduct. *See Campbell*, 538 U.S. at 423 (noting concern about "the possibility of multiple punitive awards for the same conduct").

This concern with cumulative punishment flows from basic constitutional principles. In another case involving punitive damages against a tobacco company, the Supreme Court made clear that, when a defendant's conduct has generated many lawsuits seeking punitive damages, individual cases cannot be viewed in isolation, and individual juries may not impose punishment for the totality of the defendant's conduct. *See Philip Morris USA v. Williams*, 549 U.S. 346, 353–54

(2007) ("the Constitution's Due Process Clause forbids a State to use a punitive damages award to punish a defendant for injury that it inflicts upon nonparties"). Instead, to avoid unconstitutionally duplicative punishment, the defendant in any particular case may be punished only for harms inflicted on the plaintiff, while other injured parties may seek punitive damages in their own individual cases. *See id.* Accordingly, courts must consider not whether an individual punitive award would be excessive relative to the defendant's entire course of conduct, but whether that award, if imposed in every case involving similarly situated plaintiffs, would produce an excessive amount of cumulative punishment.

If a single *Engle*-progeny plaintiff could permissibly recover $30 million in punitive damages, then the cumulative punishment facing Reynolds would be staggering. Reynolds is a defendant in the vast majority of the thousands of progeny suits that remain pending. If as few as 1,200 progeny plaintiffs were to obtain $30-million punitive awards, the cumulative punishment to Reynolds would match the $36-billion award that this Court in *Engle* unanimously held was excessive. *See* 945 So. 2d at 1265 n.8; *Engle*, 853 So. 2d at 457 n.29. The same result would follow if as few as 360 progeny plaintiffs were to obtain the $100-million awards that Mrs. Schoeff would have this Court declare to be categorically permissible going forward. Of course, the maximum permissible punishment to Reynolds is nowhere

near $36 billion.[13] And this analysis does not even account for the punitive awards that have been (or could be) sought by non-progeny Floridians and by citizens of other States; the billions of dollars in compensatory liability Reynolds faces in progeny litigation, which also furthers the goals of punishment and deterrence, *see*, *e.g.*, *Campbell*, 538 U.S. at 426 (recognizing "punitive element" in compensatory awards); *Memphis Cmty. Sch. Dist. v. Stachura*, 477 U.S. 299, 307 (1986) (recognizing "deterrence" accomplished through compensatory awards); and the billions of dollars in payments made by Reynolds to the States in settlement of their own claims, *see*, *e.g.*, *Engle*, 945 So. 2d at 1258 (discussing Florida Settlement Agreement, in which Reynolds and other defendants agreed to pay "several billion dollars" to Florida alone, and the nationwide Master Settlement Agreement).[14]

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[13] In its motion for a new trial below, Reynolds drew the trial court's attention to the significant cumulative punishment it faced at the time. SR:470–73. Even by that early date (February 2013), with fewer than 100 progeny trials completed, courts in progeny cases had entered judgments against Reynolds for punitive damages totaling more than $144 million in the aggregate. *Id.* at 472. The current figure, with fewer than 170 progeny trials completed, is for punitive judgments totaling more than $355 million in the aggregate.

[14] To date, progeny plaintiffs have fared very well in the litigation. They have prevailed in almost two-thirds of all progeny trials in the Florida state courts, and this Court has rejected defenses based on due process, *see Douglas*, 110 So. 3d 419; statutes of repose, *see Hess v. Philip Morris USA, Inc.*, 175 So. 3d 687 (Fla. 2015); and limits on the class definition, *see Ciccone*, 190 So. 3d 1028. Moreover, progeny plaintiffs may now seek punitive damages in any case in which they prove class membership—and thus establish claims for strict liability and negligence. *Soffer v. R.J. Reynolds Tobacco Co.*, 187 So. 3d 1219 (Fla. 2016).

Mrs. Schoeff agrees that the courts should consider Reynolds's "cumulative[]" punishment, but asks that they do so only "'in future cases.'" Pet. Br. 26, 27 n.5 (quoting *Townsend*, 90 So. 3d at 314). In other words, she has no problem with the courts eliminating punitive awards for future progeny plaintiffs on the ground of cumulative excessiveness, so long as she can pocket her $30 million now. But no plaintiff has an entitlement to punitive damages, which seek to punish and deter rather than compensate, so no one plaintiff should reap a punitive windfall at the expense of others farther back in the line. *See Engle*, 853 So. 2d at 458 ("Because society has an interest in protecting future claimants' demands, the importance of the relationship between the amount of punitive damages and the ability of the defendant to pay the award cannot be ignored."). Thus, Reynolds is *presently* entitled to have this Court consider the "total punishment" that it will likely receive in "past *and future*" progeny cases. *See Ballard*, 749 So. 2d at 485 (emphasis added).

3. This Individual Award Is Excessive

a. Even ignoring the trial court's reasoning and Reynolds's aggregate exposure, the magnitude of the verdict here—$30 million in punitive damages stacked on top of $10.5 million in noneconomic compensatory damages—reveals excessiveness. So far, no progeny punitive award of $30 million has withstood appellate

scrutiny, and two larger awards have been set aside as excessive. *See Webb*, 93 So. 3d at 339–40 ($72 million); *Townsend*, 90 So. 3d at 316 ($40.8 million).

Application of the due-process guidepost measuring the ratio between punitive and compensatory damages confirms the excessiveness of Mrs. Schoeff's award. Although a "single-digit ratio"—particularly one of "4-to-1"—is sometimes a useful benchmark, this Court has further held that, "'[w]hen compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee.'" *Engle*, 945 So. 2d at 1264–65 (quoting *Campbell*, 538 U.S. at 425); *accord Exxon Shipping Co. v. Baker*, 554 U.S. 471, 515 (2008). This is especially true where, as here, the compensatory award consists solely of noneconomic damages, which themselves are likely to contain a "punitive element." *See Campbell*, 538 U.S. at 426, 429.[15]

Both Florida and federal courts have applied this framework to set aside excessive punitive awards in tobacco litigation. In *Townsend*, for example, the First District held that a $40.8-million punitive award, imposed on top of a $10.8-million compensatory award, was unconstitutionally excessive. *See* 90 So. 3d at 314–16. Likewise, in *Boerner v. Brown & Williamson Tobacco Co.*, 394 F.3d 594

[15] Moreover, a lower ratio is even more important where, as here, many cases seek punitive damages for similar conduct. For example, assuming compensatory damages averaging $5 million and 1200 successful plaintiffs, even a 1-to-1 ratio would produce $6 billion in punitive damages and $12 billion in total liability.

(8th Cir. 2005), a federal appellate court held that a $15-million punitive award was "excessive when measured against the substantial compensatory damages award" of $4.025 million. *Id.* at 602–03. Moreover, the court ordered remittitur of the punitive award to $5 million to match the roughly 1-to-1 ratio that is appropriate where compensatory awards are "substantial." *See id.* And it did so despite its conclusion that the conduct at issue was "highly reprehensible" because the cigarettes there "were extremely carcinogenic and extremely addictive—substantially more so than other types of cigarettes." *Id.* at 602.

Mrs. Schoeff's $30-million punitive award qualifies as excessive under these principles. By any measure, her multi-million-dollar compensatory award, which consists solely of noneconomic damages and exceeds even her own request, is "substantial." *See id.* at 602–03 ($4 million compensatory award is "substantial" in wrongful-death tobacco case). Moreover, the ratio between Mrs. Schoeff's $30-million punitive award and her $7.875-million compensatory award (as reduced to reflect her husband's comparative fault) is roughly 3.8-to-1—an amount dwarfing the approximate 1-to-1 benchmark identified by this Court in *Engle* and by the Supreme Court in *Campbell*.

b. Mrs. Schoeff's defense of her punitive award comes up short. She first proposes categorical rules governing all progeny actions, such as "treble damages can never offend due process" (Pet. Br. 2); any award "less than $100 million" is

permissible (*id.* at 46); and "the only limit" is that an award cannot "financially destroy[]" the defendant. *Id.* at 19. But this Court has held otherwise, in stressing that the "'[t]he precise award in any case . . . must be based upon the facts and circumstances'" of that action, not "'rigid benchmarks'" or "'bright-line ratio[s].'" *Engle*, 945 So. 2d at 1264–65 (quoting *Campbell*, 538 U.S. at 425).

As for her own award, Mrs. Schoeff complains that the Fourth District considered only the punitive-to-compensatory ratio and not the other relevant guideposts. Pet. Br. 19, 22, 25. But as she herself acknowledges, "the evidence of defense conduct 'is essentially the same' in each [progeny] case" (*id.* at 26), which is why the Fourth District did not need to explicitly consider reprehensibility anew. Instead, it carefully considered four other Florida appellate decisions that had already addressed punitive excessiveness in progeny cases—including *Townsend*. *See Schoeff*, 178 So. 3d at 491–92. And in doing so, it necessarily considered the third guidepost as well—"'the civil penalties authorized or imposed in comparable cases.'" *Engle*, 945 So. 2d at 1264 (quoting *Campbell*, 538 U.S. at 418).

Mrs. Schoeff's analysis of reprehensibility is flawed and incomplete. For one thing, it ignores the fact that the conduct at issue here is the same conduct at issue in *Townsend*, *see* 90 So. 3d at 313, and no worse than the conduct at issue in *Boerner*, *see* 394 F.3d at 602–03. Moreover, she overlooks the rule that, in assessing reprehensibility, a "defendant's dissimilar acts, independent from the acts

upon which liability was premised," cannot be considered, because a "defendant should be punished for the conduct that harmed the plaintiff, not for being an unsavory individual or business." *Campbell*, 538 U.S. at 422–23. Rather than address the actions of Reynolds that actually injured her husband, Mrs. Schoeff seeks to rehash over a half-century of the tobacco industry's alleged misconduct. Pet. Br. 9–13, 19–22. *But see Campbell*, 538 U.S. at 424 ("The reprehensibility guidepost does not permit courts to expand the scope of the case so that a defendant may be punished for any malfeasance, which in this case extended for a 20-year period."). In doing so, Mrs. Schoeff aims to exact punishment for conduct that had nothing to do with her husband. For instance, although Mr. Schoeff was aware of the health risks of smoking as early as the 1950s, *see* T.15:1753–55, Mrs. Schoeff cites evidence of concealment some four decades later. Pet. Br. 10–13, 21. Even worse, she makes highly inflammatory charges of youth marketing alleged to have occurred nearly two decades after his 1995 death at age 64. *Id.* at 13. Thus, a large swath of her reprehensibility argument may be relevant to the punitive-damages claims of *other* progeny plaintiffs, but is not relevant to hers.

Mrs. Schoeff's ratio analysis also misses the mark. Relying on *Campbell*, she argues that "'[s]ingle-digit'" ratios are presumptively constitutional (Pet. Br. 23), but she fails to mention that case's admonition that where, as here, "compensatory damages are substantial," then an approximate 1-to-1 ratio "can reach the

outermost limit of the due process guarantee." *Campbell*, 538 U.S. at 425; *accord Engle*, 945 So. 2d at 1265.

Mrs. Schoeff also tries to shrink the 3.8-to-1 ratio in this case by arguing that the jury's allocation of fault should not be taken into account. Pet. Br. 23–25. But there is no good reason for punishing a defendant for harm attributable to a plaintiff's own negligence. *See*, *e.g.*, *Goddard v. Farmers Ins. Co.*, 179 P.3d 645, 666 (Or. 2008) (ratio analysis under *Campbell*: "Defendant is not responsible for paying that part of the compensatory damages that resulted from [plaintiff's] misconduct; neither should defendant be made to pay extra punitive damages in proportion to [plaintiff's] own misconduct."); *R.J. Reynolds Tobacco Co. v. Martin*, 53 So. 3d 1060, 1070–71 (Fla. 1st DCA 2010) (applying comparative-fault reduction before determining ratio). Mrs. Schoeff never grapples with this problem, and the Florida decisions that she invokes do not address it at all. *See* Pet. Br. 23. Instead, she contends that the ratio must account for the "potential harm" to the plaintiff, which she defines as her unreduced award. *Id.* at 23–25. But in this context, the phrase "potential harm" refers to intended but unrealized harm, which is not at issue here. *See*, *e.g.*, *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 460 (1993) (plurality opinion); *Pulla v. Amoco Oil Co.*, 72 F.3d 648, 659–61 (8th Cir. 1995) (White, J.). In any event, using even the unreduced compensatory award

would still result in a ratio of approximately 2.9-to-1, which would vastly exceed the approximate 1-to-1 benchmark identified in *Engle* and *Campbell*.

Mrs. Schoeff further objects that the punitive-to-compensatory ratio in her case is lower than the 7.6-to-1 ratio tolerated by the First District in *Martin*, 53 So. 3d at 1070, and the 4.8-to-1 ratio tolerated by the Fourth District in *R.J. Reynolds Tobacco Co. v. Buonomo*, 138 So. 3d 1049, 1050 (Fla. 4th DCA 2013), *quashed on other grounds*, Nos. SC14-81 & SC14-83, 2016 WL 374082 (Fla. Jan. 26, 2016). Pet. Br. 22. However, ratios of that magnitude cannot be reconciled with this Court's specific conclusion that, "'[w]hen compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit.'" *Engle*, 945 So. 2d at 1264–65 (quoting *Campbell*, 538 U.S. at 425). More generally, because Mrs. Schoeff's compensatory award was far more "substantial" than the compensatory awards in *Martin* and *Buonomo*—$3.3 million and $5.235 million, respectively—the maximum permissible ratio must be lower in this case than it was in either of those two. *See*, *e.g.*, *Engle*, 945 So. 2d at 1264–65; *Townsend*, 90 So. 3d at 315.

Finally, Mrs. Schoeff invokes a Florida statute presumptively prohibiting punitive awards exceeding a 3-to-1 ratio. Pet. Br. 26 (citing § 768.73(1), Fla. Stat. (1995)). However, a statute cannot trump constitutional limits, and the fact that the Legislature presumptively *banned* larger ratios does not mean that it conversely

approved any award with lower ratios, regardless of circumstances. In any event, the ratio here—3.8-to-1—significantly exceeds the statutory cap.

C. The Fourth District Correctly Gave Reynolds The Choice Between Remittitur Or A New Trial On Punitive Damages

The Fourth District correctly held that, as a remedy for excessiveness, Reynolds on remand may choose between remittitur of the punitive award or a new trial on punitive damages. The general remittitur statute provides that upon a finding of excessiveness and an ensuing remittitur order, "[i]f the party adversely affected by . . . remittitur . . . does not agree, the court shall order a new trial in the cause on the issue of damages only." § 768.74(4), Fla. Stat. In construing identical language in a parallel statute, *id.* § 768.043(1), this Court in *Mora* held that the phrase "the party adversely affected" includes "a defendant" who believes that the "remittitur that is too little to cure the excessiveness." 940 So. 2d at 1108.

Mrs. Schoeff's arguments for why *Mora* does not apply here are mistaken. First, she contends that a defendant may elect a new trial on damages if an award is held excessive under Florida law, but not if it is held excessive as a matter of federal due process. Pet. Br. 31. Mrs. Schoeff offers no reason for that arbitrary distinction. Nor could she, as the excessiveness inquiries under state and federal law contain significant overlap, and Florida does not have separate remittitur statutes to implement excessiveness rulings under state and federal law respectively. Accordingly, the First District made clear that *Mora* governs remittitur in the context of

punitive awards that are excessive as a matter of the federal Due Process Clause. *See R.J. Reynolds Tobacco Co. v. Townsend*, 118 So. 3d 844, 845 (Fla. 1st DCA 2013). In any event, as explained above, Mrs. Schoeff's award is excessive under Florida law as well as under the federal Constitution.

Next, Mrs. Schoeff asserts that Reynolds "waived" its right to elect a new trial on punitive damages by seeking only a remittitur. Pet. Br. 32 (citing *Lorillard Tobacco Co. v. Alexander*, 123 So. 3d 67, 77–78 (Fla. 3d DCA 2013)). To the contrary, Reynolds requested both remedies. *See* SR:359–60 ("if the Court does not grant a new trial, Reynolds asks the Court to remit the . . . punitive-damages award[]"). In any event, Reynolds never even had the opportunity to waive its choice of remedies under the remittitur statute, because the trial court denied its remittitur motion in the first instance. *Compare Alexander*, 123 So. 3d at 78 ("Because Lorillard requested and received a remittitur and failed to object to the remitted amount or to request a new trial on that ground, we conclude Lorillard is estopped from now arguing that it is entitled to a new trial on damages on this ground."), *with* R.44:8479–80 (denying remittitur motion entirely).

CONCLUSION

For these reasons, the judgment of the Fourth District should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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CERTIFICATE OF COMPLIANCE

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

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