**IN THE SUPREME COURT OF FLORIDA**

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

Petitioner,

v.

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

R.J. REYNOLDS TOBACCO CO.,

Respondent.

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

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# PETITIONER JOAN SCHOEFF'S REPLY BRIEF

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**STATUTES, CONSTITUTIONAL PROVISIONS, AND RULES OF COURT**

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

The Court should decline RJR's request to ignore the $30 million issue in this case, an issue that both presents multiple conflicts and has major importance to every one of the countless *Engle*-progeny cases awaiting trial. Measuring the defendants' exposure in each case is a global issue affecting decisions ranging from settlement demands to how much to ask a jury to award to whether a new trial is required when a jury exceeds the request.

**A. The Award Does Not Violate the Due Process Clause.** RJR does not dispute Mrs. Schoeff's recitation of the evidence in these cases, just its relevance. In one breath, RJR argues that the Fourth District silently accounted for reprehensibility by citing other *Engle* progeny cases because they all involve the same defense conduct, and in the very next it argues that "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." (Ans. Br. at 44-45.) While Mrs. Schoeff strongly disagrees with the suggestion that the Fourth District gave the required consideration to reprehensibility, RJR's first argument is more correct than the last because the same conduct is at issue in every one of these cases.

It is certainly true, as RJR notes, that "a 'defendant's **dissimilar** acts, independent from the acts upon which liability was premised,' cannot be considered." (Ans. Br. at 45-46 (quoting *State Farm Mut. Auto. Ins. Co. v.*

*Campbell*, 538 U.S. 408, 422-23 (2003)) (emphasis added).) While it is also true that RJR's misdeeds continued after the harm had been inflicted on Mr. Schoeff, the fact remains that all of the acts recited in the initial brief are not just similar, but form a continuing course of the same conduct that spanned over fifty years. That this was not isolated misconduct that just happened to injure Mr. Schoeff and was instead a sustained course of conduct guaranteed to kill millions only makes it all the more reprehensible. As the Supreme Court made clear after *Campbell*, that the same course of conduct caused "harm to other victims … shows more reprehensible conduct" that is properly considered in evaluating punitive damages so long as the jury is instructed, as it was here (R66:2500), that it cannot "punish a defendant directly on account of harms [the defendant] is alleged to have visited on nonparties." *Philip Morris USA v. Williams*, 549 U.S. 346, 355 (2007).

While contrary to the Supreme Court's clear direction that the ratio to be considered is to both actual and potential harm the defendant's conduct threatened to inflict on the plaintiff (In. Br. at 23-24), RJR's insistence that the ratio here is 3.8-to-1 because comparative fault should be applied before determining the relevant ratio only highlights how much higher the ratios were that other courts have approved. (An. Br. at 48 (noting post-comparative-fault ratios in *R.J. Reynolds Tobacco Co. v. Martin*, 53 So. 3d 1060 (Fla. 1st DCA 2010), and *R.J.*

*Reynolds Tobacco Co. v. Buonomo*, 138 So. 3d 1049 (Fla. 4th DCA 2013), were 7.6-to-1 and 4.8-to-1.) It also assumes RJR prevails on the comparative fault issue.

Finally, RJR misconstrues the third and final constitutional guidepost, which requires " 'substantial deference' to legislative judgments concerning appropriate sanctions for the conduct at issue." *BMW of N. Am. v. Gore*, 517 U.S. 559, 583 (1996) (quoting *Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 301 (1989) (O'Connor, J., concurring in part). This is not a comparison to punitive damages awarded by other juries or approved by other courts, as RJR initially claims in seeking to explain the Fourth District's failure to address this factor. (Ans. Br. at 45.) The proper comparison is instead to section 768.73(1), Fla. Stat. (1995), which reflects a "legislative judgment" that a 3-to-1 ratio is the presumptive limit, albeit one that can be overcome based on a finding that is directly supported by the evidence in these cases. *R.J. Reynolds Tobacco Co. v. Buonomo*, 138 So. 3d 1049, 1052-53 (Fla. 4th DCA 2013).

**B. Regardless of Whether the Award Was Constitutional, the Trial Court Reasonably Declined a Remittitur.** Though it concedes as it must that there is no basis to overturn the trial court's express finding that the award "was NOT infected by bias, prejudice, passion or any other sentiment," RJR interprets the trial court's ruling as (1) concluding that the jury had no logical basis to arrive at $30 million, (2) making a finding that the award is excessive, and (3) refusing to

remit the award out of "indefensible" "defiance" of case law RJR believes allows it to demand a new trial even when its motion is granted and the remitted amount is not excessive. (Ans. Br. 35-38.) The Fourth District certainly did not credit the last two accusations (especially the last one accusing a sitting judge of serious misconduct), and none of them represent a fair reading of the trial court's ruling.

The only fair reading is that the court believed the jury should have deferred to Mrs. Schoeff's request so there would be no issue, that the award was **not** excessive under the governing standards even though this trial judge would have awarded less if it were his call, and that it would be a shame to have to try the case over based on a remittitur to $25 million, an amount the Fourth District has made clear would have been sustained and Mrs. Schoeff has made clear throughout that she would accept to bring this case to a conclusion. The only basis for RJR's claim that the jury's award was not logically adduced is that it exceeded the amount Mrs. Schoeff requested, an argument squarely and properly rejected in cases like *Philip Morris USA, Inc. v. Cuculino*, 165 So. 3d 36 (Fla. 3d DCA 2015). The basis for Mrs. Schoeff's request was logical because $25 million is the amount affirmed in several prior cases, but the jury had no way to know that or to see any logic in the request. Instead, it demonstrated its independence by dispassionately determining that the closest round number to treble damages was the proper punishment here. Its finding must be respected.

Finally, RJR's suggestion that the award of punitive damages to a present plaintiff must be reduced in order to ensure that future plaintiffs can receive equal awards finds no support in the law or logic. (Ans. Br. 38-42.) The prospect of awards to future plaintiffs or even the payment of prior awards to past plaintiffs is simply not a factor recognized under the constitution or remittitur law. Again, RJR is correct that *Williams* requires that each jury may only punish for the harm caused to the plaintiff, but *Williams* makes it equally clear, as explained above, that the jury in each case may still consider actual or potential harm to others in assessing reprehensibility. This jury was so instructed, so there is no room to suggest that it was punishing RJR for harming other smokers.

This is not to say that payment of prior awards for the same misconduct is irrelevant. It is very relevant, but must be proven through evidence RJR did not put before this jury. Had it chosen to offer evidence of what it has paid in punitive damages, it could have argued to the jury that this prior punishment was sufficient and no further punitive damages are warranted. And if the payment of prior punitive damage awards left it in a financial position that a sizable award here would financially destroy it, that would be a permissible argument as well. But there was no such evidence, and as demonstrated in Part IV of the *Engle* Plaintiffs' Firms' amicus brief, there is no basis in reality for either contention.

If we ever get to the point where prior awards justify lower or even no awards to future plaintiffs, there is no unfairness to those future plaintiffs that RJR can leverage to its benefit. Punitive damages are, of course, not designed to compensate a plaintiff for any loss, and when prior awards have fully served the purposes of punitive damage awards, what room does a future plaintiff have to complain? In the very same sentence where RJR frets that "no one plaintiff should reap a punitive windfall at the expenses of others farther back in the line," it acknowledges that "no plaintiff has an entitlement to punitive damages, which seek to punish and deter rather than compensate." (Ans. Br. at 42.) In any event, its quote from the quashed Third District *Engle* decision in the very next sentence demonstrates that any societal interest in protecting future plaintiffs' demands for punitive damages is preserved by the requirements that the punitive award in any one case bear a reasonable relationship to the compensatory award and not financially destroy the defendant. (*Id.*)

**C. Alternatively, the Remedy for an Excessive Award Is Reduction of the Award, Not a New Trial.** This is an issue the Court need not reach because the punitive award should be affirmed, but even if it found the punitive damage award constitutionally excessive, the remedy would be to reduce it to the maximum amount the law will allow and not have a series of new trials until a jury finally awards something below that amount. Where, as here, the defendant does

not request a new trial based on the amount of the punitive damage awards and the only remedy it seeks is a remittitur, section 768.74(4), Florida Statutes, provides no basis for the defendant to get a new trial when that relief is granted. So long as the remitted amount is constitutional, the defendant is simply not "adversely affected" by such a ruling. In stark contrast, the plaintiffs in *Waste Management, Inc. v. Mora*, 940 So. 3d 1105 (Fla. 2006), requested a new trial, but had an additur they never requested imposed on them over their objection. And if the reduction is made to comply with the constitution instead of a finding that the trial court abused its discretion in denying a remittitur under the statute, the remedy is to remit it to an amount certain subject only to the **plaintiff's** right to elect a new trial, as the federal case on which RJR places so much reliance held. *Boerner v. Brown & Williamson Tobacco Co.*, 394 F.3d 594, 604 (8th Cir. 2005).

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

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

RJR does not dispute that it never raised the issue of waiver in the trial court and insists that the trial court's ruling "cannot be anything else" but a finding of waiver. (Ans. Br. at 16.) It also fails to address, much less attempt to distinguish, the cases on which Mrs. Schoeff relied for the proposition that a trial court errs in entering judgment based on an issue not raised by the parties. (Init. Br. at 33 (citing *Mutchnik, Inc. Constr. v. Dimmerman*, 23

So. 3d 809, 810 (Fla. 3d DCA 2009), and *Walls v. Sebastian*, 914 So. 2d 1110, 1111 (Fla. 4th DCA 2005)).) Instead, it contends that the trial court properly found waiver because "Mrs. Schoeff herself affirmatively argued that there was no waiver." (Ans. Br. at 15.) While it is certainly true that Mrs. Schoeff pointed out to the trial court that, unlike other cases where waiver was found, "[t]]here can be no argument that this happened here" (R43:8368-69), that only highlights the trial court's error in ruling on an issue that RJR was given a clear opportunity to raise but chose not to. RJR's reliance on the tipsy coachman doctrine is misplaced because that doctrine only applies when the trial court erred and the appellee raises an alternative **ground** for affirmance on the same **issue**. It makes no sense to invoke it to argue that the trial court correctly ruled on an issue RJR chose not to raise, lest the rule that trial courts are limited to the issues raised by the parties be obliterated. The only issue raised for the trial court to resolve was whether the intentional tort exception in the comparative fault statute applies to *Engle* fraud claims, and waiver is not an alternative ground for resolving that issue.

In any event, there truly is no room to contend that Mrs. Schoeff waived the intentional tort exception to the comparative fault statute. RJR misconstrues Mrs. Schoeff's argument as "an assertion that a plaintiff can *never* waive a statutory right through its litigation conduct." (Ans. Br. at 17.) If a plaintiff affirmatively requests apportionment of damages on an intentional tort claim or fails to object to

a trial court's reduction of damages by comparative fault, those might be bases to find invited error or waiver. But Mrs. Schoeff made clear at every turn that her position was that comparative fault only applies to the negligence and strict liability claims and does not apply to the intentional tort claims. She made that point in her complaint. (R4:627.) The trial court instructed the jury that was her position at the beginning of the trial. (R53:480.) Mrs. Schoeff reminded the jury of that distinction in her opening statement and again in closing argument. (R53:538; R64:2239-40.) She even (successfully!) argued that the trial court should change the normal order of jury questions to put comparative fault between the negligence/strict liability question and the intentional tort questions for the express reason that she did not want anyone to think she was suggesting the comparative fault finding would apply to the intentional torts. (R64:2123-24.)

RJR focuses on the trial court's finding that "Mrs. Schoeff repeatedly told the jury that her husband 'bore some degree of fault.' " (Ans. Br. at 12 (quoting R44:8477).) This ignores that at every turn Mrs. Schoeff made a distinction between accepting responsibility on the negligence and strict liability claims, but not the fraud and conspiracy claims. But even if her admissions that her husband was at fault had not been expressly limited to the negligence claims, an admission that her husband "bore some degree of fault" is a proper and candid admission of fact and not an invitation to disregard the law. The law, as Mrs. Schoeff sees it, is

that even when the plaintiff bears a degree of fault, she is entitled to recover one hundred percent of her damages caused by a defendant's intentional tort. That is the balance the courts drew at common law and, in Mrs. Schoeff's view, the Legislature maintained in section 768.81, and there is nothing improper about a plaintiff availing herself of that public policy.

The record belies RJR's other main contention, which is that Mrs. Schoeff "misled" the jury into believing that its compensatory award would be reduced by Mr. Schoeff's fault. She made no such suggestion at any point. She never said anything to the jury about damages being reduced by comparative fault, even on the negligence claims. The only thing anyone told the jury about whether damages would be reduced was RJR, which directly told the jury that the only way for the jury to keep RJR from being "100 percent responsible" on the fraud claims was "to put no on both" the fraud and conspiracy questions. (R65:2328-29.) In any event, this Court has made clear that if the defendant believes that it is important that the jury be told damages will not be reduced on comparative fault, the defendant bears the burden of requesting a jury instruction to that effect. *Hill v. Dep't of Corrections*, 513 So. 2d 129, 133 (Fla. 1987).

Similarly, to the extent RJR thought Mrs. Schoeff was making any arguments to the jury that improperly suggested comparative fault would apply to her intentional tort claims, it had the burden to object. That is a moot point here,

however, because she made no such arguments. It is certainly true that Mrs. Schoeff admitted that, in fact, her husband should have tried harder to quit sooner and she criticized RJR for not similarly admitting that its misconduct was at least a partial cause of Mr. Schoeff's death. That the jury might, therefore, find her more credible is no basis for finding waiver. There is nothing inconsistent by admitting that one's own negligence was partial cause of the loss while still availing oneself of the clear legal principle embodying important public policies that a plaintiff's recovery is not reduced in those circumstances. And her arguments that the defense conduct underlying the negligence and strict liability claims included a lot of intentional conduct in no way transforms her argument to an invitation to ignore the intentional tort exception for the fraud claims. All it does is belie the notion that the core of this case was anything other than intentional misconduct because even the negligence and strict liability claims are based entirely on intentional conduct RJR knew was certain to kill millions of smokers like Mr. Schoeff.

Finally, RJR's continued insistence that the jury awarded more in compensatory damages than the evidence proved because it wanted to reverse-engineer the findings so that Mrs. Schoeff would receive a full recovery after application of comparative fault is still nothing but an embrace of jury nullification. There is no reason to presume juries will disregard instructions so that the final result is something they find "just." Here, although RJR recognized it

would be better to instruct the jury one way or the other about damages, it chose not to request an instruction on this point and simply allow the trial court to make the determination post-trial. (R64:2116-17.) There is no basis in this record to support a finding that Mrs. Schoeff waived the intentional tort exception or invited the trial court to disregard it.

**B. Regardless of the "Core" of the Entire Case, Comparative Fault Does Not Apply to Intentional Tort Causes of Action.** At the very most (and Mrs. Schoeff in no way concedes the point), RJR's parsing of the language of the 1992 and 2011 versions of section 768.81 demonstrates that they might be read to eliminate the common-law intentional tort exception to comparative fault when an intentional tort claim is asserted in a lawsuit whose "core" is a negligence or products liability claim. But even if that were true, it would not be enough because this statute must be **strictly construed** to the extent it would be in derogation of the common law. *Merrill Crossings Assocs. v. McDonald*, 705 So. 2d 560, 561 (Fla. 1997). There is no way to strictly construe the language in either version to overturn the common law. To whatever extent the use of the term "action" refers exclusively to the entire lawsuit and not just a cause of action asserted in a lawsuit, the language of both versions simply does not address what happens in a lawsuit that is based on both negligence and intentional torts. The language in both versions is easily harmonized with the common law rule by interpreting the statute

to apply to causes of action based on negligence and not to causes of action based on intentional torts, even if brought in the same lawsuits.

RJR appears to question whether the common-law intentional tort exception applied to intentional tort claims brought in cases asserting products liability claims, noting that *Mazzilli v. Doud*, 485 So. 2d 477 (Fla. 3d DCA 1986), arose from a police shooting. But the very case on which *Mazzilli* relied was a case holding that the exception applied when the plaintiff prevailed on an intentional misrepresentation claim in a case that also included claims of negligent design. *Id.* at 480 (citing *Honeywell, Inc. v. Trend Coin Co.*, 449 So. 2d 876, 879 (Fla. 3d DCA 1984), *quashed in part on related issue*, 487 So. 2d 1029 (Fla. 1986)).

The policies behind the common-law exception were thoroughly discussed in the initial brief. RJR identifies no policy that would be served by changing that exception so that an intentional tortfeasor receives a reduction in its liability based on the fortuity of the plaintiff including negligence or products liability claims in the same lawsuit. A result at odds with the policies explained in Judge Ervin's opinion in *Department of Corrections v. McGhee*, 653 So. 2d 1091, 1101 (Fla. 1st DA 1995).[1] That would be an absurd result to ascribe to the Legislature, especially

[1] Contrary to RJR's quip in footnote 8, Judge Ervin's opinion could not be more clear that the intentional tort exception prohibits reducing an intentional tortfeasor's liability. His disagreement with the majority regarded reducing a negligent tortfeasor's liability.

where this Court has already held that the Legislature was merely codifying the common law on comparative fault when it adopted section 786.81. *Am. Home Assur. Co. v. Nat'l R.R. Passenger Corp.*, 908 So. 2d 459, 469 (Fla. 2005).

The 1986 adoption of comparative fault included the intentional tort exception in the same form it remains today, unchanged by the 2011 or any other amendment: "This section does not apply … to any action based upon an intentional tort." The same subsection also provides that comparative fault does not apply to "any action brought by any person to recover actual economic damages resulting from pollution." § 768.81(4), Fla. Stat. These are clear policy judgments that defendants should bear full liability even when their victim was negligent where the damages were caused by an intentional tort or where economic damages are caused by the defendant's pollution. But in those same cases, the defendant *is* entitled to reduced liability for any damages awarded on a pure negligence or strict liability claim or for non-economic damages caused by the defendant's pollution.

In stark contrast to the 2011 amendment to the comparative fault statute, which was expressly enacted to overrule this Court's holding in *D'Amario v. Ford Motor Co.*, 806 So. 2d 424 (Fla. 2001), regarding apportionment in crash-worthy cases (an issue with **no relevance** to this case), there is no indication that the Legislature has ever sought to limit the common-law intentional tort exception.

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

RJR actually makes no argument why the core of every *Engle* case is not an intentional tort. It does not dispute Mrs. Schoeff's assertion that even the negligence and strict liability claims are based on intentional misconduct and the only difference is whether the plaintiff proves the smoker relied on the fraud. Nor does it dispute that the punitive damage award in this case (75% of the damages awarded) was solely for the fraud claims. Instead, it argues that the intentional tort exception cannot apply in a lawsuit seeking to impose liability in relation to a product it manufactured. Under this analysis, comparative fault would have applied even if the only claims Mrs. Schoeff asserted were intentional torts. This argument is not even colorable given the plain language of the intentional tort exception.

In sum, even if Mrs. Schoeff misreads section 768.41 and its application depends on whether the core of the lawsuit is a negligence/strict liability theory or an intentional tort theory, comparative fault does not apply here because these cases are based on the defendants' intentional and fraudulent decision to actively conceal the dangers the defendants have ensured their products pose. The only difference between the intentional torts and negligence/strict liability claims is that the former requires the plaintiff to prove the smoker was affirmatively misled. A victim's negligence in believing a defendants' fraud has never before been a basis to reduce the defendant's liability, nor should it now.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to the following counsel for Respondent R.J. Reynolds Tobacco Company by email this 10th day of October, 2016:

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## CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the foregoing brief is in Times New Roman 14-point font and complies with the font requirements of Rule 9.210(a)(2), Florida Rules of Appellate Procedure.

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