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

APPENDIX TO ANSWER BRIEF OF RESPONDENT
R.J. REYNOLDS TOBACCO COMPANY

Gregory G. Katsas
Florida Bar No. 89091
JONES DAY
51 Louisiana Ave., N.W.
Washington, DC 20001
Telephone: (202) 879-3939
Facsimile: (202) 626-1700

Eric L. Lundt
Florida Bar No. 0861715
Robert C. Weill
Florida Bar No. 009962
SEDGWICK LLP
1 Biscayne Tower, Ste. 1500
2 S. Biscayne Blvd.
Miami, Florida 33131-1822
Telephone: (305) 670-4777
Facsimile: (877) 540-6951

Counsel for Respondent

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Exhibit	Description
A	Opinion to be Reviewed: *R.J. Reynolds Tobacco Co. v. Schoeff*, 178 So. 3d 487 (Fla. 4th DCA 2015)
B	Section 768.81, Florida Statutes (2011)
C	Section 768.81, Florida Statutes (1992)

Respectfully submitted,

/s/ Robert C. Weill

Eric L. Lundt
Florida Bar No. 0861715
eric.lundt@sedgwicklaw.com
Robert C. Weill
Florida Bar No. 009962
robert.weill@sedgwicklaw.com
david.saltares@sedgwicklaw.com (secondary)
SEDGWICK LLP
1 Biscayne Tower, Ste. 1500
2 S. Biscayne Blvd.
Miami, FL 33131
Phone: (305) 670-4777
Fax: (877) 540-6951

Gregory G. Katsas
Florida Bar No. 89091
ggkatsas@jonesday.com
JONES DAY
51 Louisiana Avenue, N.W.
Washington, DC 20001
Phone: (202) 879-3939
Fax: (202) 626-1700

Charles R.A. Morse
Florida Bar No. 0091561
cramorse@jonesday.com
preichert@jonesday.com (secondary)
JONES DAY
222 East 41st Street
New York, NY 10017-6702
Phone: (212) 326-3939
Fax: (212) 755-7306

Counsel for Respondent
R.J. Reynolds Tobacco Company

CERTIFICATE OF SERVICE

I certify that on September 12, 2016, this appendix was e-filed with the Court and a copy was e-mailed to:

John S. Mills
Courtney Brewer
The Mills Firm, P.A.
203 North Gadsden Street, Suite 1A
Tallahassee, FL 32301
jmills@mills-appeals.com
cbrewer@mills-appeals.com
service@mills-appeals.com
Counsel for Petitioner

Robert S. Glazier, Esq.
Law Office of Robert S. Glazier
540 Brickell Key Drive, Suite C-1
Miami, FL 33131
glazier@fla-law.com
Counsel for Petitioner

Alex Alvarez, Esq.
The Alvarez Law Firm
355 Palermo Avenue
Coral Gables, FL 33134
alex@integrityforjustice.com
maria@integrityforjustice.com
lisa@integrityforjustice.com
phillip.holden@integrityforjustice.com
Counsel for Petitioner

Gary M. Paige, Esq.
Gordon & Doner, P.A.
1961 N.W. 150th Avenue
Suite 201
Pembroke Pines, FL 33028
garyp216@aol.com
Counsel for Petitioner

Laurie J. Briggs, Esq.
T. Hardee Bass III, Esq.
Searcy Denney Scarola Barnhart & Shipley, P.A.
2139 Palm Beach Lakes Boulevard
West Palm Beach, FL 33409
tobacco@searcylaw.com
Counsel for Petitioner

/s/ Robert C. Weill
Counsel for Respondent R.J. Reynolds Tobacco Company

EXHIBIT A

R.J. REYNOLDS TOBACCO COMPANY, Appellant,

v.

Joan SCHOEFF, as Personal Representative of the Estate of James Edward Schoeff, deceased, Appellee.

No. 4D13–1765.

District Court of Appeal of Florida, Fourth District.

Nov. 4, 2015.

Background: Deceased smoker's personal representative brought action against tobacco company seeking damages arising out of smoker's death. The Circuit Court, Seventeenth Judicial Circuit, Broward County, Jack B. Tuter, J., entered judgment on a jury verdict awarding $10.5 million in compensatory damages, which was reduced to approximately $7.8 million due to smoker's 25% comparative negligence, and punitive damages of $30 million. Tobacco company appealed and representative cross-appealed.

Holdings: The District Court of Appeal, Damoorgian, J., held that:

(1) punitive damages award was excessive in light of substantial compensatory damages award, and

(2) compensatory damages were subject to reduction under comparative fault statute.

Affirmed in part, reversed in part, and remanded.

Taylor, J., concurred in part and dissented in part and filed opinion.

1. Appeal and Error ⚷979(5)

Appellate court reviews a trial court's order denying a motion for remittitur for an abuse of discretion.

2. Appeal and Error ⚷893(1)

The constitutionality of a punitive damages award is reviewed de novo.

3. Damages ⚷87(1)

The purpose of punitive damages is not to further compensate the plaintiff, but to punish the defendant for its wrongful conduct and to deter similar misconduct by it and other actors in the future.

4. Damages ⚷94.1, 94.7

The amount of punitive damages to be awarded is an issue left to the discretion of the jury; however, the imposition of a punitive damages award is subject to limitations.

5. Damages ⚷94.1

Under Florida law, the courts evaluate the extent of a punitive damages award by considering whether: 1) the amount is so excessive as to be out of all reasonable proportion to the conduct; 2) the award bears some relationship to ability to pay; and 3) there is a reasonable relationship between compensatory and punitive damages.

6. Constitutional Law ⚷4427
Death ⚷99(1), 106

Punitive damages award of $30 million to deceased smoker's personal representative in her action against tobacco company was excessive, in violation of due process, in light of substantial $10.5 million compensatory damages award, and thus tobacco company was entitled to a remittitur or a new trial on punitive damages, even though the ratio between the compensatory and punitive damages awards was less than the ratios upheld in other cases; both awards were higher than other awards approved in similar cases in the state, and nothing in the record suggested that tobacco company's behavior toward smoker was any more reprehensible than its con-

duct in such other cases. U.S.C.A. Const. Amend. 14.

7. Appeal and Error ⚷179(1), 883

Personal representative of smoker's estate waived any argument that jury's finding of intentional tort of fraudulent concealment by tobacco company barred application of comparative fault statute to reduce compensatory damages award in wrongful death action; complaint specifically stated that it was seeking apportionment of fault for only its negligence claims and not its intentional tort claims, verdict form listed each cause of action individually, counsel argued to the jury that the damages for smoker's terminal illness should be reduced by his portion of the fault and jury was instructed not to make any reductions based on smoker's comparative fault. West's F.S.A. § 768.81(2, 4).

8. Products Liability ⚷183, 263

At its core, personal representative's action against tobacco company, alleging that her husband had died from lung cancer caused by his addiction to cigarettes, was a products liability suit based on conduct grounded in negligence, and thus, intentional tort exception did not apply and representative's compensatory damages were subject to reduction under comparative fault statute. West's F.S.A. § 768.81(4)(a).

9. Appeal and Error ⚷893(1)

Appellate courts review de novo the legal question of whether certain conduct qualifies as negligence or intentional tort.

Appeal and cross-appeal from the Circuit Court for the Seventeenth Judicial Circuit, Broward County; Jack B. Tuter, Judge; L.T. Case No. 08–022608(19).

Gordon James, III, and Eric L. Lundt of Sedgwick LLP, Fort Lauderdale, and Gregory G. Katsas, of Jones Day, Washington, D.C., for appellant.

John S. Mills and Courtney Brewer of The Mills Firm, P.A., Tallahassee, Alex Alvarez of The Alvarez Law Firm, Coral Gables, and Gary M. Paige of Gordon & Doner, Davie, for appellee.

DAMOORGIAN, J.

R.J. Reynolds Tobacco Company ("RJR") appeals the final judgment entered in favor of Joan Schoeff Spolzino as Representative of the estate of her deceased husband, James Schoeff ("Plaintiff"). RJR raises four issues on appeal. First, it contends that the trial court erred in denying its motion for a directed verdict because Plaintiff failed to prove addiction causation. Second, it asserts that certain comments made by Plaintiff's counsel during closing necessitate a new trial. Third, it argues that the court erred in denying its motion to remit the jury's compensatory and punitive damages awards. Fourth, it argues that the court's application of the *Engle*[1] findings violated its due process rights. Plaintiff cross-appeals, arguing that the court erroneously reduced the jury's compensatory damages award based on Mr. Schoeff's comparative fault. We reverse and remand for remittitur of the punitive portion of the judgment, and affirm in all other respects.

Background

a) *Pleadings*

The instant case is an *Engle* progeny case. *See Engle v. Liggett Group, Inc.*, 945 So.2d 1246 (Fla.2006). Plaintiff filed suit against RJR[2] asserting membership

1. *Engle v. Liggett Group, Inc.*, 945 So.2d 1246 (Fla.2006).

2. Plaintiff also sued several other tobacco companies, but all except RJR were dismissed before trial.

in the *Engle* class because her husband died from lung cancer "caused by his addiction to cigarettes." In her suit, Plaintiff alleged causes of action for strict liability, fraud by concealment, conspiracy to commit fraud by concealment, negligence, and gross negligence. She also admitted that Mr. Schoeff shared some fault for his smoking-related injuries and represented that she would "seek apportionment of fault, pursuant to the principles of comparative fault, on the counts for negligence and strict liability; however not with respect to the counts constituting intentional torts as pled in this action."

b) *The Trial*

The case proceeded to trial in two phases in the manner we approved in *R.J. Reynolds Tobacco Co. v. Brown,* 70 So.3d 707, 714 (Fla. 4th DCA 2011). In the first phase, the jury was asked to: 1) determine whether Mr. Schoeff was a member of the *Engle* class; 2) if so, whether RJR's conduct was the legal cause of his death; and 3) determine damages. The jury was also asked to determine whether Plaintiff was entitled to punitive damages if it found against RJR on Plaintiff's claims for fraudulent concealment or conspiracy to fraudulently conceal.

After considering the evidence, the jury returned its verdict, finding that Mr. Schoeff was addicted to nicotine, his addiction was a legal cause of his lung cancer and death; and that the negligence of RJR as well as the defective and unreasonably dangerous cigarettes manufactured by RJR were a legal cause of Mr. Schoeff's lung cancer and death. It allocated Mr. Schoeff's comparative fault for his injuries at 25%. Additionally, the jury found that Mr. Schoeff detrimentally relied on statements made by RJR which concealed or omitted material information, and that such reliance was a legal cause of his cancer and death. Based on these findings, the jury awarded Plaintiff $10.5 million in compensatory damages and found that punitive damages were warranted.

The second phase of the trial concerned the proper amount of punitive damages. During closing arguments in this phase, Plaintiff's counsel asked the jury to award Plaintiff $25 million in punitive damages and no more. Specifically, counsel stated: "you 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." Despite Plaintiff's urging, the jury returned a verdict assessing $30 million in punitive damages against RJR.

c) *Post–Trial Motions and Rulings*

Following the trial, RJR filed a motion asking the court to reduce the compensatory damages award to reflect the comparative fault assigned to Mr. Schoeff by the jury. Plaintiff filed a response in opposition arguing that the comparative fault statute should not apply since the jury found RJR committed the intentional tort of fraudulent concealment. Additionally, RJR moved for a new trial on evidentiary grounds. In the alternative, RJR moved for remittitur of both the compensatory and punitive damages awards, arguing that they were both excessive and not supported by the evidence.

Considering the above pleadings, the trial court granted RJR's motion to enter judgment consistent with the jury's finding on comparative fault, denied RJR's motion for a new trial, and denied RJR's motion to remit the compensatory and punitive damages awards. In granting RJR's motion to reduce the jury's compensatory award by Mr. Schoeff's comparative fault, the court ruled that Plaintiff waived her argument regarding comparative fault based on representations counsel made to the jury. Alternatively, the court ruled that even if Plaintiff had not waived her

argument, the intentional tort exception to the comparative fault statute would not apply as Plaintiff's suit was a products liability suit at its core. In denying RJR's motion to remit the punitive damages award, the court recognized that there was no logical basis for the jury to award a larger amount than Plaintiff requested, but found that the jury's award was "NOT infected by bias, prejudice, passion or any other sentiment against Defendant."

In accordance with its above rulings, the court entered final judgment awarding Plaintiff $7,875,000 in compensatory damages and $30 million in punitive damages, for a total of $37,875,000. This appeal follows.

Analysis

We affirm the court's denial of RJR's motion for directed verdict, motion for a new trial, and motion to remit the jury's compensatory damages award without further comment. We also affirm the court's application of the *Engle* findings pursuant to our decision in *Brown* and our supreme court's decision in *Philip Morris USA, Inc. v. Douglas,* 110 So.3d 419 (Fla.2013). We write only to address the punitive damages award and the court's reduction of the compensatory award based on Mr. Schoeff's comparative fault.

a) *Punitive Damages*

[1, 2] RJR argues that the court erred in refusing to remit the $30 million punitive damages award because it is unconstitutionally excessive. This Court reviews a trial court's order denying a motion for remittitur for an abuse of discretion. *City of Hollywood v. Hogan,* 986 So.2d 634, 647 (Fla. 4th DCA 2008). However, the constitutionality of a punitive damages award is reviewed de novo. *Lorillard Tobacco Co. v. Alexander,* 123 So.3d 67, 81 (Fla. 3d DCA 2013).

Pursuant to Florida's remittitur and additur statute, the trial court has the responsibility to review the amount of an award and determine if it is excessive or inadequate "in light of the facts and circumstances which were presented to the trier of fact." § 768.74(1), Fla. Stat. (2012). "If the court finds that the amount awarded is excessive or inadequate, it shall order a remittitur or additur, as the case may be." § 768.74(2), Fla. Stat. In making its determination, the trial court is guided by the following statutory considerations:

(a) Whether the amount awarded is indicative of prejudice, passion, or corruption on the part of the trier of fact;

(b) Whether it appears that the trier of fact ignored the evidence in reaching a verdict or misconceived the merits of the case relating to the amounts of damages recoverable;

(c) Whether the trier of fact took improper elements of damages into account or arrived at the amount of damages by speculation and conjecture;

(d) Whether the amount awarded bears a reasonable relation to the amount of damages proved and the injury suffered; and

(e) Whether the amount awarded is supported by the evidence and is such that it could be adduced in a logical manner by reasonable persons.

§ 768.74(5), Fla. Stat.

[3, 4] "[T]he purpose of punitive damages is not to further compensate the plaintiff, but to punish the defendant for its wrongful conduct and to deter similar misconduct by it and other actors in the future." *Owens—Corning Fiberglas Corp. v. Ballard,* 749 So.2d 483, 486 (Fla.1999). The amount of punitive damages to be awarded is an issue left to the discretion of the jury. *Id.* However, the imposition of a

punitive damage award is subject to limitations.

[5] Under Florida law, the courts evaluate the extent of a punitive damages award by considering whether: 1) the amount is so excessive as to be "out of all reasonable proportion" to the conduct; 2) the award bears some relationship to ability to pay; and 3) there is a reasonable relationship between compensatory and punitive damages. *See R.J. Reynolds Tobacco Co. v. Townsend*, 90 So.3d 307, 313 (Fla. 1st DCA 2012). As for whether any given punitive damages award is so excessive as to violate due process, the United States Supreme Court has identified three guideposts to consider: 1) the degree of reprehensibility of defendant's conduct; 2) the ratio between compensatory and punitive damages; and 3) civil and criminal penalties for the same conduct. *Id.* (citing *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 562, 116 S.Ct. 1589, 134 L.Ed.2d 809 (1996)). "Although there is no bright-line standard, the Florida Supreme Court observed in *Engle* that '[s]ingle-digit [ratios] are more likely to comport with due process, while still achieving the State's goals of deterrence and retribution.' " *Id.* at 314 (quoting *Engle*, 945 So.2d at 1264–65 (quoting *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 425, 123 S.Ct. 1513, 155 L.Ed.2d 585 (2003))).

[6] At this juncture in the trajectory of Florida *Engle* cases, the appellate cases with the highest affirmed punitive damages awards are *R.J. Reynolds Tobacco Co. v. Martin*, 53 So.3d 1060 (Fla. 1st DCA 2010), and *Lorillard Tobacco Co. v. Alexander*, 123 So.3d 67 (Fla. 3d DCA 2013). Applying the above outlined principles, the *Martin* court upheld a $25 million punitive damages award that bore a 7.58 to 1 ratio to the $3.3 million compensatory damages award based on the tobacco company's wanton and reprehensible behavior. 53 So.3d at 1072–73. On the same considerations, the *Alexander* court upheld a $25 million punitive damages award that bore a 2.5 to 1 ratio to a remitted compensatory damages award of $10 million. 123 So.3d at 81–82. This Court followed suit in *R.J. Reynolds Tobacco Co. v. Buonomo*, 138 So.3d 1049, 1049, 1052 (Fla. 4th DCA 2013), affirming that the jury's initial $25 million punitive damages award (which was subsequently remitted to $15,705,000) as compared to a $5,235,000 compensatory damages award was not so excessive as to violate due process.

On the other hand, in *R.J. Reynolds Tobacco Co. v. Townsend*, 90 So.3d 307, 314 (Fla. 1st DCA 2012), the court held that a $40.8 million punitive damages award was excessive in the face of a $10.8 million compensatory damages award, even though the evidence of the tobacco company's bad conduct was the same as that presented in *Martin* and the ratio between the punitive and compensatory awards was less than that upheld in *Martin*. In doing so, it reasoned that "the $10.8 million compensatory damage award—which is substantial by any measure—justifies a lower ratio than 3.7 to 1." *Id.* at 315–16.

The award in Plaintiff's case ($30 million punitive award in light of $10.5 million compensatory award, a 2.9 to 1 ratio) falls somewhere between the award affirmed in *Alexander* ($25 million punitive award in light of $10 million compensatory award) and the award reversed in *Townsend* ($40.8 million punitive award in light of $10.8 million compensatory award). In light of the $10.5 million compensatory damages award, we hold that the $30 million punitive damages award falls on the excessive side of the spectrum.

Additionally, even if the award was not unconstitutionally excessive, remittitur should have been granted. Plaintiff's

counsel begged the jury not to award her more than $25 million in punitive damages and the trial court found that there was "no logical or sound reason for the jury to have exceeded the award sought by counsel for Plaintiff." This finding in and of itself compels remittitur. *See* § 768.74(5)(e), Fla. Stat. (one of the factors for consideration on motion for remittitur is whether the award "could be adduced in a logical manner by reasonable persons").

Accordingly, we remand to the trial court with directions to grant RJR's motion for remittitur, and, if RJR does not agree with the remitted amount, to hold a new trial on punitive damages. *See R.J. Reynolds Tobacco Co. v. Webb,* 130 So.3d 262, 264 (Fla. 1st DCA 2013) (holding that proper remedy when trial court improperly denied tobacco company's motion to remit was to remand for remittitur, or, if tobacco company did not agree with the remitted amount, to hold a new trial on damages).

b) *Comparative Fault*

[7] Plaintiff cross-appeals the trial court's order reducing the compensatory damages award based on the jury's finding that Mr. Schoeff was 25% at fault for his lung cancer. She asserts that because the jury found RJR committed the intentional tort of fraudulent concealment, section 768.81(4), Florida Statutes, barred application of Mr. Schoeff's comparative fault to reduce damages. RJR counters that the trial court correctly found Plaintiff invited the reduction and further, the substance of Plaintiff's action was a products liability suit. Thus, RJR maintains that Plaintiff's damages were subject to reduction under the comparative fault statute. We agree with RJR.

Sections 768.81(2) and (4), Florida Statutes (1994) [3], provide, in pertinent part, that in "negligence cases," "any contributory fault chargeable to the claimant diminishes proportionately the amount awarded as economic and noneconomic damages for an injury attributable to the claimant's contributory fault, but does not bar recovery." "Negligence cases" include, but are not limited to, "civil actions 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." § 768.81(4)(a), Fla. Stat. "In determining whether a case falls within the term 'negligence cases,' the court shall look to the substance of the action and not the conclusory terms used by the parties." § 768.81(4)(a), Fla. Stat. Section 768.81 does not permit the reduction of compensatory damages by plaintiff's comparative fault where the suit is based upon an intentional tort ("the intentional tort exception"). *See* § 768.81(4)(b) Fla. Stat.

a) Waiver

As outlined above, in granting RJR's motion to reduce the jury's compensatory damages award by Mr. Schoeff's comparative fault, the trial court found that Plaintiff waived any argument regarding the intentional tort exception. "[A] trial court's finding of waiver is reviewed for abuse of discretion." *R.J. Reynolds Tobacco Co. v. Hiott,* 129 So.3d 473, 479 (Fla. 1st DCA 2014).

3. The parties dispute which version of the statute governs: Plaintiff asserts it is the version as amended in 1992 while RJR contends it is the version as amended in 2011. Courts generally have held that the applicable version of section 768.81 is the version in effect at the time the cause of action accrued. *See Basel v. McFarland & Sons, Inc.,* 815 So.2d 687, 691–96 (Fla. 5th DCA 2002). Plaintiff's cause of action accrued in 1994, when Mr. Schoeff was diagnosed with lung cancer. *See, e.g., Carter v. Brown & Williamson Tobacco Corp.,* 778 So.2d 932, 934 (Fla.2000). As such, the 1994 version of the statute governs.

The case with the most in depth discussion on waiver is *Hiott.* 129 So.3d at 479–82. There, a tobacco plaintiff argued that the trial court improperly reduced her compensatory damages based on the smoker's comparative fault because she prevailed on her intentional tort claims against the tobacco companies. *Id.* at 479. The First DCA disagreed, holding that under the facts of the case, the trial court did not abuse its discretion in finding that the plaintiff invited the error by misleading the jury. *Id.* at 481. Specifically, the plaintiff "encouraged the jury, from *voir dire* through closing argument, that she accepted that her deceased husband was partially at fault for his smoking-related illness and death. Thus, she expected the jury to allocate some fault to her late husband." *Id.* Indeed, the jury was instructed that it "should not make any reduction because of the fault you charge to [the smoker]. The Court will enter a judgment based on your verdict and **will reduce the total amount of damages by the percentage of fault which you charge to [the smoker]**." *Id.* However, the plaintiff "failed to inform the jury that she intended to reserve her right to assert the inapplicability of comparative fault to any of her claims." *Id.* at 480–81. Under the circumstances, the court concluded that the jury was likely misled to believe that its award would be reduced by its determination of comparative fault. *Id.* at 481–82. Thus, the jury may have reached a different verdict on damages had it known that the tobacco company would bear the entire amount. *See id.; see also Buonomo,* 138 So.3d at 1053 n. 3 (holding, without discussion, that any error in the reduction of a tobacco plaintiff's compensatory damages award was invited and/or waived by the plaintiff).

In *R.J. Reynolds Tobacco Co. v. Sury,* 118 So.3d 849, 851 (Fla. 1st DCA 2013), the same court reached the opposite conclusion under slightly different facts. There, the First DCA held that the trial court did not abuse its discretion in finding a tobacco plaintiff did not waive application of the intentional tort exception. *Id.* The court based its conclusion on the facts that: 1) the plaintiff's "complaint clearly and specifically sought 'potential apportionment of fault and damages on all counts other than those alleging intentional torts;' " 2) the plaintiff "never argued to the jury or the court that the damages for his father's terminal illness should be reduced by his portion of fault;" and 3) "the defendants agreed to the verdict form which listed each cause of action, including the intentional torts, and requested the jury to indicate whether the defendants had committed each individual tort or not." *Id.*

Plaintiff argues that this particular case is factually analogous to *Sury* rather than *Hiott,* and thus the court erred when it found that Plaintiff waived her intentional tort exception argument. As it pertains to Plaintiff's position on comparative fault, the record reflects the following:

A. *Pleadings*

Plaintiff's complaint stated that: "Plaintiff will seek apportionment of fault, pursuant to the principles of comparative fault, on the counts for negligence and strict liability; however not with respect to the counts constituting intentional torts as pled in this action."

B. *Plaintiff's Representations to the Jury*

During voir dire, Plaintiff's counsel told prospective jurors: "from the very beginning in this case, when this case was filed, the plaintiff in this case, Miss Schoeff, on behalf of her husband who's passed, has accepted partial responsibility, okay, in combination with the acts of the defendants." During opening statements, Plaintiff's counsel stated: "Then you're going to

decide what the percentage of responsibility for RJR—if you find for us on the counts of negligence and strict liability, then we're going to apportion responsibility, what percentage of fault is Mr. Schoeff responsible for and what percentage of fault is R.J. Reynolds responsible for." Likewise, Mr. Schoeff's responsibility was a reoccurring theme in Plaintiff's closing—counsel referred to the fact that Mr. Schoeff bore responsibility for his actions no less than ten times. However, at one point, counsel did explain that although Plaintiff accepted some responsibility for the negligence and strict liability claims, the intentional torts were "a different ball game." Finally, counsel argued that due to RJR's lies and deceptive marketing strategies, the jury should not find Mr. Schoeff responsible at all for his decision to smoke until at least 1967, when the first Surgeon General's report on the harms of smoking came out. Counsel equated this number to 40%. For the remaining 60% of Mr. Schoeff's smoking life, counsel urged the jury to find Mr. Schoeff 25% responsible, averaging out to a total of 15% responsibility allocated to Mr. Schoeff and 85% to RJR.

C. *Jury Instructions*

Before retiring, the court instructed the jury as follows:

> If your verdict is for R.J. Reynolds on plaintiff's negligence and product defect claims, then you will not consider the issue of comparative fault. If, however, your verdict is for plaintiff on her negligence or product defect claims, then you will consider the issue of comparative fault.
>
> In that event, you must determine and write on the verdict what percentage of fault James Schoeff's death you find chargeable to R.J. Reynolds and to James Schoeff.
>
> Joan Schoeff, on behalf of the estate of James Schoeff, has admitted that, on the claims for negligence and defective product, James Schoeff bears some percentage of fault and that his fault was a proximate cause, in combination with the acts of omission of defendants, of his smoking-related lung cancer and death.

In the instruction regarding the jury's determination of compensatory damages, the court informed the jury: "In determining the total amount of any damages sustained by Joan Schoeff, **you should not make any reductions because of the responsibility of James Schoeff.**"

These facts share characteristics with both *Sury* (no waiver) and *Hiott* (waiver). Like in *Sury,* Plaintiff's complaint specifically stated that it was seeking apportionment of fault for only its negligence claims and not its intentional tort claims. Also like in *Sury,* the verdict form listed each cause of action individually. However, these similarities do not compel the same conclusion reached in *Sury* because, unlike in *Sury* and similar to *Hiott,* Plaintiff's counsel argued to the jury that the damages for Mr. Schoeff's terminal illness should be reduced by his portion of the fault and the jury was instructed not to make any reductions based on Mr. Schoeff's comparative fault. Although Plaintiff's counsel noted that Plaintiff was accepting some responsibility for only her negligence claims and not her intentional tort claims, counsel also argued that the jury should consider this concession when coming up with its figure for comparative fault and should find Mr. Schoeff less at fault due to RJR's fraudulent concealment of certain facts. Based on the overall theme of Plaintiff's representations to the jury, a reasonable jury would not possibly understand that its comparative fault determination was going to have no effect whatsoever on its compensatory damages award. *See Philip Morris USA, Inc. v.*

Green, 175 So.3d 312 (Fla. 5th DCA 2015) (rejecting tobacco plaintiff's argument that she did not waive her argument concerning the intentional tort exception because counsel gave "explicit, tactical directions encouraging the jury to find [plaintiff] partially at fault and to determine what percentage of fault was to be shared by each of the parties").

Under such circumstances, reversing would unfairly allow the Plaintiff to "have it both ways." It 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. *Hiott*, 129 So.3d at 481; *see also Green*, 175 So.3d 312. Accordingly, we hold that the trial court did not abuse its discretion when it found that Plaintiff waived her intentional tort exception argument.

b. Applicability of the Comparative Fault Intentional Tort Exception to this Suit

[8] Although we are affirming the trial court's reduction of the compensatory damages award by Mr. Schoeff's comparative fault based on its finding that Plaintiff waived her argument regarding the application of the intentional tort exception, we also write to address the trial court's alternative finding that the intentional tort exception does not apply to Plaintiff's case.

As outlined above, Florida's comparative fault statute provides: "In determining whether a case falls within the term 'negligence cases,' the court shall look to the substance of the action and not the conclusory terms used by the parties." § 768.81(4)(a), Fla. Stat. The seminal case addressing whether an action is founded in negligence or intentional tort is *Merrill Crossings Associates v. McDonald*, 705 So.2d 560 (Fla.1997). There, after being shot in the parking lot, a customer sued Wal–Mart and the owner of the shopping center, alleging negligent failure to maintain reasonable security. *Id.* at 561. The defendants sought to have the shooter placed on the verdict form for purposes of assessing comparative fault and the trial court refused. *Id.* On appeal, the supreme court affirmed this ruling, concluding the substance of the action was "that [the Wal–Mart customer] was the victim of an intentional tort." *Id.* at 563. The court noted that the statute did not say actions "including an intentional tort," rather it said "based upon an intentional tort." *Id.* The court reasoned that this implies " 'the necessity to inquire whether the entire action against or involving multiple parties is founded or constructed on an intentional tort. In other words, the issue is whether an action comprehending one or more negligent torts actually has at its core an intentional tort by someone.' " *Id.* (quoting *Slawson v. Fast Food Enters.*, 671 So.2d 255, 258 (Fla. 4th DCA 1996)).

Merrill Crossings makes it clear that section 768.81 cannot be avoided simply because the action includes an intentional tort—rather the "entire action" must be "founded on an intentional tort." Stated another way, the entire action must have an intentional tort "at its core."

Considering the interplay between section 768.81 and an *Engle* progeny suit alleging causes of actions for negligence and intentional tort, the *Sury* court came to a decision in accord with the direction of *Merrill Crossings*. 118 So.3d at 852. There, the trial court refused to reduce the plaintiff's compensatory damages award by the smoker's comparative fault based on its conclusion that the "core" of the plaintiff's suit was founded in intentional tort. *Id.* The First DCA found "no abuse of discretion in the trial court's determination that although the plaintiff pled negligence and strict liability, the additional allega-

tions of the intentional torts and the proof of affirmative, calculated misrepresentations in the tobacco companies' advertising and other publications supported the conclusion that this action 'actually had at its core an intentional tort by someone.' " *Id.*

Here, the trial court came to a different conclusion applying the same "core" analysis outlined in *Merrill Crossings.* In its order on post-trial motions, the court ruled that arguing *Engle* progeny suits are not founded in negligence and thus are not subject to the comparative fault statute is "to argue in the theater of the absurd." It explained:

> An attorney sued 'Big Tobacco' in *Engle* and argued the defendants negligently designed cigarettes; manipulated the nicotine in cigarettes; produced advertisement and marketing strategies destined to mislead the public; and other non-intentional 'tortuous' misconduct, specifically sounded in negligence and product liability.
>
> Concurrent with the negligence and strict liability claims plaintiffs brought intentional tort claims for fraud and misrepresentation which have led to several juries awarding punitive damages on the intentional tort claims.

[9] We disagree with the *Sury* court to the extent it reviewed the trial court's "core" analysis under the abuse of discretion standard. Instead, we "review *de novo* the legal question of whether certain conduct qualifies as negligence or intentional tort." *Petit–Dos v. Sch. Bd. of Broward Cnty.,* 2 So.3d 1022, 1024 (Fla. 4th DCA 2009). Applying the de novo standard, we agree with the trial court and hold that at its core, Plaintiff's suit is a products liability suit based on conduct grounded in negligence.

Affirmed in part, reversed in part and remanded.

MAY, J., concurs.

TAYLOR, J., concurs in part and dissents in part with opinion.

TAYLOR, J., concurring in part and dissenting in part.

I concur in the majority's decision affirming the trial court's denial of R.J. Reynolds's motion for directed verdict and motion for new trial. However, I respectfully disagree with the majority's reversal of the trial court's denial of the tobacco company's motion for remittitur of punitive damages. I also disagree with the majority's affirmance, on cross-appeal, of the trial court's reduction of compensatory damages based on comparative fault.

The trial court did not abuse its discretion in denying R.J. Reynolds's motion for remittitur of the $30 million in punitive damages. The jury's award was properly based on the evidence presented and, as the trial court determined, it was not excessive under Florida law or federal due process. As our court has recognized in other *Engle* progeny cases, the purpose of punitive damages is to punish a defendant's past wrongful conduct and deter future misconduct. *Philip Morris USA Inc. v. Cohen,* 102 So.3d 11, 16 (Fla. 4th DCA 2012). Here, the record is replete with evidence of the tobacco company's continued attempts to discredit scientific research revealing the potential harm caused by its products, its costly campaign to mislead the public about the hazards of smoking, and its manipulation of nicotine levels in cigarettes to make them even more addictive. *See Lorillard Tobacco Co. v. Alexander,* 123 So.3d 67, 79–83 (Fla. 3d DCA 2013) (reviewing a similar record and finding that the evidence supported an award of $25 million punitive damages against Lorillard).

Although the trial court was puzzled by the fact that the jury awarded the plaintiff more than the $25 million requested by plaintiff's counsel, the court expressly found that the jury's award "was not infected by bias, prejudice, passion or any other sentiment." Further, we have long held "that a jury might properly award damages equal to or in excess of those requested by counsel in closing argument." *Lopez v. Cohen,* 406 So.2d 1253, 1256 (Fla. 4th DCA 1981). No doubt plaintiff's counsel asked the jury not to award more than $25 million because this amount has been affirmed by Florida courts and is thus considered "safe" from reversal on a claim of excessiveness. But there was nothing illogical about the jury's decision to punish the tobacco company in an amount greater than that argued by plaintiff's counsel. The trial court's statement suggesting that there was no reason for the jury to exceed the award sought by plaintiff's counsel was inconsistent with our precedent in *Lopez* and does not somehow compel a remittitur.

Likewise, the mere fact that $25 million is the highest award approved thus far on appeal does not mean that it should forever remain a cap. The $30 million punitive damages award in this case is only 20% higher than $25 million and falls within a reasonable range of damages. Furthermore, the 2.9 to 1 ratio of punitive damages to compensatory damages ($10.5 million) is lower than that already approved by other Florida courts. *See R.J. Reynolds Tobacco Co. v. Martin,* 53 So.3d 1060, 1071–72 (Fla. 1st DCA 2010) (approving a 7.58 to 1 ratio); *Owens–Corning Fiberglas v. Ballard,* 749 So.2d 483 (Fla.1999) (upholding punitive damages award in an asbestos insulation case that was nearly 18 times the compensatory damages award). Notably, there are no *Engle* progeny cases suggesting that a $30 million punitive damages award is excessive. In light of the historical use of treble damages as a punitive remedy, I cannot conclude that the 2.9 to 1 ratio in this case is excessive. The $30 million punitive damages award was within constitutional limits, was supported by the evidence, and was an amount that could be adduced in a logical manner by reasonable persons. I would affirm the trial court's denial of R.J. Reynolds's motion for remittitur of the punitive damages award.

I would reverse, however, the trial court's reduction of the plaintiff's compensatory damages based on the decedent's comparative fault. Our comparative fault statute provides an exception for intentional tort claims, and although a products liability claim was included in the complaint, this lawsuit, when viewed in its entirely, essentially alleges intentional misconduct by the tobacco company. As the First District found in *R.J. Reynolds Tobacco Co. v. Sury,* 118 So.3d 849 (Fla. 1st DCA 2013), the "core" of *Engle* progeny cases is intentional misconduct. The gravamen of the charge is that the tobacco company intentionally designed its products in a defective manner and pursued a callous and intentional course of tortious conduct by fraudulent concealment. I therefore disagree with the majority's conclusion that this lawsuit is based on conduct grounded in negligence. But like the majority, I would use a de novo standard, instead of an abuse of discretion standard, in reviewing the trial court's "core" determination and find that the "core" of *Engle* progeny actions is intentional misconduct as a matter of law.

Moreover, on the waiver issue, the record does not support the trial court's finding that the plaintiff waived the intentional tort exception to the comparative fault statute. The facts in this case are more like those in *Sury,* where the First District found no waiver. Here, the plaintiff made it clear in her complaint and in both open-

ing statement and closing argument to the jury that her admission that the decedent bore some responsibility applied only to the negligence and strict liability claims and not to the intentional tort claims. Further, the trial court told the jury at the beginning of the trial that the plaintiff sought apportionment only as to the negligence and strict liability claims and not as to the intentional tort claims, and later instructed the jury that the plaintiff "admitted that on the claims for *negligence and defective product,* [the decedent] bears some percentage of fault and that his fault was a proximate cause, in combination with the acts of omission of the defendants, of his smoking-related lung cancer and death." The trial court also instructed the jury not to make any reductions in the amount of damages based on the decedent's fault, but gave no indication that it would reduce the damage award by comparative fault. In addition, to avoid a claim of waiver, the plaintiff had the trial court change the order of questions on the verdict form so comparative fault came before the intentional tort liability questions. In sum, the record does not show that plaintiff did anything to invite the court to apply comparative fault to her intentional tort claims.

For the above reasons, I would reverse the trial court's post-trial order on comparative fault and remand for entry of an amended judgment awarding plaintiff the full compensatory damages found by the jury. I would affirm in all other respects.

Gary CZAJKOWSKI, Appellant,

v.

STATE of Florida, Appellee.

No. 4D13–3693.

District Court of Appeal of Florida, Fourth District.

Nov. 4, 2015.

Rehearing Denied Dec. 9, 2015.

Background: After a jury trial, defendant was convicted in the Circuit Court, Fifteenth Judicial Circuit, Palm Beach County, Stephen A. Rapp, J., on 14 counts of unlawful compensation or reward for official behavior, in connection with his alleged provision of gifts to municipal employees with whom defendant's company was doing business. Defendant appealed.

Holding: The District Court of Appeal, Gerber, J., held that statute criminalizing unlawful compensation or reward for official behavior was not unconstitutionally vague as applied to defendant.

Affirmed.

Bribery ⚷2

Constitutional Law ⚷4509(21)

Statute criminalizing unlawful compensation or reward for official behavior was not vague in violation of Federal and State due process clauses as applied to defendant who allegedly provided gifts to municipal employees with whom defendant's company was doing business; even though statute did not define a benefit "not authorized by law," it was sufficiently definite to inform defendant that his conduct of providing gifts to influence public employees' official action—which in turn, caused them to violate the law by accepting things of value given to influence their official action—was not authorized by law. U.S.C.A. Const.Amend. 14; West's F.S.A.

EXHIBIT B

Select Year: 2011 Go

The 2011 Florida Statutes

Title XLV
TORTS

Chapter 768
NEGLIGENCE

View Entire Chapter

[1]**768.81 Comparative fault.**—

(1) DEFINITIONS.—As used in this section, the term:

(a) "Accident" means the events and actions that relate to the incident as well as those events and actions that relate to the alleged defect or injuries, including enhanced injuries.

(b) "Economic damages" means past lost income and future lost income reduced to present value; medical and funeral expenses; lost support and services; replacement value of lost personal property; loss of appraised fair market value of real property; costs of construction repairs, including labor, overhead, and profit; and any other economic loss that would not have occurred but for the injury giving rise to the cause of action.

(c) "Negligence action" means, without limitation, a civil action for damages based upon a theory of negligence, strict liability, products liability, professional malpractice whether couched in terms of contract or tort, or breach of warranty and like theories. The substance of an action, not conclusory terms used by a party, determines whether an action is a negligence action.

(d) "Products liability action" means a civil action based upon a theory of strict liability, negligence, breach of warranty, nuisance, or similar theories for damages caused by the manufacture, construction, design, formulation, installation, preparation, or assembly of a product. The term includes an action alleging that injuries received by a claimant in an accident were greater than the injuries the claimant would have received but for a defective product. The substance of an action, not the conclusory terms used by a party, determines whether an action is a products liability action.

(2) EFFECT OF CONTRIBUTORY FAULT.—In a negligence action, contributory fault chargeable to the claimant diminishes proportionately the amount awarded as economic and noneconomic damages for an injury attributable to the claimant's contributory fault, but does not bar recovery.

(3) APPORTIONMENT OF DAMAGES.—In a negligence action, the court shall enter judgment against each party liable on the basis of such party's percentage of fault and not on the basis of the doctrine of joint and several liability.

(a)1. In order to allocate any or all fault to a nonparty, a defendant must affirmatively plead the fault of a nonparty and, absent a showing of good cause, identify the nonparty, if known, or describe the nonparty as specifically as practicable, either by motion or in the initial responsive pleading when defenses are first presented, subject to amendment any time before trial in accordance with the Florida Rules of Civil Procedure.

2. In order to allocate any or all fault to a nonparty and include the named or unnamed nonparty on the verdict form for purposes of apportioning damages, a defendant must prove at trial, by a preponderance of the evidence, the fault of the nonparty in causing the plaintiff's injuries.

(b) In a products liability action alleging that injuries received by a claimant in an accident were enhanced by a defective product, the trier of fact shall consider the fault of all persons who contributed to the accident when apportioning fault between or among them. The jury shall be appropriately instructed by the trial judge on the apportionment of fault in products liability actions where there are allegations that the injuries received by the claimant in an accident were enhanced by a defective product. The rules of evidence apply to these

actions.

(4) APPLICABILITY.—This section 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 chapter 403, chapter 498, [2]chapter 517, [2]chapter 542, or [2]chapter 895.

(5) MEDICAL MALPRACTICE.—Notwithstanding anything in law to the contrary, in an action for damages for personal injury or wrongful death arising out of medical malpractice, whether in contract or tort, if an apportionment of damages pursuant to this section is attributed to a teaching hospital as defined in s. 408.07, the court shall enter judgment against the teaching hospital on the basis of such party's percentage of fault and not on the basis of the doctrine of joint and several liability.

History.—ss. 60, 65, ch. 86-160; s. 5, ch. 87-50; s. 79, ch. 88-1; s. 43, ch. 88-277; s. 1, ch. 88-335; s. 38, ch. 91-110; s. 104, ch. 92-33; s. 27, ch. 99-225; s. 1, ch. 2006-6; s. 1, ch. 2011-215.

[1]**Note.**—

A. Section 2, ch. 2011-215, provides that "[t]he Legislature intends that this act be applied retroactively and overrule *D'Amario v. Ford Motor Co.*, 806 So. 2d 424 (Fla. 2001), which adopted what the Florida Supreme Court acknowledged to be a minority view. That minority view fails to apportion fault for damages consistent with Florida's statutory comparative fault system, codified in s. 768.81, Florida Statutes, and leads to inequitable and unfair results, regardless of the damages sought in the litigation. The Legislature finds that, in a products liability action as defined in this act, fault should be apportioned among all responsible persons."

B. Section 3, ch. 2011-215, provides that "[t]his act is remedial in nature and applies retroactively. The Legislature finds that the retroactive application of this act does not unconstitutionally impair vested rights. Rather, the law affects only remedies, permitting recovery against all tortfeasors while lessening the ultimate liability of each consistent with this state's statutory comparative fault system, codified in s. 768.81, Florida Statutes. In all cases, the Legislature intends that this act be construed consistent with the due process provisions of the State Constitution and the Constitution of the United States."

[2]**Note.**—Contains no readily apparent specific reference to joint and several liability.

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EXHIBIT C

West's F.S.A. § 768.81
WEST'S FLORIDA STATUTES ANNOTATED
TITLE XLV. TORTS
CHAPTER 768. NEGLIGENCE
PART II. DAMAGES

768.81. Comparative fault

(1) Definition.—As used in this section, "economic damages" means past lost income and future lost income reduced to present value; medical and funeral expenses; lost support and services; replacement value of lost personal property; loss of appraised fair market value of real property; costs of construction repairs, including labor, overhead, and profit; and any other economic loss which would not have occurred but for the injury giving rise to the cause of action.

(2) Effect of contributory fault.—In an action to which this section applies, any contributory fault chargeable to the claimant diminishes proportionately the amount awarded as economic and noneconomic damages for an injury attributable to the claimant's contributory fault, but does not bar recovery.

(3) Apportionment of damages.—In cases to which this section applies, the court shall enter judgment against each party liable on the basis of such party's percentage of fault and not on the basis of the doctrine of joint and several liability; provided that with respect to any party whose percentage of fault equals or exceeds that of a particular claimant, the court shall enter judgment with respect to economic damages against that party on the basis of the doctrine of joint and several liability.

(4) Applicability.—

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

(b) This section does not apply to any action 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 chapter 403, chapter 498, chapter 517, chapter 542, or chapter 895. [1PP]

(5) Applicability of joint and several liability.—Notwithstanding the provisions of this section, the doctrine of joint and several liability applies to all actions in which the total amount of damages does not exceed $25,000.

(6) Notwithstanding anything in law to the contrary, in an action for damages for personal injury or wrongful death arising out of medical malpractice, whether in contract or tort, when an apportionment of damages pursuant to this section is attributed to a teaching hospital as defined in s. 407.002(27), the court shall enter judgment against the teaching hospital on the basis of such party's percentage of fault and not on the basis of the doctrine of joint and several liability.

CR01

[1PP] Chapters 542 and 895, Florida Statutes, contain no readily apparent specific reference to joint and several liability.

1992 Pocket Part Credit(s)

CR01 Added by Laws 1986, c. 86-160, § 60, eff. July 1, 1986. Amended by Laws 1988, c. 88-1, § 79, eff. Feb. 8, 1988; Laws 1988, c. 88-277, § 43, eff. July 5, 1988; Laws 1991, c. 91-110, § 38.

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