

Case No. SC17-1398

Case No. 4D16-224

**IN THE SUPREME COURT
STATE OF FLORIDA**

STEPHEN TOGNOLI, AS PERSONAL REPRESENTATIVE FOR THE ESTATE
OF LYNDA TOGNOLI,

Petitioner,

v.

PHILIP MORRIS USA INC.,

Respondent.

ON PETITION FOR DISCRETIONARY REVIEW FROM A DECISION
OF THE FOURTH DISTRICT COURT OF APPEAL

**RESPONDENT'S RESPONSE TO THE COURT'S
SHOW CAUSE ORDER OF JANUARY 19, 2018**

Respondent Philip Morris USA Inc. ("PM USA") hereby submits this response to the Court's order issued January 19, 2018, that PM USA show cause why the Court should not accept jurisdiction in this case, summarily quash the decision being reviewed, and remand to the district court for reconsideration in light of the Court's decision in *Schoeff v. R.J. Reynolds Tobacco Co.*, 42 Fla. Weekly S951 (Fla. Dec. 14, 2017). PM USA submits that *Schoeff* is controlling and that the Court should accept jurisdiction in this case, summarily quash the

RECEIVED, 02/05/2018 12:48:26 PM, Clerk, Supreme Court

decision being reviewed, and remand to the Fourth District Court of Appeal for reconsideration in light of *Schoeff*.

In its decision in this matter, the Fourth District affirmed the judgment of the trial court, rejecting Petitioner's argument that he was entitled to a new trial because the comparative fault statute does not apply to intentional torts. *See Tognoli v. Philip Morris USA, Inc.*, 221 So. 3d 777 (Fla. 4th DCA 2017) (per curiam). Petitioner sought review from this Court based on its discretionary jurisdiction, on the ground that the decision was a "citation PCA" to *R.J. Reynolds Tobacco Co. v. Schoeff*, 178 So. 3d 487 (Fla. 4th DCA 2015), over which this Court had granted review.

On December 14, 2017, this Court issued its decision in *Schoeff*, finding that "the comparative fault statute does not apply to *Engle* progeny cases in which the jury finds for the plaintiff on the intentional torts such that the compensatory damage awards in those cases are not subject to reduction" and quashing the Fourth District's decision below. *Schoeff*, 42 Fla. L. Weekly S951. The Court's decision in *Schoeff* is thus controlling in this matter. Based on the holding in *Schoeff*, the Court should accept jurisdiction in this case, summarily quash the decision being reviewed, and remand to the district court for reconsideration.

However, PM USA respectfully continues to maintain that federal law impliedly preempts *Engle* progeny plaintiffs' non-intentional tort claims, and

therefore preserves its arguments regarding implied preemption for the purposes of review in the U.S. Supreme Court. In addition, PM USA also continues to assert its position that *Philip Morris USA, Inc. v. Douglas*, 110 So. 3d 419 (Fla. 2013) and the Fourth District Court of Appeal's decision in this case deny PM USA its federal due process rights, preserving those due process arguments, too, for review in the U.S. Supreme Court.

Dated: February 5, 2018

Respectfully submitted,

s/ Geoffrey J. Michael
Geoffrey J. Michael
Florida Bar. No.: 86152
Geoffrey.Michael@apks.com
ARNOLD & PORTER KAYE
SCHOLER LLP
601 Massachusetts Ave., NW
Washington, DC 20001
Telephone: (202) 942-5000
Facsimile: (202) 942-5999

Counsel for Philip Morris USA Inc.

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing was served by electronic mail and through the Florida Court's E-Filing Portal on all counsel on the attached Service List this 5th day of February, 2018.

/s/ Geoffrey J. Michael
Counsel for Philip Morris USA Inc.

SERVICE LIST

Counsel for Plaintiff:

Philip Freidin
FREIDIN BROWN P.A.
One Biscayne Tower Building
2 South Biscayne Blvd., Suite 3100
Miami, FL 33131
pf@fblawyers.net
dd@fblawyers.net
pleadings@fblawyers.net
Tel: (305) 371-3666
Fax: (305) 371-6725

Randy Rosenblum
DOLAN, DOBRINSKY,
ROSENBLUM, LLP
2665 South Biscayne Drive, Suite 609
Miami, FL 33133
rosenblum@ddrlawyers.com
jross@ddrlawyers.com
Tel: (305) 371-2692
Fax: (305) 371-2691

Maria Sperando
LAW OFFICE OF MARIA P.
SPERANDO, P.A.
2682 SE Willoughby Blvd., Suite 201
Stuart, FL 34994
Maria@sperandolaw.com
Tel: (772) 266-4631
Fax: (772) 266-4641

Service list continues on the following page

Counsel for Plaintiff:

Alex Alvarez
THE ALVAREX FIRM
355 Palermo Avenue
Coral Gables, FL 33134
Alex.alvarez@integrityforjustice.com
Philip.holden@integrityforjustice.com
Kristian.toimil@integrityforjustice.com
maria@integrityforjustice.com
Tel: (305) 444-7675
Fax: (305) 444-0075

Celene H. Humphries
Maegan P. Luka
Thomas J. Seider
BRANNOCK & HUMPHRIES
1111 W. Cass Street, Suite 200
Tampa, FL 33602
Tel: (813) 223-4300
Fax: (813) 262-0604
tobacco@bhappeals.com

Co-counsel for Philip Morris USA Inc.

John P. Wunderli
jwunderli@rqun.com
RAY QUINNEY & NEBEKER P.C.
36 S. State Street, Suite 1400
Salt Lake City, UT 84111

Pete Henk
phenk@shb.com
SHOOK HARDY & BACON LLP
600 Travis Street, Suite 3400
Houston, TX 77002

***Co-counsel for Philip Morris USA
Inc.***

Scott Kaiser

skaiser@shb.com

Timothy Congrove

tcongrove@shb.com

Stacey Deere

sdeere@shb.com

SHOOK, HARDY & BACON LLP

2555 Grand Blvd.

Kansas City, MO 64108

Telephone: (816) 474-6550

Fax: (816) 421-5547

Joseph M. Fasi, II

Joseph_Fasi@gshllp.com

Sandy_Fisher@gshllp.com

GONZALEZ SAGGIO HARLAN

255 Aragon Ave., Third Floor

Miami, FL 33131

J. Daniel Gardner

jgardner@shb.com

SHOOK HARDY & BACON LLP

Miami Center, Suite 3200

201 S. Biscayne Blvd.

Miami, FL 33131

Tel: (305) 358-5171

Fax: (305) 358-7470