IN THE SUPREME COURT OF FLORIDA

BRINDA COATES, etc.,

Petitioner,

v.

R.J. REYNOLDS TOBACCO COMPANY,

Respondent.

Case No.: SC21 -175
L.T. Nos.: 5D19-2549
1997-CA-004541-O

ON DISCRETIONARY REVIEW FROM THE FIFTH DISTRICT COURT OF APPEAL

PETITIONER'S INITIAL BRIEF ON THE MERITS

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STATEMENT OF THE CASE AND OF THE FACTS

At issue is whether $16 million is an excessive amount of punitive damages to be imposed against R.J. Reynolds Tobacco Company (RJR) for causing the lung cancer and death of Lois Stucky. This Court unanimously held that $30 million was not excessive when RJR's misconduct caused the lung cancer and death of James Schoeff. *Schoeff v. R.J. Reynolds Tobacco Co.*, 232 So. 3d 294, 308-09 (Fla. 2017). But in this case, the district court held that an award about half that size was excessive even though it was directed to largely the same misconduct by the same defendant for the same type of lethal injury. *R.J. Reynolds Tobacco Co. v. Coates*, 308 So. 3d 1068, 1073-76 (Fla. 5th DCA 2020).

The sole reason for this disparity had nothing to do with RJR's conduct or circumstances; the district court found that the "actual dollar amount of the punitive damage award" was not excessive and was fully supported by RJR's misconduct. *Id.* at 1076. Nonetheless, it held that the law required RJR receive substantially less punishment for killing Ms. Stucky than for killing Mr. Schoeff based solely on the amount of the compensatory damages awarded to their respective survivors. Several million dollars were awarded in

Schoeff because Mr. Schoeff happened to leave behind a surviving spouse, but only a few hundred thousand dollars were awarded here because Ms. Stucky had gotten divorced and left no spouse or young children behind.

The Florida Legislature has chosen to regulate the ratio of punitive to compensatory damages that may be awarded in a civil case. But it determined that no ratio is required where, as the district court found happened in this case, the plaintiff has proven by clear and convincing evidence that an award over the presumptive limit of three times the compensatory damage award is not excessive in light of the facts and circumstances presented at trial. *Id.* at 1073 (citing § 768.73(1), Fla. Stat. (1997)). The certified question before this Court is whether some other source of law imposes a limit to the ratio of punitive to compensatory damages that may be awarded for wantonly causing the death of a human being where, as here, the compensatory award is modest.

The district court answered the question in the affirmative, concluding that there is some limit to the ratio of punitive to compensatory damages that trumps all other relevant factors. Unable to identify that limit, the district court concluded that an

amount in excess of the limit is "identifiable upon viewing." *Coates*, 308 So. 3d at 1073. Based on her assertion that neither state nor federal law impose any such limit, Petitioner asks this Court to answer the question in the negative and reinstate the judgment.

Course of Proceedings

Though covering twenty years, the relevant procedural history is straightforward. Shortly after being diagnosed with lung cancer, Ms. Stucky filed this action in 1997 against RJR and other defendants later dismissed. (R1:40.)[1] After her death, an amended complaint was filed by Petitioner Brinda Coates, as personal representative of Ms. Stucky's estate. (R1:38.)

The action was abated until 2008, when the trial court lifted the stay and allowed Ms. Coates to file an amended complaint. (R1:43.) In the operative complaint, Ms. Coates pursued remedies under the Florida Wrongful Death Act based on causes of action for negligence, strict liability, fraud, and conspiracy. (R1:1436-62.) The ultimate operative complaint did not invoke the findings approved

[1] "R1" is the PDF containing volume 1 of the record before the district court of appeal; "R2" is the PDF containing volume 2; and "DCA" is the PDF containing the filings in the district court.

in *Engle v. Liggett Group, Inc.*, 945 So. 2d 1246 (Fla. 2006) (R1:1436-62.) Accordingly, this is not an *Engle*-progeny case.

The case was tried before an Orange County jury in two phases over fourteen trial days with Circuit Judge Renee Roche presiding. (R2:16,634-20,083.) At the conclusion of the first phase, the jury returned a verdict for Ms. Coates on the strict liability count and for RJR on the remaining counts. (R2:10,026-27.) It found that Ms. Stucky and RJR each bore half the fault. (R2:10,027.) It awarded each of Ms. Stucky's three surviving children $100,000 in non-economic damages and found by clear and convincing evidence that punitive damages were warranted. (R2:10,028.) Following the second phase, the jury awarded $16 million in punitive damages. (R2:10,050.)

RJR filed a motion for new trial or remittitur, which the trial court denied without comment before entering final judgment for $16,150,000, representing the jury's compensatory damage award reduced by Ms. Stucky's percentage of fault plus the punitive damage award. (R2:10,066-130; R2:10,514-18.) On appeal, the Fifth District reversed based on its conclusion that the punitive

damage award was excessive, but granted Ms. Coates's motion to certify a question of great public importance. (DCA:277-90, 302-15.)

On Ms. Coates's timely invocation, this Court has accepted jurisdiction to answer the certified question and also granted oral argument at a date to be determined. (DCA:382-84, 407-08.)

Relevant Facts From Trial

Ms. Stucky started smoking in 1963 at age 17. (R2:19,115, 19,126.) She primarily smoked two RJR brands, Winston and Doral. (R2: 19,125-26, 19,253-54, 19,310.) She was diagnosed with lung cancer in 1997 and died in 1998. (R2:19,511.)

The jury found that RJR's cigarettes were "defective by reason of their design" and that the defect caused Ms. Stucky's lung cancer and death. (R2:10,026.) The only theory of liability for defective design submitted to the jury was that RJR's cigarettes "fail[] to perform as safely as an ordinary consumer would expect when used as intended or when used in a manner reasonably foreseeable by the manufacturer." (R2:19,765.)

The evidence underlying Ms. Coates's argument on this question came predominantly from three experts, two of whom testified to the dangers posed by cigarette smoking. Dr. John C.

Ruckdeschel, a board-certified medical oncologist, testified that cigarette smoking causes lung cancer and explained how that occurs. (R2:17,946, 17,952-66.) Dr. Tonia Werner, a board-certified forensic psychiatrist, explained how nicotine in cigarettes is highly addictive similar to cocaine or heroin, how the brain of an addicted smoker seizes on mixed public health messages to self-rationalize continued smoking, and why she concluded that Ms. Stucky had been addicted to RJR's cigarettes. (R2:18,799-801, 18,804-07, 18,842-54, 18,860-76, 18,878-86.)

As for RJR's conduct in designing and influencing consumer expectations about its cigarettes, Ms. Coates relied on the testimony of Dr. Robert Proctor, a prominent historian and expert on the tobacco industry who has testified in well over a hundred cases. (R2:18,058-59, 18,578.) He explained at length how the design of the modern cigarette, including RJR's brands, has led to the deaths of over 30 million Americans; how RJR long knew its cigarettes caused lung cancer and other disease; how RJR not only knew its cigarettes were addictive, but had made many design decisions over the years to ensure its cigarettes contained enough nicotine to hit "that sweet spot of addiction"; and how RJR successfully worked for

decades and well into the 1990s to counteract public health warnings to lead consumers to believe its cigarettes were neither dangerous nor addictive, including specific efforts at manipulating the expectations of young teenagers.[2] (R2:18,099-103, 18,107-158, 18,169-86, 18,194-204, 18,214-25, 18,230-34, 18,271-73, 18,291-98, 18,300, 18,303-43, 18,355-74, 13,386-94; *see also* R2:19,796-801 (Ms. Coates's closing argument on design defect summarizing this evidence).)

The jury was instructed that if the evidence showed "that both RJR and Ms. Stucky were negligent and the negligence of each contributed as a legal cause of the injury sustained by Ms. Stucky," the jury should apportion fault. (R2:19,770-71.) Ms. Coates conceded that Ms. Stucky may have been negligent herself and suggested the jury determine that she bore 15-20 percent of the fault for not trying harder to quit smoking. (R2:19,804-06.) RJR

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[2] Much of this testimony was also offered in support of claims for which the jury found for RJR. For example, evidence regarding RJR's efforts to mold consumer expectations also related to the fraud and conspiracy claims. The citations to Dr. Proctor's testimony above exclude testimony that was presented only to support those other claims, such as testimony that related only to the actions of alleged co-conspirators for which there was no evidence RJR directly joined or adopted.

argued that Ms. Stucky was 100 percent at fault and referenced the comparative fault instruction to warn the jury, "If you want to put blame on Ms. Stucky, you can't do that if you find for her on the concealment or the conspiracy claim." (R2:19,880.) The jury, as noted, found against Ms. Stucky on those claims and apportioned fault equally. (R2:10,027.)

As for damages, the evidence demonstrated that Ms. Stucky and her husband had three children together: Elaine was 31 when her mother died, Randall was 26, and Renea was 21. (R2:19,143, 19,447, 19,469.) Her husband left the home when the kids were young (their oldest, Elaine, was 10), and the divorce was finalized in 1980. (R2:18,823, 19,150-51, 19,558, 19,471.) Ms. Stucky was born in 1946, so she was 52 at the time of her death. (R2:19,109.)

The jury was instructed to award the amount of damages that each of the three surviving children suffered in the loss of their mother's companionship, instruction, and guidance as well as their mental pain and suffering as a result of her lung cancer and death. (R2:19,771-72.) In her closing argument, Ms. Coates reviewed the evidence regarding each child and suggested an annual amount of non-economic damages for the 21 years between her death and the

trial plus however many years in the future the jury concluded she might have lived absent lung cancer. (R2:19,808-11.) She suggested $40,000 per year for each of them, totaling $840,000 each through the date of trial. (R2:19,810.) RJR suggested "zero damages." (R2:19,882.) The jury awarded $100,000 for each of the three children before application of comparative fault. (R2:10,028.)

The jury was also directed that if it found for Ms. Coates on any of her claims, it had to determine whether punitive damages were "warranted as punishment to R.J. Reynolds and as a deterrent to others." (R2:19,772-73.) It was instructed that to recover punitive damages, Ms. Coates had the burden of proving by clear and convincing evidence that RJR's conduct causing Ms. Stucky's cancer and death warranted punitive damages. (R2:19,773-74.)

Ms. Coates argued that the same evidence referenced above regarding the design defect claim should lead the jury to find that punitive damages were warranted. (R2:19,811-13.) RJR argued both that its cigarettes were not defectively designed and that punitive damages were not warranted based on the testimony of its witness Dr. Charles Garner, the vice president of scientific and regulatory affairs for RJR's parent company, regarding efforts made by RJR to

develop safer products, including cigarette brands Premier and Eclipse, the snuff brand Snu, and the electronic cigarette brand Vuse. (R2:19,253-433, 19,865-72, 19,882-90.)

On rebuttal, Ms. Coates argued that Dr. Garner's testimony actually supported her claim for punitive damages because it demonstrated that RJR continues to put profits over safety, designing new products with the continued goal of profiting from nicotine addiction, which has increased youth smoking and nicotine addiction while posing new health dangers such as "popcorn lung." (R2:19,893-901.)

After the jury determined punitive damages were warranted and in preparation for the second phase of the trial, the trial court denied a motion in limine by RJR to preclude evidence of its financial resources and Ms. Coates's motion to preclude evidence of how much RJR has paid in punitive damages. (R2:19,965-83.) But the only additional evidence offered by either party in the second phase was a stipulation that RJR's net worth was $23.9 billion. (R2:20,042.)

The jury was instructed that in determining the amount of punitive damages, it should consider the nature, extent, and degree

of RJR's misconduct, RJR's financial resources, and any mitigating evidence. (R2:20,039-40.) It was instructed that it could not impose punitive damages to punish RJR for conduct that did not injure Ms. Stucky including harm to other persons, though it could consider harm threatened to other persons by substantially the same misconduct in determining the blameworthiness of RJR's conduct. (R2:20,040-41.)

Ms. Coates emphasized in closing argument that, in order to serve the purposes of punitive damages to punish RJR and deter RJR and others from engaging in similar misconduct, the amount had to be high enough "that it gets the attention of R.J. Reynolds' management and the management of other corporations … who would think to do the same sort of thing which you have found is not acceptable in our society." (R2:20,045.) She warned that too low of an award would not provide the desired message. (R2:20,047-50.) She suggested $10 million. (R2:20,050-51.)

RJR argued in closing that phase two was not just about RJR, but also Ms. Coates, Ms. Stucky, and the surviving children and emphasized that any punitive damages award would be paid to them and not to help people stop smoking or to further public

health. (R2:20,052-53.) It then emphasized Dr. Garner's testimony to argue that its conduct in the more than twenty years since Ms. Stucky died showed that the jury should award either nothing at all or at most $150,000, representing the reduction in compensatory damages due to Ms. Stucky's fault. (R2:20,052-68.)

Ms. Coates responded in rebuttal that $10 million was warranted because the evidence showed that RJR continues to sell and profit from the same cigarettes the jury found to be defectively designed and that it was still trying to cause and profit from nicotine addiction with its new products, which pose the same dangers. (R2:20,069-72.) The jury exceeded her request, determining that $16 million was warranted. (R2:10,050.)

Arguments and Disposition in District Court

RJR raised three issues on appeal, arguing that the trial court erred in denying RJR's motion for a directed verdict on the strict liability claim, RJR's motion for new trial based on an alleged juror misconduct, and its motion for new trial or remittitur based on its claim that the punitive damage award was excessive. (DCA:29-89.) As to punitive damages, RJR argued the award was "obviously" the result of passion or prejudice and, in any event, was excessive due

to the ratio of punitive to compensatory damages. (DCA:73-83.) Its sole argument as to why a new trial would be necessary was that the punitive damage award was "not the product of dispassionate decision making by impartial jurors." (DCA:83-86.) In her answer brief, Ms. Coates rebutted each of these arguments. (DCA:103-64.)

The district court rejected RJR's first two issues without comment and wrote solely to address the punitive damages award. *Coates*, 308 So. 3d at 1070. It analyzed the award first under Florida law and then under the United States Constitution.

The district court began its state-law analysis by concluding the award was not the result of prejudice or passion, "could have been reached in a logical manner by reasonable persons," and fell "well within the range of punitive damages amounts awarded in other tobacco cases." *Id.* at 1072 n.4. The court next concluded that Ms. Coates had satisfied her statutory burden of proving by clear and convincing evidence that a punitive award greater than three times the compensatory award "is not excessive in light of the facts and circumstances which were presented to the trier of fact." *Id.* at 1071 (quoting § 768.73(1)(b), Fla. Stat. (1997)).

Despite these findings, the district court concluded the award was excessive under state law based on "the disparity between the punitive and compensatory damages awards," which was either 106.7 or 53.3 to 1 depending on whether the punitive award is compared to the net or gross compensatory award. *Id.* at 1073. The sole explanation finding an abuse of the trial court's discretion was as follows:

> Like pornography, which is not susceptible of easy definition but is identifiable upon viewing, a punitive damages award of 106.7 (or 53.3) times the compensatory award is, in our mind, excessive and thus is unsustainable under state law.

Id. at 1073-74.

The district court began its constitutional analysis by asserting that a state's right to impose punitive damages is "constrained by the Eighth Amendment's prohibition against excessive fines." *Id.* at 1074. It then looked at the three factors identified by the Supreme Court for reviewing punitive damage awards, recognizing that the reprehensibility of the defendant's conduct was "the most important indicium of the reasonableness of a punitive damages award" and supported the award here. *Id.* at 1074-75. But it found that the award was nonetheless excessive

because "a ratio of 106.7 to 1 (or even 53.3 to 1) [is] excessive under federal due process constraints." *Id.* at 1076. The court "emphasize[d] that it is not the actual dollar amount of the punitive damages award that is excessive" because "[p]unitive damages even greater than $16 million have been affirmed in other tobacco cases," citing other district court opinions upholding punitive damage awards in excess of $20 million. *Id.* It reversed because, even though it considered the compensatory award modest,

> it is the dollar amount of the punitive damages award compared to the dollar amount of the compensatory damages award that requires a remittitur.

Id. at 1074 n.7, 1076.

The district court rendered its decision on January 7, 2021, when it denied Ms. Coates's motion for rehearing, but issued a corrected opinion certifying a question of great public importance:

> When other factors support the amount of punitive damages awarded, but the award is excessive compared to the compensatory award, does the amount of punitive damages that may legally be imposed for causing the death of a human being depend on the actual amount of compensatory damages awarded to the decedent's estate, even when that compensatory award is modest and the punitive award would be sustainable compared to awards in other cases for comparable injuries caused by comparable misconduct?

Id. at 1076.

This Court's Limited Acceptance of Jurisdiction

Ms. Coates invoked this Court's jurisdiction on the basis of both the certified question and a claim of express and direct conflict. (DCA:382-84.) In her jurisdiction brief, she asserted conflict based on several cases. (Pet. Jur. Br. at 8-11.) She also indicated in the statement of issues that she might brief the issue of the proper remedy if the Court granted review. (*Id.* at iv.) For its part, RJR identified no other issue it would raise if jurisdiction were granted and objected to Ms. Coates raising the remedy issue. (Resp. Jur. Br. at 1.) This Court accepted jurisdiction as to the certified question only. (DCA:407-08.)

SUMMARY OF ARGUMENT

This Court should answer the certified question in the negative. When the same misconduct by the same defendant causes the death of two human beings, neither Florida nor federal law prohibits juries from imposing comparable amounts of punitive damages just because one jury awards more or less in compensatory damages for the death than the other. The law does not compel less punishment for killing poor people or those leaving

behind no statutory survivors that recover large non-economic damage awards. Because this Court has already found that $30 million was not excessive punishment when RJR's misconduct killed James Schoeff, it should find that $16 million was not excessive when that same misconduct killed Lois Stucky.

I. The answer to the certified question should be based on the narrowness of the issue presented, which presupposes that all factors not tied to compensatory damages support the punitive damages award and is limited to cases where comparable misconduct causes the death of a human being, comparable punitive damages awards have been upheld, but the amount of compensatory damages awarded to the decedent's estate and survivors is modest. As with most questions, the focus should be on written laws (statutes or constitutional provisions), and while *stare decisis* should be observed, language from court holdings should be read in context and not as creating new substantive law.

II. The trial court did not abuse its discretion in upholding the jury's award under Florida law. (A) The Legislature has imposed myriad restrictions on recovering punitive damages, especially as to

amount, and there is no dispute that the award in this case complies with all of them that are not tied compensatory damages.

(B) The award also complies with the only applicable statute addressing the ratio of punitive to compensatory damages. As with all former and current statutes addressing that ratio, when a plaintiff proves circumstances like those present here, the Legislature has eliminated any cap on the ratio.

(C) This Court has long recognized that there is no judicially created restriction on the ratio in Florida. Punitive damages awards may be upheld even in the absence of any compensatory damages.

III. The district court erred in concluding that the Constitution imposes a cap on the ratio of punitive to compensatory damages. (A) It erroneously based its decision on the Eight Amendment, overlooking that the only applicable provision is the Due Process Clause. While the Supreme Court has thus far rejected the textual based views of Justices Scalia and Thomas that this clause only creates procedural, not substantive rights, their concerns warrant caution before extending any precedent beyond its holding.

(B) In any event, the award here fully comports with the substantive restrictions the Supreme Court has read into the Due Process clause. First, it does not implicate any of the concerns that led the Supreme Court to promulgate guidelines in the first place. As the district court expressly found, the award was reached through a logical manner that yielded a dollar amount that is not excessive.

Second, two of the three guideposts created by the Supreme Court fully support the award. This Court's holding in *Schoeff*, supported by myriad district court opinions reaching similar conclusions, makes clear that RJR's conduct is among the most reprehensible a jury will encounter and many higher awards have been authorized and imposed.

Third, the award should be upheld even if the only other guidepost cuts against it. These are just indicia, and the circumstances so strongly support the award under all other considerations as to outweigh any concern on the ratio.

Fourth, the second guidepost fully supports the award because the applicable comparison is not the ratio of the amounts of punitive to compensatory damages but the relation of the

punitive award to the "actual or potential harm" caused by the defendant's misconduct. The actual harm is death, and the potential compensatory damage award was well over $10 million.

Fifth, RJR's suggestion that potential harm is irrelevant here because its wanton conduct succeeded in killing Ms. Stucky is foreclosed by Supreme Court precedent making clear that the relevant "potential harm" includes the uncertainty inherent when juries are asked to monetize pain and suffering.

As a final point, while the award here should be upheld, there are reasons sounding in judicial economy for this Court to expressly determine the maximum constitutionally permitted amount of punitive damages that may be upheld when the conduct at issue in this and so many other cases results in a person's death. Whether that is the $30 million upheld in *Schoeff*, $100 million supported by Supreme Court case law, or some other number, it would help for this Court, which has the final, de novo, say to identify it.

ARGUMENT

Under no reasonable view of state or federal law is a $16 million punitive damages award rendered by a dispassionate jury after a fair trial an excessive award when a company worth billions

of dollars foreseeably kills a human being through its outrageous and intentional misconduct. Indeed, this Court recently and unanimously held that a $30 million punitive damages award against RJR was not excessive when its reprehensible conduct resulted in the lung cancer and death of James Schoeff. *Schoeff v. R.J. Reynolds Tobacco Co.*, 232 So. 3d 294, 308-09 (Fla. 2017).

It should thus come as little surprise that the district court concluded that RJR's conduct supported the award, the dollar amount of the award was not excessive, the jury was not swayed by passion or prejudice, and the award was in line with those upheld by several other appellate courts. *R.J. Reynolds Tobacco Co. v. Coates*, 308 So. 3d 1068, 1073-76 (Fla. 5th DCA 2020). That should all but end any claim that the $16 million punitive damages award against RJR in this case was excessive when its misconduct resulted in the lung cancer and death of Lois Stucky.

Any difference in the individual circumstances of Ms. Schoeff and Ms. Stucky should have nothing to do with the amount of punishment warranted for RJR's deadly misconduct. Yet the district reversed the much lower award of punitive damages in this case for

the sole reason that Ms. Stucky's survivors were awarded less in compensatory damages than Ms. Schoeff's survivors.

In Part I Ms. Coates urges this Court to be guided by the narrowness of the issue presented with the primary focus on the applicable written laws as opposed to RJR's out-of-context characterizations of certain language used in this Court's case law. Part II demonstrates that the district court erred in reversing the punitive damage award based on the amount of compensatory damages under Florida law because it expressly found Ms. Coates had proven the exception to the only statute imposing a cap on the ratio of punitive to compensatory damages. Finally, Part III shows the Supreme Court has repeatedly held that the only constitutional provision arguably implicated by a punitive damages award in a civil case (the federal Due Process Clause) imposes no such cap where the punitive damages award is justified by the actual or potential harm the conduct threatened to cause the plaintiff.

I. The question should be answered based on the narrowness of the issue presented with the primary focus on the applicable written laws.

Before developing her arguments on the merits, Ms. Coates respectfully suggests two preliminary considerations should inform this Court's analysis.

First, the question before this Court presents a remarkably narrow issue – far narrower than whether the punitive damages award is excessive. The district court's opinion makes clear that all relevant factors for making that determination fully support the award with the sole exception of the ratio between that award and the compensatory damages award. RJR did not even dispute most factors below, raising only a circular claim that the size of the award shows it was "obviously" the result of passion and prejudice in addition to its assertion that there is a cap on the ratio of punitive to compensatory damages. Not only did the district court flatly reject that argument, but RJR has abandoned it. In its jurisdiction brief, RJR elected not to renew its passion-and-

prejudice argument or any other issue in the event this Court granted review to answer the certified question.[3] (Resp. Jur. Br. 1.)

In purporting to restate the certified question "for accuracy," RJR characterizes the issue as whether a punitive damages award can be deemed excessive based on its ratio to compensatory damages "if other factors would not have dictated the conclusion that the punitive damages award is excessive." (*Id.*) But the certified question is narrower still, because it (1) affirmatively posits that the "other factors support the amount of punitive damages awarded" and (2) limits the issue to the circumstances presented in this case, which involve (a) defense conduct "causing the death of a human being," (b) a punitive damages award that is "sustainable compared to awards in other cases for comparable injuries caused by comparable misconduct," but (c) a compensatory damages award that is only "modest." 308 So. 3d at 1076.

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[3] The parties filed their jurisdiction briefs after January 1, 2021, and therefore complied with the new requirement of including a statement of the issues identifying any issue they intended to raise independent of the issue on which jurisdiction is based. *In re Amendments to Fla. R. App. P. 9.120 & 9.210*, 307 So. 3d 626, 628 (Fla. 2020) (amending Fla. R. App. P. 9.120(f)).

RJR's proposed restated question is, in other words, far broader that the issue presented here and, frankly, not subject to a yes-or-no answer. The answer to RJR's question is more likely to depend on the particular facts and circumstances of the case. But in answering the certified question, this Court should have little occasion to consider cases where there are other factors tending to show the punitive damages award was excessive or cases involving conduct that was either dissimilar or resulted in only economic injuries or even minor, non-fatal physical injuries.

Although the certified question is also limited to instances where the compensatory damage award was only modest, this Court may find it helpful to consider whether and how the proper analysis of the ratio of punitive to compensatory damages would be different if the compensatory damages were not modest, especially because that is a subjective and relative term. Thus, while this brief naturally focuses on the award in this case, which the district court reasonably characterized as modest, it will also consider compensatory awards that are minimal, awards that are substantial, and awards that might be considered outliers even if supported by unique evidence in a particular case.

Second, the primary focus should be on the applicable written laws. The district court imposed a cap on the ratio of punitive to compensatory damages that cannot be even arguably found in the text of any statute, constitutional provision, or other primary source of law. Persuaded by snippets of language from a couple of this Court's opinions that RJR took out of context, the district court erred by imposing a judicial cap that is so nebulous the court could not even identify it beyond stating that an excess ratio is "identifiable upon viewing," recalling the immortal words of Justice Stewart on a subject having nothing to do with punitive damages.[4] *Coates*, 308 So. 3d at 1073.

Florida courts do not, of course, make law. They interpret and apply written laws that are set forth in the state or federal constitution or that are enacted by the political branches. To be sure, this Court's holdings have *stare decisis* effect and play an important role in interpreting and applying those written laws, but appellate decisions are not themselves sources of substantive law.

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[4] *See Jacobellis v. State of Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring) (confessing it may not be possible to intelligibly define obscene speech that may be constitutionally prohibited, but concluding that "I know it when I see it").

Cf. Mills v. State, 310 So. 3d 512, 518 n.* (Fla. 1st DCA 2020) (Tanenbaum, J., concurring) (contending that "we should avoid referring to [appellate court] opinions as 'case law,' because under our constitution, Florida's judiciary is not the State's authorized law-giver"). So while this Court will certainly follow the holdings in its precedents, at least if not convinced that they were clearly erroneous, it should be skeptical of any argument that relies not on written statutes or constitutional provisions, but language from judicial opinions, especially where that language was not necessary to the holding.

II. The trial court did not abuse its discretion in upholding the $16 million punitive damages award under Florida law.

A trial court's determination that a punitive damages award is not excessive under Florida law is supposed to be reviewed only for an abuse of discretion. *Engle v. Liggett Grp., Inc.*, 945 So. 2d 1246, 1263 (Fla. 2006).

Though the district court recognized that this was the standard of review, 308 So. 3d at 1071, it reversed after finding the evidence and circumstances fully supported the trial court's ruling except for a single factor that it could not even define other than

referencing Justice Stewart's "I-know-when-I-see-it" approach for determining whether speech is obscene. Such a purely subjective standard might have some application for a court addressing the question de novo,[5] but is a highly suspect basis for finding an abuse of discretion.

In any event, the district court erred in reasoning that there is a hard cap on the ratio of punitive to compensatory damages under Florida law that trumps all other considerations. After (A) putting the district court's ruling into context by briefly addressing all the other applicable factors, Ms. Coates will show that (B) none of the statutes regulating the ratio of punitive to compensatory damages would apply a cap on the ratio under the circumstances of this case and (C) there is no judicial cap on the ratio in Florida.

A. The award is supported by all factors that do not relate to compensatory damages.

The availability to recover and limitations on the amount of punitive damages are subjects of extensive legislative regulation in

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[5] *See Jacobellis*, 378 U.S. at 190 & n.6 (explaining that the Court was making an "independent constitutional judgment" in its "de novo review" of the First Amendment issue on which Justice Stewart opined).

Florida. Several such statutes were amended in 1999 by chapter 99-225, sections 22-26, Laws of Florida, to provide different (typically more restrictive) rules, but only for causes of action arising after October 1, 1999. Though their application may be addressed in passing, these 1999 amendments do not apply in this case because there is no dispute that the causes of action here all arose no later than Ms. Stucky's death in 1998. *See Coates*, 308 So. 3d at 1071 ("The 1997 version of those sections applies here because the cause of action arose on the 1998 date of Ms. Stucky's death."). Unless noted, all citations are to the 1997 versions.

Given RJR's statement of the issue in its jurisdiction brief, there is no longer any claim that the award in this case does not comply with Florida law as to any issue that is not tied to the amount of compensatory damages. A quick review of those other issues, however, provides helpful context for answering the certified question.

First, Ms. Coates was not even allowed to assert a claim of punitive damages without first making an evidentiary showing to the trial court that she had a reasonable basis to recover them. § 768.72, Fla. Stat. (1997).

Second, she proved entitlement to punitive damages by clear and convincing evidence and the amount by the greater weight of the evidence as required by the standard jury instructions given in this case. (R2:19,773-74, 20,039.) *See* Fla. Std. Jury Instr. (Civ.) App. C PD 1 (providing standard instructions for punitive damages for causes of action arising prior to October 1, 1999).[6]

Third, she was prepared to overcome any evidence or argument by RJR that it has been punished enough by punitive damage awards imposed in other cases, though RJR chose to forego the right the trial court gave it to pursue that issue. (R2:19,965-83.) This was a fair trial, and RJR has never asserted any error by the trial court in its evidentiary or instructional rulings on the issue of punitive damages; nor has it even suggested that the trial court allowed Ms. Coates to make any improper arguments regarding punitive damages. The only issue is the trial court's post-trial ruling that the punitive damage award was not excessive.

Finally and most importantly, the amount of the award does not violate any of the regulations imposed through post-trial review.

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[6] This requirement is now explicitly statutory. *See* Ch. 99-225, § 21, Laws of Fla. (creating section 768.725, Fla. Stat.).

Although no provision in the Florida constitution limits amount of punitive damages that may be recovered in a civil case, the Legislature has imposed several such limitations. They fall into two categories: a general overarching standard applicable to all forms of damages and a set of specific standards applicable to the ratio of punitive to compensatory damages. Though the latter standards control the issue in this case and are discussed in detail in the next section, a brief description of the former standard provides context.

Section 768.74, Florida Statutes (1997), which has not been amended, provides that

> it shall be the responsibility of the court, upon proper motion, to review the amount of such award to determine if such amount is excessive or inadequate in light of the facts and circumstances which were presented to the trier of fact.

§ 768.74(1).

Though expressly recognizing that a jury's reasonable findings regarding the amount of damages are "a fundamental precept of American jurisprudence" that should be disturbed only "with caution and discretion," this statute expresses "the intention of the Legislature that awards of damages be subject to close scrutiny by the courts" and that all awards should be both "adequate and not

excessive." § 768.74(3), (6). Thus, so long as the evidence supports it, this statute evinces a strong intent to uphold the jury's acceptance of Ms. Coates's argument that only an award of at least $10 million dollars would be adequate punishment when a company worth nearly $25 billion foreseeably kills someone through its ongoing wanton misconduct. More importantly, nothing in section 768.74 justifies finding the $16 million award excessive.

This statute directs courts to consider five factors "in determining whether an award is excessive or inadequate in light of the facts and circumstances." § 768.74(5).

> (a) Whether the amount awarded is indicative of prejudice, passion, or corruption on the part of the trier of facts;
>
> (b) Whether it appears that the trier of fact ignored the evidence in reaching the 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.

Id. There is no dispute at this stage that the district court correctly concluded that criteria (a), (b), (c), and (e) fully support the award. *See also Coates*, 308 So. 3d at 1072-73 & n.4 (explaining why each of these criteria support the award).

The remaining factor requiring "a reasonable relation to the amount of damages proved and the injury suffered" is met here, especially in light of the abuse-of-discretion standard of review. The relationship here is not just to the amount of damages proven as the district court applied it, but to the amount of damages "and the injury suffered." Regardless of the amount of compensatory damages, it cannot be said that no reasonable trial court could conclude that $16 million in punishment has a reasonable relationship to wantonly causing the death of a human being. *See Canakaris v. Canakaris*, 382 So. 2d 1197, 1203 (Fla. 1980) (elucidating abuse-of-discretion standard).

The district court expressly recognized this fact in rejecting RJR's argument under the factors, confirming that it overlooked the relevance of the injury to factor (5)(d). *Id.* at 1072 ("A $16 million punitive damages award in a tobacco case involving death simply does not reflect either prejudice or passion"); *id.* at 1072 n.4 ("[T]he

amount of the punitive damages award could have been reached in a logical manner by reasonable persons.").

Consideration of three hypothetical alternative verdicts should remove any doubt that this award was reasonably related to the injury suffered regardless of the amount of compensatory damages proven. First, assume the jury had accepted RJR's argument and awarded "zero damages," possibly concluding Ms. Stucky's children did not suffer at all from losing their mother. Second, assume the jury reached the opposite conclusion and awarded $18 million in compensatory damages, concluding each child suffered the same kind of loss Gwendolyn Odom suffered when RJR's cigarettes caused her mother to die from lung cancer – a $6 million award this Court affirmed in *Odom v. R.J. Reynolds Tobacco Co.*, 254 So. 3d 268, 280-81 (Fla. 2018).[7] Third, putting non-economic damages aside, assume Ms. Schoeff had been the CEO of a Fortune 500 company or a professional athlete who made $10 million per year, resulting in a lost earnings award of $100 million.

[7] Justice Polston, joined by Chief Justice Canady, dissented in *Odom* on jurisdictional grounds without suggesting disagreement on the merits.

While the Legislature may have the authority to impose an otherwise arbitrary limit on the amount of punitive damages that may be recovered, section 768.74(5)(d) only provides a reasonable restriction for the trial court to apply in its discretion. One reasonable conclusion the trial court might make – perhaps the only reasonable conclusion to be drawn – is that a corporation should not be punished less for killing a poor or lonely person than for killing someone who was wealthy or especially beloved. Surely, Florida law does not compel such inequitable treatment, yet that is the result of the district court's holding.

In short, the district court erred by overlooking the phrase "and the injury suffered" in concluding that section 768.74(5)(d) required a remittitur. But even if the statute omitted those words, the district court's ruling would still be wrong. The statute does not leave the relationship between the amounts of punitive and compensatory damages to the courts' discretion. To the contrary, the Legislature has passed several statutes specifically governing that relationship, which are discussed in the next section and begin with section 768.73, Florida Statutes (1997).

"[A] specific statute covering a particular subject area always controls over a statute covering the same and other subjects in more general terms." *Bank of N.Y. Mellon v. Glenville*, 252 So. 3d 1120, 1129 (Fla. 2018) (quoting *McKendry v. State*, 641 So. 2d 45, 46 (Fla. 1994)). *See also* Antonin Scalia & Bryan Garner, *Reading Law: The Interpretation of Legal Texts* 183-85 (2012) (explaining why "the specific provision comes closer to addressing the very problem posed by the case at hand and is thus more deserving of credence").

Thus, for example, when this Court evaluated the $30 million award in *Schoeff* under section 768.74(5)(d), it did not rely on its own judgment of a proper ratio, much less the "I know it when I see it" approach of the district court; it began and ended its analysis by noting that the award was less than three times the compensatory award – the very ratio that section 768.73 makes the presumptive cap.[8] 232 So. 3d at 309.

Before turning to section 768.73 and related statutes governing the ratio of punitive to compensatory damages, there is one last factor that supports the punitive damages award worthy of

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[8] Because of the size of the compensatory award in *Schoeff*, the question in this case was not presented.

brief mention. This Court has held that a punitive damage award is excessive if it is beyond the defendant's ability to pay, though no written law so provides. *Schoeff*, 232 So. 3d at 309 (citing *Engle*, 945 So. 2d at 1263-64 (itself citing *Bould v. Touchette*, 349 So. 2d 1181, 1186 (Fla. 1977)). This concept arose before the Legislature enacted section 768.74 and the underlying concern was based as much on the need for the award to be high enough to be meaningfully felt by the defendant:

> In awarding punitive damages the jury may properly punish each wrongdoer by exacting from his pocketbook a sum of money which, according to his financial ability, will hurt, but not bankrupt ….

Bould, 349 So. 2d at 1186-87 (quoting *Joab, Inc. v. Thrail*, 245 So. 2d 291, 293 (Fla. 3d DCA 1971) (itself quoting *Lehman v. Spencer Ladd's, Inc.*, 192 So. 2d 402, 404 (Fla. 1965))).

Given RJR's nearly $25 billion net worth and the concomitant fact that only a substantial punitive damage award could come close to being meaningful, this factor affirmatively supports the award. This is doubly so in this case where RJR chose not to put on evidence of other punitive damages awards, leaving the jury with no basis to conclude RJR has already been sufficiently punished.

In short, absent an explicit cap on the ratio of punitive to compensatory damages, there is no basis for finding that the trial court abused its discretion in upholding the jury's verdict.

B. No statute applies a hard cap on the ratio of punitive to compensatory damages.

The applicable statute governing the relation between punitive and compensatory damages is section 768.73, Florida Statutes (1997). That statute provides that the amount of punitive damages could not exceed three times the amount of compensatory damages "unless the claimant demonstrates to the court by clear and convincing evidence that the award is not excessive in light of the facts and circumstances which were presented to the trier of fact." § 768.73(1). Note that it is the reasonableness of the "award," not the ratio, that is the subject of the exception to the cap.

The district court held – and RJR no longer disputes – "[t]hat was shown in this case" because "there was clear and convincing evidence sufficient to trigger the exception to the statutory 3 to 1 limitation." 308 So. 3d at 1073; *see also R.J. Reynolds Tobacco Co. v. Martin*, 53 So. 3d 1060, 1070-71 (Fla. 1st DCA 2010) (finding

standard met in case with $3.3 million net compensatory award and $25 million punitive award).

Under the applicable version of section 768.73, once that exception is established, there is no longer any statutory limit to the ratio of punitive to compensatory damages. Nor is there any other Florida statute limiting the ratio of punitive to compensatory damages in this case.

Even for causes of action arising after October 1, 1999, there no hard limits on the ratio. The amended version of section 768.73 retains the presumptive three-times-compensatory-damages cap with an exception that would fit the facts of this case. § 768.73(1)(b), Fla. Stat. (2021).[9] That exception then imposes a higher cap of the greater of four times the compensatory award of $2 million. For example, if the jury awarded $1, that statute would

[9] This exception applies on proof that the defendant's misconduct "was motivated solely by financial gain" and "the unreasonably dangerous nature of the conduct, together with the high likelihood of injury resulting from the conduct, was actually known by the managing agent, director, officer, or other person responsible for making policy decisions on behalf of the defendant." *Id.* The statute further provides that "there shall be no cap on punitive damages" upon proof the defendant had the specific intent to injure the plaintiff. § 768.73(1)(c), Fla. Stat. (2021).

allow a ratio of 2,000,000 to 1. And if the plaintiff proved liability but zero damages, the ratio would be undefinable.

Another recent statute removes any restriction on the ratio of punitive to compensatory damages upon a showing that the award is not excessive by clear and convincing evidence in actions based upon abuse of children, the elderly, or the developmentally disabled. § 768.735(2)(b), Fla. Stat. (2021). Another removes any restriction on the ratio if the defendant was intoxicated. § 768.736, Fla. Stat. (2021).

None of these post-1999 statutes have any direct application here, but they demonstrate that even in the age of substantial tort reform, the Legislature has decided that, although relevant, ratios are not determinative of whether a punitive damages award is excessive. Considering the above hypotheticals where the only difference between cases is the amount of compensatory damages, an absolute cap on the ratio would be arbitrary – the antithesis of the requirements of reason the statutes impose. Even if this Court had the power to create a substantive cap itself, that would be terrible policy.

C. There is no judicially created cap on the ratio in Florida.

In any event, this Court has never purported to create or apply such a cap. Rathe, this Court has emphasized that punitive damages punish the defendant and deter future misconduct by the defendant or others similarly situated and are not tied to compensating the plaintiff:

> Compensatory and punitive damages serve distinct purposes. As the United States Supreme Court has explained:
>
> > The former are intended to redress the concrete loss that the plaintiff has suffered by reason of the defendant's wrongful conduct. The latter, which have been described as "quasi-criminal," operate as "private fines" intended to punish the defendant and to deter future wrongdoing. A jury's assessment of the extent of a plaintiff's injury is essentially a factual determination, whereas its imposition of punitive damages is an expression of its moral condemnation.

Engle, 945 So. 2d at 1262 (quoting *Cooper Indus., Inc. v. Leatherman Tool Grp., Inc.*, 532 U.S. 424, 432 (2001)).

Consistent with the hypothetical zero-damages award, this Court has long recognized that a plaintiff may recover punitive damages where they proved liability but the jury awarded no

compensatory damages. *See, e.g.*, *Ault v. Lohr*, 538 So. 2d 454, 455-56 (Fla. 1989), *cited with approval in Engle*, 945 So. 2d at 1262-63.

Even more to the point, even in cases involving a modest award of compensatory damages, this Court long "disavowed" any "rule that punitive damages must bear some reasonable, albeit imprecise, relation to the actual or compensatory damages." *Bould*, 349 So. 2d at 1186 (citing *Lassitter v. Int'l Union of Operating Eng'rs*, 349 So. 2d 622, 626 (Fla. 1976)); *see also Arab Termite & Pest Control of Fla., Inc. v. Jenkins*, 409 So. 2d 1039, 1043 (Fla. 1982) (citing cases from this Court back to 1889 for the proposition that punitive damages "are to be measured by the enormity of the offense entirely aside from the measure of compensation for the injured plaintiff").

It is true, as RJR represented in its jurisdiction brief, that "this Court has squarely held that courts must 'evaluat[e] … the punitive and compensatory amounts awarded to ensure a reasonable relationship between the two." (Resp. Jur. Br. at 5 (quoting *Engle*, 945 So. 2d at 1264) (alterations by RJR).) But RJR omits that (1) the immediately preceding passage reiterated that Florida courts do not require this as a matter of state law; (2) the passage in the

middle of the quotation that RJR replaced with an ellipsis expressed that the reason Florida courts now evaluate the relationship is to be "consistent with United States Supreme Court decisions after *Ault* that recognize due process limits on punitive damages"' and (3) the immediately following passages made clear that the Court was considering the issue only pursuant to the "second guidepost" established by the Supreme Court for reviewing the constitutionality of a punitive damage award. 945 So. 2d at 1264.

III. The district court erred in concluding that the Constitution imposes a cap on the ratio of punitive to compensatory damages.

Whether a punitive damages award is unconstitutionally excessive is reviewed de novo. *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 418 (2003); *Engle*, 945 So. 2d at 1263. At least on this issue, the district court's imposition of a hard cap based on its own judgment is apparently consistent with the applicable standard of review. However, both the subjective nature of this review and the district court's inability to identify the constitutional limit to the award should give this Court pause.

Regardless, the award here falls below any reasonable view of the constitutional maximum. The district court's conclusion, which

is entitled to no deference, was flawed from the beginning because it failed to realize that (A) it applied the wrong constitutional provision and (B) it imposed a ratio requirement that the Supreme Court has repeatedly disclaimed.

A. The issue is governed by the non-textual, substantive protections that the Supreme Court has read into the Due Process Clause.

The district court expressly rooted its constitutional analysis in "the Eighth Amendment's prohibition against excessive fines." 308 So. 3d at 1074 (citing *Cooper Indus., Inc. v. Leatherman Tool Grp., Inc.*, 532 U.S. 424, 433 (2001)). But the Supreme Court has held that the Eighth Amendment does **not** apply to awards of punitive damages in cases between private parties. *Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 262-76 (1989), *cited with approval in Cooper Indus.*, 532 U.S. at 433 n.7.

While the district court attempted to apply the three-guidepost review required by Supreme Court precedent, its failure to consider the proper constitutional language being applied is not a trivial error. The Supreme Court has made clear that the applicable provision is the Due Process Clause. *Campbell*, 538 U.S. at 417. That clause provides that no State shall "deprive any person of life,

liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1.

Divining a substantive regulation of the ratio of punitive to compensatory damages from this text should be a near-Herculean task requiring clear binding precedent. Ms. Coates will shortly demonstrate that binding precedent disavows any such rule, but a brief review of the concerns motivating Justices Scalia and Thomas to part from the majority in those cases demonstrates why the precedents should be read narrowly.

Citing a series of *Lochner*-era precedents, Justice Stevens wrote the first modern opinion concluding that the Constitution regulates the amount of punitive damages that may be awarded in a state court. *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 454-55 (1993). Justice Scalia, joined by Justice Thomas, dissented because the text of the Fourteenth Amendment provides no basis for the "so-called 'substantive due process' right that punitive damages be reasonable." *Id.* at 470-72.

In the first case in which the Court invalidated a state punitive damages award as excessive, Justice Scalia explained his views in detail, which he introduced as follows:

> I do not regard the Fourteenth Amendment's Due Process Clause as a secret repository of substantive guarantees against "unfairness" – neither the unfairness of an excessive civil compensatory award, nor the unfairness of an "unreasonable" punitive award. What the Fourteenth Amendment's procedural guarantee assures is an opportunity to contest the reasonableness of a damages judgment in state court; but there is no federal guarantee a damages award actually **be** reasonable.
>
> This view, which adheres to the text of the Due **Process** Clause, has not prevailed in our punitive damages cases. When, however, a constitutional doctrine adopted by the Court is not only mistaken but also insusceptible of principled application, I do not feel bound to give it *stare decisis* effect – indeed, I do not feel justified in doing so. Our punitive damages jurisprudence compels such a response. The Constitution provides no warrant for federalizing yet another aspect of our Nation's legal culture (no matter how much in need of correction it may be), and the application of the Court's new rule of constitutional law is constrained by no principle other than the Justices' subjective assessment of the "reasonableness" of the award in relation to the conduct for which it was assessed.

BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 598-99 (1996) (Scalia, J., dissenting); *accord Campbell*, 538 U.S. at 429 (Scalia, J., dissenting); *Cooper Indus.*, 532 U.S. at 44304 (Scalia, J., dissenting); *see also Cooper Indus.*, 532 U.S. at 443 (Thomas, J., dissenting) ("I would vote to overrule *BMW*.").

The warnings that "the punitive damages jurisprudence which has sprung forth from *BMW v. Gore* is insusceptible of principled

application," *Campbell*, 538 U.S. at 429 (Scalia, J., dissenting), should particularly resonate in light of the district court's "I-know-when-I-see-it" methodology. Nonetheless, Ms. Coates recognizes that a majority of the Supreme Court did not share the views of Justices Scalia and Thomas on issues of "substantive due process" when any of the relevant precedents were issued. This Court is, of course, bound to follow the Supreme Court's holdings, but it should take care not to go beyond them.

B. The award is constitutional because it is fully supported by the Supreme Court's due process jurisprudence.

The punitive damages award is constitutional because (1) it does not implicate any of the concerns that led to the judicial promulgation of guideposts in the first place, (2) two guideposts strongly support it, (3) the award should be upheld even if the other guidepost cuts the other way, (4) because it focuses on "actual or potential harm," as opposed to the amount of compensatory damages awarded, that guidepost supports the award here, and (5) there is no merit to RJR's argument that potential harm is irrelevant here because its misconduct succeeded in killing Ms. Stucky.

1. While the Supreme Court has formulated three "guideposts" for courts to consider whether punitive damages were awarded "without due process of law," it is helpful to start with the concerns the Court articulated as the basis for promulgating them. In their opinions for the Court, Justice Breyer reviewed these concerns in great detail in *Gore* and *Philip Morris USA v. Williams*, 549 U.S. 346 (2007), and Justice Kennedy focused on them in *Campbell*. A review of those opinions confirm that those concerns are not implicated in this case.

States are supposed to have "considerable flexibility" in determining the amount of punitive damages that may be awarded "to vindicate the State's legitimate interests in punishment and deterrence." *Gore*, 517 U.S. at 569.

> Only when an award can fairly be characterized as "grossly excessive" in relation to these interests does it enter the zone of arbitrariness that violates the Due Process Clause of the Fourteenth Amendment.

Id.; *see also Williams*, 549 U.S. at 352 ("[W]e have emphasized the need to avoid an arbitrary determination of an award's amount."); *Campbell*, 538 U.S. at 417 ("To the extent an award is grossly

excessive, it furthers no legitimate purpose and constituted an arbitrary deprivation of property.").

Here, the jury was instructed that the purposes of punitive damages were punishment and deterrence, and it awarded an amount that was neither arbitrary nor excessive. The award was not arbitrary because it is "well within the range of punitive damages amounts awarded in other tobacco cases" and "could have been reached in a logical manner by reasonable persons." *Coates*, 308 So. 3d at 1072 & n.4. Indeed, the court chose to "emphasize that it is not the actual dollar amount of the punitive damages award that is excessive." *Id.* at 1076.

The Supreme Court was also motivated by concerns that jurors are often presented "with evidence that has little bearing as to the amount of punitive damages that should be awarded" and that jurors are often guided only by "[v]ague instructions, or those that merely inform the jury to avoid 'passion or prejudice.' " *Campbell*, 538 U.S. at 418. One of the biggest concerns is that the jury might use a punitive damage award in one case to punish the defendant for harm to strangers to the litigation. *Williams*, 549 U.S. at 353-54.

> Given the risks of unfairness that we have mentioned, it is constitutionally important for a court to provide assurance that the jury will ask the right question, not the wrong one. And given the risks of arbitrariness, the concern for adequate notice, and the risk that punitive damages awards can, in practice, impose one State's (or one jury's) policies (*e.g.,* banning cigarettes) upon other States – all of which accompany awards that, today, may be many times the size of such awards in the 18th and 19th centuries – it is particularly important that States avoid procedure that unnecessarily deprives juries of proper legal guidance. We therefore conclude that the Due Process Clause requires States to provide assurance that juries are not asking the wrong question, *i.e.,* seeking, not simply to determine reprehensibility, but also to punish for harm caused strangers.

Id. at 355.

Here, the jury was given detailed instructions on all these topics to ensure they were answering the "right question, not the wrong one" consistent with the Due Process Clause. The award does not raise **any** of the concerns that led the Supreme Court to not only discover a substantive prohibition hidden in the penumbrae of the Due Process Clause, but to also draft factors for determining if that impossible-to-define standard has been violated.

The district court concluded, however, that one of these guideposts required it to reverse a punitive damage award whose "actual dollar amount" was neither arbitrary nor excessive because

"it is the dollar amount of the punitive damages award compared to the dollar amount of the compensatory damages award that requires a remittitur." *Coates*, 308 So. 3d at 1076.

2. Before addressing that guidepost directly, it is worth emphasizing that the other two guideposts strongly support the award. The district court recognized this Court's admonition that the first guidepost – "the degree of reprehensibility of the defendant's misconduct" – is "the most important indicium of the reasonableness of a punitive damages award." *Id.* at 1074 (quoting *Schoeff*, 232 So. 3d at 306-07). It noted the five sub-considerations the Supreme Court fashioned to determine whether the first guidepost supports an award:

> [1] the harm caused was physical as opposed to economic; [2] the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; [3] the target of the conduct had financial vulnerability; [4] the conduct involved repeated actions or was an isolated incident; and [5] the harm was the result of intentional malice, trickery, or deceit, or mere accident.

Id. at 1075. All but the third factor (whether Ms. Stucky "had financial vulnerability") are clearly present in this case, and even that factor finds support in RJR's use of its vast financial strength and superior knowledge to take advantage of the relative

vulnerability of its consumers. In any event, as compelled by this Court's own conclusion about the same conduct in *Schoeff*, the district court recognized that the first and most important guidepost supports the award. *Id.* at 1076. As this Court previously concluded:

> The reprehensibility component of our analysis is supported by the fact that RJR increased the addictive qualities of cigarettes, concealed their health defects, and widely marketed their defective product for profit. The harm in this case was both physical and economic, done with reckless disregard for the health or safety of others, involved repeated actions, and was the result of intentional deceit. These factors lead to the conclusion that **this conduct is among the most reprehensible**.

Schoeff, 232 So. 3d at 307 (citations omitted, emphasis added).

The record and precedent also show that the award is fully supported by the third guidepost – "the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases." *Campbell*, 538 U.S. at 418. *Schoeff* is a "comparable case," and it authorized the $30 million punitive damage award imposed by that jury. As the district court emphasized without even including *Schoeff*,

> [p]unitive damages awards even greater than $16 million have been affirmed in other tobacco cases. *See, e.g., Lorillard Tobacco Co. v. Alexander*, 123 So. 3d 67

> (Fla. 3d DCA 2013) (finding $25 million punitive damages award not unconstitutionally excessive); *R.J. Reynolds Tobacco Co. v. Townsend*, 118 So. 3d 844 (Fla. 1st DCA 2013) (finding $20 million punitive damages award did not violate constitutional due process); *Martin*, 53 So. 3d 1060 (affirming $25 million punitive award and $3.3 million compensatory award).

Coates, 308 So. 3d at 1076.

So the dollar amount of the award in this case is not arbitrary, not excessive, satisfies all the concerns that led the Supreme Court to create the guideposts, satisfies the most important guidepost because it punishes conduct that "is among the most reprehensible" this Court has seen, and complies with the final guidepost.

3. These considerations should require that the award be upheld even if there were room for doubt that the second guidepost also supports the award. For example, the Fourth District has upheld a $5 million punitive damage award in a slander action in which the jury found the plaintiff suffered no damages at all in an exhaustive opinion applying the guideposts. *Lawnwood Med. Ctr., Inc. v. Sadow*, 43 So. 3d 710, 722-33 (Fla. 4th DCA 2010). The reasoning in that case is even more compelling when applied to a

case where the defendant intentionally engaged in conduct it knew would kill millions of people.

Indeed, that was the conclusion of the Supreme Court of Oregon in finding a $79.5 million punitive damage award was not excessive in comparison to an $821,000 compensatory damage award (roughly 100:1 ratio) in a wrongful death suit based on the same kind of conduct involved here. *Williams v. Philip Morris Inc.*, 127 P.3d 1165, 1179-82 (Or. 2006). Based on many of the same considerations discussed above, the court affirmed that award even though it recognized that the second guidepost "cuts the other way" based on language in Supreme Court opinions favoring "single-digit ratios" between punitive and compensatory damages. *Id.* at 1180-81. It found that guidepost to be mitigated by the fact that a defendant with tremendous wealth may need a higher punitive damage award to get its attention. *Id.* at 1181. It explained its balancing of the factors in these instructive terms:

> Of the three *Gore* guideposts, then, two support a very significant punitive damage award. One guidepost – the ratio – cuts the other way. In the end, we are left to use those competitive tools to assess whether the jury's punitive damage award was not "grossly excessive" and therefore should be reinstated.

> The *Gore* guideposts are not bright-line tests. In other words, the guideposts are only that – guideposts. *Gore* also referred to them as indicia. *Campbell* specifically contemplated that *some* awards exceeding single-digit ratios would satisfy due process. Single-digit ratios may mark the boundary in ordinary cases, but the absence of bright-line rules necessarily suggests that the other two guideposts – reprehensibility and comparable sanctions – can provide a basis for overriding the concern that may arise from a double-digit ratio.
>
> And this is by no means an ordinary case. Philip Morris's conduct here was extraordinarily reprehensible, by any measure of which we are aware. It put a significant number of victims at profound risk for an extended period of time.

Id. at 1181 (citations omitted).

4. Though analysis rendered it immaterial, the Oregon court's application of the second guidepost was flawed because a close review of the Supreme Court's case law shows it is not the ratio of the dollar amounts of the two awards that matter. In other words, the second guidepost does not cut against the award here.

The second guidepost is "the disparity between the **actual or potential harm** suffered by the plaintiff and the punitive damages award." *Campbell*, 538 U.S. at 418 (emphasis added). That guidepost fully supports the award in this case even using the "single-digit ratio" favored in *Campbell* and other decisions.

The "actual harm" is the death of a human being. As evidenced by all the decisions upholding greater awards in wrongful death claims against RJR, there is no troubling disparity between $16 million and Ms. Stucky's death. These cases involve the most reprehensible behavior, the most actual harm that can be inflicted on a person, and defendants who have made billions of dollars from their misconduct.

For example, in another wrongful death case against Philip Morris, an Oregon appellate court applied the second guidepost in upholding a $25 million punitive award that was 148 times the compensatory damage award. *Schwarz v. Philip Morris USA, Inc.*, 355 P.3d 931, 942-44 (Or. Ct. App. 2015), *cert. denied*, 578 U.S. 975 (2016). It reasoned that the compensatory damage award did not account for the actual harm because Oregon law, like Florida law, limits recoverable damages to certain elements that prevent true compensation for the death.

> [A]s the trial court instructed the jury in this case, the $168,514.22 in compensatory damages awarded to plaintiff accounted for "Mrs. Schwarz's medical and funeral expenses, her disability and pain and suffering; and her spouse's and children's loss of her society, companionship and services." However, those damages did **not** account for the loss of her life itself, as "Oregon

> law does not provide for compensatory damages for loss of life to the person who has died or to her estate in this type of case." Thus, the compensatory damages did not account for all of the harm directly suffered as a result of the actions of defendant. Rather, defendant's conduct caused harm for which defendant was not required to pay.

Id. at 943. The same was true with the instruction and wrongful death law in this case. *See generally Capone v. Philip Morris USA, Inc.*, 116 So. 3d 363, 374-76 (Fla. 2013); *cf. Martin v. United Sec. Servs., Inc.*, 314 So. 3d 765, 771 (Fla. 1975) (explaining that despite the limitation on recoverable compensatory damages, Florida's Wrongful Death Act does not contemplate "a tortfeasor to be punished for his malicious and reckless acts when they maim another but not for those same acts when they kill they victim").

Similarly, the Supreme Court of Alabama focused on death as the harm in reviewing a $15 million punitive damage award for much less egregious misconduct in a wrongful death case where the jury only awarded $75,000 in compensatory damages. *Gen. Motors Corp. v. Johnston*, 592 So. 2d 1054, 1063-64 (Ala. 1992). Though it found that award excessive, it remitted the award to $7.5 million, representing a 100 to 1 ratio.

Even if the Due Process Clause required harm to be converted to dollars to assess whether a punitive damages award is excessive, the "potential harm" in this case fully supported the award. Had Ms. Stucky left behind a surviving spouse, the potential compensatory damage award could have been as high as the $15 million affirmed in *R.J. Reynolds Tobacco Company v. Schleider*, 273 So. 3d 63 (Fla. 3d DCA 2018), or at least the $10 million this Court considered in *Schoeff*. These potential awards yield ratios of less than 2 to 1.

The same result obtains even if one looks only to the potential awards to the three surviving children Ms. Stucky left behind. Had this jury awarded each child the same $6 million this Court upheld in *Odom*, 254 So. 3d at 280-81, the ratio would have been less than 1 to 1. Even if one limited the potential harm to the amount of damages sought in closing argument, the result is still the same. Ms. Coates sought over $840,000 for each child, which would have totaled $2.5 million, yielding a 6.4 to 1 ratio. And even including the suggested comparative fault percentage of 15% would yield a $2.125 million net compensatory award, presenting a ratio of 7.5 to

1. *Cf. Martin*, 53 So. 3d at 1071 (approving 7.58 to 1 ratio of punitive to net compensatory damages).[10]

Though the Supreme Court occasionally included language about the amount of compensatory damages in discussing this guidepost, it has long made clear that it is **not** the amount of compensatory damages actually awarded that controls, but the actual or potential harm.

As an initial matter, none of the Supreme Court's cases evaluated a punitive damages award for conduct that caused serious physical injury, much less death. Instead, its cases on this subject almost always involve not just purely economic injuries, but typically very minor injuries. *See Campbell*, 538 U.S. at 426 (noting the plaintiff "suffered only minor economic injuries"); *Gore*, 517 U.S. at 582 & n.35 (addressing claim that BMW had concealed that cars it sold had been repainted causing no more than $4,000 in diminution of value).

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[10] Given that "potential harm" is the comparator and the jury was freed to apportion no fault to Ms. Stucky, only the gross award of damages need be considered, though this is an academic dispute at this point.

But the Court was not unaware of tobacco cases like this. Indeed, Philip Morris twice sought certiorari in *Williams* on this issue. The first time, the Supreme Court granted certiorari, remanded the case for the Oregon courts to ensure that the jury had not awarded that amount of punishment for harming anyone but the plaintiff, but declined to address Philip Morris's argument that the amount was excessive. 549 U.S. at 357-58. When the Supreme Court of Oregon adhered to its ruling on remand, the Supreme Court denied Philip Morris's renewed request to review its claim that the award was excessive. *Williams v. Philip Morris Inc.*, 176 P.3d 1255 (Or. 2008), *cert. dismissed*, 556 U.S. 178 (2009).

In any event, even in its cases reviewing punitive damages for misconduct threatening only economic harm, the Supreme Court has made clear that the relevant comparator includes the potential harm. For example, in *TXO* the Court upheld a $10 million punitive damages award in a slander-of-title case where only $19,000 in actual damages were awarded, a ratio of over 526 to 1. 509 U.S. at 446, 454-55. The Court held that ratio to the actual damage award was not the comparator, and found the relationship reasonable because the potential loss threatened by the defendant's

misconduct was between $1 million and $8.3 million, resulting in nothing higher than a 10 to 1 ratio. *Id.* at 462. Although *TXO* was only a plurality opinion, *Gore* embraced but distinguished *TXO* because BMW's conduct threatened no similar potential harm. *Gore*, 517 U.S. at 581-82; *see also Cooper Indus.*, 532 U.S. at 441-42 (recognizing that potential damages the injured reasonably may have recovered are included).

5. RJR's response has been that the potential harm should only be considered "when a defendant's blameworthy conduct is thwarted" and has "no relevance here" because nobody kept its conduct from killing Ms. Stucky. (DCA:186; Resp. Jur. Br. 12.) But there is no case even suggesting a rule of constitutional law that would mean that RJR should be punished less because it succeeded in causing the foreseeable death of its customer.

To the contrary, the Supreme Court has made clear that potential harm must be considered where the conduct was successful in causing injuries like this one that only resulted in non-economic damages where there is necessarily a wide range of potential amounts a jury could award.

> [W]e have consistently rejected the notion that the constitutional line is marked by a simple mathematical formula, even one that compares actual **and potential** damages to the punitive award. Indeed, low awards of compensatory damages may properly support a higher ratio than high compensatory awards, if, for example, a particularly egregious act has resulted in only a small amount of economic damages. A higher ratio may also be justified in cases in which the injury is hard to detect **or the monetary value of noneconomic harm might have been difficult to determine**.

Gore, 517 U.S. at 582 (emphasis added, but citation and footnote omitted); *see also Campbell*, 538 U.S. at 425 ("We decline again to impose a bright-line ratio which a punitive damages award cannot exceed.").

The district court even recognized the "difficulty in measuring noneconomic damages" in this case. 308 So. 3d at 1073. This Court has long emphasized that "there is no objective standard by which to measure" these damages, the jury is in the "best position" to undertake the task of picking a number in the wide range of possible awards, and the jury's determination "is not one of mathematical calculation but involves an exercise of sound judgment of what is fair and right." *Odom*, 254 So. 3d at 276-77 (quoting *Angrand v. Key*, 657 So. 2d 1146, 1149 (Fla. 1995), and

Braddock v. Seaboard Air Line R.R. Co., 80 So. 2d 662, 668 (Fla. 1955)).

Especially because the sole element of damages in this case was noneconomic, the modest award fully supports a high ratio as in *TXO*, though an even higher ratio would be appropriate here where the conduct was more egregious and the injury was death. Indeed, there should be no limit to the acceptable ratio in a case like this. Had the jury awarded just one dollar, a ratio of well over a 10,000,0000 to 1 would have been justified to allow the punitive damage award to serve its purposes of imposing meaningful punishment and deterrence on a company worth nearly $25 billion. Nothing in the text of the Due Process Clause – or even in its penumbrae and interstices – suggests that the jury in this case was constitutionally prohibited from imposing a level of punishment for killing Ms. Stucky comparable to what other juries have imposed for killing other smokers.

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Though the Court should not have to reach the issue, Ms. Coates closes with a few concluding remarks about the district court's refusal to identify the constitutional limit it imposed in its de

novo review. This pin-the-tail-on-the-donkey approach requiring new trials until a jury renders a punitive damage award that complies with this nebulous limit is problematic as a practical matter.

While this Court should uphold the award here, it should consider making an express determination of the maximum award constitutionally permitted when the conduct at issue in this and other cigarette cases results in the death of a human being. This would help litigants and lower trial and appellate courts across the state.

Any appellate decision expressly construing the Constitution to review one of these awards will fall within this Court's discretionary jurisdiction. Art. V, 3(b)(3), Fla. Const. Because de novo review means that the only judgment that controls is that of the highest court with jurisdiction, a clear holding on the maximum allowable punitive damage award would maximize the efficiency of the court system. That way counsel will know the limit to try to keep the jury from exceeding, trial judges will know when to remit awards that are otherwise untainted by error or prejudice, and appellate courts will not have to repeatedly consider the same issue.

Given that many compensatory awards in these cases fall in the $10 to $15 million range, the limit should be no lower than the $30 million this Court found reasonable in *Schoeff*. Following the Supreme Court's holding in *TXO*, the maximum award should be at least $100 million.

CONCLUSION

For the foregoing reasons, this Court should answer the certified question in the negative, quash the Fifth District's finding that the punitive damages award was excessive, and reinstate the judgment below.

Respectfully submitted,

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I HEREBY CERTIFY that the foregoing brief complies with the font requirements of Florida Rule of Appellate Procedure 9.045(b) and the word limit requirements of Rule 9.210(a)(2).

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