

No. SC21-175  
L.T. Case No. 5D19-2549

---

**IN THE SUPREME COURT OF FLORIDA**

---

BRINDA COATES, as personal representative  
of the estate of LOIS STUCKY,  
*Petitioner,*

v.

R.J. REYNOLDS TOBACCO Co.,  
*Respondent.*

---

---

On Review from the District Court of Appeal  
Fifth District, State of Florida

---

---

**BRIEF OF WASHINGTON LEGAL FOUNDATION  
AS AMICUS CURIAE SUPPORTING RESPONDENT**

---

---

Cory L. Andrews  
(Fla. Bar No. 25677)  
WASHINGTON LEGAL FOUNDATION  
2009 Massachusetts Ave., NW  
Washington, DC 20036  
(202) 588-0302  
candrews@wlf.org

December 30, 2021

*Counsel for Amicus Curiae  
Washington Legal Foundation*

## TABLE OF CONTENTS

TABLE OF CONTENTS .....	ii
TABLE OF AUTHORITIES.....	iii
IDENTITY AND INTEREST OF <i>AMICUS CURIAE</i> .....	1
SUMMARY OF THE ARGUMENT .....	1
ARGUMENT .....	4
I. REYNOLDS’S CONDUCT LACKED THE REPREHENSIBILITY NEEDED TO JUSTIFY A PUNITIVE-DAMAGES AWARD THIS SIZE .....	4
A. Given the jury’s liability verdict here, any ‘finding’ of reprehensibility is speculative at best.....	5
B. Because punitive damages exist to punish egregious wrongdoing, awarding them in a strict-liability context raises heightened due-process concerns .....	8
C. The Court may not defer to phantom ‘implicit’ findings based on the size of the jury’s award.....	11
II. THE RATIO OF PUNITIVE TO COMPENSATORY DAMAGES SHOULD NOT EXCEED 1:1 WHEN, AS HERE, THE CONDUCT AT ISSUE IS NOT HEINOUS AND COMPENSATORY DAMAGES ARE SUBSTANTIAL....	14
III. THE RATIO OF PUNITIVE TO COMPENSATORY DAMAGES MUST EXCLUDE THE AMOUNT ATTRIBUTED TO MS. STUCKY’S CONDUCT ...	18
CONCLUSION .....	20
CERTIFICATE OF SERVICE	
CERTIFICATE OF COMPLIANCE	

## TABLE OF AUTHORITIES

	Page(s)
<b>CASES:</b>	
<i>Aken v. Plains Elec. Generation &amp; Transmission Co-op</i> , 49 P.3d 662 (N.M. 2002).....	13
<i>Aubin v. Union Carbide Corp.</i> , 177 So. 3d 489 (Fla. 2015) .....	6, 9
<i>Bistline v. Rogers</i> , 215 So. 3d 607 (Fla. 4th DCA 2017) .....	8
<i>Boerner v. Brown &amp; Williamson Tobacco Co.</i> , 394 F.3d 594 (8th Cir. 2005) .....	16
<i>BMW of N. Am. v. Gore</i> , 517 U.S. 559 (1996) .....	1, 11, 12
<i>Clark v. Chrysler Corp.</i> , 436 F.3d 594 (6th Cir. 2006) .....	19
<i>Cooper Industries v. Leatherman Tool Group</i> , 532 U.S. 424 (2001) .....	12
<i>Dep't of Law Enf't v. Real Prop.</i> , 588 So.2d 957 (Fla. 1991) .....	17
<i>Engle v. Liggett Grp., Inc.</i> , 945 So. 2d 1246 (Fla. 2006) .....	5
<i>Exxon Shipping Co. v. Baker</i> , 554 U.S. 471 (2008) .....	10
<i>Ferayorni v. Hyundai Motor Co.</i> , 711 So.2d 1167 (Fla. 4th DCA 1998) .....	6
<i>Goddard v. Farmers Ins. Co. of Or.</i> , 179 P.3d 645 (Or. 2008) .....	19
<i>In re Exxon Valdez</i> , 270 F.3d 1215 (9th Cir. 2001) .....	3
<i>Jurinko v. Med. Protective Co.</i> , 305 Fed. App'x 13 (3d Cir. 2008) .....	16

	<b>Page(s)</b>
<i>Lompe v. Sunridge Partners, LLC</i> , 818 F.3d 1041 (10th Cir. 2016) .....	15, 19
<i>Méndez-Matos v. Mun. of Guaynabo</i> , 557 F.3d 36 (1st Cir. 2009) .....	15, 16
<i>Memphis Cmty. Sch. Dist. v. Stachura</i> , 477 U.S. 299 (1986) .....	8
<i>Morgan v. N.Y. Life Ins. Co.</i> , 559 F.3d 425 (6th Cir. 2009) .....	15, 16
<i>Owens-Corning Fiberglass Corp. v. Ballard</i> , 749 So.2d 483 (Fla. 1999) .....	8
<i>Pac. Mut. Life Ins. Co. v. Haslip</i> , 499 U.S. 1 (1991) .....	14
<i>Philip Morris USA v. Williams</i> , 549 U.S. 346 (2007) .....	1
<i>R.J. Reynolds Tobacco Co. v. Martin</i> , 53 So.3d 1060 (Fla. 1st DCA 2010) .....	19
<i>Roby v. McKesson Corp.</i> , 219 P.3d 749 (Cal. 2009) .....	16
<i>Roth v. Farner-Bocken Co.</i> , 667 N.W.2d 651 (S.D. 2003) .....	16
<i>Saccameno v. U.S. Bank Nat’l Ass’n</i> , 943 F.3d 1071 (7th Cir. 2019) .....	15
<i>Simon v. San Paolo U.S. Holding Co.</i> , 113 P.3d 63 (Cal. 2005) .....	13
<i>State Farm Mut. Auto. Ins. Co. v. Campbell</i> , 538 U.S. 408 (2003) .....	<i>passim</i>
<i>Traylor v. State</i> , 596 So. 2d 957 (Fla. 1992) .....	17
<i>Weinstein v. Prudential Prop. &amp; Cas. Ins. Co.</i> , 233 P.3d 1221 (Idaho 2010) .....	16

	<b>Page(s)</b>
<i>West v. Caterpillar Tractor Co.</i> , 336 So.2d 80 (Fla 1976) .....	9

**CONSTITUTIONAL PROVISIONS:**

Fla. Const. art. I, § 9 .....	17
Fla. Const. art. I, § 17 .....	17

**OTHER SOURCES:**

Curt Cutting, <i>An Emerging Trend?: Federal Appeals Court Limited Punitive Damages to 1:1 Ratio</i> , WLF Legal Opinion Letter (Feb. 27, 2009) .....	1
Restatement (Second) Torts .....	6, 9
Victor E. Schwartz, <i>Punitive Damages Awards: The Rest of the Story</i> , WLF Legal Backgrounder (Nov. 4, 2011).....	1
Jeffrey S. Sutton, <i>51 Imperfect Solutions</i> (2018) .....	17
Ellen Wertheimer, <i>Punitive Damages and Strict Products Liability: An Essay in Oxymoron</i> , 39 Vill. L. Rev. 505 (1994)...	9, 10

## **IDENTITY AND INTEREST OF *AMICUS CURIAE***

Founded in 1977, Washington Legal Foundation is a nonprofit, public-interest law firm and policy center with supporters nationwide, including many in Florida. WLF promotes free enterprise, individual rights, limited government, and the rule of law. WLF regularly appears as *amicus curiae* to emphasize the limits due process imposes on arbitrary deprivations of property. *See, e.g., Philip Morris USA v. Williams*, 549 U.S. 346 (2007); *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003); *BMW of N. Am. v. Gore*, 517 U.S. 559 (1996).

And WLF's Legal Studies Division, the publishing arm of WLF, has produced many works by outside experts on punitive damages. *See, e.g.,* Victor E. Schwartz, *Punitive Damages Awards: The Rest of the Story*, WLF Legal Backgrounder (Nov. 4, 2011); Curt Cutting, *An Emerging Trend?: Federal Appeals Court Limited Punitive Damages to 1:1 Ratio*, WLF Legal Opinion Letter (Feb. 27, 2009).

## **SUMMARY OF THE ARGUMENT**

Irrational awards of punitive damages foster undue “arbitrariness, uncertainty, and lack of notice.” *Williams*, 549 U.S. at 354. Look no further than this case. After awarding the plaintiff

\$150,000 in compensatory damages on her design-defect claim, the jury awarded her a staggering \$16 million in punitive damages. As both federal and Florida law make clear, the disparity between the jury's punitive and compensatory awards far exceeds the outermost bounds of due process.

This is not a case of egregious conduct—and certainly not conduct so egregious as to support the massive amount of punitive damages awarded below. After hearing all the evidence, the jury rejected the plaintiff's claims for fraudulent concealment, conspiracy, and even negligence. (R.10026) The plaintiff's *only* successful claim—the only claim on which punitive damages can stand—sounds in strict liability. In finding for the plaintiff on that claim, the jury made no finding about Reynolds's reprehensibility or intentional wrongdoing; the elements of a design-defect claim require none.

Because strict liability focuses solely on a product's defective condition rather than on the manufacturer's culpable conduct, damages aimed at punishing a defendant for a strict-liability offense raise heightened due-process concerns. Yet here there is simply nothing to suggest that the jury, in imposing \$16 million in punitive damages, found Reynolds's conduct to be especially reprehensible,

let alone that it found Reynolds to have acted with the degree of malice and enormity needed to justify so severe a punishment.

Nor may the Court infer otherwise. In applying the U.S. Supreme Court's guideposts, this Court may not presume that the jury resolved all factual disputes and construed all inferences in favor of the plaintiff. That "hands-off appellate deference to juries, typical of other kinds of cases and issues, is unconstitutional for punitive damages awards." *In re Exxon Valdez*, 270 F.3d 1215, 1239 (9th Cir. 2001). When the jury has made no governing finding of fact—beyond the naked fact of entitlement to punitive damages present in all such cases—an appellate court must independently decide all factual issues bearing on the constitutionally permissible amount of punitive damages.

When, as here, the compensatory award is substantial and the conduct at issue is not heinous, the constitutional maximum is a 1:1 ratio of punitive to compensatory damages. The plaintiff's \$150,000 compensatory-damages award is more than 'substantial' enough to warrant imposing a 1:1 ratio, particularly given the jury's failure to find that Reynolds acted reprehensibly. Anything greater than a 1:1



ratio would far exceed the amount necessary to accomplish Florida's interest in punishing and deterring Reynolds's conduct.

Finally, the Court should reject the plaintiff's self-serving arithmetic. In calculating the ratio of punitive to compensatory damages, the plaintiff insists that the denominator should include \$150,000 in damages that the jury attributed to Ms. Stucky's own conduct. But the only constitutionally relevant number is the amount of compensatory damages *the defendant* caused. Just as Reynolds may not be punished for any harms caused by Ms. Stucky, neither may it be forced to pay extra punitive damages in proportion to Ms. Stucky's own share of fault.

## **ARGUMENT**

### **I. REYNOLDS'S CONDUCT HERE LACKS THE REPREHENSIBILITY NEEDED TO JUSTIFY A PUNITIVE-DAMAGES AWARD THIS SIZE.**

At bottom, the plaintiff insists that the reprehensibility of Reynolds's conduct outweighs any other consideration. While the Fifth DCA agreed that "reprehensibility was established," it held that the "evidence of reprehensibility was not so great" as to "completely overwhelm[] consideration" of other punitive-damages guideline factors. (DCA-289)

That was an understatement. If anything, the “evidence of reprehensibility” here is remarkably scant. As the jury’s own liability verdict confirms, nothing close to a \$16 million punitive-damages award is warranted to punish Reynolds for its specific conduct here.

**A. Given the jury’s liability verdict here, any ‘finding’ of reprehensibility is speculative at best.**

This is not an *Engle* progeny case. Thus, whatever may be true in *Engle* cases, the plaintiff here cannot avail herself of the *Engle* Phase I jury’s common ‘findings’ of tobacco-industry wrongdoing. See *Engle v. Liggett Grp., Inc.*, 945 So. 2d 1246, 1254-55 (Fla. 2006). Any ‘finding’ of reprehensible conduct by Reynolds, therefore, must derive solely from this jury’s verdict.

Punitive damages may be imposed only on the conduct underlying that verdict and, specifically, on the specific conduct “upon which liability was premised.” *State Farm*, 538 U.S. at 422. A “defendant’s dissimilar acts,” no matter how reprehensible, “may not serve as the basis for punitive damages.” *Id.* Put differently, “[a] defendant should be punished for the conduct that *harmed the plaintiff*, not for being an unsavory character.” *Id.* at 423 (emphasis added).

The only conduct the jury found to have harmed Ms. Stucky was Reynolds's sale of 'defective' cigarettes. The jury rejected the plaintiff's claims for negligence, fraudulent concealment, and conspiracy. (R.10026) The plaintiff prevailed on just one claim: strict-liability, premised on a design-defect theory. (R.7731) To prevail on that theory, however, she had only to prove that Reynolds's cigarettes were defectively designed and that the defect was the legal cause of Ms. Stucky's injury. *Aubin v. Union Carbide Corp.*, 177 So. 3d 489, 512-13 (Fla. 2015). Strict liability relieves a plaintiff of the burden of proving fault. *Id.*

The only wrongdoing, if any, that may be gleaned from the jury's strict-liability verdict is something *less than* mere negligence. *Ferayorni v. Hyundai Motor Co.*, 711 So.2d 1167, 1172 (Fla. 4th DCA 1998). Indeed, a manufacturer is strictly liable for selling a defective product in Florida "even though the seller has exercised all possible care in the preparation and sale of the product." *Aubin*, 177 So. 3d at 517 n.8 (citing Restatement (Second) Torts, § 402A(2)(a)).

In other words, the only conduct for which Reynolds may be punished here is designing a "modern cigarette" with "inhalable smoke" and "manipulated" nicotine levels. (DCA-176) But these have

been inherent features of all cigarettes, for decades, well before Ms. Stucky was born. And the record contains *no* evidence that Reynolds manipulated the nicotine levels in the Winston and Doral brands that Ms. Stucky smoked.

More to the point, the jury made no finding that Ms. Stucky was harmed by egregious misconduct. Nothing in the verdict form suggests that Reynolds acted with intent to harm Ms. Stucky, or that her injury resulted from Reynolds's fraudulent or even negligent wrongdoing. On the contrary, the verdict form precludes that conclusion.

The jury found that neither Reynolds's alleged fraudulent conduct nor its alleged unreasonable conduct (i.e., negligence) harmed Ms. Stucky. As a result, the jury's outsized punitive-damages award cannot be justified based on any such conduct. *State Farm*, 538 U.S. at 422. In short, the jury's findings not only fail to establish that Reynolds's conduct here was reprehensible enough to support the \$16 million punitive award, they refute that suggestion.

**B. Because punitive damages exist to punish egregious wrongdoing, awarding them in a strict-liability context raises heightened due-process concerns.**

Because compensatory damages have a deterrent effect all their own, the Supreme Court has emphasized that “punitive damages should only be awarded if the defendant’s culpability, after having paid compensatory damages, is so reprehensible as to warrant the imposition of further sanctions to achieve punishment or deterrence.” *State Farm*, 538 U.S. at 419; *see also Memphis Cmty. Sch. Dist. v. Stachura*, 477 U.S. 299, 307 (1986) (“Deterrence . . . operates through the mechanism of damages that are compensatory.”).

To recover punitive damages, then, a plaintiff must show that the defendant has not only been at fault, but at grievous fault. Punitive damages “are reserved for particular types of behavior which go beyond mere intentional acts.” *Bistline v. Rogers*, 215 So. 3d 607, 611 (Fla. 4th DCA 2017). Such punishment is appropriate only “when a defendant engages in conduct which is fraudulent, malicious, deliberately violent or oppressive, or committed with such gross negligence as to indicate a wanton disregard for the rights and safety of others.” *Owens-Corning Fiberglass Corp. v. Ballard*, 749 So.2d 483,

486 (Fla. 1999). Strict liability—the only claim on which the plaintiff succeeded here—embodies none of that.

The policy behind strict liability is that a manufacturer must sometimes be held liable even if not at fault. The “justification” for strict liability is that “the seller, by marketing his product for use and consumption, has undertaken and assumed a special responsibility toward any member of the consuming public who may be injured by it.” Restatement (Second) of Torts § 402A cmt. c; see *West v. Caterpillar Tractor Co.*, 336 So.2d 80, 86-87 (Fla 1976) (“The user should be protected from unreasonably dangerous products or from a product fraught with unexpected dangers.”). To accomplish this goal, strict liability applies even when “the seller has exercised all possible care in the preparation and sale of his product.” Restatement (Second) of Torts § 402A(2)(a); accord *Aubin*, 177 So. 3d at 517 n.8.

When strict liability is the only basis for compensatory damages, therefore, it is hard to justify punishment beyond full victim compensation given the non-negligent nature of the defendant’s conduct. In other words, the “only plaintiffs who need to invoke strict products liability are those who cannot prove fault on

the part of the defendant.” Ellen Wertheimer, *Punitive Damages and Strict Products Liability: An Essay in Oxymoron*, 39 Vill. L. Rev. 505, 512 (1994). “Because punishment is the sole focus of punitive damages, their availability in a strict products liability case is a contradiction in terms.” *Id.*

Strict liability should not support punitive damages—especially when due process limits the basis for any such award to the conduct for which the defendant is found liable. *State Farm*, 538 U.S. at 422. Even when appropriate, punitive damages require the jury to go beyond a bare liability finding—that is, finding something especially bad about the defendant’s strictly liable conduct. Given its rejection of the plaintiff’s negligence claim below, the jury could not have made that finding here. It follows that Reynolds’s conduct was not reprehensible enough to support the outsized punitive-damages award.

The law limits punitive damages to cases of “‘enormity,’ where a defendant’s conduct is ‘outrageous.’” *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 492 (2008) (cleaned up). Because strict liability focuses solely on the defective condition of a product rather than on the culpable conduct of its manufacturer, damages aimed at punishing

a defendant for a strict-liability offense raise heightened due-process concerns. These heightened concerns, coupled here with the jury's rejection of all claims with any component of fault, preclude the jury's outsized award.

**C. The Court may not defer to phantom 'implicit' findings based on the size of the jury's award.**

A court cannot uphold the award here based on assumptions about 'implicit' reprehensibility findings the jury theoretically might have made. First, that approach is foreclosed by the jury's conclusion that Ms. Stucky was *not* harmed by negligent conduct; it thus follows that the conduct that harmed her was neither reckless nor intentional. Second, relying on hypothesized reprehensibility findings is foreclosed by the Supreme Court's recent punitive-damages decisions.

In *Gore*, for example, the Court accepted "the jury's finding that BMW suppressed a material fact which Alabama law obligated it to communicate to prospective purchasers of repainted cars in that State." 517 U.S. at 579-80. But that finding could not, the Court insisted, "establish the high degree of culpability that warrants a substantial punitive damages award." *Id.* at 580.



After reviewing the record for itself, the Court determined that the case implicated “none of the aggravating factors associated with particularly reprehensible conduct.” *Id.* at 576; *see also id.* at 585 (“[W]e of course accept the Alabama courts’ view that the state interests in protecting its citizens from deceptive trade practices justifies a sanction in addition to the recovery of compensatory damages. We cannot, however, accept the conclusion of the Alabama Supreme Court that BMW’s conduct was sufficiently egregious to justify a punitive sanction that is tantamount to a severe criminal penalty.”).

In *Cooper Industries v. Leatherman Tool Group*, the Court emphasized that “the level of punitive damages is not really a ‘fact’ ‘tried’ by the jury,” but “an expression of [the jury’s] moral condemnation.” 532 U.S. 424, 432 & 437 (2001) (cleaned up). As a result, when (as here) the jury has made no “specific findings of fact,” *id.* at 439 n.12, the appellate court should independently examine any assumptions underlying the punitive-damages award. Indeed, the Court in *Cooper Industries* went on to expressly reject the plaintiff’s assertion that, for purposes of the second guidepost, the potential harm was \$3 million. *Id.* at 441-42.

And reiterating the importance of “[e]xacting appellate review” in *State Farm*, 538 U.S. at 418, the Court rejected the dissent’s suggestion that “[e]vidence the jury could credit demonstrated that the PP & R program regularly and adversely affected Utah residents,” *id.* at 432 (Ginsburg, J. dissenting). Rather than defer to imaginary jury findings, the majority concluded from its own review of the record that there was “scant evidence of repeated misconduct of the sort that injured [the plaintiffs].” *Id.* at 423.

In sum, while “findings of historical fact made in the trial court are still entitled to the ordinary level of appellate deference,” appellate courts may not “presum[e] simply from the size of the [punitive-damages] award” that the jury made any specific finding of facts. *Simon v. San Paolo U.S. Holding Co.*, 113 P.3d 63, 70 (Cal. 2005). Indeed, “to infer [such a finding] from the size of the award would be inconsistent with *de novo* review, for the award’s size would thereby indirectly justify itself.” *Id.*; see also *Aken v. Plains Elec. Generation & Transmission Co-op*, 49 P.3d 662, 668 (N.M. 2002).

**II. THE RATIO OF COMPENSATORY TO PUNITIVE DAMAGES SHOULD NOT EXCEED 1:1 WHEN, AS HERE, THE CONDUCT AT ISSUE IS NOT HEINOUS AND COMPENSATORY DAMAGES ARE SUBSTANTIAL.**

“The point of due process—of the law in general—is to allow citizens to order their behavior.” *State Farm*, 538 U.S. at 418 (quoting *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 59 (1991) (O’Connor, J., dissenting)). Thus, “a person [should] receive fair notice” of both “the conduct that will subject him to punishment” and “the severity of the penalty that a State may impose.” *Gore*, 517 U.S. at 574. Arbitrary—and thus unpredictable—awards of punitive damages violate due process. *State Farm*, 538 U.S. at 416.

While the States enjoy broad discretion to impose punitive damages in egregious cases, that discretion is not unlimited. The Supreme Court has repeatedly struck down excessive punitive-damages awards by state courts as “arbitrary deprivation[s] of property without due process of law.” *Gore*, 517 U.S. at 586 (Breyer, J., concurring); *Williams*, 549 U.S. at 346 (striking down a \$79.5 million punitive-damages award because it arbitrarily punished the defendant for conduct toward non-parties); *State Farm*, 538 U.S. at 429 (striking down a \$145 million-damages punitive award as “an irrational and arbitrary deprivation of the property of the defendant”).

“[T]he most commonly cited indicium of an unreasonable or excessive punitive damages award is its ratio to the actual harm inflicted on the plaintiff.” *Gore*, 517 U.S. at 580. In *State Farm*, the Supreme Court explained that “[w]hen compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee.” 538 U.S. at 425.

The Court went on, in *Exxon*, to adopt a bright-line rule in maritime tort cases that a 1:1 ratio is a “fair upper limit.” 554 U.S. at 513 & n.27. But that ratio was not based on unique aspects of maritime law. Rather, it derived from the median ratio of state-court awards. *See id.* at 512-13. It follows that the 1:1 ratio the Court adopted for maritime cases in *Exxon* is also appropriate in other civil cases.

Following that guidance, many federal courts of appeals have reduced the ratio of punitive to compensatory damages to 1:1 when the conduct at issue is not heinous and compensatory damages are substantial. *See, e.g., Saccameno v. U.S. Bank Nat’l Ass’n*, 943 F.3d 1071, 1090 (7th Cir. 2019); *Lompe v. Sunridge Partners, LLC*, 818 F.3d 1041, 1073-75 (10th Cir. 2016); *Morgan v. N.Y. Life Ins. Co.*, 559

F.3d 425, 4443 (6th Cir. 2009); *Méndez-Matos v. Mun. of Guaynabo*, 557 F.3d 36, 55-56 (1st Cir. 2009); *Jurinko v. Med. Protective Co.*, 305 Fed. App'x 13, 30 (3d Cir. 2008); *Boerner v. Brown & Williamson Tobacco Co.*, 394 F.3d 594, 602-03 (8th Cir. 2005).

State courts of last resort have done the same. *See, e.g., Weinstein v. Prudential Prop. & Cas. Ins. Co.*, 233 P.3d 1221, 1262 (Idaho 2010); *Roby v. McKesson Corp.*, 219 P.3d 749, 770 (Cal. 2009); *Roth v. Farner-Bocken Co.*, 667 N.W.2d 651, 671 (S.D. 2003). This Court should follow suit.

Here, the plaintiff's \$150,000 compensatory damages award is more than 'substantial' enough to warrant imposing a 1:1 ratio, particular given the jury verdict's failure to establish Reynolds's reprehensibility. *See, e.g., Méndez-Matos*, 557 F.3d at 56 (affirming reduction of a \$350,000 punitive award to \$35,000, the amount of compensatory damages). Anything greater than a 1:1 ratio would exceed the amount necessary to accomplish Florida's interest in punishing and deterring the defendant's strict liability for design defect.

The trial court's deferential ruling is out of step with the Supreme Court's due-process guideposts. As this case highlights,

Florida trial courts continue to give short shrift to the Due Process Clause’s limits on punitive-damage awards—limits already “well established” when *State Farm* was decided, 538 U.S. at 416. Defendants in Florida are thus at risk of punishment without “fair notice . . . of the severity of the penalty that a State may impose.” *Gore*, 517 U.S. at 574.

Although the U.S. Supreme Court has not yet imposed a bright-line ratio in all cases, this Court may do so under the Florida Constitution. The “federal Constitution . . . represents the floor” for Floridians’ due-process rights; “the state constitution, the ceiling.” *Traylor v. State*, 596 So. 2d 957, 962 (Fla. 1992); see Jeffrey S. Sutton, *51 Imperfect Solutions* 178 (2018) (arguing that “neglected state constitutional protections remain on the books and provide an alternative theory for relief”).

Like its federal counterpart, the Florida Constitution protects citizens from (1) deprivations of property “without due process of law,” Fla. Const. art. I, § 9, and (2) “[e]xcessive fines,” Fla. Const. art. I, § 17. Under these provisions, “Floridians have substantive rights to be free from excessive punishments.” *Dep’t of Law Enf’t v. Real Prop.*, 588 So.2d 957 (Fla. 1991).

Imposing a 1:1 ratio when compensatory damages are substantial would diminish the possibility of multiple, overlapping punitive-damages awards for the same historical conduct—a risk very much on display here. And it would allow Florida tort law to accomplish Florida’s legitimate interests in punishing and deterring truly egregious conduct without abridging defendants’ rights under the Florida Constitution to be free from excessive punishments.

**III. THE RATIO OF PUNITIVE TO COMPENSATORY DAMAGES MUST EXCLUDE THE AMOUNT ATTRIBUTED TO MS. STUCKY’S CONDUCT.**

Eager to deflate the eye-popping 106.7:1 punitive-to-compensatory ratio, the plaintiff insists that the denominator should include the \$150,000 in damages the jury attributed to Ms. Stucky’s own conduct. Doubling the denominator would halve the numerator, yielding a 53.3:1 ratio. But the only constitutionally relevant number is the amount of damages *the defendant* caused.

Again, the “precise award” of punitive damages must be based on “the facts and circumstances of the defendant’s conduct and the harm to the plaintiff.” *State Farm*, 538 U.S. at 424. “Compensatory damages are intended to redress the concrete loss that the plaintiff has suffered *by reason of* the defendant’s wrongful conduct.” *Id.* at

416 (emphasis added). Using a denominator of \$300,000—the total amount of compensatory damages found by the jury—despite the jury’s finding that Ms. Stucky was 50% responsible for those damages—would improperly punish Reynolds for harm it did not cause. *See, e.g., Clark v. Chrysler Corp.*, 436 F.3d 594, 606 n.16 (6th Cir. 2006) (“[A] ratio based on the full compensatory award would improperly punish [the defendant] for conduct that the jury determined to be the fault of the plaintiff.”); *accord Lompe*, 818 F.3d at 1068.

“A defendant should be punished for [its] conduct that harmed the plaintiff.” *State Farm*, 538 U.S. at 423. It follows that Reynolds may not be punished for any harms caused by Ms. Stucky. Neither may Reynolds be made to pay extra punitive damages in proportion to Ms. Stucky’s own share of fault. *See, e.g., R.J. Reynolds Tobacco Co. v. Martin*, 53 So.3d 1060, 1070-71 (Fla. 1st DCA 2010) (considering only the reduced compensatory award when assessing the punitive-to-compensatory ratio); *Goddard v. Farmers Ins. Co. of Or.*, 179 P.3d 645, 666 (Or. 2008) (en banc) (excluding from the punitive-to-compensatory ratio “that part of the compensatory damages that resulted from [the plaintiff’s] misconduct”). This Court



has yet to decide the question. To provide much needed clarity to Florida courts, it should do so here.

Of course, a mountain half as tall is still a mountain; Mount Everest would not become a molehill at 14,500 instead of 29,000 feet. Even if this Court were to ignore the jury's allocation of fault to Ms. Stucky, a punitive-damages award that is 53 times greater than the unreduced compensatory award is "breathtaking" and "must surely raise a suspicious judicial eyebrow." *Gore*, 517 U.S. at 583. No matter how generous the ratio, the jury's punitive-damages award is "grossly excessive" and "furthers no legitimate purpose." *State Farm*, 538 U.S. at 417.

### **CONCLUSION**

The Court should impose a 1:1 ratio of punitive to compensatory damages, without regard to the damages caused by Ms. Stucky.

Respectfully submitted,

/s/ Cory L. Andrews

Cory L. Andrews

(Fla. Bar. No. 25677)

WASHINGTON LEGAL FOUNDATION

2009 Massachusetts Ave., NW

Washington, DC 20036

*Counsel for Amicus Curiae*

*Washington Legal Foundation*

December 30, 2021

## CERTIFICATE OF SERVICE

I certify that a copy of this brief was served through the Florida Courts E-Filing Portal on all counsel of record:

John S. Mills  
jmills@bishopmills.com  
BISHOP & MILLS PLLC  
1 Independent Dr.  
Suite 1700  
Jacksonville, FL 32202

Courtney Brewer  
cbrewer@bishopmills.com  
Jonathan A. Martin  
jmartin@bishopmills.com  
Bailey Howard  
bhoward@bishopmills.com  
BISHOP & MILLS PLLC  
325 North Calhoun St.  
Tallahassee, FL 32301

William H. Ogle  
oglelaw@gmail.com  
Parama K. Liberman  
pkliberman@gmail.com  
OGLE LAW FIRM  
444 Seabreeze Blvd.  
Suite 800  
Daytona Beach, FL 32118

Andrew B. Greenlee  
andrew@andrewgreenleelaw.com  
ANDREW B. GREENLEE PA  
401 East 1st St. #261  
Sanford, FL 32772

Troy A. Fuhrman  
troy.fuhrman@hwhlaw.com  
Marie A. Borland  
marie.borland@hwhlaw.com  
HILL WARD HENDERSON  
101 East Kennedy Blvd.  
Tampa, FL 33601

Jason T. Burnette  
jtburnette@jonesday.com  
Brian C. Lea  
blea@jonesday.com  
JONES DAY  
1221 Peachtree St., NE  
Suite 400  
Atlanta, GA 30361

Charles A. Morse  
cramorse@jonesday.com  
JONES DAY  
250 Vesey St.  
New York, NY 10281-1047

Joshua R. Gale  
jgale@wigginschilds.com  
WIGGINS CHILDS PANTAZIS  
FISHER & GOLDFARB LLC  
101 North Woodland Blvd.  
Suite 600  
Deland, FL 32720

/s/ Cory L. Andrews

## **CERTIFICATE OF COMPLIANCE**

I certify that this brief complies with the font and word-count limit under Florida Rules of Appellate Procedure 9.045(b) and 9.210. It has been prepared in Bookman Old Style 14-point font. The word count is 3,743—excluding those portions of the brief exempted under Rule 9.045(e).

/s/ Cory L. Andrews