>> NEXT CASE UP IS JOAN SCHOEFF,
ETC. C. R.J. REYNOLDS TOBACCO
COMPANY .
>> I THINK THAT --
>> JUST WAIT FOR THEM TO STEP
OUT.
THIS IS DOWN A LITTLE BIT.
HOW DO YOU PRONOUNCE YOUR
CLIENT'S NAME?
>> THIS IS SCHOEFF LIKE A LOAF
OF BREAD.
>> THE COURT IS READY.
MAY IT PLEASE THE COURT?
JOAN SCHOEFF, ETC. C. R.J.
REYNOLDS TOBACCO COMPANY TO ON
BEHALF OF THE PETITIONER, JOAN
SCHOEFF.
I WOULD LIKE TO BEGIN WITH THE
SAME ISSUE THE FOURTH DISTRICT
BEGAN WITH WHICH IS REVIEW OF
THE PUNITIVE DAMAGE AWARD.
WE CAN COVERED UNDER THE
CONSTITUTION, UNITED STATES DUE
PROCESS CLAUSE AND THIS COURT'S
STATE LAW ON EXCESSIVENESS
TOGETHER.
AS THE COURT RECOGNIZED, THE
MAIN GUIDEPOST FOR
CONSTITUTIONAL REVIEW AND THE
FIRST FACTOR FOR STATE COURT
REVIEW IS REPREHENSIBLE THE OF
THE DEFENDANT'S CONDUCT.
THE FOURTH DISTRICT DID NOT
ADDRESS IT.
>> DID THE FOURTH DISTRICT
ACTUALLY DEAL WITH THE PUNITIVE
DAMAGE ISSUE ON CONSTITUTIONAL
GROUNDS?
WHAT PORTION WAS THAT?
>> BOTH.
>> IT ADDRESSED BOTH?
>> FOUND IT WAS UNCONSTITUTIONAL
AND EVEN IF IT WASN'T
UNCONSTITUTIONAL IT WOULD BE
SUBJECT -- THERE WAS A NO --
>> THE GROUND FOR THE
UNCONSTITUTIONALITY IS WHAT I
WAS LOOKING FOR IN THE OPINION.
>> IT WAS PAGE 5, THEY CITE THE
TOWNSEND CASE FOR WHETHER ANY

PUNITIVE DAMAGE AWARD WAS SO
EXCESSIVE AS TO VIOLATE DUE
PROCESS.
WE CONSIDER THE USE GUIDEPOSTS.
THAT IS WHAT WE ARE GOING TO
TALK ABOUT TODAY AND OVERLAP
WITH THE THREE REQUIREMENTS
UNDER STATE LAW AND THE FIRST
ONE WITH YOU ARE TALKING
CONSTITUTIONAL REVIEW OR REVIEW
ON WHETHER IT IS EXCESSIVE IS
THE REPREHENSIBLE ANY OF THE
DEFENDANT'S CONDUCT, DISTRICT
COURT DID NOT ANALYZE IT BUT
MANY COURTS HAVE.
WE CITED THAT AND PROVIDED A
LONG, DETAILED SUMMARY WITH
CITATIONS.
THERE IS NO DISPUTE AS TO ANY OF
THAT.
EXEMPLIFIED IN ANOTHER BRIEF.
IN SHORT THIS IS THE WORST OF
THE WORST, THE WORST CONDUCT
THIS COURT WILL SEE.
THE WORST CONDUCT ANY COURT HAS
SEEN FROM CORPORATION IN
AMERICAN HISTORY.
THE CLOSEST ANALOGUE WOULD BE
THE ASBESTOS CASES LOSE THIS
COURT IN THE OWENS CORNING
FIBERGLAS VERSUS VALOR CASE
CITED BY THE DISTRICT AND OUR
BRIEFS, THIS COURT CONSIDER THE
REPREHENSIBLE MONEY OF THE
ASBESTOS CONSPIRACY.
IT CONCLUDED $31 MILLION
PUNITIVE DAMAGE AWARD WHICH IS
HIGHER THAN THE AWARD HERE WAS
APPROPRIATE IN THAT CASE.
>> WHAT WAS COMPENSATORY DAMAGE?
>> $1.8 MILLION.
IT WAS A 17.2 MULTIPLIER THAT
THIS COURT APPROVED 20 YEARS AGO
AGAINST THE ASBESTOS COMPANIES.
WHAT THE TOBACCO COMPANIES IT IS
FAR WORSE AND THE ONLY WAY TO DO
THING WISH BALLARD IS TO
RECOGNIZE THAT.
THE ASBESTOS COMPANIES DID NOT
ENSURE HUNDREDS OF THOUSANDS,

MILLIONS OF AMERICANS WOULD
EXPOSE THEMSELVES VOLUNTARILY
THROUGH A NICOTINE ADDICTION TO
CARCINOGENIC TOXINS THAT WOULD
CAUSE 500,000 PEOPLE A YEAR TO
DIE.
THAT DIDN'T HAPPEN AS BEST AS,
THAT IS THE FACTS WE HAVE HERE.
UNLESS AND UNTIL WE HAVE A
CORPORATION THAT COMES IN AND
ENGAGE IN INTENTIONAL GENOCIDE
TO KILL PEOPLE FOR THE HECK OF
IT THIS IS THE WORST OF THE
WORST WHICH THEY DIDN'T INTEND
FOR CUSTOMERS TO DIE BUT THEY
KNEW THEY WERE GOING TO DIE AND
CONTINUE THEIR CONDUCT TO MAKE
MONEY.
IT IS THE WORST OF THE WORST.
THE STATE LAW PROVIDE EVERYTHING
YOU LOOK AT IS THE RELATIONSHIP
TO COMPENSATORY DAMAGES AND IN
BALLARD THOSE DAMAGES WERE FAR
LESS.
WE HAD A HIGHER PUNITIVE DAMAGE
AWARD, BALLARD 31 IS COMPARED TO
30 HERE, AND COMPENSATORY
DAMAGES BY THE FOURTH DISTRICT
HERE, WE ARE 1.8 SO HAD A 17
PLUS MULTIPLIER IN BALLARD.
>> DOES IT MATTER FOR THE RATIO,
WHETHER WE AGREE WITH YOU ON THE
INTENTIONAL EXCEPTION THAT YOU
HAVE 10 MILLION VERSUS 7
MILLION.
>> IT SHOULD NOT MATTER UNDER
THE FACTS OF THIS CASE.
>> IF IT IS 10 MILLION IT IS
WITHIN THE THREE TIMES.
IT IS A LITTLE STRONGER.
>> IT IS A LITTLE STRONGER.
WHETHER YOU TAKE THAT FOOL 10.8
FOR THE RATIO OR TAKE THE
REDUCTION WHICH KNOCKS IT DOWN
TO 7.8 IF THEY ARE CORRECT.
>> AS TO THAT ARGUMENT, EVEN IF
IT WAS NOT UNCONSTITUTIONALLY
EXCESSIVE, THERE WAS WAIVER,
THAT THE LAWYER BEGGED THE JURY
NOT TO AWARD $25 MILLION.

IT IS NOT QUITE LIKE THE PAUL NEWMAN IN THE VERDICT, ONLY 5 MILLION MORE BUT WHAT IS THAT? HOW DO YOU APPROACH THE ALTERNATIVE.
>> A COUPLE WAYS.
THAT HAS NOTHING TO DO WITH ANY OF THE FACTORS OF EXCESSIVENESS OF THE PUNITIVE DAMAGE AWARD.
IT IS NOT ONE OF THE FACTORS.
WHETHER IT HAS A LOGICAL BASIS IN THE FOURTH DISTRICT, DOESN'T HAVE A LOGICAL BASIS TOWARD MORE THAN THE PLAINTIFF REQUESTED AND THAT IS NOT TRUE HAS BEEN REJECTED BY THE COURTS AND THE PLAINTIFF'S DEMAND IS NOT A LIMIT.
THE PLAINTIFF EVEN SAID YOU MAY THINK THE EVIDENCE SUPPORTS HIGHER BUT PLEASE DON'T AWARD MORE.
THE CLEAR REASON THE JURY WOULD KNOW WHAT THAT LOGIC WAS IS NOT LOGICAL BASED ON THE EVIDENCE THAT IS NOT AN EVEN MULTIPLIER, THE JURY'S HONEST EXACTLY A 3-TIME MULTIPLIER, THE JURY'S AWARD WAS LOGICAL, THEY HAD A REQUEST THAT WAS NOT LOGICAL BECAUSE WHAT THEY DIDN'T KNOW, THE COURTS REVIEWING THIS, MANY OF THEM INCLUDING THE FOURTH DISTRICT HAD HELD $25 MILLION SAFE.
>> ONE MORE PRACTICAL QUESTION.
IF UNDER THE FOURTH DISTRICT'S OPINION, THEY REMITTED $5 MILLION.
AND R.J. REYNOLDS HAVING THE ABILITY UNDER OUR CASE LAW TO REJECT THAT AND REQUIRE A WHOLE NEW TRIAL AND PUNITIVE DAMAGE.
>> THEY DO NOT UNDER CASE LAW BUT UNDER THE FOURTH DISTRICT OPINION, WHAT YOUR CASE LAW SAYS IS IN MORA WHERE A PLAINTIFF ASKED FOR A NEW TRIAL BECAUSE THE DAMAGES WERE NOT SUPPORTED BY THE EVIDENCE THE TRIAL COURT

SAID I AM NOT GIVING YOU WHAT
YOU REQUEST.
AND THAT I OPPOSE AN EDITOR AND
THIS COURT HELD YOU CAN'T DO
THAT.
THAT IS NOT WHAT THEY REQUESTED.
THEY ARE AGGRIEVED AND ELECT
FROM A NEW TRIAL.
IN THIS CASE AS THE PUNITIVE
DAMAGES THEY DIDN'T ASK FOR A
NEW TRIAL.
AND THEY NEED TO BE REDUCED.
IF IT IS REDUCED TO THE HIGHEST
LEVEL OF CONSTITUTIONAL
ALLOWANCE THAT OUT TO BE THE END
OF IT.
THAT OUT TO BE WHAT IT IS, THAT
OUGHT TO BE WHAT IT IS, THERE
OUGHT NOT TO BE A NEW TRIAL
BECAUSE THEY DID REQUEST IT.
THERE ARE DCA OPINIONS THAT
CREATE RECUSING UNDER THE
REMITTITUR STATUTE.
UNDER THE CONSTITUTION, THEY
MAKE IT CLEAR THE REMEDY IS JUST
TO REDUCE TO THE CONSTITUTIONAL
MAXIMUM.
THAT IS NOT AN ISSUE THAT NEEDS
TO BE DECIDED UNLESS THE COURT
DECIDES AFTER BALLARD, $31
MILLION OR $30 MILLION IS TOO
MUCH FOR WORST CONDUCT WITH THE
LOWER RATIO.
I DON'T SEE HOW THE COURT CAN
REACH THAT CONCLUSION.
IT WOULD BE AN APPLICATION OF
BALLARD AND THAT IS A CLEAR
ADDITIONAL CONFLICT.
>> WHAT YEAR WAS THE BALLARD
DECISION?
>> IT IS CITED ON PAGE 5 OF THE
DISTRICT COURT OPINION, 749,
483, WHICH IS A 1999 DECISION.
>> THE ISSUES THAT WE HAVE
CONFLICT ON IS THE QUESTION OF
ONCE THEY FOUND INTENTIONAL --
>> I WILL SAY THERE IS
ABSOLUTELY CONFLICT ON THE OTHER
ISSUE.
>> CONFLICT WITH WHAT?

>> YOU CONSIDER REPREHENSIBLE MONEY, CONFLICT WITH THE COURT CASE WHICH SAID $30,000,070 MULTIPLIER NOT TOO HIGH IS DIRECT CONFLICT.
WHETHER IT IS OR NOT THERE IS CLEAR ADMITTED CONFLICT, COMPARATIVE THOUGHT.
>> YOU BOTH SEEM TO SAY ABUSE OF DISCRETION THE LEGAL ISSUE AS OPPOSED TO WHETHER AN INTENTIONAL TORT COMBINED WITH NEGLIGENCE IS THE PART WHERE IT INTENTIONAL TORT IS COMPARATIVE NEGLIGENCE.
ON THIS ONE WITH THE JURY INSTRUCTION, THEY HAD THE TORT CLAIMS, STRICT LIABILITY, NEGLIGENCE, THEN FOLLOWING THAT, INTENTIONAL TORT QUESTIONS.
>> THERE WAS A REASON FOR THAT, THERE WAS ARGUMENT ABOUT THAT, COURT SAID WHY WE DOING IT THAT WAY AND THERE WAS ARGUMENT ABOUT IT AND THAT GOES THE WAY VIRTUE ON WHICH THERE IS CONFLICT WAS THE FOURTH DISTRICT SAID REGARDLESS WHERE IT APPLIED IT IS WAIVED AND THE VERY PURPOSE, THE VERY PURPOSE FOR THE VERDICT FORM TO BE CHANGED, STANDARD JURY INSTRUCTION, STATED VERDICT FORM IS DON'T REDUCE THE IMAGES, COURT WILL MAKE THE REDUCTION.
THAT CAME OUT, WE SAID WE DON'T WANT TO HAVE ANYBODY SAY WE ARE WAVING, UNLIKE CASES LIKE HIGHEST WHERE THERE WAS A COMPLAINT YOU CAN WAIVE.
IF YOU ASK THE COURT TO MAKE A REDUCTION, YOU CAN'T COMPLAIN WHEN YOU GET A REDUCTION.
WE DIDN'T DO THAT.
WE MADE IT PARTICULARLY CLEAR FROM OUR COMPLAINT AND AT EVERY JUNCTURE THAT OUR REQUEST FOR ALLOCATION OF ALT ONLY APPLIES TO THE NEGLIGENCE AND STRICT LIABILITY CLAIMS THAT WE ASSERT THE INTENTIONAL TORT EXCEPTION.

THAT WAS NOT THAN IN THE FIRST WAVE OF CASES, THEY FORMED COMPLAINTS THAT WERE USED, THEY JUST SAID WE INVITE APPLICATION FOR ALL CLAIMS.
THE WERE LOTS OF TRIAL COURT CASES ON THAT AND WE DON'T DISPUTE THAT BUT WE DIDN'T DO THAT HERE AND THE NOTION OF WAIVER ADOPTED BY THE FOURTH DISTRICT, THE FIRST IN HYATT AND THE FIFTH IN THE GREEN CASE ADOPTED IT TOO, SAID THAT IF YOU LEAVE THE JURY TO BELIEVE DAMAGES WILL BE REDUCED, THAT IS A WAIVER.
WE DID NOT DO THAT, VERY IMPORTANT, WE DID NOT DO THAT IN THIS CASE THE MORE FUNDAMENTAL POINT IS THAT IS NOT THE LAW. THAT CAN'T BE THE LAW.
>> YOU SAID YOU DIDN'T DO THAT IN THIS CASE BUT WASN'T THERE ARGUMENT MADE BY THE PLAINTIFF ABOUT COMPARATIVE FAULT?
>> WE DIDN'T KNOW IF WE WERE GOING TO WIN.
WE DON'T KNOW IF WE WILL WIN ON FRIDAY.
IF WE LOSE ON FRAUD IT APPLIES --
>> IF ON THAT JURY VERDICT FORM WHERE YOU HAVE INTENTIONAL TORT AFTER THE FINDING OF COMPARATIVE FAULT IF THERE HAD BEEN NO CHECK ON THOSE INTENTIONAL TORTS ANY JURY VERDICT WOULD HAVE BEEN REDUCED TO BUY THE 25%.
>> THAT IS WHY ALLOCATION WAS IMPORTANT AND WE HAD TO ARGUE AND WE DID NOT ARGUE THAT IT APPLIES TO FRAUD.
WE SAID CLEARLY EVERY TIME WE AREN'T EXCEPTING RESPONSE ABILITY FOR FRAUD AND EVEN IF WE DID THIS IS AN IMPORTANT POINT.
IF THE JURY WAS MISLED AND THIS JURY WASN'T, THE DEFENSE TOLD THEM DIRECTLY THE CLOSING ARGUMENT WAS YOU GOT TO SAY NO

ON FRAUD OR THEY WILL GET 100%
OF THE DAMAGES, DEFENDANT TOLD
THEM THAT SO THEY WERE CONFUSED,
THAT IS IMPOSSIBLE.
THEY WERE TOLD EXACTLY THAT.
EVEN IF THEY HAD BEEN TOLD THE
REASON HYATT AND GREEN ARE WRONG
IS IT IS NOT A JURY'S JOB TO
COME UP WITH AN ULTIMATE JUST
RESULT DISREGARDING THE LAW.
THE JURY'S JOB IS TO SET THE
DAMAGES AS THEY ARE TOLD WHAT
THE MAJOR DAMAGE IS, THEY ARE
TOLD TO AWARD 100%.
WHETHER THOSE DAMAGES ARE
REDUCED BY PERCENTAGE OF FAULT
IS A LEGAL QUESTION FOR THE
JUDGE TO APPLY BASED ON
LEGISLATIVE POLICY.
>> ON THE INSTRUCTIONS, WERE
THESE AGREED TO OR OBJECTIONS?
I AM LOOKING AT THE ONE FOR
COMPARATIVE FAULT, THE VERDICT
FORM MAKES IT TO ME IF YOU ARE
LOOKING AT IT LOGICALLY, IT
DOESN'T -- THE COMPARATIVE FAULT
ONLY APPLIES IF THERE ARE
ANSWERS TO ONE, 2 OR 3 AND YOU
GET TO 5 WHICH IS THE RELIANCE
AND INTENTIONAL TORT.
FINAL INSTRUCTIONS 16 TALKS
ABOUT IF THE VERDICT FOR R.J.
REYNOLDS IS FOR THE PLAINTIFF ON
NEGLIGENCE AND PRODUCT CLAIMS OR
IF IT IS R.J. REYNOLDS YOU WON'T
CONSIDER COMPARATIVE FAULT.
IF IT IS YOUR VERDICT FOR THEM,
YOU WILL, THEN DID ANYONE ASK
FOR INSTRUCTION?
IF YOU ALSO FIND INTENTIONAL
TORT WE WILL NOT CONSIDER
COMPARATIVE FAULT.
>> THERE WAS NO REQUEST ONE WAY
OR ANOTHER.
NOBODY WANTED TO MISLEAD THE
JURY BECAUSE IT IS AN OPEN
QUESTION UNDER FLORIDA LAW.
IF YOU TELL THEM ONE THING IN
THE COURT SAY IT IS THE OTHER
THE OTHER SIDE WILL SAY WE GET A

NEW TRIAL.
LET'S JUST GET IT NEUTRAL.
>> EVERYONE KNEW THE PUNITIVE DAMAGES BASED ON CONDUCT THAT IS THE INTENTIONAL TORT, NO ONE IS ARGUING THAT WOULD BE REDUCED.
>> THEY NEVER ARGUE THAT.
LOOK AT THE PUNITIVE DAMAGE ARGUMENT, THEY SAID WE FOUND FRAUD SO GETTING THE FULL $10.5 MILLION, DEFENDANT'S SAID THAT IN PHASE 2.
THERE WAS NO WAIVER HERE AND I WISH YOU WOULD EXTEND AND DISAPPROVE THIS LINE OF CASES THAT THEY OF THE JURY THINK THERE'S GOING TO BE A REDUCTION THAT WOULD BE A WAIVER BECAUSE THAT IS RECOGNIZING JURY NULLIFICATION.
THAT ARGUMENT MEANS YOU ARE PRESUMING THE JURY PUT AN ARTIFICIALLY HIGH DAMAGE NEVER SO WHEN IT IS REDUCED BY THE PERCENTAGE IT GETS TO WHAT THEY THINK THE FINAL RESULT SHOULD BE.
>> NO ARGUMENT ON EXCESSIVENESS EITHER AT 7 MILLION OR 10 MILLION COMPENSATORY.
>> NONE IN THIS COURT.
THEY SAID 10.5 MILLION WAS EXCESSIVE WITHOUT DISCUSSION AND HAVE NOT RAISED THAT BEFORE THIS ONE.
ONCE YOU GET PAST WAIVER, WHAT DOES THE STATUTE MEAN?
THIS COURT TOLD US THE STATUTE 768, THANK YOU, WAS A CODIFICATION OF THE COURT'S CASE LAW ON COMPARATIVE FAULT.
THAT IS WHAT THIS COURT SAID IN THE AMERICAN HOME WARRANTY CASE.
AND IT SAID AGAIN IN ERROL CROSSINGS RELIED ON BY THE FOURTH DISTRICT, BECAUSE THIS WAS A MATTER OF COMMON LAW WE INTERPRET THE STATUTE STRICTLY BECAUSE IT IS TO THE EXTENT IT IS INTERROGATION OF COMMON-LAW.

THE COMMON-LAW RULE WAS VERY
CLEAR, THE HILL CASE FROM THIS
COURT, HILL VERSUS THE PURPOSE
OF CORRECTIONS, THE THIRD DCA
CITING PRODUCT LIABILITY CASE,
HONEYWELL, ALL THOSE CASES ARE
VERY CLEAR THAT WHEN YOU HAVE
NEGLIGENCE AND INTENTIONAL TORT
CLAIMS COMPARATIVE FAULT
COMPLIES TO THE NEGLIGENCE
CLAIMS, DOESN'T APPLY TO
INTENTIONAL COURTS.
IF YOU WIN ON THE INTENTIONAL
TORTS --
>> YOU ARE TO REBUTTAL TIME.
YOU ARE WELCOME TO CONTINUE.
DID ANYTHING IN THE STATUE
CHANGE COMMON-LAW?
NOTHING DID.
THERE IS A THRESHOLD QUESTION
WHETHER IT IS THE 92 OR 99
VERSION I DON'T THINK IT
MATTERS.
THE FOURTH DISTRICT SAID IT IS
THE 92.
THAT IS CORRECT.
TO THE EXTENT THE 99 TORT REFORM
ACT MADE A MATERIAL CHANGE TO
THE COMMON-LAW.
IT CAN'T BE APPLIED
RETROACTIVELY.
IT CAN ONLY BE APPLIED
REGARDLESS -- I KNOW THE
LEGISLATOR SAID IT APPLIES
RETROACTIVELY BUT THAT CAN ONLY
BE IF IT DIDN'T CHANGE AND IT
DIDN'T.
A FAIR READING OF THE STATUTE
MEANS YOU LOOK AT EACH CAUSE OF
ACTION SEPARATELY.
IT IS AMBIGUOUS, THE SAY WHAT
YOU DO WHEN YOU HAVE SOMETHING
BASED ON NEGLIGENCE AND
INTENTIONAL TORT SO THAT IS AN
AMBIGUITY, WE RELY ON
COMMON-LAW.
THERE WOULD BE NO POLICY.
>> SO IN THESE PROGENY CASES,
ONCE THE JURY MAKES A
DETERMINATION THAT THERE WERE

INTENTIONAL TORTS COMMITTED BY
THE DEFENDANT, NO COMPARATIVE
NEGLIGENCE IS APPLICABLE.
>> THAT IS ABSOLUTELY CORRECT.
THAT IS WHAT JUDGE TAYLOR FOUND.
THAT HAS TO BE WHAT THE LAW IS.
THE LEGISLATURE DID DO IT IN
CLEAR LANGUAGE.
WHY WOULD THEY SAY IF YOU MAKE
YOUR INTENTIONAL TORT WITH
NEGLIGENCE CLAIMS THE DEFENDANT
GETS THE BENEFIT OF THE VICTIM
BE LEAVING.
NO REASON TO DO THAT.
>> I HAVE BEEN WRESTLING WITH
HOW TO DO THAT OR DETERMINE HOW
MUCH IS APPLICABLE TO NEGLIGENCE
CLAIMS.
>> THE DAMAGES ARE THE SAME
REGARDLESS OF THE CLAIM.
IT IS JUST APPLYING THAT
PERSON'S FOR THE DAMAGE AWARD IF
YOU DON'T WIN ON INTENTIONAL
TORTS.
THE COMPARATIVE FAULT DOESN'T
MATTER.
LASTLY SO I CAN SAVE TIME FOR
REBUTTAL IT IS IMPORTANT EVEN IF
I'M WRONG AND YOU HAVE TO LOOK
AT THE CORE OF THE CASE AND IT
IS 1-SIZE-FITS-ALL, WE COULD
HAVE DROPPED THE UNINTENTIONAL
TORTS.
YOU HAVE ANGLE CASES WITH NONUSE
DEFENDANT, NO PRODUCT LIABILITY
CLAIM AT ALL, WE COULD HAVE KEPT
PHILLIP MORRIS AGAIN.
THE CLAIM WOULD HAVE BEEN
INTENTIONAL TORT.
75% OF THE DAMAGES AWARDED HERE
WERE FOR THE INTENTIONAL TORT,
THE JURY WAS TOLD COULDN'T AWARD
PUNITIVE DAMAGES ON NEGLIGENCE
AND EVEN THE NEGLIGENCE CLAIMS
ARE BASED ON INTENTIONAL CONDUCT
SO TO THE EXTENT YOU ARE
SUPPOSED TO LOOK AT
1-SIZE-FITS-ALL AND IS THIS
NEGLIGENCE OR INTENTIONAL TORT,
THIS IS THE WORST INTENTIONAL

TORT YOU ARE EVER GOING TO SEE, CLEARLY FORMED THE CORE, THE FOURTH DISTRICT WAS INCORRECT WHICH I RESERVE THE REST OF MY TIME.
>> MAY IT PLEASE THE COURT MY NAME IS DONALD LAYER REPRESENTING R.J. REYNOLDS TOBACCO COMPANY.
I WOULD LIKE TO START WITH THE ISSUE ON WHICH THIS COURT TO CONFLICT JURISDICTION RELATED TO THE COMPARATIVE FAULT AND I WOULD SUBMIT THE SIMPLEST AND MOST STRAIGHTFORWARD WAY TO DECIDE THE CASE WOULD BE TO UPHOLD THE FINDING OF WAIVER, THE CRITICAL FACTS IN THIS CASE THAT SUPPORT THE FINDING OF WAIVER THAT ARE CHARACTERISTICALLY DIFFERENT THAN OTHER CASES THAT DEALT WITH THIS ISSUE IS THE EXTENSIVENESS OF THE ARGUMENT MADE BY PLAINTIFFS COUNSEL THAT THE COMPARATIVE FAULT JUDGMENT SHOULD REST UPON REPEATED FOCUS ON THE INTENTIONAL CONDUCT OF THE DEFENDANT.
SIX DIFFERENT TIMES IN THE CLOSING ARGUMENT BETWEEN PAGES 21, 93, AND 22, 46, I WILL READ SOME OF WHAT THEY SAID.
THE PLAINTIFF'S LAWYER WAS TALKING ABOUT THE ALLEGATIONS OF INTENTIONAL MISCONDUCT AND PAUSED TO TALK ABOUT COMPARATIVE FAULT AND MAKES THE ARGUMENT BASED ON BAD CONDUCT THAT IS INTENTIONAL YOU SHOULD FIND R.J. REYNOLDS MORE RESPONSIBLE.
THIS IS A UNIQUE PHENOMENON IN THESE CASES, TO DO IT TO THIS EXTENT.
>> THE DEFENDANT ARGUE AS MISTER MILLS REPRESENTS TO THE COURT THE PLAINTIFF WAS GOING TO RECOVER FULL $10 MILLION FOR INTENTIONAL TORTURING THE SECOND PHASE.

>> THE ARGUMENT HE REFERENCED WAS STATED ONCE.
>> HOW CAN IT BE IF THE DEFENDANT HAS TAKEN THE POSITION IN THE TRIAL COURT THAT THIS IS WHAT HAPPENED BEFORE US TODAY, THAT ALL OF A SUDDEN GET ON AN APPEAL AND WAVED IT.
I DON'T UNDERSTAND THE LOGIC OF THAT.
>> THE LOGIC OF IT IS BASICALLY IN THE FIRST INSTANCE IT IS FOR THE TRIAL JUDGE TO EVALUATE THE CIRCUMSTANCES.
THIS IS AN ISSUE OF WAIVER THAT WAS RAISED IN THEIR POST TRIAL BRIEF.
THE COURT, HAVING SAT THROUGH THE TRIAL SAID IT WOULD MISLEAD THE JURY NOT TO DO IT AND THE REASON WHY IS WHAT I AM ABOUT TO CONVEY, THE EXTENSIVENESS AND REPETITION WITH WHICH THE PLAINTIFFS LAWYER MADE THE POINT WAS WHY THE COMPARATIVE FAULT SHOULD BE HIGHER FOR R.J. REYNOLDS.
IF YOU LOOK AT PAGE 2216, PLAINTIFFS COUNSEL SAYS THIS IS IN THE MIDDLE OF THE ARGUMENT ABOUT INTENTIONAL FALSE, INTENTIONAL MISCONDUCT, YOU CAN CONSIDER FAULT, THAT DOESN'T MEAN THEY DON'T BEAR SOME RESPONSIBILITY.
YOU HAVE THESE THREE COMPANIES WITH ALL THEIR MONEY AND POWER AND MANIPULATION OF NICOTINE AND MARKETING AND LIES AND FILTERS AND JIM SCHOEFF.
>> DIDN'T R.J. REYNOLDS AS A PART OF THEIR ARGUMENT ARE ALSO ARGUE TO THE JURY THAT YOU SHOULD NOT FIND INTENTIONAL TORTS BECAUSE IF YOU DON'T, IT CAN BE REDUCED BY THE NEGLIGENCE.
>> WE SAID THAT ONCE, LITERALLY 50 PAGES OF TRANSCRIPT, THE NEXT ONE, WE TALK ABOUT JIM SCHOEFF'S

FAULT, THIS IS 1967, YOUNGSTERS
ARE NOT BEING TOLD ONCE THEY
START THEY MIGHT NEVER STOP.
THAT IS THE RESPONSIBILITY OF
THE CIGARETTE COMPANIES AND A
FEW PAGES LATER, YOU KNOW JIM
SCHOEFF, HE IS AT FAULT, THE
APPEAL IS REPEATED STATEMENTS
THAT HE IS THAT ALSO TO CURRY
FAVOR WITH THE JURY TO GET THE
JURY'S SUPPORT, HIS FAULT, WHAT
HE BEARS RESPONSIBILITY FOR IS
HE HAD AN ADDICTION.
HE WAS WEAK, HE WASN'T STRONG
ENOUGH THAT WASN'T A LIAR AND
DID DO IT ON PURPOSE AND THAT IS
THE DIFFERENCE BETWEEN HIM AND
THEM.
>> SEEMS TO ME YOU ARE ARGUING
WITH MISLEADING THE JURY RATHER
THAN WAIVER.
>> I AM NOT.
I AM ARGUING THE TRIAL JUDGE AT
THE END OF THIS CASE HAD TO MAKE
A JUDGMENT AND WE ULTIMATELY
HAVE TO GIVE RESPECT TO THE
JUDGE'S DISCRETION, SAT THROUGH
THE TRIAL AND HE HEARD THE JURY
TOLD WHEN WE HAD PAGES OF
TRANSCRIPT.
AND FIGURING OUT THE COMPARATIVE
FAULT ALLOCATION, YOU NEED TO
CONSIDER THE ATTENTIONAL
MISCONDUCT OF THE --
>> WEIGHT, JURORS ARE INSTRUCTED
BY THE COURT ON JURY
INSTRUCTIONS, NOT ARGUMENTS OF
COUNSEL.
>> WHAT JUSTICE QUINN --
>> LAWYERS MAKE A LOT OF
DIFFERENT ARGUMENTS IN THESE
JURY TRIALS AND GET ALL
EMOTIONAL AT TIMES.
AND THAT IS NOT THE EVIDENCE.
AND WHAT THE SITUATION IS WITH
THE JURY.
THEY TRY TO MAKE CREDIBILITY
FINDINGS.
AND BEFORE THE CLAIMS OF
INTENTIONAL TORTS.

AND INTENTIONAL TORTS IS
NEGLIGIBLE FROM THE NEGLIGENCE
CLAIMS.
AND WAS POINTED THE OUT THIS
MORNING THERE WAS NO STATEMENT
TO THE JURY.
>>
>>
>>
>> THEY HAVE TO MAKE JUDGMENTS.
THIS TRIAL JUDGE BACKED UP VERY
WELL AND EFFECTIVELY BY THE
FOURTH DCA MADE THE JUDGMENT,
DOESN'T ME MISLEADING THE
FINDING OF FACT UNDER THE
CIRCUMSTANCES.
>> UNDER YOUR THEORY,
HYPOTHETICALLY.
IF A LAWYER IN A CIVIL CASE
CONCEDES THE POINT, THE EVIDENCE
UNEQUIVOCALLY SHOWS OTHERWISE.
WHICH ONE DOES THE JURY FOLLOW?
THEY WOULD HAVE TO FOLLOW THE
EVIDENCE, NOT WHAT THE LAWYERS
SAY.
IF WE FOLLOW YOUR ARGUMENT
ANYTIME THE LAWYER CONCEDES
ANYTHING WE HAVE TO CHANGE OUR
INSTRUCTIONS.
>> THE CONCERN REALLY IS THE
JURY WAS URGED TO SEE THE
FRAUDULENT AND INTENTIONAL
CONDUCT AS PART OF THE JUDGMENT
OF WHO WAS COMPARATIVELY AT
FAULT.
THE RECORD GOES ON, I CAN READ
MORE QUOTES, VERY CLEAR THAT WAS
THE ARGUMENT THAT WAS MADE.
IT WAS CLEAR THE COURT -- THE
ARGUMENT WAS ADVANCED, AND --
>> HERE'S MY CONCERN.
FOR THE PUNITIVE DAMAGES ON THE
PART OF R.J. REYNOLDS, DOESN'T
THAT THEN IF THE JURY BELIEVES
THERE IS GOING TO BE $10 MILLION
AND THEY MIGHT HAVE AWARDED MORE
PUNITIVE DAMAGES IF THE
PLAINTIFF WAS GOING TO GET LESS
DOESN'T THAT MISLEAD THE JURY AS
TO WHAT THE AMOUNT OF PUNITIVE

DAMAGES IS, WE HAVE A LITTLE BIT
ON BOTH SIDES OR MORE SO.
HOW CAN YOU DEFEND THAT ARGUMENT
AS TO WHEN R.J. REYNOLDS WAS
MAKING THE ARGUMENT FOR PUNITIVE
DAMAGES AND NOT SAY THAT WAS A
CONCESSION BY R.J. REYNOLDS AND
THERE IS NO REDUCTION.
>> -- THE PLAINTIFF MISLED THE
JURY, AND THIS LINE OR ARGUMENT
ON THE PART OF R.J. REYNOLDS
SAYING THERE IS NO REDUCTION OF
THIS $10 MILLION, THEY AWARDED
-- WHAT HAPPENS IS $10 MILLION,
THEY COME BACK WITH $1 MILLION
THREE TIMES THE AMOUNT, RELYING
ON WHAT R.J. REYNOLDS SAID WHEN
THEY AWARDED PUNITIVE DAMAGES.
>> THE ARGUMENT I AM MAKING ON
THE WAIVER POINT, THE TRIAL
COURT WAS THERE, THEY MADE THE
FINDING, HEARD THE EVIDENCE,
THEY SAID THE JURY WOULD BE
MISLED, THE COURT OF APPEALS
SAID AFTER REVIEWING THE ENTIRE
RECORD THERE WAS NO WAY, NO WAY
THE JURY WOULD UNDERSTAND.
WE SUBMIT THAT WITH A FAIR
READING OF THE RECORD.
WHAT I WOULD LIKE TO DO, TIME IS
FLYING BY, THE WAIVER POINT IS
VERY CLEAR.
I ADDRESS THE MERITS BECAUSE IT
IS NO LESS CLEAR AND THE
CRITICAL FACT ABOUT THE ACTUAL
LAW GROWS OUT OF THE COURT'S
DECISION IN THE MERRILL
CROSSINGS CASE WHICH WAS DECIDED
IN 1996 OR 1997 STREWING THE
1992 COMPARATIVE FAULT STATUTE
AND THE LOGIC AND HOLDING OF THE
MERRILL CROSSINGS CASE, WHEN YOU
ARE DETERMINING WHETHER OR NOT
THERE WOULD BE A COMPARATIVE
FAULT, WITH MERRILL CROSSINGS,
MERRILL CROSSINGS SAID YOU HAVE
TO LOOK AT WHAT THE CORE OF THE
CASE IS.
THAT IS THE CASE WHERE EVERYBODY
WAS SHOT IN A WALMART PARKING

LOT AT WALMART AND THE OWNER OF
THE BUILDING WERE CHARGED WITH
NEGLIGENCE AND ONE OF THE
QUESTIONS, THERE WERE TWO
QUESTIONS, WHETHER COMPARATIVE
FAULT BETWEEN THE TWO NEGLIGENT
DEFENDANT IN THE CASE, AND
SECONDARILY WHETHER YOU COULD
BRING IN THE SHOOTER AND 2
COMPARATIVE FAULT BETWEEN THAT
INTENTIONAL TORT.
AND THE STATUTE DOESN'T APPLY.
AND --
>> THERE WAS MORE THAN ONE
ALLEGED IN MERRILL CROSSINGS.
>> MORE THAN ONE CAUSE OF ACTION
IN MERRILL CROSSINGS?
>> THEY ARE ALL IN THE NATURE OF
NEGLIGENCE, IT IS NOT AN
INTENTIONAL TORT BECAUSE THE
DEFENDANT WASN'T IN THE CASE.
>> ISN'T THAT THE CRITICAL
DISTINCTION?
WHAT JUSTICE LAWSON IS GETTING
TO, YOU ARE NOT GOING TO START
COMPARING, FOR PROPERTY IN
REASONABLY SAFE CONDITION AND
SOMEBODY COMMITS A CRIMINAL ACT,
YOU WILL NOT START PORTIONING
THE CRIMINAL'S CONDUCT WITH
THE PROPRIETOR DID, THE
PROPRIETOR HAS NOT BEEN CHARGED.
IN THIS CASE THERE IS A
DIFFERENT SCENARIO BECAUSE THE
DEFENDANT, ALLEGATIONS --
>> ALSO AREN'T GOING TO USE THAT
TO ALLOCATE RESPONSIBILITY
BETWEEN NEGLIGENT DEFENDANT'S.
THEY WERE VERY CLEAR THE
LANGUAGE COULD NOT HAVE BEEN
CLEARER THAT YOU LOOK AT THE
OVERALL SITUATION, GO TO THE
CORE OF THE CASE, GO TO THE HARM
IT IS PROTECTED AGAINST THE
>> IS THE CASE TO THINK WAS
BELIEVE THAT IS MERRILL
CROSSING'S ONLY HAD ONE CAUSE OF
ACTION FOR LIABILITY.
AND TRYING TO FIGURE OUT WHAT
THE CORE OF THE CASE WAS.

COMPLETELY DIFFERENT QUESTION AS TO WHETHER YOU CAN LOOK AT THIS ON A COUNT BY COUNT BASIS WHEN THERE'S MORE THAN ONE CAUSE OF ACTION.
>> THE WAY -- I DON'T UNDERSTAND THE DIFFERENCE.
YOU HAD IN COURT ONLY DEFEND CHARGED WITH NEGLIGENCE, NO INTENTIONAL ALLEGATIONS IN THE CASE.
IT WAS THE LANDLORD AND THE OWNER AND WALMART AND AS BETWEEN THEM IT WOULD HAVE IMPOSSIBLE TO ALLOCATE COMPARATIVE FAULT BUT THE COURT WAS CLEAR YOU GO TO THE HEART OF THE HARM AND MAKE A JUDGMENT.
ONE IMPORTANT FACT IF YOU READ THE REASONING OF MERRILL CROSSINGS IT IS PRETTY CLEAR THAT THEY SAY YOU LOOK AT THE WRONG AS A WHOLE AND MAKE A JUDGMENT AND THEN IN 2011 THE LEGISLATURE REENACTED THE STATUES IN TERMS THAT IF ANYTHING MADE IT CLEARER.
I WANT TO GO TO THE LANGUAGE BECAUSE TEXTUALLY SPEAKING IT IS VERY CLEAR.
>> DO YOU AGREE WITH MISTER MILLS THAT BEFORE THE STATUTE WAS ENACTED YOU WOULD LOOK AT THIS ON A COUNT BY COUNT BASIS, AND USE COMPARATIVE THOUGHT FOR IN NEGLIGENCE CLAIM FOR INTENTIONAL TORT.
>> I AM NOT CERTAIN OF IT.
THE ONE CASE THEY CITED, THE MOZILLA CASE, IS NOT A CASE THAT SAYS ANYTHING ABOUT GOING COUNT BY COUNTERCLAIM BY CLAIM.
>> IF THAT IS TRUE WOULD YOU AGREE THIS STATUTE THE CHANGE IN COMMON-LAW TO READ IT.
>> THAT IS A PRINCIPAL THE COURT HAS RECOGNIZED.
I WOULD SIMPLY SAY WHEN YOU HAD THE CLEAR RULING IN MERRILL CROSSINGS AND THE STATUTE, THE

CLEAR RULING YOU LOOK AT THE
CORE OF THE CASE AND THE STATUTE
REENACTED IN TERMS THAT MADE IT
STRONGER HOW DID IT MAKE IT
STRONGER?
TALKED ABOUT ACTIONS FOR
NEGLIGENCE, USES THE WORD
ACTIONS ALL THE TIME.
IT DOESN'T APPLY TO ACTIONS FOR
INTENTIONAL TORTS.
>> IT IS MIXED.
CASES WHERE THERE IS ONLY
INTENTIONAL TORT, STRICT
LIABILITY, NEGLIGENCE.
AND THE JURY RECOGNIZES, AN
ADDITIONAL CAUSE OF ACTION FOR
INTENTIONAL ACTS.
IN THIS CASE, AS A MATTER OF
LAW, THE ACTION IS NEGLIGENCE
VERSUS THAT IT IS THE CORE OF
THE ACTION, THE INTENTIONAL
WRONGDOING FOR THE TOBACCO
INDUSTRY OVER DECADES.
>> THE REASON, THERE IS A QUOTE
WHICH WAS A SIMILAR CASE THAT
PREDATED CROSSINGS AND IT SAID
YOU LOOK AT THE HARM THAT IS AT
ISSUE OR TO BE AVOIDED AND IT IS
ASSAULTING A BATHROOM, LIKE A
SHOOTING IN A PARKING LOT, HARM
FROM A PRODUCT.
THE STATUTE IS STRUCTURED TO
DEFINE NEGLIGENCE CASES
INCLUDING A NUMBER OF THINGS
LIKE LIABILITY AND PRODUCT
LIABILITY.
>> IT IS ALTERING COMMON-LAW.
>> THE STATUTE IS DEFINING
NEGLIGENCE ACTIONS AND INCLUDES
PRODUCT VIABILITY CASES.
>> BEFORE WE WENT TO COMPARATIVE
NEGLIGENCE AND TO BE A STORY
NEGLIGENCE CAN THAT APPLY TO
INTENTIONAL TORTS?
IN FLORIDA WE WERE CONTRIBUTORY.
DID THAT APPLY UNDER THE COMMON
LAW TO INTENTIONAL TORTS?
>> I DON'T BELIEVE SO, NO.
>> YOU PROBABLY WANT TO GO INTO
PUNITIVE DAMAGE.

IF WE WERE TO IMPROVE THE FOURTH DISTRICT'S OPINION WHICH WOULD GIVE THE 7 AND WHATEVER MILLION DOLLARS, AND THE $25 MILLION, IS THAT THE END?
ARE YOU ALLOWED -- YOU DIDN'T ASK FOR A REMITTITUR TO COME BACK AND SAY I WANT A NEW TRIAL ON PUNITIVE DAMAGES.
>> THE FOURTH DISTRICT MADE CLEAR UNDER THE MORA DECISION THAT IS WHAT THE LAW IS.
>> YOU ARE ALLOWED TO REJECT THE $25 MILLION BUT YOU DIDN'T ASK FOR REMITTANCE.
I THOUGHT YOU DIDN'T AFTER THIS
>> WE ASKED FOR A NEW TRIAL AND REMITTED AND OUR REMITTITUR WAS DENIED AND OUR NEW TRIAL WAS DENIED.
SINCE WE DIDN'T GET A REMITTITUR GRANTED, THERE WAS NO OPPORTUNITY TO SAY WE WANT A NEW TRIAL.
>> I APPRECIATE YOUR BEING CANDID.
THE EFFECT OF THIS, IF WE APPROVE THE FOURTH DISTRICT AND YOU DON'T AGREE WITH THE $25 MILLION, THERE WOULD BE A NEW TRIAL ON PUNITIVE DAMAGES.
>> I THINK WE HAVE THAT OPTION.
I HONESTLY DON'T KNOW WHAT THE PLAN IS.
I WOULD LIKE TO ADDRESS PUNITIVE DAMAGES.
>> TO CARRY ON WITH THAT QUESTION THAT WAS ASKED, THE TRIAL JUDGE, TO DO A REMITTITUR ON PUNITIVE DAMAGES, IF THE TRIAL JUDGE WENT LOWER THAN 25 MILLION THAT WAS ASKED FOR, YOU WOULD HAVE THE OPTION TO SAY I WANT A NEW TRIAL.
EVEN -- HE SET $1 MILLION.
>> NOT SURE WHAT IT WOULD BE IF WE SAID WE WANT THIS AMOUNT OF A REDUCTION AND IT WAS GIVEN I DON'T KNOW IF WE WOULD HAVE A RIGHT TO A NEW TRIAL.

>> YOU DIDN'T ASK FOR A SPECIFIC AMOUNT.
AND A NEW TRIAL.
>> THAT IS THE LAW, THAT IS WHAT THE LAW IS.
NOT TELLING YOU WHAT IS GOING TO HAPPEN.
>> DID THAT INVOLVE AND ADDITUR AS OPPOSED TO A REMITTITUR.
>> -- IT MIGHT BE A LITTLE DIFFERENT.
>> I DON'T THINK IT IS DIFFERENT.
>> IN TERMS OF BEING ADVERSELY AFFECTED.
>> IT WORKS THE SAME WAY.
WHAT I WANT TO SAY ABOUT THE PUNITIVE DAMAGE AWARD, WHAT THE PLAINTIFFS HAVE DONE, WHAT THE PLAINTIFF OBVIOUSLY HAS DONE IS GET THIS COURT'S CONFLICT JURISDICTION OVER THE COMPARATIVE FAULT ISSUE, 3 QUARTERS OF THEIR BRIEF ABOUT THE PUNITIVE DAMAGE ISSUE ON WHICH THERE IS NOT A CONFLICT, ACTUALLY ARGUE FOR ONE OF A COUPLE OF RULES OF LAW, ONE OF WHICH WOULD BE ACTUALLY SAY YOU SHOULD SET A OF A COUPLE HUNDRED MILLION DOLLARS OR PUT OUT A PER SE RULE THAT SAYS 3 TIMES DAMAGES ARE ALL OKAY, NONE OF THOSE ISSUES OBVIOUSLY HAVE EVER BEEN BRIEFED OR DECIDED OR IN TERMS OF THIS COURT AND THIS CASE, THAT AVENUE ON THAT ISSUE WE SUBMIT MAKES NO SENSE.
>> THE STATUTE -- THERE IS A STATUTE THAT TALKS ABOUT THREE TIMES PUNITIVE DAMAGE AND FOUR TIMES PUNITIVE DAMAGES SO IF THAT IS THE CASE, THREE TIMES THE COMPENSATORY DAMAGES, IS THERE REALLY --
>> IF IT IS PERMISSIBLE.
>> DO YOU REALLY HAVE AN ARGUMENT TO MAKE FOR THAT?
>> YES BECAUSE YOU HAVE FACTORS UNDER THE REMITTITUR'S STATUTE

AND I WOULD PARTICULARLY POINT
TO 768.745 DND THAT HAVE TO DO
WITH BEING LOGICALLY APPARENT TO
A REASONABLE PERSON AND THE
VARIOUS DAMAGE AWARDS.
THE TRIAL COURT MADE A CLEAR
STATEMENT THAT HE DID THINK IT
WAS LOGICAL AND THE PRINCIPAL
REASON WAS THE VEHEMENT ARGUMENT
OF COUNSEL THAT IT SHOULDN'T BE
DONE.
AND THE REASON THIS COURT NOT TO
GET INTO THIS ISSUE AND WHAT YOU
HAVE IN THESE CASES.
TO THAT, STRUCK DOWN AWARDS AND
EXCESS OF THAT, ONE IS
FORTYSOMETHING AND ONE WAS 72,
YOU DON'T HAVE WHAT I WOULD
DESCRIBE AS A PROBLEM THAT NEEDS
THE COURT TO RUSSIAN AND FIX IT
AND THE ONLY WAY TO ADDRESS IT
WOULD BE TO WALLOW IN THE FACTS
OF THIS CASE.
>> YOUR TIME IS UP.
COUNSEL?
>> I HATE TO CORRECT MY BROTHER
BUT HE IS MISTAKEN ABOUT
CROSSINGS.
IT DEMONSTRATES WHEN WE WIN
WHICH TWO NEGLIGENT DEFENDANT
DID NOT STOP INTENTIONAL TORT.
AND REDUCING LIABILITY FOR THE
INTENTIONAL, YOU ABSOLUTELY DO
FOR NEGLIGENT DEFENDANTS COME IT
IS CLEAR IN MERRILL, IF YOU READ
THE HARRELL OPINION FROM 97 LOOK
AT OUR BURNS CASE CITED IN OUR
BRIEF WHICH WAS 2005 CASE FROM
THE FOURTH DISTRICT WHICH
EXPRESSLY HOLDS THAT.
IT IS BETWEEN THE NEGLIGENT
DEFENDANTS.
IN THE SAME CASE, YOU DON'T
APPLY COMPARATIVE FAULT TO THE
INTENTIONAL TORTS.
>> THAT IS EASIER WITH SEPARATE
INTENTIONAL -- IN THE QUESTION
OF A COMBINED ACTION, WE LOOK AT
THE CORE.
DO YOU AGREE YOU LOOK AT THE

CORE?
>> LOOK AT EACH ONE
INDIVIDUALLY.
IF WE LOST ON THE FRAUD CLAIM,
EVEN THOUGH FRAUD WAS THE CORE
OF THE CASE COMPARATIVE FAULT
STILL APPLIES.
>> THERE SHOULD BE JURY
INSTRUCTION THAT SAYS PRECISELY
THAT WHICH IS THERE IS NO
COMPARATIVE FAULT REDUCTION IF
YOU FIND ALSO INTENTIONAL TORT.
>> I DON'T THINK A JURY
INSTRUCTION IS NECESSARY.
IF YOU WANT TO TELL THE JURY
WHAT THE END RESULT IS, TELL THE
MAN WE HAVE NO OBJECTION TO
THAT.
>> I KNOW YOU ARE OUT OF TIME
BUT HE HAS CITED MANY PAGES
REPEATEDLY SAYS, THAT, THERE IS,
A REDUCTION COMPARATIVE FAULT.
>> THAT'S WRONG.
THE JURY WAS NEVER TOLD BY
ANYBODY THAT THE DAMAGES WOULD
BE REDUCED EXCEPT FOR ONE TIME.
THE ONLY TIME THEY WERE TOLD
ANYTHING ABOUT WHETHER
NEGLIGENCE OR ANYTHING WOULD BE
REDUCED THEY SAID THE IMAGES
WON'T BE REDUCED ON INTENTIONAL
TORTS.
THERE IS NO INSTRUCTION.
THERE IS NO ARGUMENT.
THERE IS NOTHING THAT TOLD THIS
JURY.
>> BUT, REALLY THERE IS A LOT OF
ARGUMENT ABOUT THE, YOUR CLIENTS
ACCEPTING RESPONSIBILITY AND
BEING AT FAULT.
YOU WOULD CONCEDE THAT?
THAT WAS KIND OF A THEME?
YES.
AND OUR CLIENT WAS AT FAULT.
OUR CLIENT WAS PARTIALLY-- SO
THEIR DEFENSE TO THE FRAUD CLAIM
WAS, YOU WEREN'T DECEIVED.
YOU WANTED TO KEEP SMOKING.
THAT IS A CONTRIBUTING CAUSE.
WE AGREE.

THAT IS A PARTIAL CAUSE.
THAT IS EVEN A PARTIAL CAUSE OF THE FRAUD, BUT THE LAW SAYS, EVEN AS A VICTIM AS A MATTER OF FACT ARE A PARTIAL CAUSE WE DON'T REDUCE THE DAMAGES BECAUSE IT WAS AN INTENTIONAL TORT.
IF MAY, JUST THE LAST ANSWER TO THAT?
>> SURE.
>> JUST TO FINISH.
WHAT THE ARGUMENT ABOUT THE FRAUD WAS, IS THAT HE WAS DEFRAUDED IN THE BEGINNING TO BEGIN SMOKING.
AND YES, THIS WAS IN THE 1940s.
AND AS INFORMATION CAME OUT HE SHOULD HAVE KNOWN HE SHOULD QUIT AND HE SHOULD HAVE TRIED HARDER AND THAT IS WHY HE IS PARTIALLY AT FAULT.
THE INITIAL WAS CLEARLY FRAUD.
AND THEN AFTERWARDS, WHETHER THE FRAUD HELPED KEEP HIM FROM QUITTING THAT IS THE JURY QUESTION THEY HAD TO RESOLVE BUT WE HAD TO ADDRESS, THAT YES, IT IS PARTIALLY HIS FAULT.
THE POINT OF THE LAW, WHAT THE LEGISLATURE SAID, EVEN IF IT IS THE PLAINTIFF'S FAULT, EVEN IF THEY WERE NEGLIGENT IN BEING DECEIVED, WE DON'T REDUCE THOSE DAMAGES AS A MATTER OF PUBLIC POLICY ESTABLISHED FIRST BY THE COMMON LAW AND ADOPTED BY THE LEGISLATURE.
>> THANK YOU FOR YOUR ARGUMENTS.
>> THANK YOU VERY MUCH.
>> WE'RE IN RECESS FOR TEN MINUTES.