R.J. REYNOLDS TOBACCO COMPANY,

Appellant,

v.

LYANTIE TOWNSEND, as Personal Representative of the Estate of FRANK TOWNSEND,

Appellee.
_____/

IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA

NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF FILED

CASE NO. 1D10-4585

Opinion filed February 14, 2012.

An appeal from the Circuit Court for Alachua County.
Hon. Victor L. Hulslander, Judge.

Gregory G. Katsas, of Jones Day, Washington, D.C.; Robert B. Parrish, Charles M. Trippe, and David C. Reeves, of Moseley, Prichard, Parrish, Knight & Jones, Jacksonville; Stephanie E. Parker, John F. Yarber, and John M. Walker, of Jones Day, Atlanta, Georgia; Hada de Varona Haulsee, of Womble, Carlyle, Sandridge & Rice, PLLC, Winston-Salem, North Carolina, for Appellant.

Steven Brannock, Celene H. Humphries, and Tyler K. Pitchford, of Brannock & Humphries, Tampa; Gregory D. Prysock, of Morgan & Morgan, P.A., Jacksonville; Keith R. Mitnik, of Morgan & Morgan, P.A., Orlando, for Appellee.

VAN NORTWICK, J.

In this Engle[1] progeny case, R.J. Reynolds Tobacco Company (RJR) appeals a final judgment following a jury verdict awarding Appellee, Lyantie Townsend, as

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

personal representative of the estate of Frank Townsend, her late husband, $10.8 million in compensatory damages and $80 million in punitive damages for the death of Mr. Townsend. Mr. Townsend died from lung cancer and was a long-time smoker of cigarettes manufactured by RJR. The jury found RJR 51% responsible for Mr. Townsend's death and, based on that apportionment of fault (and after denying RJR's motion for new trial or remittitur), the trial court entered judgment against RJR for $46.308 million, which comprised approximately $5.5 million in compensatory damages and $40.8 million in punitive damages.[2]

In this appeal, RJR contends that 1) it is entitled to a new trial because of several improper comments by Appellee's counsel in closing argument; 2) the use of the Engle findings to establish elements of Appellee's claims violates Florida law and due process; 3) Appellee failed to prove reasonable reliance by Mr. Townsend on any statement or act of RJR or its predecessor companies; 4) the compensatory damage award is excessive; and 5) the punitive damage award is excessive and violates due process.

[2] Punitive damages are not typically subject to apportionment based on comparative fault, see R.J. Reynolds Tobacco Co. v. Martin, 53 So. 3d 1060, 1066 (Fla. 1st DCA 2010), rev. den., 67 So. 3d 1050 (Fla. 2011), but the record indicates that Appellee consented to the trial court's reduction of the punitive damage award to $40.8 million. Nothing in the record suggests that the trial court ordered the reduction because it found the $80 million award excessive and a $40.8 million award appropriate; rather, it appears the reduction was simply the result of a mathematical calculation by the trial court based on the comparative fault percentage found by the jury: $80 million x 51% = $40.8 million.

With respect to the "closing argument" issue, we hold that by waiting until the end of closing argument to object to the argument and move for mistrial and by failing to object specifically to distinct portions of the argument, RJR failed to preserve this issue for appellate review. Engle, 945 So. 2d at 1271-74; see also Murphy v. Int'l Robotic Sys., Inc., 766 So. 2d 1010 (Fla. 2000). Accordingly, we find no abuse of discretion in the denial of the motion for new trial based on the closing argument. We affirm the second and third issues based on Martin, 53 So. 3d at 1060.[3] For the reasons that follow, we affirm the compensatory damage award and we reverse and remand the punitive damage award for the limited purpose of permitting Appellee to choose between a new jury trial solely to determine punitive damages or acceptance of a remittitur judgment to be determined by the trial court in accordance with this opinion.

COMPENSATORY DAMAGES

RJR contends the compensatory damage award is excessive and, therefore, the trial court should have granted its motion for a new trial on damages or remittitur. We review the trial court's denial of the motion for an abuse of discretion. See Engle, 945 So. 2d at 1263; McCarthy Bros. Co. v. Tilbury Constr.,

[3] To the extent the district court in R.J. Reynolds Tobacco Co. v. Brown, 70 So. 3d 707 (Fla. 4th DCA 2011), disagreed with our decision in Martin because certain jury instructions were not given in Martin, the record here reflects that at Appellee's trial, the judge gave the same instruction as was given in Brown.

Inc., 849 So. 2d 7, 9 (Fla. 1st DCA 2003).

The purpose of compensatory damages is "to make the injured party whole to the extent that it is possible to measure his injury in terms of money." Mercury Motors Exp., Inc. v. Smith, 393 So. 2d 545, 547 (Fla. 1981); see also Cooper Indus., Inc. v. Leatherman Tool Group, 532 U.S. 424, 432 (2001) (explaining that compensatory damages "are intended to redress the concrete loss that the plaintiff has suffered by reason of the defendant's wrongful conduct"). The compensatory damage award in this case comprises only non-economic damages—e.g., mental pain and suffering and loss of consortium—suffered by Appellee due to the death of her husband, Mr. Townsend. These damages are inherently difficult to measure and, as explained by the Florida Supreme Court, our judicial system places great faith in the jury's ability to assess the amount of these damages:

> Jurors know the nature of pain, embarrassment and inconvenience, and they also know the nature of money. Their problem of equating the two to afford reasonable and just compensation calls for a high order of human judgment, and the law has provided no better yardstick for their guidance than their enlightened conscience. Their problem is not one of mathematical calculation but involves an exercise of their sound judgment of what is fair and right.

Braddock v. Seaboard Air Line R. Co., 80 So. 2d 662, 668 (Fla. 1955); accord Citrus County v. McQuillin, 840 So. 2d 343, 348 (Fla. 5th DCA 2003) ("Who can place a dollar value on a human life, measured by the loss and grief of a loved one? That difficult decision is generally one for the jury or fact finder, not the appellate

court.").

"The fact that a damage award is large does not in itself render it excessive nor does it indicate that the jury was motivated by improper consideration in arriving at the award." Allred v. Chittenden Pool Supply, Inc., 298 So. 2d 361, 365 (Fla. 1974). And "[n]ot every verdict which raises a judicial eyebrow should shock the judicial conscience." Laskey v. Smith, 239 So. 2d 13, 14 (Fla. 1970). A verdict should not be declared excessive "merely because it is above the amount which the court itself considers the jury should have allowed." Bould v. Touchette, 349 So. 2d 1181, 1184 (Fla. 1977). The verdict should be disturbed only when "it is so inordinately large as obviously to exceed the maximum limit of a reasonable range within which the jury may properly operate." Id. at 1184-85.

These general principles are consistent with the legislative policy expressed in section 768.74, Florida Statutes (2009). This statute recognizes that "the reasonable actions of a jury are a fundamental precept of American jurisprudence and that such actions should be disturbed or modified with caution and discretion." § 768.74(6), Fla. Stat. But the statute also requires courts to give "close scrutiny" to damage awards, section 768.74(3), Florida Statutes, and it lists several criteria for the court to consider in determining whether an award "exceeds a reasonable range of damages." § 768.74(5), Fla. Stat. The criteria in subsection (5) include whether the award is "supported by the evidence," whether the award "bears a

reasonable relation to the amount of damages proved and the injury suffered," and whether the amount of the award is "indicative of prejudice, passion, or corruption" on the part of the jury.

Although the $10.8 million compensatory damage award in this case[4] is higher than the non-economic damage awards affirmed by this Court in the other Engle progeny cases that we have reviewed to date[5], we cannot say that the award obviously exceeds the "reasonable range within which the jury may properly operate." Bould, 349 So. 2d at 1185. The highest post-Engle compensatory damages awards that have passed appellate muster thus far are the $7.8 million award in Liggett Group, 60 So. 3d at 1078, and the $5 million award in Martin, 53 So. 3d at 1066. We are persuaded from our review of the record that a proper evidentiary basis existed to justify the award and that, despite its size, it was not based merely on passion or prejudice.

The jury observed Appellee testify and heard her first-hand account of her

[4] We are using the jury's $10.8 million compensatory award, before the reduction due to Mr. Townsend's 49% comparative negligence. See McQuillin, 840 So. 2d at 347.

[5] R.J. Reynolds Tobacco Co. v. Gray, 63 So. 3d 902 (Fla. 1st DCA) (citing Martin in affirming a $7 million non-economic damage award), rev. den., 67 So. 3d 1050 (Fla. 2011); R. J. Reynolds Tobacco Co. v. Hall, 70 So. 3d 642 (Fla. 1st DCA) (citing Martin in affirming a $5 million non-economic damage award), rev. den., 67 So. 3d 1050 (Fla. 2011); Liggett Group LLC v. Campbell, 60 So. 3d 1078 (Fla. 1st DCA) (citing Martin in affirming a $7.8 million non-economic damage award), rev. den., 67 So. 3d 1050 (Fla. 2011); Martin, 53 So. 3d at 1066 (affirming a $5 million pre-apportionment, non-economic damage award).

life with Mr. Townsend. She and Mr. Townsend were wed young in 1956, enjoyed a very close relationship during their 39-year marriage, and were always together until Mr. Townsend became ill. Appellee was required to remain in Ocala to work to provide support for the couple while Mr. Townsend traveled to Chicago for medical treatment and surgery relating to his lung cancer, and then she cared for him as he lay dying during the final six months. Appellee described Mr. Townsend's suffering and premature death at age 59 from smoking, a tragic circumstance that had, and is likely to continue to have, an acute impact on Appellee for the rest of her life. Mr. Townsend was diagnosed just when Appellee was about to join him in retirement and realize their life-long dream of traveling together. Appellee has not remarried.

With this evidence, the jury was entrusted with the "difficult decision" of effectively placing a dollar value on Mr. Townsend to Appellee. See McQuillin, 840 So. 2d at 348. Although the $10.8 million awarded by the jury is certainly at the outer limit of reasonableness for a case such as this, the award is not so inordinately large that it shocks our collective judicial conscience. Cf. id. at 347 (affirming $4.4 million non-economic damage award, but noting the award was "on the outer limit in size"). Judged by the factors set forth in section 768.74(5), Florida Statutes (2009), the amount of compensatory damages in this case is not beyond reason. Accordingly, we find no abuse of discretion in the trial court's

refusal to second-guess the jury's award of compensatory damages.

PUNITIVE DAMAGES

RJR contends the punitive damage award in this case is excessive and violates due process.[6] Our review of this issue is de novo. See Engle, 945 So. 2d at 1263; Martin, 53 So. 3d at 1071.

The purpose of punitive damages is "not to further compensate the plaintiff, but to punish the defendant for its wrongful conduct and to deter similar misconduct by it and other actors in the future." Owens-Corning Fiberglas Corp. v. Ballard, 749 So. 2d 483, 486 (Fla. 1999). The amount of punitive damages to be awarded is an issue left to the discretion of the jury. Id. at 486-87 (quoting Wackenhut Corp. v. Canty, 359 So. 2d 430, 435-36 (Fla. 1978)). However, the imposition of a punitive damage award is subject to constitutional limitations because "[t]he Due Process Clause of the Fourteenth Amendment prohibits a state from imposing a 'grossly excessive' punishment on a tortfeasor." BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 562 (1996); see also Martin, 53 So. 3d at 1071-72 (quoting Cooper Indus., 532 U.S. at 433-34). "[T]he relevant constitutional line is 'inherently imprecise.'" Cooper Indus., 532 U.S. at 434. The court in Gore, 517

[6] RJR also contends that the punitive damage award was based on "improper considerations," including the Engle findings, youth marketing not seen or relied on by Mr. Townsend, and argument of counsel. We reject these claims without further comment. Accord Martin, 53 So. 3d at 1070 ("We are satisfied Mrs. Martin produced sufficient evidence independent of the Engle findings to allow the jury to find RJR guilty of intentional misconduct or gross negligence.").

U.S. at 574-85, identified "three guideposts" for assessing the reasonableness of punitive damages: (1) the degree of reprehensibility of the defendant's conduct; (2) the ratio between the punitive and compensatory damages; and (3) civil and criminal penalties for similar conduct. In Martin, we set forth the criteria for evaluating punitive damages under Florida law, as follows:

> [T]he three criteria a punitive damage award must satisfy under Florida law to pass constitutional muster are: (1) "the manifest weight of the evidence does not render the amount of punitive damages assessed out of all reasonable proportion to the malice, outrage, or wantonness of the tortious conduct"; (2) the award "bears some relationship to the defendant's ability to pay and does not result in economic castigation or bankruptcy to the defendant"; and (3) a reasonable relationship exists between the compensatory and punitive amounts awarded.

53 So. 3d at 1072 (quoting Engle, 945 So. 2d at 1263-64).

As to the first Martin criterion, we agree with Appellee that the $40.8 million punitive damage award in this case is not "out of all reasonable proportion" to RJR's conduct. The record of this case, like the record in Martin, 53 So. 3d at 1070-72, is replete with evidence of the decades-long, wanton and intentional conduct by RJR in vigorously, persuasively marketing to the public (including young people) a product the company knew was addictive; willfully concealing the serious health hazards posed by cigarette smoking; affirmatively deceiving the public into believing that cigarettes may not be harmful; and refusing to remove certain ingredients in cigarettes (such as nicotine) that the company counted on to

sustain sales.[7]

As to the second criterion, we agree with Appellee that the $40.8 million punitive damage award will not cause RJR's financial ruin because RJR's stipulated net worth between 2006 and 2008 averaged approximately $8 billion. We are aware of the significant potential liability that RJR faces from thousands of other pending Engle progeny cases, but our review is limited to the impact of the award in this case on RJR. See Martin, 53 So. 3d at 1072. Indeed, we have no way of knowing how many of the other Engle progeny cases will result in verdicts for the plaintiff, whether punitive damages will be awarded in those cases[8], and how much any such awards will be. Moreover, we note that protections exist against successive punitive damage awards that RJR presumably will be able to raise in future cases. See Owens-Corning, 749 So. 2d at 488 n.7 (explaining that "punitive awards in other cases is a proper factor for juries to consider in deciding

[7] Harm to nonparties caused by the conduct that harmed the plaintiff is admissible and relevant to show the extent of reprehensibility of the defendant's conduct. Philip Morris USA v. Williams, 549 U.S. 346, 355 (2007). While the jury may consider such evidence when evaluating a defendant's reprehensibility, "a jury may not go further than this and use a punitive damages verdict to punish a defendant directly on account of harms it is alleged to have visited on nonparties." Id. Punishing a defendant for harm caused to nonparties "creates the possibility of multiple punitive damages awards for the same conduct." State Farm Mut. Auto. Ins. v. Campbell, 538 U.S. 408, 423 (2003). The jury here was instructed on the permissible uses of evidence of harm to nonparties.

[8] We note that in one of the Engle progeny cases recently affirmed by this Court, the jury awarded $7.8 million in compensatory damages and no punitive damages. See Liggett Group, 60 So. 3d at 1078.

the amount of punitive damages," but noting that the defendant is required to present evidence on the amount of punitive damages actually paid); W.R. Grace & Co.-Conn. v. Waters, 638 So. 2d 502, 506 (Fla. 1994) (requiring a bifurcated trial for punitive damages and explaining that, at the second stage of the trial, the defendant could introduce evidence of prior punitive damage awards in mitigation and "build a record for a due process argument based on the cumulative effect of prior awards"); § 768.73(2), Fla. Stat. (2009) (precluding successive punitive damage awards against a defendant for the same conduct under certain circumstances).

As to the third criterion, the typical measure used to determine whether a "reasonable relationship" exists between the punitive and compensatory damages is the ratio of the awards. See Gore, 517 U.S. at 580; Martin, 53 So. 3d at 1071-72. Although there is no bright-line standard, the Florida Supreme Court observed in Engle that "[s]ingle-digit [ratios] are more likely to comport with due process, while still achieving the State's goals of deterrence and retribution." Engle, 945 So. 2d at 1264-65 (quoting State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 425 (2003)). The reasoning in Engle accords with the United States Supreme Court's statement in State Farm that "in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process." 538 U.S. at 425.

Here, the ratio between the punitive damage award ($40.8 million) and the pre-apportionment compensatory damage award ($10.8 million) is 3.7 to 1, which is less than the 5 to 1 pre-apportionment ratio we upheld in Martin.[9] The 3.7 to 1 ratio is also less than the 4 to 1 ratio the United States Supreme Court has suggested "might be close to the line of constitutional impropriety." See State Farm, 538 U.S. at 425 (citing Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 23-24 (1991), and Gore, 517 U.S. at 581, and referring to the long history of statutes providing only for up to quadruple damages, as "instructive" as to the multipliers likely to comport with due process). Nevertheless, we hold that the $40.8 million punitive damage award in this case is constitutionally excessive in view of the substantial $10.8 million compensatory damages award.

Both the compensatory and punitive damage awards in this case are significantly higher than any other damage awards approved by a Florida appellate court in a case involving the death of a single smoker.[10] The $40.8 million award in this case is approximately 60% higher than the $25 million award in Martin,

[9] The 7.58 to 1 ratio referenced in Martin was based on the post-apportionment compensatory damages of $3.3 million, not the $5 million awarded by the jury. See 53 So. 3d at 1072. Here, the ratio would be 7.4 to 1 if the post-apportionment damages of approximately $5.5 million were used.

[10] Additionally, Appellee has brought to our attention only two other cases in the entire country involving the death of a single smoker in which a punitive damage award higher than the award in this case has been approved on appeal: Williams v. Philip Morris USA, Inc., 176 P.3d 1255 (Ore. 2008) ($79.5 million), and Boeken v. Philip Morris, Inc., 26 Cal. Rptr. 3d 638 (Cal. Ct. App. 2005) ($50 million).

which is the highest punitive damage award to be affirmed thus far in an Engle progeny case. Although the record contains ample evidence of RJR's wanton conduct in marketing cigarettes, we can find nothing in the record to suggest that RJR's conduct toward Mr. Townsend was any more wanton or reprehensible than it was toward Mr. Martin. The conduct here is essentially the same conduct the Martin jury found to justify "only" $25 million in punitive damages. See Gresham v. Courson, 177 So. 2d 33, 39-40 (Fla. 1st DCA 1965) ("[I]f the verdict and resulting judgment do not bear a reasonable relation to the philosophy and general trend of prior decisions in such cases, the judgment must either be set aside and a new trial awarded or a remittitur imposed reducing it to an amount which the appellate court in the exercise of its discretionary powers and in good conscience deems sustainable."). We do not believe that it is necessary, however, for the punitive damages awarded here to be the precise amount of, or capped by the amount of, the punitive damages in Martin.

The Supreme Court has been "reluctant to identify concrete constitutional limits on the ratio between harm . . . to the plaintiff and the punitive damages award," State Farm, 538 U.S. at 424. Nevertheless, it has identified a circumstance in which caution is required: "When compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee." State Farm, 538 U.S. at 425. As the Supreme

Court noted in Gore, however, there is no "simple mathematical formula" that marks the constitutional line. Gore, 517 U.S. at 582. See also State Farm, 538 U.S. at 425 ("We decline again to impose a bright-line ratio which a punitive damages award cannot exceed."); Martin, 53 So. 3d at 1072 (rejecting RJR's argument that the United States Supreme Court adopted a bright-line 1 to 1 ratio as a limit on punitive damages). We find instructive the reasoning of the Eighth Circuit in Boerner v. Brown & Williamson Tobacco Co., 394 F.3d 594 (8th Cir. 2005). There the court found that the amount of the punitive damages award was excessive under both state law and federal due process guarantees. Applying the three Gore guidelines as restated in State Farm, the Boerner court found that the punitive award of $15 million was "excessive when measured against the substantial compensatory damages award." Id. at 603. The court explained that:

> [n]otwithstanding the absence of a simple formula or bright-line ratio, the general contours of our past decisions lead to the conclusion that a low ratio is called for here. . . . Factors that justify a higher ratio, such as the presence of an "injury that is hard to detect" or a "particularly egregious act [that] has resulted in only a small amount of economical damages," are absent here. . . . [T]here is no evidence that anyone at American Tobacco intended to victimize its customers. . . . Accordingly, given the $4,025,000 compensatory damages award in this case, we conclude that a ratio of approximately 1:1 would comport with the requirements of due process. Thus, we conclude that the punitive damages award must be remitted from $15 million to $5 million.

Id. (citations omitted).

Here, the $10.8 million compensatory damage award—which is substantial by any measure—justifies a lower ratio than 3.7 to 1. Although we find the $40.8 punitive damage award excessive under the Gore and State Farm criteria, a 1 to 1 ratio is unwarranted, however, because the evidence of the extreme reprehensibility and wantonness of RJR's conduct was substantial. See Gore, 517 U.S. at 575 (noting that "the most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant's conduct").

In sum, applying the Gore and State Farm criteria, in view of the substantial compensatory damages awarded here, we agree with RJR that the $40.8 million punitive damage award in this case is constitutionally excessive. Thus, it was error to deny RJR's motion for new trial or remittitur. Accordingly, we reverse and remand the punitive damages award for the limited purpose of permitting Appellee to choose between a new jury trial solely to determine punitive damages or acceptance of a remittitur judgment on the punitive damages award to be established by the trial court.

AFFIRMED, in part, REVERSED, in part, and REMANDED for further proceedings consistent with this opinion.

MARSTILLER, J., CONCURS; WETHERELL, J., CONCURS IN PART AND DISSENTS IN PART WITH WRITTEN OPINION.

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

I agree with the majority that RJR's first issue on appeal was not adequately preserved (and it is without merit in any event); that Martin is controlling as to the second and third issues; and that the punitive damage award is constitutionally excessive and must be reversed.[11] However, for the reasons that follow, I would also reverse the compensatory damage award.

I joined the opinions affirming the judgments in two prior Engle progeny cases, Martin and R.J. Reynolds Tobacco Co. v. Hall, 70 So. 3d 642 (Fla. 1st DCA 2011), but I cannot join the decision in this case. The $5 million non-economic damage awards in Martin and Hall raised my proverbial judicial eyebrow, but the

[11] Although I agree with the reversal of the punitive damage award, I disagree with the statement in the majority opinion that "a 1 to 1 ratio is unwarranted" in this case. On this issue, I recognize the reprehensibility of RJR's conduct over the years in marketing an addictive product it knew would harm its users while at the same time actively misleading the public about the serious health risks of smoking, and I also recognize that RJR has likely made many billions of dollars over the years from selling cigarettes. Nevertheless, it seems to me that a 1-to-1 ratio may very well be appropriate on remand because the $10.8 million compensatory damage award is, as the majority notes, "substantial by any measure" and it clearly includes a punitive component already. Indeed, in the "instructive" Boerner case cited by the majority, the court held that a ratio of approximately 1-to-1 was constitutionally required based on a compensatory damage award that was $6.8 million less than the award in this case. See 394 F. 3d at 603. I also disagree with the majority's statement that punitive damages in this case should not be capped at the amount awarded in Martin, particularly in light of the majority's observation (with which I agree) that there is "nothing in the record to suggest that RJR's conduct toward [Appellee] was any more wanton or reprehensible than it was toward [the plaintiff in Martin]."

$10.8 million[12] award in this case shocks my judicial conscience. Cf. Laskey v. Smith, 239 So. 2d 13, 14 (Fla. 1970) (observing that "[n]ot every verdict which raises a judicial eyebrow should shock the judicial conscience").

I recognize that a damage award should not be declared excessive simply because it is "conscience-shocking" or exceeds the amount the court considers appropriate; rather, as the majority explains, the award should only be disturbed by the court if it is "so inordinately large as obviously to exceed the maximum limit of a reasonable range within which the jury may properly operate." Bould v. Touchette, 349 So. 2d 1181, 1184-85 (Fla. 1977); see also Lassiter v. Int'l Union of Operating Eng'rs, 349 So. 2d 622, 627 (Fla. 1977)). This standard is, as it should be, difficult to meet. However, unlike the majority, I am persuaded that the compensatory damage award in this case meets this standard.

The award is comprised of only non-economic damages for the emotional suffering experienced by Appellee as a result of the death of her husband from lung cancer. I do not question that Appellee's suffering from the loss of her husband is real and significant and, like the majority, I recognize that these types of damages are inherently difficult to measure and that the task of doing so is typically left to the jury. However, juries do not have free reign to turn widows of

[12] I agree with the majority that the determination of whether a damage award is excessive should focus on the amount awarded by the jury, not the amount reduced by the plaintiff's comparative negligence. See note 4, supra.

life-long smokers into decamillionaires simply because RJR is "a deep-pocket defendant and 'a present-day popular villain'"[13] and non-economic damages are difficult to measure. That is apparently what happened in this case because there is absolutely nothing in the record that would justify anything close to an eight-figure award for Appellee's emotional suffering.

When the damages awarded by the jury have no logical or rational relationship to the extent of the injury suffered by the plaintiff or when the award was unduly influenced by passion and prejudice, the court can and should remit the award or order a new trial on damages. See generally § 768.74, Fla. Stat. (1995) (requiring courts to closely scrutinize damage awards to ensure that they are not excessive using criteria similar to those discussed in Bould and the cases cited therein). The cases cited by Appellee in an attempt to justify the excessive compensatory damage award in this case involved awards to parents for the death of a child,[14] which is a far more traumatic loss than the loss of a spouse to lung

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[13] R.J. Reynolds Tobacco Co. v. Hall, 67 So. 3d 1084, 1092 (Fla. 1st DCA 2011) (quoting Philip Morris, Inc. v. French, 897 So. 2d 480 (Fla. 3d DCA 2004)).

[14] See, e.g., Goldberg v. Fla. Power & Light Co., 899 So. 2d 1105 (Fla. 2005) ($10 million award for parents of 12-year-old child killed in a motor vehicle accident); Parham v. Fla. Health Scis. Ctr., 35 So. 3d 920 (Fla. 2d DCA 2010) ($12 million award, reduced by statute to $700,000, for parents of infant who died due to medical malpractice); Gen. Motors Corp. v. McGee, 837 So. 2d 1010 (Fla. 4th DCA 2002) ($60 million award for family that was severely injured in a motor vehicle accident, with $15 million attributable to the emotional loss suffered by parents of 13-year-old child who died from serious burns he received in the accident).

cancer after a lifetime of smoking. Cf. Winner v. Sharp, 43 So. 2d 634, 637 (Fla. 1943) ("Those who have not brought a child into the world and loved it and planned for it, and then have it suddenly snatched away from them and killed can hardly have an adequate idea of the mental pain and anguish that one undergoes from such a tragedy. No other affliction so tortures and wears down the physical and nervous system."). Additionally, in the McQuillin case relied on by Appellee and the majority, the Fifth District made a point of noting that the $4.4 million non-economic damage award in that case (for a 7-year-old child who lost his mother in a "horrific" car accident) was "on the outer limit in size." See 840 So. 2d at 347.

The non-economic damage award in this case is $6.4 million larger than the "outer limit" identified in McQuillin,[15] and, in my view, the sheer size of the award is a clear indication that the jury was acting on passion and prejudice. Indeed, the

[15] The majority's statement that the award in this case is "certainly at the outer limit of reasonableness" appears to set (or, at least, imply) an upper limit on non-economic damage awards in future Engle progeny cases. However, I do not see how the "outer limit" set by the majority can be squared with the "outer limit" set by our sister court in McQuillin, particulary since that case involved a more traumatic loss. Also, I am concerned that the majority has "set the market" far too high and that by affirming the $10.8 million award in this case, the majority has made it nearly impossible for a court to declare an non-economic damage award up to that amount excessive in any future Engle progeny case. As a result, unless the Florida Supreme Court steps in, it appears that juries (at least in this District) will be free to continue awarding Engle plaintiffs non-economic damages that resemble Lotto jackpots simply because the tobacco company defendant has deep pockets and such damages are inherently difficult to measure.

only conceivable explanation for the amount of the award comes from Appellee's closing argument, where her trial counsel suggested that the jury could use the annual compensation of one of RJR's experts (Dr. Thomas) and one of its executives (Dr. Gentry) as "reasonable gauges or measuring sticks" to value the time Appellee lost with her husband as a result of his premature death from lung cancer. Although the amount awarded by the jury is towards the low end of the range suggested by counsel,[16] there is no logical or rational relationship between the amount RJR pays its executives and experts for their work and the emotional injury suffered by Appellee. Rather, it appears that this false comparison was merely intended to shift the jury's focus in assessing damages onto the wealth of the defendant who caused the damages, and to that end, counsel's argument was nothing more than a thinly-veiled invitation for the jury to lavishly compensate Appellee for the death of her husband simply because RJR could afford to do so. This argument was improper because compensatory damages should be based on the loss suffered by the plaintiff, not the defendant's ability to pay; however, it clearly worked, as reflected by the eight-figure compensatory damage award assessed by the jury.

I recognize that RJR did not object to this argument at trial or raise it as an

[16] The amounts identified by counsel – $400,000 per year for Dr. Thomas and $2.6 million per year for Dr. Gentry – equate to $6 million to $39 million over Appellee's remaining life expectancy.

issue on appeal, and I am not necessarily suggesting that the argument would have met the Murphy test and required reversal had it been raised on appeal. However, the substance of this argument fortifies my view that the jury's compensatory damage award was based on passion, prejudice, or other improper considerations (namely, RJR's ability to pay a large award), and not a legitimate assessment of Appellee's emotional loss. Accord Gresham v. Courson, 177 So. 2d 33, 39 (Fla. 1st DCA 1965) (finding support for the conclusion that non-economic damage award was excessive in the fact that the amount awarded by the jury was "the exact amount suggested by counsel for plaintiff in the course of oral argument to the jury and does not appear elsewhere in the trial proceedings."). Indeed, aside from this argument, there is no way to explain the eight-figure compensatory damage award in this case because the evidence of Appellee's non-economic damages consisted of little more than her testimony describing her long and happy marriage and testimony that her husband's death has been "very hard" on Appellee. Surely the law requires more than a sympathetic plaintiff testifying that she is saddened by the death of a loved one to justify such a large non-economic damage award.

While I have no trouble concluding that the $10.8 million non-economic damage award in this case is excessive, I do not have a precise answer for what the

award should be.[17] However, for the reasons that follow, it appears to me that the high end of a reasonable range of non-economic damages in a case such as this is no more than $5 million.[18]

The compensatory damage award in this case is well outside of this range, and according to the verdict information provided by Appellee,[19] it is one of the highest awards in the Engle progeny cases tried to verdict thus far. The award is one of only five compensatory damage awards exceeding $10 million and it is

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[17] RJR did not provide the jury or the trial court any guidance on this issue. In fact, it was not until oral argument in this court that RJR first articulated what a proper compensatory damage award in this case might be; there, in response to a question as to what this court should remit the compensatory damage award to if that was the course the court took, RJR's counsel answered "ballpark ... a million dollars." I recognize why a defendant would not want to "bid against itself" by suggesting a damage award to the jury that might be in excess of what the jury might otherwise be inclined to award, but the case law seems to require that in order to obtain a remittitur from the trial court, the defendant must be able to show what the maximum award should be based on the evidence presented. See Rowlands v. Signal Const. Co., 549 So. 2d 1380, 1382 (Fla. 1989); Evering v. Smithwick, 526 So. 2d 185, 186 (Fla. 3d DCA 1988) (citing Wackenhut Corp. v. Canty, 359 So. 2d 430, 434 (Fla. 1970), for the proposition that "[t]he amount of the excess must be readily apparent from the record" to support a remittutur of the verdict). However, it seems to me that the failure to identify the amount of the excess would not preclude the trial court (or this court) from ordering a new trial on damages if it was convinced that the award was excessive.

[18] I recognize that this statement is difficult to square with the prior decisions of this court approving non-economic damage awards of as much as $7.8 million. See note 5, supra. However, I am not persuaded that that the awards affirmed by this court to date are a representative sample of Engle progeny cases that should be used to "set the market" for the proper measure of damages in these cases.

[19] See Appellee's Notice of Judgments and Request to Take Judicial Notice, filed Sept. 27, 2011; Appellee's Request to Take Judicial Notice, filed Nov. 9, 2011.

more than twice the median award.[20] Additionally, the award in this case is five times the largest non-economic damage award upheld by the Florida Supreme Court in Engle,[21] $3 million more than the largest non-economic damage award affirmed by this court in an Engle progeny case,[22] nine times the largest non-economic damage award affirmed by any other district court in an Engle progeny case,[23] and almost 87 times larger than the non-economic damage award to the surviving spouse affirmed in Philip Morris USA, Inc. v. Lukacs, 34 So. 3d 56 (Fla.

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[20] The median compensatory damage award is $4.5 million based on my calculations using the verdict information provided by Appellee. This figure excludes defense verdicts, but includes verdicts awarding both economic and non-economic damages, as well as verdicts in favor of multiple plaintiffs. Accordingly, the median non-economic damage award to a single plaintiff is likely much lower than $4.5 million. Additionally, many of these awards have yet to withstand appellate review.

[21] The Engle court reinstated the verdicts in favor of class representatives Farnan and Della Vecchia. See 945 So. 2d at 1255, 1276. The total award to Farnan was $2.85 million, but only $1.6 million was for "intangible damages" such as her pain and suffering, mental anguish, and loss of capacity to enjoy life. See Engle v. R.J. Reynolds Tobacco Co., Case No. 94-08273CA, Verdict Form for Phase II, at 17-18 (Fla. 11th Jud. Cir. Apr. 7, 2000). The total award to Della Vecchia was $4.023 million, but only $3.5 million was for non-economic damages, and of that amount, $1.5 million was for the loss of companionship suffered by Della Vecchia's surviving husband and $2 million was for the loss of parental companionship suffered by her surviving son. Id.

[22] Liggett Group LLC v. Campbell, 60 So. 3d 1078 (Fla. 1st DCA 2011) (citing Martin in affirming $7.8 million non-economic damage award to spouse of deceased smoker).

[23] See R.J. Reynolds Tobacco Co. v. Brown, 70 So. 3d 707 (Fla. 4th DCA 2011) (affirming $1.2 million non-economic damage award to spouse of deceased smoker).

3d DCA 2010).[24] These comparisons highlight the excessiveness of the compensatory damage award in this case and support my view that the award is far outside the reasonable range within which the jury may properly operate.

Accordingly, for the reasons discussed above, I would hold that the trial court abused its discretion in denying RJR's motion for a new trial on damages or remittitur, and either reduce the pre-apportionment award (as this court did in Gresham and as the Third District did in Goldberg[25]) to no more than $5 million, or remand the case for a new trial on damages. See Rowlands, 549 So. 2d at 1382 ("[W]here the only problem is a dollar award so excessive to shock the conscience of the court, the trial court has discretion to deny the defendant's motion for new trial if the plaintiff will accept a remittitur that reduces the award by subtraction to the maximum recovery supported by the evidence.") (emphasis in original and footnote omitted); § 768.74(2), (4), Fla. Stat. (1995) (same).

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[24] The total award affirmed in Lukacs was $24.835 million, but only $125,000 was for the surviving spouse's non-economic damages. The jury awarded the surviving spouse $12.5 million in non-economic damages, but the trial court remitted that award to $125,000 because the evidence did not justify damages of the magnitude awarded by the jury. See Lukacs v. R.J. Reynolds Tobacco Co., Case No. 01-03822 CA 23, at ¶¶ 9-10 (Fla. 11th Jud. Cir. Mar. 22, 2003) (Order on Remittitur).

[25] Fla. Power & Light Co. v. Goldberg, 856 So. 2d 1011, 1028-29 (Fla. 3d DCA 2002) (summarily reducing damage award from $37 million to $10 million because that amount was not disputed by the defendant and "would not shock the conscience of the court, nor is it grossly disproportionate to awards in similar cases"), vacated on rehearing en banc, id. at 1034 n.1 (Fla. 3d DCA 2003), reinstated, 899 So. 2d 1105, 1108 (Fla. 2005).