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

R.J. REYNOLDS TOBACCO COMPANY,

Appellant,

v.

VERNELL SMITH, as PERSONAL REPRESENTATIVE of the ESTATE OF EMMON SMITH,

Appellee.

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

CASE NO. 1D12-2778

Opinion filed November 20, 2013.

An appeal from the Circuit Court for Jackson County.
John L. Fishel, II, Judge.

Larry Hill and Charles F. Beall, Jr. of Moore, Hill & Westmoreland, Pensacola, Stephanie E. Parker and John M. Walker of Jones Day, Atlanta, Georgia, and Gregory G. Katsas of Jones Day, Washington, D.C., for Appellant.

John G. Crabtree, George R. Baise, Jr., and Donald P. Fitzgerald III of Crabtree & Associates, Key Biscayne, J.B. Harris, Coral Gables, and Stuart N. Ratzan of Ratzan Law Group, Miami, Robert D. Trammell, Tallahassee, for Appellee.

PER CURIAM.

AFFIRMED. See R.J. Reynolds Tobacco Co. v. Townsend, 90 So. 3d 307 (Fla. 1st DCA 2012).

CLARK, J., CONCURS. WETHERELL, J., SPECIALLY CONCURRING. MAKAR, J., CONCURRING WITH OPINION.

WETHERELL, J., specially concurring.

Appellant raised six issues in this Engle[1] progeny appeal, four of which are meritless. The other two issues – which challenge the excessiveness of the compensatory and punitive damage awards – have merit in my view, but are foreclosed by this court's decision in R.J. Reynolds Tobacco Company v. Townsend.[2] Accordingly, despite my continued disagreement with Townsend, I am duty-bound to concur in the decision affirming the judgment in this case.

With respect to the compensatory damages, I agree with Appellant that the evidentiary basis for an eight-figure noneconomic damage award in this case was quite thin. However, I am persuaded based on my review of the record that the plaintiff in this case suffered as much as, if not more than, the plaintiff in Townsend. Accordingly, I agree with Appellee that there is no principled way to square a reversal of the compensatory damage award in this case with the affirmance of the similar award in Townsend.

Simply put, **if** the $10.8 million noneconomic damage award to Mrs. Townsend, who established little more than that she was saddened by her husband's untimely death from smoking-caused cancer,[3] was not excessive, then it logically follows that the $10 million noneconomic damage award to the plaintiff

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[1] Engle v. Liggett Group, Inc., 945 So. 2d 1246 (Fla. 2006).
[2] 90 So. 3d 307 (Fla. 1st DCA 2012).
[3] See id. at 318-19 (Wetherell, J., concurring in part and dissenting in part).

in this case – a smoker who had a lung removed due to smoking-caused cancer and then lived the final 20 years of his life with only one lung and recurring health concerns – is likewise not excessive. The problem, of course, is that the noneconomic damage award in Townsend **was** excessive – indeed, morbidly excessive. But, that award was affirmed by this court in a decision that the Florida Supreme Court declined to review.[4] Accordingly, Townsend cannot be ignored simply because it was, in my view, wrongly decided.

Moreover, unlike the other Engle progeny cases in which outrageously large compensatory damage awards were reversed on appeal,[5] there is no evidence apart from the sheer size of the verdict of a jury run amok in this case. Accordingly, even though the compensatory damage award in this case, like the award in Townsend, is conscience-shocking (at least to me) and grossly overcompensates the plaintiff for the consequences of his poor choice to smoke cigarettes for much

[4] R.J. Reynolds Tobacco Co. v. Townsend, 110 So. 3d 441 (Fla. 2013) (table).

[5] See Philip Morris USA, Inc. v. Naugle, 103 So. 3d 944 (Fla. 4th DCA 2012) (reversing $36.76 million judgment in favor of smoker and remanding for new trial on damages because the compensatory and punitive damage awards, which totaled nearly $300 million, were "infected with passion and prejudice" that could not be cured by the remittitur granted by the trial court); R.J. Reynolds Tobacco Co. v. Webb, 93 So. 3d 331 (Fla. 1st DCA 2012) (reversing $79.2 million judgment in favor of estate of deceased smoker where evidence at trial focused on the unrelated health problems of the smoker's daughter and grandchild), rev. denied, 107 So. 3d 406 (Fla. 2012); and cf. Philip Morris USA, Inc. v. Putney, 117 So. 3d 798 (Fla. 4th DCA 2013) (reversing denial of motion for remittitur of a $15 million loss of consortium award to three adult children of deceased smoker because none of the children lived with or relied on the smoker for support).

of his life,[6] I am compelled by this court's precedent to join the decision affirming the compensatory damage award in this case.

Likewise, with respect to the punitive damages, although I adhere to the view expressed in my opinion in Townsend that no more than a 1-to-1 ratio between compensatory and punitive damages is constitutionally appropriate where the compensatory damages include a substantial – or, as here, an über-substantial – noneconomic damage award,[7] I recognize that the majority in Townsend rejected that view.[8] Accordingly, even though I find the $20 million punitive damage award in this case to be constitutionally excessive in light of and in relation to the compensatory damages, I am compelled by this court's precedent to join the decision affirming the award.

Having said that, this case proves the point I made in Townsend that "by affirming the $10.8 million award in [that] case, the majority has made it nearly impossible for a court to declare a non-economic damage award up to that amount excessive in any future Engle progeny case."[9] Although the Florida Supreme Court denied review in Townsend, I remain hopeful that that court will at some

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[6] The plaintiff smoked for 48 years, starting at age 13 and quitting "cold turkey" in 1992 after being diagnosed with lung cancer. He died in September 2012, several months after entry of the final judgment and a few weeks shy of his 81st birthday.

[7] 90 So. 3d at 316 n.11 (Wetherell, J., concurring in part and dissenting in part).

[8] Id. at 315-16.

[9] Id. at 318 n.15 (Wetherell, J., concurring in part and dissenting in part).

point squarely address whether there is any limit on the noneconomic damages that can be awarded in Engle progeny cases short of the $10.8 million award approved in Townsend.[10] But, unless and until the supreme court steps in or trial courts begin reviewing mega-noneconomic damage awards in cases such as this with a greater degree of skepticism,[11] it appears that the Townsend-fueled Engle verdict lottery and its jackpot-sized damage awards will continue in the trial courts within this court's jurisdiction (and around the state[12]) simply because noneconomic damages are difficult to measure and the tobacco companies are perceived to have sufficiently-deep pockets to pay these awards.

With these observations and reservations, I dutifully concur in the disposition of this case.

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[10] See id. at 312 (stating that "the $10.8 million awarded by the jury is certainly at the outer limit of reasonableness").

[11] See § 768.74(3) and (6), Fla. Stat. (recognizing that the damages awarded by the jury should be disturbed or modified "with caution and discretion," but expressing the legislative intent that damage awards be given "close scrutiny" for excessiveness or inadequacy).

[12] See Lorillard Tobacco Co. v. Alexander, 2013 WL 4734565, at *9 (Fla. 3d DCA Sept. 4, 2013) (affirming a $10 million noneconomic damage award based on the approval of a similar award in Townsend); Philip Morris USA Inc. v. Cohen, 102 So. 3d 11, 19 (Fla. 4th DCA 2012) (same).

MAKAR, J., concurring with opinion.

I concur in affirmance, but with much reluctance for many of the reasons expressed by Judge Wetherell. If this case had arisen prior to R.J. Reynolds Tobacco Co. v. Townsend, 90 So. 3d 307 (Fla. 1st DCA 2012), review denied, 110 So. 3d 441 (Fla. 2013), and review dismissed, 110 So. 3d 442 (Fla. 2013) (Townsend I), it would be exceptionally difficult to justify the $10 million award for non-economic damages under the statutorily-required "close scrutiny" spelled out in section 768.74(3), Florida Statutes ("It is the intention of the Legislature that awards of damages be subject to close scrutiny by the courts and that all such awards be adequate and not excessive."). As noted in Townsend I, the applicable statutory "criteria 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." 90 So. 3d at 311 (quoting portions of section 768.74(5), Florida Statutes).

The record evidence here, absent Townsend I, would not meet the statutory criteria that the award is "supported by the evidence" and that it bear "a reasonable relationship" to the harm proven. The primary evidence the jury heard about Mr. Smith's non-economic losses was limited to just four pages of testimony from him and his wife. Mr. Smith was 80 years old at the time his case went to trial and lived

some twenty years after his 1992 surgery.[13] He retired at age 60 from his job of thirty years with the State of Florida, but he continued a fulfilling working career as a minister in his church until roughly around 2006 or 2007. Admittedly, his testimony was limited by agreement of the parties due to his diminishing mental capacity, but in that limited testimony, Mr. Smith testified that he was able to do "most of the things" he had done before the surgery. He did not specify what he could no longer do because of his smoking-related injury (versus limitations due to his advancing age generally); when questioned about his abilities following his 1992 lung surgery, his wife testified only generally saying that he "wasn't able to do the same things" as before (such as walks around the block or bowling) and that the couple was unable to have the "same type of intimate relationship" as before.

Applying "close scrutiny" to this Spartan record raises the proverbial judicial eyebrow, which soon recedes—as Judge Wetherell's reflections suggest—because Townsend I and like decisions have wearied the shock to the collective judicial conscience of large jury awards; a form of judicial innumeracy and ennui takes hold. No doubt Mr. Smith proved entitlement to significant non-economic damages, but the reasonableness of a $10 million award in this case (which is $500,000 a year or about $1370 daily) is not immediately apparent on this slender record. Because it is within the "outer limits" set by Townsend I, however, we are

[13] On September 25, 2012, R.J. Reynolds notified this Court that Mr. Smith died during the pendency of this appeal.

obliged to affirm.