FIRST DISTRICT COURT OF APPEAL
STATE OF FLORIDA

No. 1D20-360

PHILIP MORRIS USA INC.,

Appellant,

v.

ELAINE JORDAN,

Appellee.

On appeal from the Circuit Court for Duval County.
Russell Healey, Judge.

January 19, 2022

LEWIS, J.

In this *Engle*[1] progeny case, Appellant, Philip Morris USA Inc., appeals the trial court's supplemental judgment and order awarding Appellee, Elaine Jordan, attorney's fees and taxable costs. We affirm the award of costs without further comment. For the reasons that follow, we affirm the attorney's fee award as well.

Following a 2015 jury verdict in Appellee's favor for both compensatory and punitive damages, the trial court determined that Appellee was entitled to attorney's fees pursuant to section 768.79, Florida Statutes, the offer of judgment statute. During the attorney's fee hearing, attorney Thomas Edwards, Jr., Appellee's

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

fee expert, opined that the hourly rates sought by Appellee's attorneys were reasonable given the complexity of *Engle* litigation. He testified that the skill level needed to properly perform legal services in *Engle* cases was extraordinary and that working on such cases would preclude other employment by the attorney. Following the testimony of a number of Appellee's attorneys, Appellant's fee expert, who had no experience in handling an *Engle* case, testified that the requested rates were significantly more than rates that would be applicable in Jacksonville, Florida.

In the Order on Plaintiff's Revised Motion for Determination of the Amount of Attorneys' Fees and Costs, the trial court addressed the federal lodestar approach used in Florida and noted that the parties had stipulated as to the amount of time to be included in the calculation. As to the attorneys' reasonable hourly rates, the court set forth in part:

> ***Defining "Locality" and "Similar Legal Services" within "The Fee Customarily Charged in the Locality for Similar Legal Services"***
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> Of all the reasonable rate factors of analysis set forth above, the parties have a sharp disagreement over the meaning of one in particular: the fee customarily charged in the locality for similar legal services. The parties offer competing definitions for the relevant terms of "locality" and "similar legal services." Under [Appellee's] formulation, the relevant community is comprised of all *Engle* progeny litigators who try cases in Jacksonville, no matter whether they represent plaintiffs or defendants and no matter where the attorneys primarily practice or reside. In contrast, [Appellant] asserts that the relevant community is restricted only to attorneys who try complex product liability cases primarily in Jacksonville.
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> In resolving this dispute, this Court finds a recent Fourth Judicial Circuit *Engle* case to be helpful, as it did in *Brown v. Philip Morris USA, Inc.* . . . . The *Mrozek* Court observed the following factors that make *Engle* progeny litigation unique among complex civil litigation:

> [T]he breadth and depth of technical, scientific, medical and historical information which must be understood, organized, and prepared for presentation to a jury, and the level of trial support which the foregoing requires; the volume and complexity of the *Engle* Phase I trial record; ongoing development of appellate case law in *Engle* progeny litigation . . .; strong public sentiment against both cigarette manufacturers and smokers; the massive human and financial resources brought to bear by defendants, and the zeal of their counsel's advocacy on all issues; the lengthy delay from accrual of the cause of action to the trial of the case . . .; the seemingly unlimited and exhaustive discovery process, and the human and financial resources required to participate in such; the complexity of factual and legal issues, especially regarding class membership and causation; and the age and poor health of many plaintiffs, providing motivation for delays by defendants.

Id. at *4–5.

Having identified the facts that make *Engle* litigation unique among civil litigation generally, the *Mrozek* Court went on to find the following with respect to the relevant legal community in an *Engle* case:

> However, this Court finds that in today's world, where increased mobility of practitioners and participants is pervasive in *Engle* progeny cases, a solely geographical view of "relevant legal community" is archaic. Instead, and in light of evidence adduced at the hearing, the Court finds that the relevant legal community for an *Engle* progeny case[] tried in Jacksonville, Florida is the community of lawyers who try these cases in Jacksonville, no matter where the lawyer's primary office is located.

Id. at *5.

> As it did in *Brown*, this Court agrees with the Court in *Mrozek* that it is improper to artificially restrict the relevant locality in *Engle* cases to only those practitioners who hang their shingles in Jacksonville.[2] The factor of analysis requires this Court to consider the fee customarily charged in the locality for similar legal services. However, the factor does not contain any requirement that the attorneys charging the customary fee in the locality also reside within that locality. If "similar" legal services in Jacksonville (i.e., *Engle* litigation occurring in Jacksonville) are provided almost exclusively by attorneys who reside elsewhere, then it logically follows that *their* hourly rates are the most relevant (rather than the rate of lawyers who happen to reside in Jacksonville but perform inherently dissimilar work).
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> As adduced at the hearing, the vast majority of litigators who try *Engle* cases in Jacksonville neither primarily practice nor reside in Jacksonville. The litigators involved in this case exemplify this dynamic, as [Appellant] used counsel from Washington, Kansas City, Miami, and Tampa. [Appellee] employed counsel based in Atlanta, Tallahassee, and Jacksonville. It is true that the "general rule is that the relevant market for purposes of determining the reasonable hourly rate for an

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[2] In the *Brown* appeal, Appellant made the same argument it makes in this case. This Court affirmed "as to all issues except the issue of whether prejudgment interest was warranted." *See Philip Morris USA, Inc. v. Brown*, 313 So. 3d 898, 899 (Fla. 1st DCA 2021). As the parties acknowledge, our previous rejection of the argument does not bind our decision on the issue in this appeal. *See Dep't of Legal Affairs v. Dist. Ct. of Appeal, 5th Dist.*, 434 So. 2d 310, 311 (Fla. 1983) (holding that an appellate decision with no written opinion has no precedential value).

> attorney's services is the place where the case is filed." . . . Indeed, this court recognizes that Jacksonville is the relevant venue. However, this Court declines to impose the additional requirement that an attorney practice primarily in Jacksonville in order to be considered a part of Jacksonville's boutique *Engle* community. *Engle* litigation is *sui generis*. It is therefore appropriate for this Court to consider the hourly rates that *Engle* litigators use when performing *Engle* litigation in Jacksonville, no matter where the litigators sleep at night or where their physical office is located.
>
> ***Applying the Reasonable Rate Factors***
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> . . . .
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> After listening to and carefully considering the testimony of each expert witness, this Court finds Mr. Edward's testimony more persuasive. Mr. Edwards applied all of the required factors of analysis and specifically testified that the timekeepers' rates are reasonable. He supported his testimony with competent, substantial evidence. In contrast, Mr. Barbour did not complete an analysis of the timekeepers' rates based on all of the required factors. Instead, Mr. Barbour offered a qualitative (bordering on anecdotal) assessment of prevailing billing rates for complex civil litigation in Jacksonville, but not specifically *Engle* progeny litigation.

Based upon the foregoing, the trial court found that the requested hourly rates for Appellee's attorneys were reasonable, and it entered a supplemental judgment awarding her $3,204,880 in fees and $288,755.61 in taxable costs. This appeal followed.

As Appellant acknowledges, the standard of review for an award of attorney's fees is abuse of discretion. *Grapski v. City of Alachua*, 134 So. 3d 987, 989 (Fla. 1st DCA 2012). "When there is competent, substantial evidence which supports the trial court's order under the totality of the circumstances, there is no abuse of discretion." *Id.*; *see also Brown*, 313 So. 3d at 899 (applying the

abuse of discretion standard in holding that the trial court did not err in using a current rate approach to determine the attorney's fee award).

Florida has adopted the federal lodestar approach for an award of attorney's fees. *See Fla. Patient's Compensation Fund v. Rowe*, 472 So. 2d 1145, 1150 (Fla. 1985). Courts should consider several factors in "determining reasonable attorney fees," including the one at issue in this case – the fee customarily charged in the locality for similar legal services. *Id.* "The party who seeks the fees carries the burden of establishing the prevailing 'market rate,' *i.e.*, the rate charged in that community by lawyers of reasonably comparable skill, experience and reputation, for similar services." *Id.* at 1151.

Appellant contends that the trial court erred in using *Engle* progeny rates instead of rates from the Jacksonville locality in determining Appellee's attorney's fee award. However, the trial court expressly recognized that Jacksonville was the relevant venue. It also recognized that *Engle* litigation is unique, something that this Court has previously acknowledged. *See Soffer v. R.J. Reynolds Tobacco Co.*, 106 So. 3d 456, 460 (Fla. 1st DCA 2012) (describing *Engle* as "one of the most uniquely structured and extraordinarily adjudicated cases" in Florida's history and explaining that the "unique context of *Engle* matters"), *decision quashed on other grounds in Soffer v. R.J. Reynolds Tobacco Co.*, 187 So. 3d 1219 (Fla. 2016). The trial court concluded that "the relevant legal community for an *Engle* progeny case tried in Jacksonville is the community of lawyers who try these cases in Jacksonville, no matter where the lawyer's primary office is located." The court looked to the evidence presented below that the "vast majority of litigators who try *Engle* cases in Jacksonville neither primarily practice nor reside" there, and it found that the case at hand exemplified that dynamic given that both parties used attorneys from a number of different cities. The court also accepted Appellee's expert's opinion that the requested hourly rates were reasonable given what the expert believed was the extraordinary skill level needed to try an *Engle* case.

Because the testimony accepted by the trial court constitutes competent, substantial evidence that supports its fee award and

because reasonable people could differ as to the propriety of the trial court's decision, we reject Appellant's argument that the trial court abused its discretion. *See Odom v. R.J. Reynolds Tobacco Co.*, 254 So. 3d 268, 275 (Fla. 2018) (recognizing, as explained in *Canakaris v. Canakaris*, 382 So. 2d 1197, 1203 (Fla. 1980), that if reasonable people can differ as to the propriety of a trial court's action, then the action is not unreasonable and cannot be considered an abuse of discretion).

Accordingly, we affirm the supplemental judgment.

AFFIRMED.

BILBREY, J., concurs with opinion; B.L. THOMAS, J., dissents with opinion.

Not final until disposition of any timely and authorized motion under Fla. R. App. P. 9.330 or 9.331.

BILBREY, J., concurring.

I fully concur in the majority opinion. I write to briefly address the dissent and respectfully submit that it errs in three respects.

First, the dissent presumes that *Engle* progeny cases are easier to prove than other civil litigation thereby justifying a lower hourly rate for attorneys conducting the litigation. But the trial court had expert testimony that the trial of this case involved "complex and novel legal issues and factual issues." These issues included "contested issues relating to causation" as well as "issues related to epidemiology." Comparative fault was also an issue including whether the Appellee "had other exposures that caused damage." The trial court also had evidence that in defending the case, Appellant had expended almost $3,600,000, with its attorneys of comparable skill charging rates like those charged by

Appellee's attorneys. Furthermore, fifteen years after *Engle*, novel issues continue to arise in the complex progeny cases, requiring highly skilled counsel for plaintiffs and defendants. *See, e.g.*, *Sheffield v. R.J. Reynolds Tobacco Co.*, 46 Fla. L. Weekly S346, 2021 WL 5365650 (Fla. Nov. 18, 2021) (resolving conflict among district courts as to the appliable punitive damages statute); *R.J. Reynolds Tobacco Co. v. Prentice*, 290 So. 3d 963 (Fla. 1st DCA 2019), *review granted*, SC20-291, 2020 WL 4590156 (Fla. Aug 11, 2020) (accepting jurisdiction to resolve conflict among the district courts as to proof necessary for a fraud claim).

Second, the dissent correctly defines the factor for "fee[s] customarily charged in the locality for similar legal services." *Florida Patient's Comp. Fund v. Rowe*, 472 So. 2d 1145, 1150 (Fla. 1985). But in applying that factor, the dissent would count only the fees customarily charged by Jacksonville-based attorneys, rather than all attorneys litigating *Engle* progeny cases in Jacksonville. The *Rowe* factor is not so limited as suggested by the dissent. The applicable market consists of the attorneys of "reasonably comparable skill, experience and reputation" performing "similar services" in the locality. *Id.* at 1151. It matters not whether the attorney performing the services is from New York or Newberry. The hypothetical New York and Newberry attorneys may charge very different rates when practicing in their home cities. What matters is the fee charged by attorneys of similar skill for similar services in the applicable market, here in Jacksonville.

Third, the dissent makes much of the trial court calling the *Engle* progeny cases sui generis — that is unique. But in *Engle* the Court noted "the procedural posture of this case is unique and unlikely to be repeated." *Id.* at 1270 n.12; *see also Philip Morris USA, Inc. v. Hallgren*, 124 So. 3d 350, 354 (Fla. 2d DCA 2013) (noting the "unique nature of *Engle*"). The trial court's labeling this *Engle* progeny case as unique did not mean that it disregarded the necessary analysis of the required *Rowe* factors. Any area of practice outside the norm can be thought of as unique and that term is appropriate for any case requiring specialized knowledge and skill. *Compare Kindle v. Dejana*, 308 F. Supp. 3d 698, 712 (E.D.N.Y. 2018) (noting that "ERISA class action litigation . . . constitutes a specialized practice area requiring unique

expertise"), *with Advanced Physical Therapy of Kendall, LLC v. Camrac, LLC*, 319 So. 3d 735, 739 (Fla. 3d DCA 2021) (holding that the trial court did not abuse its discretion in concluding that nothing "novel or unique" was involved in a PIP case to exceed a fee cap required by New York law). *Engle* progeny cases are unique, as are many other complex areas of practice.

In conclusion, I agree that there was no abuse of discretion by the trial court. As such, we are correct to affirm.

B.L. THOMAS, J., dissenting.

"Because of the preclusive effects of the *Engle* findings, plaintiffs even start out with most of their case already proven. Nothing about *Engle* progeny cases justifies a departure from established fee-setting principles[] . . . ." Appellant's statements are correct. The fee award was granted in violation of supreme court precedent requiring that attorney fee awards be based on local market rates. Therefore, this Court should reverse the order and remand for further findings consistent with *Florida Patient's Compensation Fund v. Rowe*, 472 So. 2d 1145 (Fla. 1985).

Under *Rowe*, the trial court *must* apply the following factors in any fee-award determination:

> (1) The time and labor required, the novelty and difficulty of the question involved, and the skill requisite to perform the legal service properly.
>
> (2) The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer.
>
> (3) *The fee customarily charged in the locality for similar legal services.*
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> (4) The amount involved and the results obtained.
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> (5) The time limitations imposed by the client or by the circumstances.

(6) The nature and length of the professional relationship with the client.

(7) The experience, reputation, and ability of the lawyer or lawyers performing the services.

(8) Whether the fee is fixed or contingent.

472 So. 2d at 1150 (emphasis added). The trial court committed reversible error by disregarding the "local market rate" factor when it awarded Appellee attorney's fees. "The party who seeks the fees carries the burden of establishing the prevailing 'market rate,' *i.e.,* the rate charged *in that community* by lawyers of reasonably comparable skill, experience and reputation, for similar services." *Id.* at 1151 (emphasis added). Rather than entering an order based on community standards, the trial court based its fee award on the rates charged by non-Jacksonville attorneys litigating *Engle* claims. This was legal error and an abuse of discretion. *See Windsor Falls Condo. Ass'n, Inc. v. Davis*, 265 So. 3d 709, 711 (Fla. 1st DCA 2019).

The supreme court's decision and admonition in *Rowe* are particularly apt here:

> Recently, partially because of the substantial increase in the number of matters in which courts have been directed by statute to set attorney fees, great concern has been focused on a perceived lack of objectivity and uniformity in court-determined reasonable attorney fees. Some time ago, this Court recognized the impact of attorneys' fees on the credibility of the court system and the legal profession when we stated:
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> > There is but little analogy between the elements that control the determination of a lawyer's fee and those which determine the compensation of skilled craftsmen in other fields. Lawyers are officers of the court. The court is an instrument of society for the administration of justice. Justice should be administered economically, efficiently, and expeditiously. The attorney's fee is, therefore, a

> very important factor in the administration of justice, *and if it is not determined with proper relation to that fact it results in a species of social malpractice that undermines the confidence of the public in the bench and bar.* It does more than that. *It brings the court into disrepute and destroys its power to perform adequately the function of its creation.*

472 So. 2d at 1149–50 (citation omitted) (emphasis added).

While it may be understandable for a trial court to enhance a fee award given the length of *Engle* litigation, such assertions go to the *number of hours* not the *rate of compensation*. *Id.* at 1150 ("The 'novelty and difficulty of the question involved' should normally be reflected by the number of hours reasonably expended on the litigation."). The trial court violated *Rowe* by disregarding the "fee customarily charged *in the locality* for *similar legal services"* as a factor in its fee award.* *Id.* (emphasis added).

The trial court's error was based on a faulty premise. *Engle* cases are indeed *sui generis*, but not for the reason the trial court

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* The trial court's order also failed to conform with the Florida Bar's Rules of Professional Conduct. Under Rule 4-1.5(b)(1)(C) attorneys are to consider "the fee, or rate of fee, customarily charged in the locality for legal services of a comparable or similar nature[]" as a factor when determining their own fees. And Rule 4-1.5(c) states that "*[a]ll factors* set forth in this rule should be considered[]" to determine a reasonable attorney fee.

If attorneys are to consider "the fee, or rate of fee, customarily charged in the locality for legal services of a comparable or similar nature[]" as a factor in setting their own fees, then certainly the trial court must do the same when awarding attorney's fees. *See Dep't of Transp. v. Skinners Wholesale Nursery, Inc.*, 736 So. 3d 3, 9 (Fla. 1st DCA 1998) (noting that the trial court could consider factors listed in Rule 4-1.5(b) in assessing attorney fees on remand).

cited. They are *sui generis* because they are *easier to prove* when compared to other types of complex civil actions.

The special dispensation granted to *Engle* plaintiffs has been described by Judge Tjoflat in his dissenting opinion in *Graham v. R.J. Reynolds Tobacco Company*:

> [R]egardless of the tort a class member alleged, she only needed to prove that she was injured as a result of " 'smoking cigarettes' manufactured by [a defendant]" to recover. [*Philip Morris USA, Inc., v. Douglas*, 110 So. 3d 419, 426 (Fla. 2013).] In effect, then, the *Douglas* . . . Court proscribed the very act of selling cigarettes, albeit under color of traditional tort law. So long as a defendant's sale of cigarettes caused a plaintiff's injury—that is, so long as a plaintiff was injured by smoking cigarettes—the plaintiff had no need to identify, for example, the defendant's negligent conduct or unreasonably dangerous product defect.

857 F.3d 1169, 1193 (11th Cir. 2017) (Tjoflat, J., dissenting) (footnotes omitted).

The indisputable fact here is that *Engle* plaintiffs are excused from proving several elements of their claims. Plaintiffs were not even required to prove detrimental reliance to succeed on a fraudulent concealment claim before this Court's decision in *R.J. Reynolds Tobacco Co. v. Whitmire*, 260 So. 3d 536, 539 (Fla. 1st DCA 2018) (holding that "plaintiffs claiming fraudulent concealment must prove that they relied to their detriment on false statements from the tobacco companies" (citing *Hess v. Philip Morris USA, Inc.*, 175 So. 3d 687, 698 (Fla. 2015))).

And this Court held in *R.J. Reynolds Tobacco Co. v. Martin*:

> The crux of this appeal is the extent to which an *Engle* class member can rely upon the findings from the class action when she individually pursues one or more *Engle* defendants for damages. RJR contends the *Engle* Phase I jury findings in the class action establish nothing relevant to any individual class member's action for damages, and thus the trial court applied *Engle* too

broadly in Mrs Martin's case. In RJR's view, the findings given res judicata effect by the supreme court facially prove only that RJR at some point manufactured and sold an unspecified brand of cigarette containing an undefined defect; RJR committed one or more unspecified negligent acts; RJR on some occasion concealed unspecified information about the health effects of smoking and the addictive nature of smoking; and RJR and several other entities agreed to conceal said unspecified information. Thus, RJR argues, notwithstanding the *Engle* findings Mrs. Martin was required to prove Lucky Strike brand cigarettes contained a specific defect rendering the brand unreasonably dangerous; RJR violated a duty of care it owed to Mr. Martin; RJR concealed particular information which, had it been disclosed, would have led Mr. Martin to avoid contracting lung cancer; and RJR was part of a conspiracy to conceal the specified information.

We disagree with RJR's characterization of the *Engle* findings. RJR attempts to diminish the preclusive effect of the findings by claiming, based on the Phase I verdict form, that the findings "facially" prove nothing specifically relevant to Mr. Martin's claims. In so doing, RJR urges an application of the supreme court's decision that would essentially nullify it. We decline the invitation. *See Hoffman v. Jones*, 280 So. 2d 431, 434 (Fla. 1973) (district courts of appeal do not have the prerogative to overrule Florida Supreme Court precedent). *See also, Brown v. R.J. Reynolds Tobacco Co.*, 611 F.3d 1324, 1335, (11th Cir. 2010) ("The Phase I approved findings . . . do establish some facts that are relevant to this litigation. Otherwise, the Florida Supreme Court's statement in [*Engle*] that the Phase I approved findings were to have 'res judicata effect' in trials involving former class members would be meaningless."). No matter the wording of the findings on the Phase I verdict form, the jury considered and determined specific matters related to the defendants' conduct. Because the findings are common to all class members, Mrs. Martin, under the supreme court's

> holding in *Engle,* was entitled to rely on them in her damages action against RJR. The question is to what extent could Mrs. Martin use the *Engle* findings to establish the elements of her claims? . . .
>
> As does the Eleventh Circuit, we interpret the supreme court's ruling in *Engle* to mean individual class plaintiffs, when pursuing RJR and the other class defendants for damages, can rely on the Phase I jury's factual findings. *But unlike the Eleventh Circuit, we conclude the Phase I findings establish the conduct elements of the asserted claims, and individual* Engle *plaintiffs need not independently prove up those elements or demonstrate the relevance of the findings to their lawsuits, assuming they assert the same claims raised in the class action.* For that reason, we find the trial court in Mrs. Martin's case correctly construed *Engle* and instructed the jury accordingly on the preclusive effect of the Phase I findings.

53 So. 3d 1060, 1066–69 (Fla. 1st DCA 2010) (emphasis added).

Thus, the trial court committed reversible error by awarding Appellee's counsel excessive fees based on its mistaken analysis that local market rates are irrelevant because *Engle* cases were purportedly more difficult. Again, as Judge Tjoflat noted, "the one theme that remains constant throughout—with a few exceptions—is that *Engle*-progeny courts have rested their thumbs on the scales to the detriment of the unpopular *Engle* defendants." *Graham*, 857 F.3d at 1194 (Tjoflat, J., dissenting). Placing the thumb of the law on the scale of justice is no justification to reward the party *benefiting* from the unbalanced scale with an excessive attorney-fee award.

The trial court's order violated binding supreme court precedent. Because the majority opinion upholds the trial court's erroneous fee award, I respectfully dissent.

David M. Menichetti and Geoffrey J. Michael of Arnold & Porter Kaye Scholer LLP, Washington, D.C.; Terri L. Parker of Shook, Hardy & Bacon L.L.P., Tampa, for Appellant.

John S. Mills of Bishop & Mills, PLLC, Jacksonville; Courtney Brewer and Jonathan A. Martin of Bishop & Mills, PLLC, Tallahassee, for Appellee.