IN THE SUPREME COURT OF FLORIDA

BRINDA COATES, as personal representative of the estate of Lois Stucky,

Petitioner,

v.

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

R.J. REYNOLDS TOBACCO CO.,

Respondent.

ON REVIEW FROM THE DISTRICT COURT OF APPEAL FIFTH DISTRICT, STATE OF FLORIDA

APPENDIX TO PETITIONER'S BRIEF ON JURISDICTION

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to the following persons by email on March 23, 2021:

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Appendix 3

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT

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

R.J. REYNOLDS TOBACCO COMPANY,

Appellant,

v.

Case No. 5D19-2549
CORRECTED

BRINDA COATES, INDIVIDUALLY AND AS PERSONAL REPRESENTATIVE OF THE ESTATE OF LOIS STUCKY,

Appellee.

_____/

Opinion filed October 23, 2020

Appeal from the Circuit Court
for Orange County,
Renee A. Roche, Judge.

Marie A. Borland and Troy A. Furman, of Hill, Ward & Henderson, P.A., Tampa, and Charles R.A. Morse, of Jones Day, New York, New York, and Brian C. Lea, Stephanie E. Parker, John M. Walker and Jason T. Burnette, of Jones Day, Atlanta, Georgia, for Appellant.

John S. Mills, Courtney Brewer, and Jonathan Martin, of Bishop & Mills, PLLC, Tallahassee, and Andrew B. Greenlee, of Andrew B. Greenlee, P.A., Sanford, for Appellee.

ORFINGER, J.

We deny Appellant's motion for rehearing, but grant Appellant's motion for certification.

R.J. Reynolds Tobacco Company ("Reynolds") appeals the final judgment rendered against it in a wrongful death action brought by Brinda Coates, individually and as the personal representative of the estate of her sister, Lois Stucky.[1] At trial, Ms. Coates prevailed on her claim that Reynolds defectively designed its Winston and Doral brand cigarettes, and Ms. Stucky, a longtime smoker of these brands, died as a result. The jury awarded Ms. Stucky's three adult children $300,000 in compensatory damages, which was reduced by fifty percent due to Ms. Stucky's comparative fault. In addition, the jury awarded punitive damages of $16 million. Following unsuccessful post-trial motions for mistrial, new trial or remittitur, Reynolds brought this appeal. Of the various arguments that Reynolds raises in this appeal, we find merit only in its challenge to the amount of the punitive damages award and reverse for entry of remittitur or, if remittitur is rejected, a new trial solely on the amount of punitive damages.

Thirteen months after her diagnosis, Ms. Stucky died at the age of 52 from small cell lung cancer caused by smoking cigarettes. Starting at age 17, she smoked Reynolds' filtered Winston cigarettes until she switched to Doral cigarettes about five years prior to her death. Ms. Stucky believed that she was addicted to the cigarettes, a belief confirmed by expert testimony, because she had tried various times to stop smoking, but could not. Indeed, she continued to smoke even after her lung cancer diagnosis. Ms. Stucky's inability to quit smoking was, perhaps, a testament to the success of Reynolds in

[1] This is not an Engle progeny case. See Engle v. Liggett Grp., Inc., 945 So. 2d 1246, 1256–57 (Fla. 2006).

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designing its cigarettes to reach what one expert testified was the "sweet spot of addiction" and its persuasive advertising skills.

The evidence at trial demonstrated significant reprehensibility by Reynolds in designing its cigarettes. It used a tobacco curing process designed to make the smoke "smoother" and manipulated the levels of nicotine and other additives to make its product easily inhalable, and thus, addictive. Too, its advertising efforts, particularly those advertisements produced in the early years of Ms. Stucky's addiction, were intended to entice young people to begin smoking and to suggest, if not convince, consumers that smoking was safe, or reasonably so. But it was well established that the inhalation of cigarette smoke is not safe. Stucky paid the price for her addiction. The jury determined that Reynolds must also pay its price.

The jury found punitive damages were appropriate and was instructed that, in determining the amount of punitive damages to award, it should consider the nature, extent, and degree of Reynolds' misconduct, its financial resources, and any mitigating evidence.[2] Ms. Coates' attorney proposed $10 million as the appropriate punitive damages amount. Reynolds' attorney, after pointing out testimony that Reynolds had made changes to its cigarettes to make them safer and had disclosed the dangers of smoking, argued that the upper limits of any award should be an amount equal to the reduced compensatory damages award. The jury disagreed with the suggestions of both attorneys and awarded $16 million in punitive damages.

[2] By stipulation, the jury was advised that Reynolds' net worth was $23.9 billion as of December 31, 2016.

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Reynolds challenges the punitive damages award as excessive, particularly when considered in relation to the $150,000 net compensatory damages award, and argues that the trial court erred in denying its motion for new trial or remittitur. Having reviewed the award under both state law and federal due process concerns, we conclude that the amount of the punitive damages award is excessive and that reversal and remand for remittitur or, failing either party's acceptance of remittitur, a new trial on punitive damages, is required.

Excessiveness Under State Law

We begin our analysis under Florida law. We review a trial court's denial of post-trial motions for new trial or remittitur for the abuse of discretion.[3] See Engle v. Liggett Grp., Inc., 945 So. 2d 1246, 1263 (Fla. 2006) (citing St. John v. Coisman, 799 So. 2d 1110, 1114 (Fla. 5th DCA 2001)).

Sections 768.73 and 768.74, Florida Statutes, govern the review of a claim that a punitive damages award is excessive. The 1997 version of those sections applies here because the cause of action arose on the 1998 date of Ms. Stucky's death. Section 768.73, titled, "Punitive damages; limitation," provides in relevant part:

> (1)(a) In any civil action . . . involving willful, wanton, or gross misconduct, the judgment for the total amount of punitive damages awarded to a claimant may not exceed three times the amount of compensatory damages awarded to each person entitled thereto by the trier of fact, except as provided in paragraph (b). . . .
>
> (b) If any award for punitive damages exceeds the limitation specified in paragraph (a), the award is presumed to be excessive and the defendant is entitled to remittitur of the amount in excess of the limitation unless the claimant

[3] The unelaborated trial court order denying Reynolds' motions provides us with no insight into the trial court's reasoning.

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> demonstrates to the court by clear and convincing evidence that the award is not excessive in light of the facts and circumstances which were presented to the trier of fact.

§ 768.73(1)(a)-(b), Fla. Stat. (1997) (emphasis added). Section 768.74, titled "Remittitur and additur," then sets out the criteria by which a court must review an award claimed to be excessive. Importantly, section 768.74(5), Florida Statutes (1997), states:

> (5) In determining whether an award is excessive or inadequate in light of the facts and circumstances presented to the trier of fact and in determining the amount, if any, that such award exceeds a reasonable range of damages or is inadequate, the court shall consider the following criteria:
>
> (a) Whether the amount awarded is indicative of prejudice, passion, or corruption on the part of the trier of fact;
>
> (b) Whether it appears that the trier of fact ignored the evidence in reaching a verdict or misconceived the merits of the case relating to the amounts of damages recoverable;
>
> (c) Whether the trier of fact took improper elements of damages into account or arrived at the amount of damages by speculation and conjecture;
>
> (d) Whether the amount awarded bears a reasonable relation to the amount of damages proved and the injury suffered; and
>
> (e) Whether the amount awarded is supported by the evidence and is such that it could be adduced in a logical manner by reasonable persons.

Reynolds focuses on sections 768.74(5)(a) and (d) to argue the award must be reversed for a new trial, or at the least, remittitur.

We reject Reynolds' assertion that the $16 million punitive damages award is "self-evidently" excessive under section 768.74(5)(a) and must fail because its sheer size

confirms the jury was impermissibly influenced by prejudice or passion.[4] A $16 million punitive damages award in a tobacco case involving death simply does not facially reflect either prejudice or passion. See, e.g., Schoeff v. R.J. Reynolds Tobacco Co., 232 So. 3d 294, 308 (Fla. 2017) (upholding punitive damages award of $30 million in Engle progeny case where there was no evidence amount could not have been awarded by reasonable jury and trial court found it free from undue prejudice). To the contrary, the award is well within the range of punitive damages amounts awarded in other tobacco cases, as demonstrated by even a cursory review of pertinent cases.[5] The review of amounts

[4] Section 768.74(5) requires consideration of all five criteria when a court is considering a claim of excessiveness. Here, the dollar amount of the punitive award is not itself suggestive that the jury ignored evidence, misconceived the merits, took improper elements of damages into account, or arrived at the amount of damages by speculation and conjecture. To the contrary, the amount of the punitive damages award could have been reached in a logical manner by reasonable persons.

[5] Although the following list of cases is not exhaustive, we include it as reflective of the general range of punitive damages awards in tobacco litigation. Where noted, the punitive to compensatory ratios that have been considered and upheld by Florida courts are also included. See, e.g., Odom v. R.J. Reynolds Tobacco Co., 254 So. 3d 268 (Fla. 2018) (finding no abuse of discretion in trial court's denial of remittitur; upholding award of $14 million punitive and $4.5 million compensatory damages); Philip Morris USA Inc. v. Boatright, 217 So. 3d 166 (Fla. 2d DCA 2017) (determining punitive award against Philip Morris of $19.7 million not excessive in light of $15 million compensatory award); R.J. Reynolds Tobacco Co. v. Buonomo, 138 So. 3d 1049 (Fla. 4th DCA 2013) (finding neither jury's initial award of $25 million in punitive damages or remitted amount of $15.705 million, compared to $5.235 million compensatory damages award, were so excessive as to violate due process; 4.78 to 1 ratio), quashed on other grounds, 41 Fla. L. Weekly S113 (Fla. Jan. 26, 2016); Lorillard Tobacco Co. v. Alexander, 123 So. 3d 67 (Fla. 3d DCA 2103) (upholding punitive award of $25 million and remitted compensatory award of $10 million; ratio of 2.5 to 1); R.J. Reynolds Tobacco Co. v. Townsend, 118 So. 3d 844 (Fla. 1st DCA 2013) (affirming $20 million punitive award; ratio of 1.85 to 1); R.J. Reynolds Tobacco Co. v. Martin, 53 So. 3d 1060 (Fla. 1st DCA 2010) (affirming $25 million punitive award and $3.3 million compensatory award; ratio of 7.58 to 1), review denied, 67 So. 3d 1050 (Fla. 2011). The Eleventh Circuit also recently provided an exhaustive survey of federal case law addressing claims of excessiveness of punitive damages awards, albeit not in the tobacco arena. See Williams v. First Advantage LNS Screening Sols. Inc., 947 F.3d 735, 758–61 (11th Cir. 2020) (where faced with $250,000

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awarded in similar cases "has at least a limited value" when reviewing a punitive damages award against a claim of excessiveness, but each case must be "measured in the light of the circumstances peculiar to it." Odom v. R.J. Reynolds Tobacco Co., 254 So. 3d 268, 276 (Fla. 2018) (quoting Loftin v. Wilson, 67 So. 2d 185, 189 (Fla. 1953)). In this instance, the review of similar cases confirms our conclusion that the $16 million punitive damages award was not indicative of passion or prejudice.

We next address Reynolds' argument that the $16 million award, which is 106.7 times greater than the $150,000 net compensatory award,[6] bears no reasonable relation to the injury suffered, as demonstrated by the disparity between it and the comparative damage award. See § 768.74(5)(d), Fla. Stat. (1997). It asserts that there was no evidentiary basis presented to support such a "lop-sided," unprecedented award.

Our review of a punitive damages award that exceeds a 3 to 1 ratio requires that we first consider whether the statutory presumption of excessiveness that attaches to such an award was overcome by "clear and convincing evidence that the award is not excessive in light of the facts and circumstances which were presented to the trier of fact." § 768.73(1)(b), Fla. Stat. (1997). That was shown in this case. Ms. Coates adduced evidence of Reynolds' history of disregard for the health of its smokers; its purposeful

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compensatory award and $3.3 million punitive damages award, a 13 to 1 ratio, Eleventh Circuit concluded punitive amount violated federal due process and required remittitur to reduce punitive damages award to a 4 to 1 ratio).

[6] Reynolds contends, as it did in its Renewed Motion for Directed Verdict or Alternatively New Trial or Remittitur, that the denominator for the presumptive ratio should be the net compensatory amount, $150,000, not the $300,000 total compensatory damages amount, because Reynolds is not liable for the gross amount and it would be unfair to calculate the ratio using an amount for which it is not fully liable. Coates takes the contrary position, contending that the correct ratio is 53.3 to 1, calculated using the gross compensatory award. We need not address this issue inasmuch as the award is excessive when viewed under either calculation.

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concealment of the negative health risks of smoking; its manipulation of additives and tobacco to ensure addiction; and its efforts to mislead the public on the dangers of smoking, all while knowing of the negative impact smoking had on the health of its customers. Indeed, while Reynolds acknowledged it could manufacture cigarettes that were not as harmful or addictive, its studies had shown that consumers would not smoke them, and it asserted it had the right to manufacture cigarettes that consumers would buy. Certainly, there was clear and convincing evidence sufficient to trigger the exception to the statutory 3 to 1 limitation of section 768.73(1)(a) in this case. See R.J. Reynolds Tobacco Co. v. Martin, 53 So. 3d 1060, 1071, 1072 (Fla. 1st DCA 2010) (noting evidence of Reynolds' disregard for safety of consumers, its purposeful concealment of health risks related to smoking, its refusal to take nicotine out of its product because sales would decrease, and its collusion with other cigarette manufacturers to mislead public on safety of cigarettes; concluding $25 million punitive damages award (7.58 to 1 ratio) was "not out of proportion with what the jury clearly considered to be wanton conduct by [Reynolds] in marketing a product it knew to be harmful and misleading the public about the health risks of smoking cigarettes"), review denied, 67 So. 3d 1050 (Fla. 2011).

Having established that the evidence supported an award in excess of the presumptive 3 to 1 ratio, we must evaluate whether the evidence supports a punitive award exceeding the compensatory award by a ratio of 106.7 (or even 53.3) to 1. The Florida Supreme Court has acknowledged the difficulty in measuring noneconomic damages, as there is no mathematical or technical measure for them. See, e.g., Odom, 254 So. 3d at 276; Angrand v. Key, 657 So. 2d 1146, 1149 (Fla. 1995). This difficulty is alleviated in the instant case by the enormity of the disparity between the punitive and

compensatory damages awards. Like pornography, which is not susceptible of easy definition but is identifiable upon viewing, a punitive damages award of 106.7 (or 53.3) times the compensatory award is, in our mind, excessive and thus is unsustainable under state law.

Federal Due Process

Turning to federal law, States possess broad discretion with respect to the imposition of punitive damages, but that discretion is constrained by the Eighth Amendment's prohibition against excessive fines, which amendment is made applicable to the states by the Due Process Clause of the Fourteenth Amendment. Cooper Indus., Inc. v. Leatherman Tool Grp., Inc., 532 U.S. 424, 433 (2001) ("[T]he Due Process Clause of the Fourteenth Amendment to the Federal Constitution imposes substantive limits on that discretion. That Clause makes the Eighth Amendment's prohibition against excessive fines . . . applicable to the States. The Due Process Clause of its own force also prohibits the States from imposing 'grossly excessive' punishments on tortfeasors." (citations omitted)). Unlike the deferential standard of review applicable in the state law analysis, we review de novo a trial court's determination regarding whether a punitive damages award is unconstitutionally excessive under federal due process guarantees. Engle, 945 So. 2d at 1263 (citing Cooper, 532 U.S. at 436). Our review includes, for purposes of ensuring that due process limits on punitive damages awards are not exceeded, "an evaluation of the punitive and compensatory amounts awarded to ensure a reasonable relationship between the two." Id. at 1264.

The relevant constitutional line is inherently imprecise, United States v. Bajakajian, 524 U.S. 321, 336 (1998), but the United States Supreme Court has identified three

factors that a court must consider in determining whether a punitive damages award is unconstitutionally excessive: "(1) the degree of reprehensibility of the defendant's misconduct; (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award; and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases." State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 418 (2003) (citing BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 575 (1996)); see Engle, 945 So. 2d at 1264 (quoting Campbell 538 U.S. at 418). Of these, "[r]eprehensibility is 'the most important indicium of the reasonableness of a punitive damages award.'" Schoeff, 232 So. 3d at 306–07 (quoting Gore, 517 U.S. at 575).

Reynolds argues the punitive damages award exceeds the constitutional limits proscribed by federal due process constraints. It notes the Supreme Court's observation that four times the amount of compensatory damages might be close to constitutional impropriety, Campbell, 538 U.S. at 425, which the Court reemphasized in Exxon Shipping Co. v. Baker, 554 U.S. 471 (2008), when the Court wrote that "few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process." Exxon, 554 U.S. at 501 (quoting Campbell, 538 U.S. at 425). When compensatory damages are substantial, a ratio perhaps in the realm equal to compensatory damages might be the outermost limit for due process propriety. Campbell, 538 U.S. at 426. Conversely, when the compensatory award is small, a larger punitive to compensatory ratio may be appropriate.[7] JCB, Inc. v. Union Planters Bank,

[7] We consider the compensatory damages award in this case to be on the modest side. Accordingly, on remand, that factor may be taken into consideration in determining an appropriate punitive damages award.

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NA, 539 F.3d 862, 876 (8th Cir. 2008) ("Punitive damages may withstand constitutional scrutiny when only nominal or a small amount of compensatory damages have been assigned, even though the ratio between the two will necessarily be large.").

There is no bright-line ratio by which a punitive damages award may be judged. Indeed, we acknowledge the flaws extant in a system as imprecise as that given for the review of a punitive damages award that calls for a balance of the punitive damages award against the damages and harm suffered. As the Eleventh Circuit so aptly wrote:

> Trying to extrapolate guiding principles from the caselaw is a migraine-inducing exercise, as the dissection of the above cases well reveals. Instead of a firm, fixed mathematical formula for assessing whether a particular punitive damages award is so grossly excessive as to violate a defendant's due process rights, we instead have guidelines that are so flexible as to almost lose their status as an objective standard. At bottom, the problem is not that that the particular guidelines for determining reprehensibility are not reasonable—they are quite sensible—but that the caselaw thus far has provided no consistent means of monetizing those guidelines. For example, what is a low level of reprehensible conduct as compared to a high level, and how do we monetize those degrees of reprehensibility, and the resulting harm, to determine when a punitive damages award is grossly excessive, versus just slightly excessive? In figuring out whether the ratio between punitive and compensatory damages is too high, how do we gauge whether the compensatory damages award is for a "significant" amount of money (which calls for a lower ratio between the two types of damages) or—if we deem the compensatory damages to be insignificant—whether the underlying conduct was "egregious" enough to allow us to reject the 4:1 ratio-guideline suggested by the Supreme Court?

Williams v. First Advantage LNS Screening Sols. Inc, 947 F.3d 735, 761–62 (11th Cir. 2020). But, we will not "throw up our hands in frustration just because the exercise is so imprecise." Id. at 762.

Ms. Coates argues that the "extreme" level of reprehensibility present in the instant case is sufficient to remove it from the realm of single-digit ratio cases. Reprehensibility requires us to consider:

> [1] the harm caused was physical as opposed to economic; [2] the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; [3] the target of the conduct had financial vulnerability; [4] the conduct involved repeated actions or was an isolated incident; and [5] the harm was the result of intentional malice, trickery, or deceit, or mere accident.

Campbell, 538 U.S. at 419. Not all five factors are required to be present, but the absence of all five would make the punitive award suspect. Id.

In addressing the Campbell reprehensibility factors, Ms. Coates asserts that Reynolds' design of its cigarettes killed Ms. Stucky and millions of other people worldwide; Reynolds knew its design was killing people; and Reynolds, knowing its cigarette design was killing people, continued selling its cigarettes and continued to manipulate their addictive qualities in order to benefit financially. These facts, Ms. Coates argues, are sufficient to demonstrate extreme indifference and reckless disregard for the health and safety of consumers, which is sufficient to support the compensatory to punitive ratio imposed in this case. See Schoeff, 232 So. 3d at 307 ("The reprehensibility component of our analysis is supported by the fact that [Reynolds] increased the addictive qualities of cigarettes, concealed their health defects, and widely marketed their defective product for profit. The harm in this case was both physical and economic, done with reckless disregard for the health or safety of others, involved repeated actions, and was the result of intentional deceit. These factors lead to the conclusion that this conduct is among the most reprehensible." (citations omitted)).

We agree that reprehensibility was established. But even affording that factor preeminence in our consideration as instructed by Schoeff, the evidence of reprehensibility was not so great that it completely overwhelms consideration of the other two factors. Having considered the second factor—"the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award"—and the third factor—"the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases"—we conclude that the award in a ratio of 106.7 to 1 (or even 53.3 to 1) was excessive under federal due process constraints. See, e.g., Boerner v. Brown & Williamson Tobacco Co., 394 F.3d 594, 602–03 (8th Cir. 2005) (holding that although tobacco company's conduct was "highly reprehensible," $15 million punitive amount, when measured against $4.025 million compensatory award, was excessive and remittitur to a 1 to 1 ratio was required); R.J. Reynolds Tobacco Co. v. Townsend, 90 So. 3d 307, 315 (Fla. 1st DCA 2012) (finding Boerner instructive).

In so holding, we emphasize that it is not the actual dollar amount of the punitive damages award that is excessive. Punitive damages awards even greater than $16 million have been affirmed in other tobacco cases. See, e.g., Lorillard Tobacco Co. v. Alexander, 123 So. 3d 67 (Fla. 3d DCA 2013) (finding $25 million punitive damages award not unconstitutionally excessive); R.J. Reynolds Tobacco Co. v. Townsend, 118 So. 3d 844 (Fla. 1st DCA 2013) (finding $20 million punitive damages award did not violate constitutional due process); Martin, 53 So. 3d 1060 (affirming $25 million punitive award and $3.3 million compensatory award). Rather, it is the dollar amount of the punitive

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damages award compared to the dollar amount of the compensatory damages award that requires a remittitur.

For these reasons, we reverse the punitive damages award and remand for entry of an order of remittitur or, if remittitur is rejected by either party, a new trial solely on the amount of punitive damages. However, we certify the following question to the Florida Supreme Court as one of great public importance:

> When other factors support the amount of punitive damages awarded, but the award is excessive compared to the compensatory award, does the amount of punitive damages that may legally be imposed for causing the death of a human being depend on the actual amount of compensatory damages awarded to the decedent's estate, even when that compensatory award is modest and the punitive award would be sustainable compared to awards in other cases for comparable injuries caused by comparable misconduct?

AFFIRMED in part; REVERSED in part; REMANDED with instructions; QUESTION CERTIFIED.

EDWARDS, J., and CHASE, M., Associate Judge, concur.

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