Case No. SC17-563, Lower Tribunal No.: 4D14-3867

IN THE SUPREME COURT OF FLORIDA

GWENDOLYN ODOM, etc.,

Plaintiff/Petitioner,

v.

R.J. REYNOLDS TOBACCO CO., etc.,

Defendant/Respondent.

ON DISCRETIONARY REVIEW FROM A DECISION
OF THE FOURTH DISTRICT COURT OF APPEAL

ANSWER BRIEF OF RESPONDENT R.J. REYNOLDS TOBACCO COMPANY

William L. Durham II
Florida Bar No. 91028
Val Leppert
Florida Bar No. 97996
KING & SPALDING LLP
1180 Peachtree St., N.E.
Atlanta, Georgia 30309
Telephone: (404) 572-4600
Facsimile: (404) 572-5100

Jeffrey S. Bucholtz
Admitted *pro hac vice*
KING & SPALDING LLP
1700 Pennsylvania Avenue NW
Washington, D.C. 20006
Telephone: (202) 737-0500
Facsimile: (202) 626-3737

Jeffrey A. Cohen
Florida Bar No. 57355
CARLTON FIELDS JORDEN BURT, P.A.
100 S.E. 2nd Street, Suite 4200
Miami, Florida 33131
Telephone: (305) 530-0050
Facsimile: (305) 530-0055

Counsel for Respondent R.J. Reynolds Tobacco Company

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

CONSTITUTIONAL PROVISIONS

OTHER AUTHORITIES

STATEMENT OF THE CASE AND FACTS

Petitioner, Gwendolyn Odom, brought this *Engle* progeny case alleging that her mother, Juanita Thurston, died from lung cancer caused by an addiction to smoking cigarettes manufactured by Defendant R.J. Reynolds Tobacco Company. *See Engle v. Liggett Grp., Inc.*, 945 So. 2d 1246 (Fla. 2006) (per curiam). When her mother died, petitioner was an independent, 42-year-old adult with her own home, family, and career. The jury nonetheless awarded her $6 million in noneconomic consortium damages. That amount is more than 120 times the median annual household income in Florida.[1] It also far exceeds the largest noneconomic damage award to an adult child ever affirmed by a Florida court.

The Fourth District correctly held that the trial court abused its discretion in refusing to remit petitioner's $6 million award. In so holding, the court applied the same standards and methods that are uniformly employed by all Florida appellate courts: It accepted the relevant facts as found by the trial court and considered them in light of the philosophy and general trend of decisions in similar cases. As the Fourth District explained, Florida courts have consistently found similar awards to be excessive in wrongful death cases involving an independent, adult child suing for the loss of a parent. Against that backdrop, the evidence in this

[1] *See* U.S. Census Bureau, QuickFacts: Florida, http://www.census.gov/quickfacts/FL (reporting median household income of $48,900 from 2012 through 2016).

case simply did not support a conclusion that petitioner had sustained $6 million in noneconomic damages.

Although the Fourth District's decision was unremarkable in every way, petitioner strains to portray it as an outlier in order to invoke this Court's conflict jurisdiction. Among other unjustified charges, petitioner contends that the Fourth District adopted an absolute "cap" on noneconomic damages for all adult children, regardless of their circumstances. That is not a remotely fair reading of the opinion below. Petitioner's other attempts to manufacture a conflict similarly require ignoring the Fourth District's clear statements and distorting its reasoning.

In the end, petitioner's arguments would upend settled law regarding judicial review of damage awards and greatly reduce the courts' ability to ensure fair and consistent treatment of similarly situated parties—all for the sake of reviving an indefensible $6 million award to a fully independent, 42-year-old woman who had lived apart from her mother with her own husband and children for many years before her mother's death.

Because petitioner's initial brief makes clear that this case does not present a genuine conflict, the Court should dismiss the petition as improvidently granted. Failing that, the Court should approve the decision below and affirm.

A. Proceedings in the Trial Court

Ms. Thurston was diagnosed with lung cancer in 1990 and died from that disease in 1993. T.18:2771, 2778–79.[2] Petitioner filed this wrongful death lawsuit as personal representative of Ms. Thurston's estate, alleging that her mother was a member of the *Engle* class and asserting claims for negligence, strict liability, concealment, and conspiracy to conceal. R.1:0001–0009. She sought noneconomic damages under the wrongful death statute "for lost parental companionship, instruction, and guidance and for mental pain and suffering." § 768.21(3), Fla. Stat. With respect to those damages, the evidence showed the following:

After petitioner was born in 1950, T.18:2720, she and her mother lived with Ms. Thurston's parents in Pompano Beach until 1958, when they moved to Delray. T.18:2726. Sometime in the 1960s, Ms. Thurston and petitioner moved in with John Stewart, the father of petitioner's younger sister. T.18:2726–27. Petitioner described her mother as a special person during her childhood and recalled family activities, such as shopping and attending church. T.18:2727. After graduating from high school in 1968, petitioner left her mother's house in the beginning of 1969 to attend college in South Carolina. T.18:2729–30.

[2] References to the record and to the trial transcript are in the form "R.[Clerk's Record Index Vol.]:[Page]" and "T.[Vol.]:[Page]."

During the summer of 1969, petitioner met her first husband, Thaddeus Hayes, in Florida. T.18.2733–34. That relationship prompted petitioner to quit college at the end of 1969 and return to Florida for good so that she could be closer to Mr. Hayes. T.18:2733–34. Petitioner married Mr. Hayes in 1971 but continued to live with her mother until 1972. T.18:2737, 2739–40.

In 1972, petitioner moved to Germany for nine months because of Mr. Hayes' military deployment there. T.18:2739. After returning from Europe in 1973, the couple moved into their own apartment in Boca Raton. T.18:2741. Petitioner frequently visited her mother or talked with her on the phone. T.18:2740–41. Around this time in the early 1970s, Ms. Thurston began a relationship with a man named George Harden. T.18:2734.

When petitioner became pregnant with her first son Ahmad in 1976, she and Mr. Hayes began experiencing marital difficulties. T.18:2742–43. Petitioner testified that she divorced Mr. Hayes in 1976 and that her mother provided emotional support during that time. T.18:2742–43, 2746–47. Petitioner moved in with her mother and Mr. Harden in the late 1970s and lived with them until 1980. T.18:2747, 2750, 2815–16.

In 1983, petitioner met her second husband, Randy Odom. T.18:2750. The couple's first child, Duriel Odom, was born in 1985. T.18:2751. Although petitioner was busy with her job and her own family in the 1980s, she testified that

she would spend time with her mother on the weekends. T.18:2758–59. Ms. Thurston played an important role in the childhood of petitioner's older son, Ahmad. T.18:2688–91. Ahmad testified that his mother and grandmother were more like sisters than parent and child. T.18:2698.

Ms. Thurston was diagnosed with lung cancer in November 1990. T.18:2771. Petitioner testified that she and Mr. Harden cared for Ms. Thurston during her illness when they were not working. T.18:2772, 2777–79.[3] Petitioner accompanied Ms. Thurston to chemotherapy treatments, and she testified that seeing her mother suffer was a painful experience. T.18:2772–75. Ms. Thurston suffered a stroke in April 1993 during a visit from petitioner and died in the hospital a few days later. T.18:2778–79.

Petitioner testified that she experienced sadness in the period immediately following Ms. Thurston's death and that she sometimes wanted to call her mother before realizing that she could no longer do so. T.18:2785–86. She told the jury that she believed she was depressed at one point but that she had gotten better over time since her mother's death. T.18:2785–86. No expert testified regarding her mental health.

[3] Ms. Thurston's sister, Bobbie Newsome, testified that she visited Ms. Thurston every week and never saw petitioner care for Ms. Thurston during this time period. T.19:2890–92.

Petitioner was 42 years old when Ms. Thurston died in 1993, and she had not lived with her mother for 13 years. T.18:2720, 2750, 2778, 2816. She was married to her second husband and had two children of her own. T.18:2708, 2751. She supported herself by working in the newsroom at *The Palm Beach Post*. T.18:2758–59.

In closing argument following the trial's first phase, petitioner's counsel requested that the jury award petitioner $5 million in noneconomic damages for the loss of her mother. T.29:4348. The jury awarded petitioner $6 million—one million dollars more than counsel had asked for. T.30:4500–02. It also allocated 75 percent of the fault for Ms. Thurston's lung cancer and death to Reynolds and 25 percent to Ms. Thurston. *Id.* Following the trial's second phase, the jury awarded petitioner $14 million in punitive damages. T.32:4784–85.

In its post-trial motions, Reynolds asked the trial court to remit the $6 million noneconomic damage award or grant a new trial on damages because the award was unsupported by the evidence and out of line with the philosophy and general trend of awards affirmed in comparable cases. R.72:14258–70. The trial court denied the motion by signing an order drafted entirely by petitioner's counsel and entered judgment against Reynolds in the amount of $18,504,029. R.74:14686–97.

B. The Fourth District's Decision

On appeal, the Fourth District reviewed the trial court's ruling "under an abuse of discretion standard." *R.J. Reynolds Tobacco Co. v. Odom*, 210 So. 3d 696, 699 (Fla. 4th DCA 2016). It began by describing the relevant considerations under Florida's remittitur statute, including whether the amount awarded "bears a reasonable relation to the amount of damages proved and the injury suffered" and whether it "is supported by the evidence and is such that it could be adduced in a logical manner by reasonable persons." *Id.* (quoting § 768.74(5)(d)–(e), Fla. Stat.).

The Fourth District then emphasized the deference afforded to juries in assessing noneconomic damages: "Because no formula can determine the value of such a loss, great deference is given the jury's estimation of the monetary value of the plaintiff's mental and emotional pain and suffering." *Id.* The court made clear that "a compensatory damage award is only excessive if it is so large that it exceeds the maximum limit of a reasonable range," *id.*, a standard that comes directly from this Court's decisions in *Lassitter v. International Union of Operating Engineers*, 349 So. 2d 622, 627 (Fla. 1976), and *Bould v. Touchette*, 349 So. 2d 1181, 1184–85 (Fla. 1977).

In applying those principles, the Fourth District noted, it is well established that courts "may consider the philosophy and general trend of decisions in comparable cases." *Odom*, 210 So. 3d at 699 (quoting *R.J. Reynolds Tobacco Co.*

v. Webb, 93 So. 3d 331, 337 (Fla. 1st DCA 2012) ("*Webb I*")). The court therefore carefully examined the facts and reasoning of other Florida appellate decisions in cases involving an independent, adult child suing for the death of a parent. *Id.* at 699–701. Its review of those cases showed that even when the adult child had a close relationship with the parent and was devastated by the parent's suffering and death, Florida courts have uniformly found multi-million dollar awards to be excessive if the adult child did not live with and was not otherwise dependent on the parent. *Id.* The highest award ever affirmed in such a case was $400,000. *Id.* at 701.

Having reviewed the comparable cases, the Fourth District then addressed the relevant facts of this case. Although petitioner "had a very close and unique relationship" with her mother, took her "to many of her appointments," and "was devastated by her decline and subsequent death," it was undisputed that petitioner "was not living with [her mother] and was not financially or otherwise dependent on her" when she became ill. *Id.* Rather, petitioner "was married with two children of her own," and her mother was living with a long-time partner. *Id.* Comparing those facts to the philosophy and general trend in similar cases, the Fourth District found that the $6 million award was excessive and that "the trial court abused its discretion when it denied [petitioner's] motion." *Id.*

Because the Fourth District directed the trial court to remit the compensatory award, it also vacated the award of punitive damages. *Id.*; *see Engle*, 945 So. 2d at 1265 ("[T]he amount of compensatory damages must be determined in advance of a determination of the amount of punitive damages awardable, if any, so that the relationship between the two may be reviewed for reasonableness."). Petitioner does not dispute that if remittitur of the compensatory award was proper, then vacatur of the punitive award was as well.

Petitioner did not file a post-decision motion in the Fourth District and instead sought review in this Court based on conflict jurisdiction. She claimed that although the district court had "acknowledged the abuse of discretion standard," it had "actually conducted a *de novo* review" and "establish[ed] a bright-line rule which caps the recovery of noneconomic damages for one class of claimants." Pet. Br. on Jurisdiction 3. This Court accepted jurisdiction by a vote of 4 to 3, with Justices Canady, Polston, and Lawson dissenting.

SUMMARY OF THE ARGUMENT

I. This Court has no power to review the Fourth District's decision unless it expressly and directly conflicts with a decision of this Court or another district court on a question of law. The Fourth District's opinion, however, presents no conflict at all, much less one that is express and direct. Petitioner attempts to manufacture conflict jurisdiction where none exists by leveling

unfounded accusations that the Fourth District applied the wrong standard of review and adopted bright-line legal rules that appear nowhere in the opinion. This Court should reject those mischaracterizations and dismiss the petition as improvidently granted.

A. There is no conflict concerning the applicable standard of review. Nothing in the opinion below suggests that the judges of the Fourth District were being disingenuous when they said they were reviewing the trial court's order using an "abuse of discretion" standard. That standard is deferential, but it is not the same as no review at all. Within the framework provided by "abuse of discretion" review, the Fourth District accepted the facts found by the trial court and applied the well-established rule that a damages award must bear a reasonable relation to the philosophy and general trend reflected in prior judicial decisions—a legal inquiry for which appellate courts are particularly well suited. In carrying out that inquiry, the Fourth District responded directly to the reasoning in the trial court's order (which was drafted entirely by petitioner's counsel) and properly concluded that the trial court had abused its discretion.

B. The Fourth District did not "cap" noneconomic damages for adult children at $2 million or any other number. It simply observed that a multimillion-dollar award to an independent, adult child appears inconsistent with the philosophy and general trend in prior decisions. It did not foreclose the

possibility that such an award might be justified in a particular case with facts different than those at issue here. The Fourth District's only precedential holding was that a *$6 million* award was excessive on the facts of *this* case. The comments in question are mere dicta that do not warrant this Court's review and cannot give rise to conflict jurisdiction.

C. The Fourth District did not suggest that an adult child must have been financially dependent on a deceased parent in order to recover noneconomic damages. To the contrary, it observed that petitioner was not dependent on her mother "financially *or otherwise*," *Odom*, 210 So. 3d at 701 (emphasis added), and it acknowledged that petitioner could still recover substantial noneconomic damages—just not $6 million. The Fourth District's recognition that petitioner's overall (not just financial) independence from her mother was relevant to her noneconomic damages was correct and, in any event, does not conflict with any other case.

II. If the Court does not dismiss the petition, it should affirm. Petitioner's $6 million award was grossly excessive, and the trial court abused its discretion by refusing to remit that award.

A. The Fourth District was right to compare petitioner's award to other noneconomic damage awards to adult children, rather than awards to surviving spouses. As Florida courts have recognized, widows and widowers on

the one hand, and independent, adult children on the other, are differently situated with respect to noneconomic damages in wrongful death cases. The wrongful death statute does not suggest that the monetary value of noneconomic losses will be the same for spouses and adult children, which would go against common sense. Of course, *some* adult children will reasonably obtain larger awards than *some* spouses. But the maximum limit of a reasonable range for an award to an independent, adult child like petitioner will naturally be lower than the limit for an award to a bereaved spouse.

B. The Fourth District's careful review of the case law showed that Florida courts have consistently found awards of this magnitude to be excessive where, as here, the adult child did not live with and was not otherwise dependent on the parent at the time of the injury, *see, e.g., MBL Life Assurance Corp. v. Suarez*, 768 So. 2d 1129, 1136 (Fla. 3d DCA 2000) ($1 million excessive), even where the adult child had a close relationship with the parent, *see Webb I*, 93 So. 3d at 337–38 ($8 million excessive), or was devastated by the parent's suffering and death, *see Philip Morris USA Inc. v. Putney*, 199 So. 3d 465, 470 (Fla. 4th DCA 2016) ($5 million excessive). The highest award ever affirmed in such a case was $400,000 (about $640,000 inflation-adjusted) in *National Railroad Passenger Corp. v. Ahmed,* which "raise[d] a judicial eyebrow" but was not excessive. 653 So. 2d 1055, 1058–60 (Fla. 4th DCA 1995). Petitioner's $6 million award would

be on the outer limit even for a minor child who was much more dependent on the decedent's affection, guidance, and support than petitioner possibly could have been when she lost her mother at age 42.

C. Petitioner's *amicus* has compiled a list of 31 jury awards in 17 *Engle* progeny cases in an effort to show that adult children should be allowed to recover very large amounts of noneconomic damages. Even though the *amicus*'s compilation has a number of shortcomings (such as including awards that were not tested on appeal), it confirms the Fourth District's conclusion that petitioner's $6 million award was excessive.

ARGUMENT

I. The Fourth District's Application of Settled Legal Principles Does Not Support the Exercise of This Court's Conflict Jurisdiction.

Under its conflict jurisdiction, this Court may review a decision of a district court only if it "expressly and directly conflicts with a decision of another district court of appeal or of [this Court] on the same question of law." Art. V, § 3(b)(3), Fla. Const.; *see Jenkins v. State*, 385 So. 2d 1356, 1359 (Fla. 1980).

The Fourth District's opinion presents no conflict at all, much less one that is "express and direct" and appears "within the four corners" of the opinion. *Reaves v. State*, 485 So. 2d 829, 830 (Fla. 1986). The court did not "announce[] a rule of law which conflicts with a rule previously announced by this Court or another district." *Mancini v. State*, 312 So. 2d 732, 733 (Fla. 1975). Just the

opposite: It applied the same legal rules and engaged in the same analysis uniformly used by all Florida courts, and it quoted and closely followed the decisions of its sister districts.

Nor can petitioner identify any case where a different result was reached on "substantially the same [controlling] facts." *Id.* The truth is that all the Florida appellate decisions where courts have reviewed noneconomic damage awards to independent, adult children are in perfect harmony—the opposite of conflict. *See Webb I*, 93 So. 3d at 337–38 ($8 million excessive); *Putney*, 199 So. 3d at 470 ($5 million excessive); *Suarez*, 768 So. 2d at 1136 ($1 million excessive); *Ahmed,* 653 So. 2d at 1058–60 (inflation-adjusted $640,000 "raise[d] a judicial eyebrow" but was not excessive).

In an effort to manufacture conflict jurisdiction where none exists, petitioner repeatedly mischaracterizes the Fourth District's opinion. She first accuses that court of misrepresenting the standard of review it was applying. *See* Pet. Br. 22–39. She then claims that the Fourth District adopted legal rules—a supposed $2-million "cap" on noneconomic damages for adult children, and a rule that adult children cannot recover noneconomic damages unless they were financially dependent on the decedent—that she misleadingly cobbles together from dicta in the court's opinion. *See* Pet. Br. 39–43. Those charges are meritless.

Petitioner simply disagrees with how the Fourth District applied settled legal principles—including the "abuse of discretion" standard and the rule that damages must bear a reasonable relation to the philosophy and general trend of decisions in similar cases—to the facts of this particular case. This Court's conflict jurisdiction, however, is concerned with "decisions as precedents," not with "the rights of particular litigants." *Ansin v. Thurston*, 101 So. 2d 808, 811 (Fla. 1958). Enforcing the constitutional limits on conflict jurisdiction is vital to the orderly operation of the judicial system. The district courts "are and were meant to be courts of final appellate jurisdiction in the vast majority of cases." *S. Fla. Hosp. Corp. v. McCrea*, 118 So. 2d 25, 28 (Fla. 1960). "Sustaining the dignity of" those courts requires that this Court refrain from "arrogating to itself the right to delve into . . . whether or not [it] agrees with . . . the disposition of a given case." *Id.*

If conflict jurisdiction exists here, then it will exist every time a district court applies a settled legal rule to reach a result that one litigant disagrees with. That cannot be right. This Court should discharge jurisdiction and dismiss the petition. *See, e.g.*, *Gresham v. State*, 220 So. 3d 1133 (Fla. 2017) (per curiam) (having initially accepted jurisdiction based on express and direct conflict, this Court concluded after merits briefing that review was improvidently granted and discharged jurisdiction); *Sells v. CSX Transp., Inc.*, 214 So. 3d 1232 (Fla. 2017)

(per curiam) (same); *Dozier v. State*, 214 So. 3d 541 (Fla. 2017) (per curiam) (same); *Shaw v. Hunter*, 212 So. 3d 362 (Fla. 2017) (per curiam) (same).

A. The Court Applied the Correct "Abuse of Discretion" Standard of Review.

Under Florida law, courts have a duty to subject damage awards to "close scrutiny" to ensure that they are not excessive. § 768.74(3), Fla. Stat. One way courts carry out that duty is by requiring that "an award of non-economic damages must 'bear a reasonable relation to the philosophy and general trend of prior decisions in [similar] cases.'" *Putney*, 199 So. 3d at 470 (quoting *Bravo v. United States*, 532 F.3d 1154, 1162 (11th Cir. 2008) (applying Florida law)). Responsibility for ensuring that damage awards are not excessive rests with the trial court in the first instance, with appellate review for abuse of discretion. *Lassitter*, 349 So. 2d at 627.

There is no merit to petitioner's claim that the Fourth District failed to review the trial court's order for abuse of discretion and instead "applied a *de novo* standard of review." Pet. Br. 22–23. The Fourth District could not have been clearer. It expressly stated that its analysis of the remittitur issue was governed by "an abuse of discretion standard." *Odom*, 210 So. 3d at 699; *see also id.* at 701. It also acknowledged that valuing a noneconomic loss is "inherently difficult," that the jury's valuation of the loss is entitled to "great deference," and that "a compensatory damage award is only excessive if it is so large that it exceeds the

maximum limit of a reasonable range." *Id.* at 699. Yet petitioner insists that the Fourth District was being disingenuous when it made those statements. That charge is unfounded, and this Court should reject it.

Petitioner points to three pieces of evidence that supposedly demonstrate that the Fourth District actually applied a *de novo* standard of review. None of them supports that conclusion. The Fourth District did exactly what it said it was doing: It reviewed the trial court's order denying remittitur to ensure that the trial court had not abused its discretion.

1. Contrary to petitioner's assertion (Pet. Br. 23), the Fourth District considered and addressed the reasons given in the trial court's order denying remittitur. The trial court's order contains only a few paragraphs of substantive reasoning on this issue. It states that "the question is the closeness of the relationship" between petitioner and her mother, and it concludes that prior decisions concerning damage awards to adult children are "distinguishable" because the relationships in those cases supposedly were not as "close" as petitioner's relationship with her mother. Order ¶¶ 11–14. The Fourth District's opinion discusses the prior decisions cited in the trial court's order, as well as others, and concludes that although petitioner and her mother had a "very close" relationship, that closeness is not legally sufficient to justify $6 million in compensatory damages in light of the undisputed evidence that petitioner was an

independent, 42-year-old adult living apart from her mother with her own husband and children. *Odom*, 210 So. 3d at 699–701. It is not clear what more petitioner believes the Fourth District was required to do in order to demonstrate that it had considered the reasoning in the trial court's order.

Moreover, petitioner's claim (Pet. Br. 23) that the trial court's "detailed" order provides an important window into the trial judge's "perspective" on the evidence and "exactly how he exercised his discretion" blinks reality. The order was drafted entirely by petitioner's counsel, and the trial court signed the order the day after it was submitted without making a single change. "Florida appellate courts have criticized the practice of a trial court adopting verbatim proposed findings" drafted by one party. *In re T.D.*, 924 So. 2d 827, 829 (Fla. 2d DCA 2005). Signing an order drafted entirely by petitioner's counsel may nonetheless have been the trial court's prerogative, but the fact that the court did so in just 24 hours and without making even a single revision to petitioner's draft casts doubt on the degree to which the contents of the order truly reflect the trial judge's own thought process and "perspective." Regardless, the Fourth District was plainly aware of the reasoning set forth in the order, and it directly responded to that reasoning in its opinion. Nothing more was required.

2. The Fourth District did not place "too much weight on the results in other cases." Pet. Br. 24. Rather, the Fourth District accepted the facts as found by the

trial court and considered them in light of "the philosophy and general trend of decisions in comparable cases." *Odom*, 210 So. 3d at 699 (quoting *Webb I*, 93 So. 3d at 337). As even petitioner acknowledges (*see* Pet. Br. 24), "comparison of jury verdicts reached in similar cases" is a "recognized method of assessing whether a jury verdict is excessive or inadequate." *Aills v. Boemi*, 41 So. 3d 1022, 1028 (Fla. 2d DCA 2010). This Court has used that method since 1935. *See, e.g.*, *Fla. Dairies Co. v. Rogers*, 161 So. 85, 88 (Fla. 1935); *Pendarvis v. Pfeifer*, 182 So. 307, 313 (Fla. 1938). And all district courts have applied it since then. *See, e.g.*, *Gresham v. Courson*, 177 So. 2d 33, 39–40 (Fla. 1st DCA 1965); *Aills*, 41 So. 3d at 1028; *Lorillard Tobacco Co. v. Alexander*, 123 So. 3d 67, 78 (Fla. 3d DCA 2013); *Philip Morris USA Inc. v. Cohen*, 102 So. 3d 11, 18 (Fla. 4th DCA 2012), *quashed in part on other grounds*, No. SC13-35, 2016 WL 375143 (Fla. 2016) (summary order); *Putney*, 199 So. 3d at 470; *Citrus Cty. v. McQuillin*, 840 So. 2d 343, 347 & n.2 (Fla. 5th DCA 2003). That method is also even-handed; courts applying it sustain large damage awards to plaintiffs at least as often as they vacate those awards. *See, e.g.*, *R.J. Reynolds Tobacco Co. v. Grossman*, 211 So. 3d 221, 228 (Fla. 4th DCA 2017); *Alexander*, 123 So. 3d at 78–79; *Cohen*, 102 So. 3d at 18–19; *McQuillin*, 840 So. 2d at 347–48.

Petitioner disagrees with the Fourth District's conclusions about the philosophy and general trend in prior decisions involving noneconomic damage

awards to independent, adult children. *See generally* Pet. Br. 24–33. As explained below, petitioner's arguments lack merit. *See* Part II, *infra*. Regardless, the fact that the Fourth District carefully considered those prior decisions does nothing to undermine the court's repeated statements that it was applying "abuse of discretion" review.

Review for abuse of discretion "is not the same as *no* review." *Watkins v. INS*, 63 F.3d 844, 852 (9th Cir. 1995). In particular, although the "abuse of discretion" standard is deferential, it "does not shelter a [trial] court that . . . base[s] its ruling on an erroneous view of the law." *McLane Co. v. EEOC*, 137 S. Ct. 1159, 1168 n.3 (2017); *see Planned Parenthood of Greater Orlando, Inc. v. MMB Props.*, 211 So. 3d 918, 925–26 (Fla. 2017). And the interpretation of prior judicial decisions ordinarily presents a legal question, so it is entirely appropriate for an appellate court, operating within the "abuse of discretion" framework, to consider whether the trial court misunderstood the philosophy and general trend reflected in past decisions.

Petitioner would replace the "abuse of discretion" standard with one requiring total deference to trial courts, even when the trial court has misconstrued the relevant case law. That would be abdication, not deference. Meaningful appellate review is vital to achieving the greater consistency the Florida legislature

desired when it enacted the remittitur statute, which it hoped would help bring "soundness and logic to our judicial system." § 768.74(6), Fla. Stat.[4]

3. Finally, petitioner claims that the Fourth District "failed to meaningfully apply the remittitur statute" because it did not find that the jury's verdict was the product of passion or prejudice. Pet. Br. 34–38. But whether the amount awarded "is indicative of prejudice, passion, or corruption" is only one of several considerations set forth in the statute. § 768.74(5)(a), Fla. Stat. The statute also authorizes courts to consider whether the amount awarded "bears a reasonable relation to the amount of damages proved and the injury suffered," whether it is "supported by the evidence," and whether it "could be adduced in a logical manner by reasonable persons." § 768.74(5)(d)–(e), Fla. Stat.

The Fourth District's attention to those considerations is evident in its conclusion that the relationship between petitioner and her mother did not "justify the magnitude of [petitioner's] compensatory damage award." *Odom*, 210 So. 3d at 701. Petitioner grudgingly concedes as much. *See* Pet. Br. 35 (acknowledging

---

[4] Greater consistency in noneconomic damage awards benefits plaintiffs as well as defendants by helping to reduce disparities between awards to plaintiffs who are similarly situated and thus making the legal system fairer for all plaintiffs. *See* Bovbjerg et al., *Valuing Life and Limb in Tort: Scheduling "Pain and Suffering*," 83 Nw. U. L. Rev. 908, 924 (1989); D. Studdert et al., *Rationalizing Noneconomic Damages: A Health-Utilities Approach*, 74 L. & Contemp. Probs. 57, 62 (2011). Moreover, the same statute governs both remittitur and additur, so plaintiffs stand to benefit from meaningful judicial review in cases where a jury's award is too low. *See* § 768.74(2), Fla. Stat.

that the Fourth District "arguably considered [the factors] set forth in sections 768.74(5)(d) and (e)"). That the Fourth District focused on whether petitioner's award was reasonable in relation to the evidence presented, rather than whether it reflected passion or prejudice, does not support petitioner's claim that the court applied a standard of review other than abuse of discretion.

B. The Court Did Not Purport To "Cap" Noneconomic Damages for Adult Children.

Petitioner next accuses the Fourth District of "[l]egislating from the bench" by announcing a "cap" on the recovery of noneconomic damages by adult children in wrongful death cases. Pet. Br. 40. The court did no such thing. To the contrary, it emphasized that (a) juries are afforded "great deference" in determining noneconomic damages because "no formula can determine the value of such a loss," (b) an award is not excessive just because it "is large," and (c) a jury award can be set aside only when "it exceeds the maximum limit of a reasonable range." *Odom*, 210 So. 3d at 699. Those unequivocal statements refute any notion that the court adopted a hard-and-fast cap.

All the Fourth District did was attempt to describe, consistent with this Court's guidance and the district courts' uniform practice, the "philosophy and general trend" that it discerned in prior decisions involving awards to independent, adult children. *Id.* In doing so, the court observed that a "multi-million dollar compensatory damages award" to an "adult child who lives independent of the

parent" appears to fall outside the reasonable range suggested by a review of comparable cases. *Id.* at 701. That observation does not impose a "cap," nor does it foreclose the possibility of a higher award—perhaps even a "multi-million dollar" award—in a case with different facts. At most, the opinion suggests that, because such an award would fall well outside the range of awards that have been affirmed in prior cases, it should receive careful scrutiny to ensure that it is supported by the evidence at hand.

In any event, however one interprets the Fourth District's reference to "multi-million dollar" awards, the only *precedential holding* of the opinion below is that the $6 million award here is excessive "in light of the facts and circumstances which were presented to the trier of fact" in this case—namely, that petitioner was a 42-year old adult who had a close relationship with her mother but was also "married with two children of her own" and "was not living with [her mother] and was not financially or otherwise dependent on her." *Odom*, 210 So. 3d at 699, 701. Even if petitioner were correct that the opinion could be read to suggest that noneconomic damage awards to independent, adult children ought to be limited to $2 million or less, any suggestion to that effect "was not essential to the decision" and is therefore "without force as precedent." *State ex rel. Biscayne Kennel Club v. Bd. of Bus. Regulation*, 276 So. 2d 823, 826 (Fla. 1973). This Court does not sit to review non-binding dicta in the opinions of lower courts. *See*

City of Tampa v. Thatcher Glass Corp., 445 So. 2d 578, 580 (Fla. 1984); *Ciongoli v. State*, 337 So. 2d 780, 781–82 (Fla. 1976); *McCrea*, 118 So. 2d at 27.

C. The Court Did Not Suggest that Adult Children Must Be Financially Dependent To Recover Noneconomic Damages.

Finally, contrary to petitioner's assertion, the Fourth District did not "impose[] a requirement of financial dependence [for a plaintiff] to claim noneconomic damages." Pet. Br. 43. If the court had imposed such a requirement, it would have concluded that petitioner could not recover *any* noneconomic damages, because it is undisputed that petitioner was not financially dependent on her mother at the time of her mother's death. Yet the court's opinion plainly contemplates that petitioner can recover a substantial amount of noneconomic damages (albeit not $6 million). And nothing in the Fourth District's opinion even suggests that financial dependence is a prerequisite to the recovery of noneconomic damages or that "a survivor [must] have an economic loss in order to prove her noneconomic losses." *Id.* at 42.

There is nothing objectionable in the Fourth District's accurate statement that at the time of her mother's death, petitioner "was not living with [her mother] and was not *financially or otherwise* dependent on her." *Odom*, 210 So. 3d at 701 (emphasis added); *see* Pet. Br. 41–42. Nor does that statement so much as hint at the existence of any legal conflict that could support this Court's jurisdiction. The Fourth District did not put any special weight on petitioner's *financial*

independence. Rather, it was concerned with *all* forms of independence—"financial or otherwise"—that might bear on the closeness of the relationship between petitioner and her mother. That approach is consistent with petitioner's argument (which the trial court adopted when it signed the order drafted by petitioner's counsel) that in determining the reasonable range of noneconomic damages that petitioner could recover, "the question is the closeness of the relationship." Order ¶ 12.

Of course, the extent to which a survivor was financially dependent on a decedent, standing alone, is not dispositive of the closeness of the relationship or the amount of noneconomic damages the survivor can recover. But petitioner goes too far in contending that a survivor's financial independence is completely "irrelevant" to those questions. Pet. Br. 43. An adult child's financial independence from a parent, like other forms of independence—such as living apart from the parent and having a career and a family of one's own—is one clue among many that bears on the closeness of the relationship and the degree of emotional upheaval the child is likely to experience when the parent dies. *Cf. Philippides v. Bernard*, 88 P.3d 939, 947 (Wash. 2004) (state law that required parents to show financial dependence on adult child in order to recover noneconomic damages for child's death had a rational basis, because "[o]bviously a parent who is dependent on a child for material well-being and the basic physical

necessities of life is impacted [by the child's death] in a way unlike an independent parent").

Just as the Fourth District did not make financial dependence a prerequisite to petitioner's ability to recover noneconomic damages, nothing in its opinion suggests that the court considered petitioner's financial independence in isolation or placed undue weight on it. Instead, the court treated petitioner's financial independence from her mother as one circumstance among many that, taken as a whole, demonstrated that petitioner—a married adult with her own family and career who had lived separately from her mother for many years before her mother's illness and death—was not similarly situated to a spouse or a minor child for purposes of determining the reasonable range of a noneconomic damage award.

* * *

In sum, the Fourth District's opinion does not conflict with a prior decision of this Court or another district court on any point of law. Petitioner's disagreement with the result the Fourth District reached in this case by applying settled legal principles is not enough to invoke this Court's conflict jurisdiction. The Court should dismiss the petition as improvidently granted.

II. The Fourth District Correctly Held that Failing To Remit Petitioner's $6 Million Award Was an Abuse of Discretion.

The Fourth District was right to hold that the trial court had abused its discretion in refusing to remit petitioner's $6 million noneconomic damage award.

That award bore no reasonable relation to the evidence presented and was entirely out of line with the philosophy and general trend of prior decisions. The largest noneconomic damage award to an adult child ever sustained by a Florida appellate court was $400,000—or about $640,000 when adjusted for inflation—and even that award was "generous" enough to "raise[] a judicial eyebrow." *Odom*, 210 So. 3d at 701 (quoting *Ahmed*, 653 So. 2d at 1059). Petitioner's award was nearly *ten times* that amount. As the Fourth District recognized, awards of such magnitude are generally "reserved for cases involving 'much closer relationships'" than the one between petitioner—an independent, 42-year-old adult with her own home, career, and family—and her mother. *Id.* at 700 (quoting *Putney*, 199 So. 3d at 471).

A. The Court Properly Compared This Case to Other Cases Involving Adult Children.

At the outset, petitioner's contention that the Fourth District should have looked to past noneconomic damage awards to "surviving spouses" instead of those to adult children, Pet. Br. 25, flouts precedent and common sense. Both *Putney* and *Webb* rejected that argument, reasoning that the relevant comparison was to other cases involving adult children as plaintiffs. *See Webb I*, 93 So. 3d at 337–38; *Putney*, 199 So. 3d at 470–71. That is for good reason. A spouse losing his or her partner of many years and having to grow old alone is far different from an adult child losing a parent, as most do in the course of a normal life. When an

adult child loses a parent, she has typically become independent and found new relationships (such as with a spouse) that provide strength and support.

That is what happened here. When her mother died in 1993, petitioner was a 42-year-old independent adult, living in her own house, working a full-time job, and married to her second husband, Randy Odom (to whom she is still married today). She also had two loving sons, Ahmad and Duriel, with whom she enjoyed an excellent relationship. Last but not least, she had George Harden, her mother's partner of many years, whom petitioner called a "very, very loving person," T.18:2734, who was in the hospital room when petitioner's first child was born, T:18.2743, and whom her children considered to be their grandfather, T.18:2690–91.

No one doubts that petitioner also had a close and loving relationship with her mother. But there is no evidence that their relationship was on the same plane as the "enduring bond" of marriage, "a two-person union unlike any other in its importance to the committed individuals." *Obergefell v. Hodges*, 135 S. Ct. 2584, 2599 (2015). Nor is there any evidence that the mental suffering petitioner experienced when her mother died was comparable to the profound sorrow and loss of a widow or widower. *Cf. Wheat v. United States*, 860 F.2d 1256, 1262–63 (5th Cir. 1988) (in wrongful death case under Texas law, court reduced husband's award to $900,000 and reduced adult daughter's award to $250,000, noting that she

"did not live with her mother and was not dependent on her mother for financial support").

Florida's Wrongful Death Act does not, as petitioner claims, equate the loss of a spouse with an adult child's loss of a parent. That the Act allows adult children, minor children, and spouses to recover some of the same generic "elements" of noneconomic damages, such as lost companionship and mental pain and suffering, Pet. Br. 27 (citing § 768.21(2)–(3), Fla. Stat.), does not mean that those elements have the same monetary value for all relationships. On the contrary, courts recognize that noneconomic damages "will obviously be larger" for "dependent, young children" than for "independent, adult children," even though the statute uses the same language to describe the type of damages individuals in those groups may recover. *Grossman*, 211 So. 3d at 228.

Nor is there any merit to petitioner's suggestion that, because an adult child can recover noneconomic damages under the Act only when the decedent does not have a living spouse, the adult child's remedy is a "substitute for the remedy of the surviving spouse." Pet. Br. 27–28. The right of adult children to recover noneconomic damages for a parent's death did not exist in any form until 1990, when the legislature amended the Act to create "a limited right of recovery"—available only in cases where there is no surviving spouse—"where no recovery had previously existed at all." *Stewart v. Price*, 718 So. 2d 205, 209–10 (Fla. 1st

DCA 1998). In making that novel right *subordinate* to the rights of any surviving spouse, the legislature did not somehow suggest that an adult child's losses would be *equal in magnitude* to those of a surviving spouse.

Petitioner's suggestion that she is entitled to more noneconomic damages than other adult children because she and her mother were "more like sisters," Pet. Br. 9, 31, makes no sense either. The siblings of a decedent have no claim at all for noneconomic damages under the Wrongful Death Act. *See* § 768.21, Fla. Stat. Because the legislature has never recognized the loss of a sibling relationship as one that should be compensated with noneconomic damages, portraying petitioner's relationship with her mother as "more like sisters" does nothing to justify a $6 million noneconomic damage award.

To be clear, the Fourth District did not hold that "the parent child relationship cannot, as a matter of law, support a substantial award of noneconomic damages." Pet. Br. 31. To the contrary, the court recognized that petitioner is entitled to significant noneconomic damages, perhaps even a seven-figure amount. *See Odom*, 210 So. 3d at 701 (suggesting only that petitioner would not be entitled to a "multi-million dollar compensatory damages award"). That petitioner is willing to argue that such an award would not even qualify as "substantial" only underscores the need for courts to exercise some degree of control in this area.

Nor does the Fourth District's opinion foreclose the possibility that *some* awards to adult children will be larger than *some* awards to surviving spouses. As petitioner points out (Pet. Br. 27), an adult child who enjoyed a close and loving relationship with the decedent might well be entitled to a larger noneconomic award than a spouse whose discordant marriage was "at or past its breaking point." *Adkins v. Seaboard Coast Line R. Co.*, 351 So. 2d 1088, 1092–93 (Fla. 2d DCA 1977). Reviewing a noneconomic damage award will always require careful attention to the facts in a given case. But the facts here do not support a $6 million award to petitioner, a 42-year-old adult with her own home, family, and career who lived independently from her mother for many years before her mother's death.

B. Petitioner's Award Is Drastically Out of Step with the Philosophy and General Trend in Similar Cases.

As the Fourth District recognized, a review of prior awards to independent, adult children for the loss of a parent shows that the $6 million award in this case bears no reasonable relation to the philosophy and general trend of the relevant decisions.

1. *Webb*—$8 million is excessive. In *Webb*, the jury awarded $8 million in noneconomic damages to Diane Webb, the adult daughter of James Horner, a deceased smoker. *Webb I*, 93 So. 3d at 336. Observing that no Florida appellate court had affirmed an award of that magnitude to an adult child, the First District reversed. *Id.* at 337–38. The court acknowledged that the evidence showed a

"close relationship" between Diane and her father. *Id.* at 338. Diane lived across the street from her father and saw him "every day," and he helped her care for her own children, including one who was severely disabled. *Id.* Nevertheless, Diane "was 54 years old when her father died at the age of 78 [and] was not wholly dependent on his companionship, instruction and guidance at that time." *Id.* at 339. Instead, "[s]he was married, with two adult children and grandchildren, as well." *Id.* The First District thus concluded that the trial court had abused its discretion in denying remittitur. *Id.* After a new trial on damages, the jury awarded Diane $900,000 in compensatory damages. *See R.J. Reynolds Tobacco Co. v. Webb*, 187 So. 3d 388, 392 (Fla. 1st DCA 2016) ("*Webb III*").

Petitioner does not contend that her relationship with her mother was closer than Diane Webb's relationship with her father. Instead, she dismisses *Webb* because Diane's father was 78 when he died, whereas petitioner's mother was 58. Pet. Br. 30. But the First District placed much more weight on *Diane's* age and circumstances, which were comparable to petitioner's, than it did on her father's age. Even if Ms. Thurston's younger age could justify a somewhat higher award here than the $900,000 awarded in *Webb*, it would not justify an award of $6 million.

Equally unavailing is petitioner's attempt to distinguish *Webb* because the First District concluded that the award there reflected "passion and prejudice."

Pet. Br. 30. That conclusion was not critical to the court's reasoning, which focused on the magnitude of the award. The First District held that, given Diane's age and independence, the $7.2 million award was "more than the evidence at trial reasonably support[ed]." *Webb I*, 93 So. 3d at 339. So too here. The court's further observation that "[t]he *amount* of the compensatory damages suggests an award that is the product of passion," *id.* (emphasis added), does not distinguish *Webb* from this case. Nor does the fact that the jury in *Webb*—like the jury here—awarded more compensatory damages than the plaintiff's lawyer had asked for in closing argument. *Id.*

2. *Putney*—$5 million is excessive. In *Putney*, the Fourth District held that awards of $5 million to each of the three adult children of Margot Putney, a deceased smoker, were excessive. 199 So. 3d at 470–71. The children were between 31 and 36 years old at the time of Margot's death. *See* Brief of Appellant, *Philip Morris USA Inc. v. Putney*, 2011 WL 3563878, at *20 (Fla. 4th DCA June 27, 2011). "[N]one of them testified that they lived with her or relied on her for support." *Putney*, 199 So. 3d at 471. The court acknowledged that the evidence justified an award of noneconomic damages. *Id.* But it observed that very large awards, like those at issue in *Putney*, were generally reserved for cases involving "much closer relationships between the parties and the decedents during the decedent's illness." *Id.* It gave as an example a $10.8 million award to a widow

whose husband of 39 years was diagnosed with cancer "just as the wife was about to retire," so that instead of realizing "their life-long dream of traveling together," she "had to personally care for him 'as he lay dying during [his] final six months.'" *Id.* (quoting *R.J. Reynolds Tobacco Co. v. Townsend*, 90 So. 3d 307, 311–12 (Fla. 1st DCA 2012)). Even that award had barely survived appellate review; the majority said it was "certainly at the outer limit of reasonableness," *Townsend*, 90 So. 3d at 312, and one judge maintained that it should have been reduced to "no more than $5 million," *id.* at 319 (Wetherell, J., dissenting).

Petitioner's assertion that her relationship with her mother was much closer than Margot Putney's relationship with her three children, *see* Pet. Br. 31, disregards the loss and pain suffered by the three Putney children. Margot's death "devastated" her daughter Sharon. *Putney*, 199 So. 3d at 471. Like petitioner, Sharon also witnessed her mother's suffering and death due to lung cancer. "[W]hen she learned of her mother's diagnosis, she was too emotional to talk about it." *Id.* She, too, accompanied her mother to chemotherapy treatments, which "killed" Sharon "on the inside, because it made her think about losing her mother." *Id.* Sharon saw her mother become so ill that she could no longer wish Sharon a "happy birthday." *Id.* Margot's adult sons also testified about a goodbye letter their mother wrote, the emotional impact of her diagnosis, and how they still missed their mother at the time of trial. *Id.* Petitioner, who was about ten years

older than Sharon when she lost her mother, cannot explain why she is entitled to $6 million when Margot Putney's children were not entitled to $5 million each.

3. *Ahmed*—$400,000 is "generous" but acceptable. In *Ahmed*, the Fourth District held that awards of $400,000 to each adult child of a man killed in a train accident were "generous" and "raise[d] a judicial eyebrow" but were not excessive in light of the evidence presented. 653 So. 2d at 1056, 1059–60. Adjusting for inflation, the $400,000 award in *Ahmed* would be about $640,000 today.[5] Because liability was conceded, the trial was strictly about the children's damages. *Id.* at 1055–56. An expert witness testified that some of the children were suffering from depression and adjustment disorder as a result of their father's death. *Id.* at 1057. Several of the children had enjoyed a close relationship with their father and testified about their difficulties in coping with the loss. *Id.* at 1056–58. And although petitioner dismisses *Ahmed* because the father died in "just twenty-nine days," Pet. Br. 26, she ignores that most of the children watched his suffering before his death and saw his head swollen to "three times its normal size," 653 So. 2d at 1056.

4. *Suarez*—$1 million is excessive. In *Suarez*, the Third District held that a $1 million award to each adult child of a boat captain killed in a ferry accident was excessive. 768 So. 2d at 1136–37. The court observed that "none of [the] children

[5] *See* U.S. Inflation Calculator, www.usinflationcalculator.com (accessed Feb. 21, 2018).

were residing with" their father or "financially dependent upon him for support." *Id.* at 1136. Petitioner points out that the father in *Suarez* "appears to have died instantaneously" and that the children's relationship with their father had "'deteriorated' because of the father's girlfriend." Pet. Br. 26, 30 (quoting *Suarez*, 768 So. 2d at 1136). But a "sudden death" can produce more emotional suffering in the survivors than one where they had time to grieve with the decedent and to say goodbye. *Ahmed*, 653 So. 2d at 1058. And the Third District also found it significant that the survivors in *Suarez* were independent, adult children who did not reside with or otherwise depend on their father. *Suarez*, 768 So. 2d at 1136.

5. *Searcy*—$6 million is excessive. Although not cited by the Fourth District, the decision of the federal district court in *Searcy v. R.J. Reynolds Tobacco Co.*, No. 09-cv-13723, 2013 WL 5421957 (M.D. Fla. Sept. 12, 2013), is also instructive. There the jury awarded $6 million to Cheryl Searcy, the adult child of a deceased smoker. Applying *Webb* and *Putney*, the court held that the award was unsupported by the evidence at trial and remitted it to $1 million. *Id.* at *6. The jury had heard testimony that Cheryl and her mother were "very close," that they "spen[t] a lot of time together," that Cheryl "took care of her mother through her illness," and that it was "heart-wrenching" for Cheryl to see her mother "smoke the very last cigarette she would smoke before her death." *Id.* That evidence, however, was insufficient to support a $6 million award given that

Cheryl was 41 years old when her mother died, had moved out of her mother's house 21 years earlier, had children of her own, and did not depend on her mother for financial support. *Id.* (*Searcy* is currently on appeal to the Eleventh Circuit, but neither side has appealed the district court's remittitur.)

* * *

In attempting to draw increasingly fine distinctions between her case and other cases involving noneconomic damage awards to independent, adult children, petitioner misses the point. The question is not whether *Webb*, *Putney*, *Ahmed*, *Suarez*, *Searcy*, or any other case is exactly on all fours with this one. The factual circumstances of a particular plaintiff's relationship with a particular decedent will always be unique in some respects. The question is whether the Fourth District, examining those precedents and placing them alongside the evidence in this case, could conclude that a $6 million award to petitioner was outside the reasonable range in which the jury could operate.

That is not a close call. Given that the $6 million award here was an order of magnitude greater than the highest award ever affirmed by a Florida court in a case involving an adult child, and given that Florida courts have consistently found similar awards to be excessive, the Fourth District was correct to conclude that the award was entirely out of line with the philosophy and general trend in comparable cases and that the trial court abused its discretion when it failed to enter a

remittitur. That was not a conclusion reached without appropriate deference. Far from acting as a "seventh juror" or "substitut[ing] its judgment for that of the jury and the trial court," Pet. Br. 22–24, the Fourth District accepted the relevant facts of this case as they were stated by the trial court (and in petitioner's brief) and only then determined that the $6 million award was excessive because it lacked *any* reasonable relation to the philosophy and general trend in similar cases.[6]

The truth is that a $6 million noneconomic damage award would be at the outer limit even for a minor child who was much more dependent on the affection, guidance, and support of the deceased parent than petitioner could possibly have been at age 42 when she lost her mother. In *Citrus County v. McQuillin*, the Fifth

---

[6] Because no Florida court has sustained a noneconomic damages award anywhere near $6 million to an independent, adult child, petitioner seeks to rely on an out-of-state case in which the Massachusetts Supreme Judicial Court affirmed an award of $10 million (remitted from $21 million) to an adult son. *See* Pet. Br. 32 (citing *Evans v. Lorillard Tobacco Co.*, 990 N.E. 2d 997, 1006, 1037–38 (Mass. 2013)). Petitioner's reliance on *Evans* is misplaced. Not only was that case not decided under Florida law; it is also devoid of meaningful analysis. The opinion does not describe the evidence relating to noneconomic damages or the trend in comparable cases. It offers only a conclusory pronouncement that the award "was not disproportionate to the injuries suffered and did not represent a miscarriage of justice." *Id.* at 464. The trial court's remittitur order is similarly short on detail. *See Evans v. Lorillard Tobacco Co.*, No. 04-2840, 2011 WL 7090720, at *2 (Mass. Super. Ct. Sept. 2, 2011). Worse yet, the trial court justified its selection of the $10 million figure by pointing to a Florida court's (unexplained) affirmance of a $12.5 million award "to a deceased smoker's wife." *Id.* at *3 (citing *Phillip Morris USA, Inc. v. Lukacs*, 34 So. 3d 56 (Fla. 3d DCA 2010) (per curiam)). But as Florida courts have recognized, it is not proper to equate an independent, adult child with a bereaved spouse when evaluating noneconomic damages. *See* Part II.A, *supra*.

District held that a $4.4 million noneconomic damage award to a seven-year-old child for the death of his 28-year-old mother was "on the outer limit" of what is permissible but did not shock the judicial conscience under the facts of that case. 840 So. 2d at 347. The court relied on lengthy trial testimony about how the mother's death had impacted the young boy and about the unusual bond between the two. *Id.*; *see also Grossman*, 211 So. 3d at 228–29 (affirming awards of $7.5 million and $4 million to "two young children who were wholly dependent on their parents for support, guidance, and care" and who "not only lost their mother during their formative years, but watched her suffer and waste away as her body was ravaged by cancer"); *Alamo Rent-A-Car, Inc. v. Clay*, 586 So. 2d 394, 395–96 (Fla. 3d DCA 1991) (affirming inflation-adjusted awards of approximately $1.4 million per child as not excessive in light of "the extensive and heart-rending evidence of the particular relationships between these children and these fathers"). In other cases, much smaller awards to minor children have been deemed excessive. *See, e.g.*, *Salazar v. Santos*, 537 So. 2d 1048, 1049, 1051 (Fla. 3d DCA 1989) (affirming remittitur of $850,000 jury awards to minor children aged nine, eight, and five to inflation-adjusted amounts of approximately $325,000, $350,000, and $380,000, respectively, for the wrongful death of their father); *Rochelle v. State Dep't of Corr.*, 927 So. 2d 997, 997–98 (Fla. 1st DCA 2006) (affirming remittitur of $3 million award to $250,000 to a daughter who lost her father).

A $6 million noneconomic damage award would also be at the outer limit, and likely beyond it, for a parent who lost a minor child. Few suffer greater loss than parents whose young children are killed or maimed. Yet, in *Glabman v. De La Cruz*, the Third District overturned as excessive awards of $4 million to each parent of a teenager who died as a result of a doctor's negligence. 954 So. 2d 60, 63 (Fla. 3d DCA 2007) (per curiam). In *Bravo*, another medical malpractice case, the Eleventh Circuit, applying Florida law, overturned as excessive an award of $5 million to the father of a child who had suffered severe and irreversible brain damage during birth. 532 F.3d at 1169. In *Johnson v. United States*, the same court, applying Florida law, invalidated awards of $1 million (roughly $2.25 million when adjusted for inflation) to each parent of an infant who died of iron poisoning due to medical malpractice. 780 F.2d 902, 907–08 (11th Cir. 1986). *Cf. Walt Disney World v. Goode*, 501 So. 2d 622, 626 (Fla. 5th DCA 1986) (affirming awards of $1 million to each parent of four-year-old drowning victim in light of "unrebutted evidence" that the parents "suffered almost complete, full personality changes since the loss of [their child] and that their grief was overwhelming, genuine and crushing"); *Kammer v. Hurley*, 765 So. 2d 975, 977 (Fla. 4th DCA 2000) (affirming awards of $2.5 million to each parent of stillborn child whose skull was negligently crushed moments before birth), *receded from in part on other*

grounds, *Special v. Baux*, 79 So. 3d 755 (Fla. 4th DCA 2011), *rev'd sub nom. Special v. West Boca Med. Ctr.*, 160 So. 3d 1251 (Fla. 2014).

These decisions, where the plaintiffs were minor children or parents of minor children, confirm that petitioner's $6 million award is excessive. Awards to minor children should "obviously be larger" than those to independent, adult children. *Grossman*, 211 So. 3d at 228; *see also Wheat*, 860 F.2d at 1262–63 (under Texas law, sustaining $1 million award to minor child while reducing adult child's award to $250,000); *Mono v. Peter Pan Bus Lines, Inc.*, 13 F. Supp. 2d 471, 477 (S.D.N.Y. 1998) (under New York law, observing that, "[n]ot surprisingly, courts reviewing jury awards for loss of parental guidance have generally reduced awards to adult children to a fraction of the amount recoverable by infant children"). Common sense also dictates that awards to parents who suffer the loss of a minor child should be larger than awards to independent, adult children who suffer the loss of a parent, as most do at some point in their lives.

Even assuming that a $6 million award could be appropriate for a spouse or a young, dependent child, it is simply too large—at least absent unusual circumstances not present here—for a 42-year-old adult who lived apart from her mother with her own husband and children.

C. The Compilation of Awards Submitted by Petitioner's *Amicus* Lends Additional Support to the Fourth District's Decision.

In an effort to show that large noneconomic damage awards to adult children are appropriate, petitioner's *amicus* provides a list of 31 individual plaintiffs, in 17 *Engle* progeny cases, who were awarded $1 million or more in noneconomic damages. *See* Amended *Amicus* Br. of Fla. Justice Ass'n, App. 4–9. Properly understood, the *amicus*'s list actually supports the Fourth District's decision and confirms that petitioner's $6 million award was excessive.

The list should be taken with several grains of salt. For one thing, it does not include noneconomic damage awards of less than $1 million, so it says nothing about how rare or common awards of $1 million or more to independent, adult children may be. It also does not include any information—apart from the plaintiff's age—about the facts of the cited cases, which makes it impossible to tell whether any given award may have been justified based on unusual circumstances not present here. Finally, the list is populated almost entirely by awards as to which the defendant either did not seek remittitur in the trial court or did not raise the issue on appeal. Such awards are of at best highly limited precedential value. Courts evaluating whether an award is excessive in light of prior awards in similar cases generally focus on "reported appellate decisions in which awards were tested for size." *Bravo*, 532 F.3d at 1166 (applying Florida law); *see also, e.g., Putney*, 199 So. 3d at 470–71; *Webb*, 93 So. 3d at 337–38. This allows courts to "assess

the 'philosophy and general trend of prior decisions in such cases' on a statewide basis, not on the basis of varied trial court decisions." *Bravo*, 532 F.3d at 1166. It is also "essential to ensuring that the measure is not skewed by phantom awards"—those that "may not realistically reflect what is actually going on in the world of damage awards" for any of a number of reasons, such as that the parties settled "for a more realistic amount which [was] not disclosed." *Id.* at 1167–68.

In any event, the *amicus*'s list of $1-million-plus awards supports the decision below. A review of the list reveals the following:

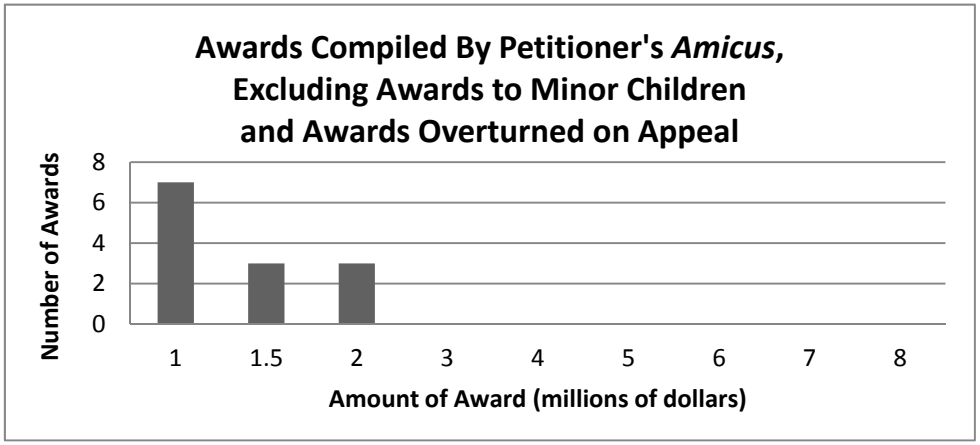
- Of the 31 awards listed by the *amicus*, 22 awards (71%) were for $2 million or less. *See* FJA Br. App. 4–9.
- The *amicus* lists nine awards of exactly $2 million. Of those nine awards, six were made to *minor* children, not adult children. *Id.* at 6–7. The Wrongful Death Act defines "minor children" as "children under 25 years of age," presumably because the legislature recognized that individuals in their early twenties are often dependent on their parents' affection, guidance, and support in a way and to a degree that older individuals, like petitioner, are not. *See* § 768.18(2), Fla. Stat.[7]

[7] While the facts of a particular case might make it appropriate to treat an individual younger than 25 as an adult for purposes of evaluating a damage award, the *amicus* provides no basis for concluding that such treatment was appropriate in the referenced cases.

Moreover, the three $2 million awards identified by the *amicus* that went to *adult* children were all made in a single case. *See* FJA Br. App. 6.

- The *amicus* lists nine awards of $3 million or more. Only five of the nine were made to adult children, and *all five were overturned as excessive*. The other four were made to minor children—and of those four, three are subject to pending challenges and one was reversed on other grounds and replaced with an $890,000 award after retrial. *See id.* at 7–9.

In short, as the chart below indicates, the *amicus*'s list actually shows that (i) multi-million dollar awards to adult children are extremely rare and (ii) not a single such award over $2 million has survived judicial review. Even if one were to accept this selective compilation of unexplained and untested jury awards as a relevant metric, it would confirm what the Fourth District recognized: that petitioner's $6 million award is an outlier that is unsupported by the evidence and does not bear a reasonable relation to the philosophy and general trend of decisions in comparable cases.



CONCLUSION

The Court should dismiss the petition as improvidently granted. Failing that, the Court should approve the decision below and affirm.

Respectfully submitted,

/s/ *Jeffrey S. Bucholtz*

Jeffrey S. Bucholtz
Admitted *pro hac vice*
KING & SPALDING LLP
1700 Pennsylvania Avenue NW
Suite 200
Washington, D.C. 20006
Telephone: (202) 737-0500
Facsimile: (202) 626-3737
jbucholtz@kslaw.com
KSTobacco@kslaw.com

William L. Durham II
Florida Bar No. 91028
Val Leppert
Florida Bar No. 97996
KING & SPALDING LLP
1180 Peachtree St., N.E.
Atlanta, Georgia 30309
Telephone: (404) 572-4600
Facsimile: (404) 572-5100
bdurham@kslaw.com
vleppert@kslaw.com
KSTobacco@kslaw.com

Jeffrey A. Cohen
Florida Bar No. 57355
CARLTON FIELDS JORDEN BURT, P.A.
100 S.E. Second Street, Suite 4200
Miami, Florida 33131
Telephone: (305) 539-7289
Facsimile: (305) 530-0055
jacohen@carltonfields.com

CERTIFICATE OF SERVICE

I certify that on February 21, 2018, this brief was e-filed with the Court and copies were e-mailed to:

Attorneys for Plaintiff/Petitioner
Rosalyn Sia Baker-Barnes
T. Hardee Bass
Mariano Garcia
SEARCY DENNEY SCAROLA BARNHART & SHIPLEY, PA
2139 Palm Beach Lakes Blvd.
West Palm Beach, FL 33409
tobacco@searcylaw.com

David J. Sales
DAVID J. SALES, PA
1001 N. U.S. Highway One
Suite 200
Jupiter, FL 33477
david@salesappeals.com

Attorneys for Defendant/Respondent
Eric L. Lundt
Robert C. Weill
GRAY | ROBINSON
401 E. Las Olas Blvd., Ste. 1000
Fort Lauderdale, FL 33301
eric.lundt@gray-robinson.com
robert.weill@gray-robinson.com
david.saltares@gray-robinson.com

Stephanie E. Parker
John M. Walker
JONES DAY
1420 Peachtree St., N.E.
Suite 800
Atlanta, GA 30309
separker@jonesday.com
jmwalker@jonesday.com

Hada de Varona Haulsee
WOMBLE CARLYLE SANDRIDGE & RICE LLP
One West Fourth St.
Winston-Salem, NC 27101
hhaulsee@wcsr.com

/s/ *Val Leppert*
Val Leppert
Florida Bar No. 97996

CERTIFICATE OF COMPLIANCE

I certify that the foregoing brief is in Times New Roman 14-point font and complies with the font requirements of Florida Rule of Appellate Procedure 9.210(a)(2).

/s/ *Val Leppert*
Val Leppert
Florida Bar No. 97996