IN THE SUPREME COURT OF FLORIDA

Case Number SC17-563
LT Number 4D14-3867

GWENDOLYN E. ODOM, Personal Representative of the Estate of Juanita Thurston,

Petitioner,

vs.

R.J. REYNOLDS TOBACCO COMPANY,

Respondent.

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

PETITIONER'S INITIAL BRIEF

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Nature of the Case

Petitioner raises three questions regarding the Fourth District's reversal of a trial court order which denied a motion to remit a jury's award of damages in a wrongful death case. Petitioner contends that each of these questions should be answered in the negative. First, whether the Fourth District honored its obligation to review that order for an abuse of discretion. Second, whether the Fourth District has the power to impose a de facto cap prohibiting a "multi-million dollar" award of noneconomic damages for adult children who qualify as survivors under the Wrongful Death Act. Third, whether a wrongful death survivor must prove that she was financially dependent upon the decedent to obtain a substantial award of purely noneconomic damages. Petitioner requests that this Court quash the decision of the Fourth District with directions to affirm the trial court's judgment.

Course of Proceedings

As personal representative of the estate of her late mother, Juanita Thurston, Petitioner Gwendolyn Odom ("Plaintiff" when referred to in her representative capacity, and "Gwen" when referred to individually) sued R.J. Reynolds Tobacco Company ("Reynolds") for wrongful death pursuant to this Court's decision in *Engle v. Liggett Group, Inc.*, 945 So. 2d 1246 (Fla. 2006). She brought claims authorized by *Engle* for strict liability, negligence, fraud by concealment, and conspiracy to

commit fraud by concealment. Plaintiff sought compensatory damages for her benefit, as a statutory survivor under the Wrongful Death Act. (R.9817-28) After a three-week trial, the jury found for Gwen on all of her claims and awarded her $6 million in compensatory damages. (R.14184-86) It also found that the conduct of Reynolds warranted punitive damages. In the trial's second phase, the jury awarded $14 million in punitive damages. (R.14229) Because the jury also assigned 25% comparative fault to Juanita, the trial court reduced the compensatory damage award to $4.5 million when entering judgment.[1] (R.14686-88)

Reynolds moved for a remittitur or a new trial on the ground that the jury's noneconomic damage award was excessive. (R.14258-65) Plaintiff submitted a written response. (R.14642-48) The trial court conducted a lengthy post-trial hearing, which devoted substantial attention to the issue of remittitur. (R.15438-49; 14459-74; 15483-15500) During the hearing, the trial court noted that the parties' post-trial submissions were extensive and cited several authorities. (R.15496-97) At the conclusion of the hearing, the court explained that it had "a number of cases" it was "going to have to reread" before ruling. It requested the parties to submit proposed orders; both parties did so. (R.15504-06; 14656; 14662)

[1] Plaintiff prevailed on her intentional tort claims. Under this Court's recent decision in *Schoeff v. R.J. Reynolds Tobacco Co.*, No. SC15-2233, 2017 WL 6379591 (Fla. Dec. 14, 2017), she would have been entitled to entitled to a judgment for all compensatory damages awarded by the jury. She did not, however, seek such a judgment, nor raise the issue on appeal.

The trial court entered the order proposed by Plaintiff. The order distinguishes two other authorities, *R.J. Reynolds Tobacco Co. v. Webb*, 93 So. 3d 331 (Fla. 1st DCA 2012), and *Philip Morris USA, Inc. v. Putney*, 117 So. 3d 798 (Fla. 4th DCA 2013),[2] both of which required the remittitur of noneconomic damage awards to adult children as wrongful death survivors ($8 and $5 million, respectively). The parties had extensively discussed *Webb* and *Putney* in their written and oral arguments before the trial court. (*E.g.*, R.14647-48; 15459; 15462; 15469)

The trial court found *Webb* distinguishable because (1) the First District concluded that the verdict was the product of passion and prejudice resulting from certain evidence, (2) the jury awarded twice the amount requested by Plaintiff, "a factor which significantly influenced" the First District, and (3) there were "obvious" differences relating to the ages of the decedents and survivors in the two cases. (R.14694-95) The trial court also rejected arguments that *Putney* required a remittitur. It disagreed that there was a cap on the amount an adult child can recover in a wrongful death case. It noted that any such cap would "deprive the Court of the responsibility conferred by the legislature" to review verdicts for excessiveness.

[2] This Court quashed the decision in *Putney*, and reinstated the jury's verdict on unrelated grounds (application of the statute of repose). *Philip Morris USA, Inc. v. Putney*, No. SC13-1831, 2016 WL 390276 (Fla. Feb. 1, 2016). After remand, the Fourth District issued a new opinion which left the court's earlier treatment of the remittitur issue intact. *Philip Morris USA, Inc. v. Putney*, 199 So. 3d 465 (Fla. 4th DCA 2016).

(R.14695) Rather, the court recognized that the question is the closeness of the relationship. The trial court concluded that this case was "simply different" from *Putney*. It recited evidence that was "not disputed" concerning the close relationship between Gwen and her mother, and the difficulties Gwen faced following her mother's death. (R.14695-96)

The trial court also noted the rule that "'[r]emittitur cannot be granted unless the amount of damages is so excessive that it shocks the judicial conscience and indicates that the jury has been influenced by passion and prejudice.'" (R.14696) (quoting *Weinstein Design Group, Inc. v. Fielder*, 884 So. 2d 990, 1002 (Fla. 4th DCA 2004)) Noting its prior experience in wrongful death cases, the trial court stated, "The Court's conscience is not shocked by the jury's compensatory damage verdict, and RJR has identified nothing in the record to suggest that the verdict was the product of passion and prejudice." (R.14696-97)

Although it wanted the trial court's order reversed, Reynolds barely acknowledged that same order on appeal. It failed to attach the order to its notice of appeal or include the order in its appendix. (R.14835-41) Despite acknowledging that the order was subject to an abuse of discretion standard of review, Reynolds did not even mention the order in its brief except to state the fact of its entry. (4D14-3867, Initial Br. at 13; 18) Indeed, Reynolds's appellate arguments focused almost exclusively on the results in *Webb* and *Putney* and two other cases. (*Id.* at 18-25) It

also asserted that the jury's verdict should shock the judicial conscience and could only be the product of passion and prejudice. (*Id.* at 25-26) For the first time on appeal, it purported to identify proof and sources of such alleged passion and prejudice, arguments it never made to the trial court. (*Id.* at 26-29)

In reversing the trial court's order, the Fourth District said it was reviewing the order for an abuse of discretion. *R.J. Reynolds Tobacco Co. v. Odom*, 210 So. 3d 696, 699 (Fla. 4th DCA 2016). It recited the factors set forth in the remittitur statute, section 768.74(5), Florida Statutes, which are applied to determine whether a verdict is excessive. *Id.* It noted that "great deference" is owed to a jury's award of noneconomic damages and that the size of a verdict, standing alone, does not indicate it is excessive or the product of improper considerations. A verdict is excessive only if it "exceeds the maximum limit of a reasonable range." *Id.* (quoting *Allred v. Chittenden Pool Supply, Inc.*, 298 So. 2d 361, 365 (Fla. 1974)). It noted that courts "may consider the philosophy and general trend of decisions in comparable cases." *Id.* (citing *Webb*, 93 So. 3d at 337).

While the Fourth District recited these legal maxims, it nowhere considered the trial court's order. It focused only on the last of these stated considerations, comparing the jury's verdict to results in just four other cases. The court explored the First District's reasoning in *Webb*, noting that the First District had failed to uncover a verdict for a surviving adult child as large as the one in *Webb* ($8 million).

Id. at 700. It also discussed *Putney* and the evidence which led the court to conclude that the awards for the adult children in that case ($5 million each) were excessive. *Id.* While recognizing that a marital relationship might justify awards of "such magnitude," the court ruled that the relationship between an adult child and a parent could not as a matter of law. *Id.* at 700-01 (citing *R.J. Reynolds Tobacco Co. v. Townsend*, 90 So. 3d 307 (Fla. 1st DCA 2012) ($10.8 million for surviving spouse)).

The court interpreted the authorities it cited to impose a ceiling on wrongful death recoveries for adult children:

> Read together, *Webb* and *Putney* establish that no matter how strong the emotional bond between an adult child and a decedent parent may be, an adult child who lives independent of the parent during the parent's smoking related illness and death is not entitled to multi-million dollar compensatory damages award, even if the child was involved in the facilitation of the parent's treatments and suffered tremendous grief over the loss of the parent. Cases from outside the tobacco arena support this conclusion.
>
> In *MBL Life Assurance Corp. v. Suarez*, 768 So. 2d 1129, 1136 (Fla. 3d DCA 2000), the Third District held that an award of $1 million to each of a decedent's four adult surviving children was "excessive" where none of the children were financially dependent on or residing with the decedent at the time of his death. In *National Railroad Passenger Corp. v. Ahmed*, 653 So. 2d 1055, 1059 (Fla. 4th DCA 1995), this Court affirmed a $400,000 compensatory damages award to adult surviving children for the loss of their parent with whom they did not live at the time of his death, but in doing so, noted that it was "indeed a generous award" that "raises a judicial eyebrow." (citations and internal quotation marks omitted).
>
> Based on the foregoing precedent, the jury's award of $6 million in compensatory damages to Plaintiff for the loss of her mother was excessive.

Id. at 701. The court reached this conclusion despite the fact that "the evidence established that Plaintiff and her mother had a very close and unique relationship." *Id.*

The court focused on the facts that "Plaintiff was not living with Ms. Thurston and was not financially or otherwise dependent on her. Instead, Plaintiff was married with two children of her own and Ms. Thurston was living with her long-time partner." *Id.* Even though Gwen was directly involved in caring for her mother and, in the Fourth District's own words, "devastated by her decline and subsequent death," the court concluded as a matter of law that "the relationship between an adult child living independent of their parent" cannot support such an award. *Id.* Because this "type of relationship" can never support a large damage award, the court held "[a]ccordingly … that the trial court abused its discretion when it denied RJR's motion for remittitur or a new trial." *Id.*

Statement of Facts

The evidence concerning the relationship between Gwen and Juanita was unrebutted. Juanita was just 16 years old when she gave birth to Gwen in 1950. (T.18.2723) Juanita dropped out of school when she became pregnant. (T.18.2706; 2730; 2788) For most of her life, Juanita was all Gwen really had, especially because Gwen's biological father was absent from her life. (T.18.2690-91; 2698) Juanita was an integral part of Gwen's family life and the person she leaned on. (T.18.2706-07)

Gwen remembers her mother as a "fun person," with a great, outgoing personality, someone who treated peopled very kindly. (T.18.2722-23) She was a "very special person." (T.18.2727) Gwen recalls that "everybody loved my mother. She was just a kind-hearted person." (T.18.2722-23) Gwen and her mother spent a lot of time in Pompano Beach with family. (T.18.2720-21) On weekends, they always went to church, shopped and enjoyed other family activities like barbecues together. (T.18.2688-89, 2727) They were "always" around one another. (T.18.2698)

Although Gwen married in 1971, she continued to live with her mother until she moved to Germany to be with her husband, a serviceman stationed there. (T.18.2737-39) While in Germany, Gwen and her mother wrote letters and remained close. (T.18.2739) When Gwen and her husband returned from Germany, they got a place of their own. Still, Gwen and Juanita remained "really close," talking on the phone "every night." On evenings and weekends or whenever they were not working, Gwen and her mother were together. (T.18.2741)

When Gwen became pregnant in 1976, her marriage became "really rocky." Pregnant and in fear, she left her husband to move back in with her mother "for [her] own safety," and filed for divorce during her pregnancy. (T.18.2742) Without her mother's support, Gwen "would have been lost." (T.18.2743) Gwen gave birth to her son, Ahmad, while she was living with Juanita (T.18.2686), and Juanita was present for the birth. (T.18.2743-44) Juanita's support during this time "meant

everything" to Gwen and gave her a "lot of comfort." (T.18.2744) When Gwen, as an adult with her own child, was living with Juanita, they would walk to church together, where Juanita was an usher. Gwen would observe her mother's various activities at the church and "knew [that] she loved people." (T.18.2760-61)

Gwen continued to live with Juanita from 1976 to 1980. (T.18.2742; 2748-49) Even afterward, Gwen relied on Juanita to help to raise Ahmad, who was "constantly" with his grandmother. (T.18.2688) The relationship between Juanita and Ahmad—two people for whom she had a special love—gave Gwen a sense of pride and joy. (T.18.2750) Gwen recalls that Ahmad got to develop "the same kind of relationship" with Juanita that she herself enjoyed. (T.18.2750) Gwen remembers her mother as a "very proud grandmother" and travelled with Juanita to all of Ahmad's sporting events from the time he was five years old. (T.18.2770) Juanita was always there to cheer on her grandson as his "biggest, biggest fan." (T.18.2770-71) Juanita died two years before Ahmad graduated from high school and received a college football scholarship. (T. 18.2687) Her premature death deprived Gwen of one of her greatest joys—watching Ahmad's games together.

Ahmad confirmed that Gwen "leaned on" Juanita for support; his grandmother worked to resolve family problems and was "a huge part of our lives." (T.18.2706-07) According to Ahmad, Juanita and Gwen were actually "more like sisters" with a "wonderful relationship." (T.18.2698) Still, Gwen was very respectful

of her mother, always addressing her Juanita with “yes, ma’am” and “no ma’am.” (T.18.2697-98) Ms. Odom’s second son, Duriel, was born in 1985. Juanita was also very close with Duriel though she did not live to see him turn nine years old. (T.18.2751, 2767) Still, while Gwen had two young children of her own, later remarried, and was working, she continued to spend time with her mother. (T.18.2691; 2759; 2767-69)

Gwen recalls her mother’s struggles when she quit smoking in 1987. (T.18.2762) She has fond memories of spending time with her mother in the years after she quit for good. Gwen testified that Juanita was “very, very proud of herself,” and she was proud of her mother as well. (T.18.2762-63) Gwen testified that they “were happy. We spent a lot of time together. And I think because she had stopped smoking, she was just a different person.” (T.18.2763)

In late 1990, three years after she quit smoking, Juanita was diagnosed with lung cancer. She was only 56 years old. (Ex.JT003:207, 255, 437-8; T.16.2516; T.17.2613) In tears, Juanita called Gwen to report the news. Gwen first tried to console Juanita and reassure her on the phone. (T.18.2771) After hanging up, she immediately drove to see her mother. (T.28.2771) Gwen continued to console her, and they prayed together. (T.28.2771)

Juanita’s treatment consisted of an initially hopeful, but ultimately deadly course. She began radiation treatment in early 1991. (T.17.2552-54) After several

months, there were no further signs of cancer. (T.18.2773) As she and Gwen would later learn, however, "the radiation that was used to treat her lung cancer didn't cure it…. It shrunk down with radiation, and it came back." (T.14.2095)

Gwen helped Juanita in various ways, taking her to and from radiation treatments and helping around Juanita's house. (T.18.2698) Ahmad recalls that Gwen "was in a lot of pain" from witnessing her own mother's battle with cancer. (T.18.2698) They tried to take comfort in their church and in their faith. (T.18.2698) Gwen testified that she was with Juanita "pretty much the whole time" during that period, and that she would regularly miss work to be with her mother and take her mother to and from radiation treatment. It was what Gwen wanted to do. (T.18.2772) When they believed that Juanita's cancer was in remission, Gwen and her mother celebrated outside the hospital. (T.18.2773) Together, they thought they had beaten the cancer, and Gwen praised her mother for how she handled these struggles. (T.18.2773) Gwen remembers her mother being "very, very happy," and jumping in the air outside with a shout. (T.18.2772-73)

In October, 1992, while Juanita and Gwen believed the cancer was in remission, Juanita suffered a heart attack which required angioplasty. (Ex.JT003:188; T.17.2558-59) Her prognosis relating to her heart attack was good, and the probability of another heart attack after angioplasty was "very small." (T.14.2112) During the workup for Juanita's heart attack, however, a chest x-ray

revealed a “large mass” in her right lung which was already “necrotic,” meaning that the “tissue had died and liquefied.” (T.14.2094-95, 2099) A CT scan further showed a “necrotic mass in the right upper lobe with destruction of the bone.” (Ex.JT003:188; T.14.2116) A biopsy showed squamous cell carcinoma of the right lung, which was infiltrating and eating away at the tissue around it. (T.14.2096)

Juanita’s diagnosis was inoperable stage IV cancer primary to the lung. (T.15.2302) The cancer had spread to four of the ribs in her back and metastasized to her right knee and femur. (T.14.2096-98, 2102-03) These processes are “very painful,” evidence which the trial court emphasized was directly relevant to Gwen’s own pain and suffering, because it proved how Gwen experienced her mother’s illness and demise. (T.14.2100-02) As Juanita’s cancer grew, it blocked off her airways, caused her lung to collapse, and grew around blood vessels causing them to become narrow and blocked as well. (T.14.2079) Juanita’s lung cancer had “grown into the top part of the heart, the atrium, left and right atrium of the heart.” (T.14.2079) When Gwen learned that Juanita’s cancer had returned, she felt like she had “been punched in [her] stomach and hit over the head with a hammer all at one time.” (T.18.2773) She and her mother were extremely upset together and it was a very difficult time. (T.18.2773) Despite her own emotional pain, Gwen remained strong for her mother; she tried to give her mother confidence, but in her heart, she was afraid. (T.18.2773-74)

Juanita underwent four rounds of chemotherapy and radiation therapy to "try to reduce the size of the cancer, to reduce its symptoms, to make her more comfortable for a period of time." (T.14.2097) She was given strong narcotic pain medication to alleviate the pain caused when cancer spread to her bones, destroying them. (T.17.2561-62) Over the following months, as the lung cancer further destroyed her body, Juanita progressively declined, her weight dropped, and she became more and more fragile. (Ex.JT003:171; T.14.2116; T.17.2556-57) She did not respond to chemotherapy treatment. (T.17.2563)

Gwen was there again throughout her mother's chemotherapy treatments, seeing her five times a week and every weekend. (T.18.2777) Gwen struggled to do it all—work her job in the newsroom at the *Palm Beach Post*, raise her sons, and care for her mother. (T.18.2758, 2777-78) Gwen recalls taking her mother to each medical appointment and witnessing first-hand the toll that each chemotherapy treatment had on her. (T.18.2774-75) Gwen cared for Juanita throughout her decline, trying to feed her despite Juanita's lack of appetite. (T.18.2774) Ahmad testified that towards the end, when his grandmother was suffering a lot, Gwen would go to work, come home, and then to his grandmother's house. (T.18.2698-99) She would cook, clean, pick up around the house—anything that was needed: "[M]y mom was there for her…. [S]he tried her best." (T.18.2698-99)

As Juanita's condition deteriorated, Gwen witnessed her body taking on a different shape. (T.18.2774-75) Gwen would sit with her mother, hold her hand, and kiss her face. (T.18.2775) Gwen would try and hide tears from her mother, retreating to the bathroom to cry; there, Gwen would wash her face, regain her composure and emerge, always trying to be strong for her mother without revealing her own fears and pain. (T.18.2775) Although Juanita was only 58 at the time, she looked 30 years older to Gwen. It still pains Gwen greatly to think about her mother's suffering. (T.18.2774-75) Because Gwen was so frequently with Juanita during this period, she directly witnessed her mother's steady decline in weight and loss of hair, appetite, and energy. (T.18.2699-2700)

In 1993, Gwen continued her practice of visiting her mother after work. (T.18.2699) One day, Gwen repeatedly knocked on her mother's door and called her but Juanita did not answer. (T.18.2778) When she finally met Gwen at the door, Juanita showed symptoms of a stroke, which was caused by her cancer. (T.14.2117; T.18.2778) Gwen watched as her mother lost control of her body, tossing and turning. (T.18.2778) Her mouth and the right side of her face began to twist. (T.18.2778) Gwen started screaming and called an ambulance; by the time it arrived, Juanita was already unconscious. (T.18.2778-79) On arrival at the hospital, Juanita was completely comatose, stopped breathing, went into cardiac arrest, and coded. (T.14.2117-18) In the emergency room, hospital personnel were able to resuscitate

her, and placed her on a mechanical ventilator for life support. (T.14.2117-19; T.18.2779) When Gwen saw her mother unconscious and on life support, she understood that:

> my mother was dying, she was pretty much dead at that point. So I just knew that this is the person that I had always depended on my entire life, and I knew she was dying, she was gone, she was leaving—she was leaving me. And it was very, very sad.
>
> My mother was the one person that I could always depend on. And knowing that I wasn't going to have her in my life anymore, it was going to be very, very difficult for me.

(T.18.2779)

Documentary evidence confirmed the sworn testimony concerning the closeness of Gwen and Juanita's relationship and the effect of Juanita's demise on Gwen. Emergency room records list Gwen as the "nearest relative," and references to Gwen appear throughout Juanita's medical records. (Ex.JT003: 174-76, 182, 192, 194, 201, 215, 233, 237, 243, 258, 260, 298, 300, 421, 424, 435) The records describe "a caregiver who appears overwhelmed," and include a hand-written notation that the "family needs assistance coping [with the] gravity of [the] situation." (Ex.JT003: 173, 176) Another describes the fruitless hope "that the patient was going to wake up and be able to get out of the hospital." (Ex.JT003: 172) In fact, there was no real "hope that she was going to survive." (T.14.2119-20; T.15.2571) By this point, "her entire right lung was gone," destroyed by the invading cancer growing around her

heart and the major blood vessels. (T.14.2120-21) Accordingly, hospital personnel spoke with Gwen to help her accept the fact that, even though they had resuscitated her mother, Juanita "was, indeed, in the process of dying." (T.18.2119; Ex.JT003:171)

On April 17, 1993, Gwen's condition further deteriorated and she finally passed. (Ex.JT003:172; T.14.2119-20) Juanita's death at 58 was premature by twenty-five years according to the mortality tables entered into evidence. (Ex.JT003:214; T.19.2904) As Ahmad reflected, at the time of trial, Gwen was already four years older than Juanita was when she died, a fact that highlighted not only the young age at which Juanita died, but also the closeness in age of between mother and daughter. (T.18.2700) Gwen describes the period following her mother's death as:

> a very difficult time in my life. I think at one point, I was depressed. I don't know that—the definition of depression, but knowing she wasn't there, I didn't want to do anything. I—it was just a bad time for me because I knew that my mother was no longer with me, and I could not call her, I couldn't see her, we couldn't talk on the phone anymore, it was just—it was very difficult.

(T.18.2785)

Gwen testified that she would pick up the phone to call her mother, only to remember she was not there anymore. (T.18.2785-86) "That's just how much we talked on the phone. And that was a sad time. And it was really sad knowing that I

could not talk to her or see her anymore." (T.18.2786) Ahmad testified that he still observes Gwen missing her own mother to this day and that Gwen often speaks of her lovingly. (T.18.2700) Ahmad recalled seeing his mother sitting alone in a room, long after Juanita had passed, becoming emotional. (T.18.2699-2700) He asked his mother if there was a problem, and Gwen told him that she had been thinking about Juanita. (T.18.2699-2700)

SUMMARY OF ARGUMENT

I. When a party seeks appellate review of an order denying a motion to remit a jury's award of damages, that party bears the burden of showing the trial court abused its discretion. When the award is for noneconomic damages, a highly deferential standard of review applies, owning not only to the trial court's discretion, but also the unique role performed by the jury in determining such damages. While the Fourth District acknowledged that such a deferential standard exists, it failed to apply that standard. That is apparent from three separate aspects of the Fourth District's decision.

First, the court failed to consider the content of the trial court's order denying the motion for remittitur, signaling that it accorded the trial court no deference whatsoever.

Second, the court based its decision primarily on the results in a handful of other cases which had considered awards of noneconomic damages to adult children.

While such comparisons are one method of evaluating a verdict for potential excessiveness, each case must be measured on its own. The sample of four appellate decisions upon which the court relied is far too small to create a hard and fast rule as to what may constitute an excessive award. The court incorrectly presumed that the relationship between a parent and her adult child is always and necessarily less compelling than other family relationships, such as the relationship between spouses, without regard to the evidence in a particular case. In this litigation, where *Engle* class members are relatively older, adult children like Gwen are frequently the primary caregiver for their parents. Class members suffer from highly destructive, "creeping" diseases which often kill slowly, aggravating and extending a survivor's damages. Such circumstances reinforce the need for deference to the trial court and jury's decision-making.

Third, as the trial court stated, the evidence of Gwen's damages was undisputed. She and her mother enjoyed a particularly close relationship, which the Fourth District itself described as "unique." They were in constant contact and spent a great deal of time together. When Juanita became sick with lung cancer, Gwen was her caregiver and companion for an extensive period, and she personally witnessed the ravages of Juanita's disease over time. She was directly affected by Juanita's illness and the loss of her mother left her "devastated," again in the Fourth District's own words. While the court referred to the remittitur statute, it did not identify any

of the factors contained in the statute which would have supported its conclusion that this verdict was excessive. It certainly did not accept Reynolds's belated assertions of passion and prejudice and, in fact, the trial court found there were none.

II. An appellate court cannot lawfully erect a cap on noneconomic damages, but that is precisely what the Fourth District purported to do. Legislating from the bench, the Court simply declared that an adult survivor cannot recover a "multi-million" dollar award of noneconomic damages—*i.e.*, more than $2 million—in a wrongful death case. Erecting such a cap not only exceeded the court's powers, but it also violated the cardinal rule that a court should not declare a verdict excessive merely because it was higher than the amount which the court believes the jury should have awarded.

III. The Fourth District incorrectly reasoned that the compensatory damage award was excessive because Gwen was not financially dependent upon Juanita. The Wrongful Death Act distinguishes between economic and noneconomic losses recoverable by a survivor. The financial dependence of a survivor is relevant to economic losses like "support and services," but it is irrelevant to noneconomic losses, like "pain and suffering" or the loss of "companionship." The Fourth District erred in suggesting that Plaintiff was obligated to prove that Gwen was financially dependent in order to obtain a substantial award of purely noneconomic damages.

ARGUMENT

Standard of Review. Denials of a motion for remittitur are reviewed for an abuse of discretion. *Engle*, 945 So. 2d at 1263, *cited in Schoeff*, 2017 WL 6379591, at *8. There is no abuse of discretion if reasonable people "could differ as to the propriety of the action taken by the trial court." *Baptist Memorial Hospital, Inc. v. Bell*, 384 So. 2d 145, 146 (Fla. 1980). When a verdict is for noneconomic damages, the deference due to such orders is substantial, owing not only to the trial court's superior position having presided over a trial, but also the jury's unique role in determining awards of noneconomic damages:

> The correctness of the jury's verdict is strengthened when the trial judge refuses to grant a new trial or remittitur….
>
> Two factors unite to favor a very restricted review of an order denying a motion for new trial on ground of excessive verdict. The first of these is the deference due the trial judge, who has had the opportunity to observe the witnesses and to consider the evidence in the context of a living trial rather than upon a cold record. The second factor is the deference properly given to the jury's determination of such matters of fact as the weight of the evidence and the quantum of damages.
>
> The appellate court should not disturb a verdict as excessive, where the trial court refused to disturb the amount, unless the verdict is so inordinately large as obviously to exceed the maximum limit of a reasonable range within which the jury may properly operate.

Lassitter v. Int'l Union of Op. Eng., 349 So. 2d 622, 627 (Fla. 1976); *see also Lorillard Tobacco Co. v. Alexander*, 123 So. 3d 67, 71 n.2 (Fla. 3d DCA 2013) (quoting *Smith v. Goodpasture*, 179 So. 2d 240, 240-41 (Fla. 2d DCA 1965) (The

"decision to grant or deny remittitur 'comes to us properly boxed in the wide discretion of the trial court … carefully wrapped in presumption of correctness and securely tied with the strong cord of a jury verdict.'")).

A jury's determination of noneconomic damages is entitled to the highest level of deference because this task is a matter of human judgment that should rest in jurors, not judges. *See Braddock v. Seaboard Air Line R. Co.*, 80 So. 2d 662, 668 (Fla. 1955) (Jurors are particularly suited to resolve issues of intangible damages, and the law has provided "no better yardstick" than the "exercise of their sound judgment of what is fair and right."); *accord*, *Bould v. Touchette*, 349 So. 2d 1181, 1184-85 (Fla. 1977); *see also Citrus Cnty. v. McQuillin*, 840 So. 2d 343, 348 (Fla. 5th DCA 2003) (determining the "dollar value on a human life, measured by the loss and grief of a loved one" must generally be left to the jury, not the courts); *accord*, *Townsend*, 90 So. 3d at 311.

"A party who assails the amount of a verdict as being excessive, has the burden of showing it is unsupported by the evidence, or that the jury was influenced by passion or prejudice." *Bould*, 349 So. 2d at 1184. Indeed, neither the trial nor appellate courts can require a remittitur unless the verdict is "so excessive or so inadequate so as at least to imply an inference that the verdict evinces or carries an implication of passion or prejudice, corruption, partiality, improper influences, or the like." *Lassitter*, 349 So. 2d at 627; *see also Pierard v. Aerospatiale Helicopter*

Corp., 689 So. 2d 1099, 1101 (Fla. 3d DCA 1997) (verdict "must be so excessive as to strike mankind, at first blush, as being, beyond all measure, unreasonable and outrageous, and such as manifestly show the jury to have been actuated by passion, partiality, prejudice, or corruption"). Thus, no abuse of discretion can be found absent something in the record "indicative of the improper influences of passion and prejudice working on the jury." *Nordt v. Wenck*¸ 653 So. 2d 450, 452 (Fla. 3d DCA 1995). Otherwise, the courts become just what this Court has long prohibited—a "seventh juror with veto power." *Laskey v. Smith*, 239 So. 2d 13, 14 (Fla. 1970); *cf. Schoeff*, 2017 WL 6379591, at *10 (when reviewing punitive damage award, trial court "properly deferred to the jury's discretion, declining to sit as a seventh juror").

Denials of a motion for new trial are also reviewed for an abuse of discretion, *Allstate Ins. Co. v. Manasse*, 707 So. 2d 1110, 1111 (Fla. 1998), and subject to the test of reasonableness. *E.g., J.T.A. Factors, Inc. v. Philcon Svcs., Inc.*, 820 So. 2d 367, 372 (Fla. 3d DCA 2002) (citing *Canakaris v. Canakaris*, 382 So. 2d 1197, 1202 (Fla. 1980)).

I. The District Court Erroneously Failed to Apply an Abuse of Discretion Standard of Review.

While the Fourth District stated that it was reviewing the trial court's order for an abuse of discretion, 210 So. 3d at 699, its decision nowhere displays the level of deference this Court requires. Several aspects of the Fourth District's decision

reveal, in fact, that it applied a *de novo* standard of review and simply substituted its own view for that of the jury and the trial judge. This was error.

A. The District Court Ignored the Trial Court's Order.

The Fourth District failed to consider the content of the trial court's order it was reviewing, which included not only a review of the evidence, but the trial court's perspective of why the evidence was more compelling in this case than as reported by the courts in *Webb* and *Putney*. It is difficult to see how a reviewing court can apply the required deferential, abuse of discretion standard, when it does not consider the contents of the trial court's order. *See Sosa v. Safeway Prem. Fin. Co.*, 73 So. 3d 91, 98 (Fla. 2011) ("incorrect" for district court to afford "no deference" to trial court findings when abuse of discretion was "proper appellate standard of review"); *cf. Custer Med. Ctr. v. United Auto Ins. Co.*, 62 So. 3d 1086, 1094 (Fla. 2010) (district court could not quash circuit court order under second-tier certiorari review when it failed to analyze circuit court decision). This trial judge not only presided over the trial, but considered extensive briefing and arguments by the parties at a post-trial hearing. He requested an opportunity to read the authorities relied upon by the parties and asked the parties to formalize their positions in orders submitted for his consideration. It was only after all of that took place that he agreed with the position taken by Plaintiff and signed a detailed order explaining exactly how he exercised his discretion. Because the Fourth District substituted its judgment

for that of the jury and the trial court, without satisfying the standards repeatedly articulated by this Court, *e.g.*, *Laskey*, 239 So. 2d at 14, the Court should quash the Fourth District's decision.

B. The District Court Placed Too Much Weight on Results in a Handful of Other Cases.

The Fourth District placed far too much weight on the results in other cases. While comparing the results in other cases is one method of measuring a verdict's reasonableness, such comparisons can be "fraught with danger because, of course, each case is different and must of necessity be measured in light of the circumstances peculiar to it." *Loftin v. Wilson*, 67 So. 2d 185, 189 (Fla. 1953). As this Court explained in *Laskey*,

> In its movement toward constancy of principle, the law must permit a reasonable latitude for inconstancy of result in the performance of juries. The trial judge's review of that performance is likewise sustainable within a broad range provided that the record or findings of influence outside it support his determination.

239 So. 2d at 14.

These rules are particularly important in *Engle* wrongful death suits, for reasons the Fourth District overlooked. At the time of the Fourth District's decision, the entire universe of Florida appellate decisions evaluating the verdict for an adult child consisted of *Webb*, *Putney*, *Suarez*, and *Ahmed*. There are relatively few reported decisions involving the loss of adult wrongful death survivors. The remedy was added to the Wrongful Death Act in 1990, *see Mizrahi v. North Miami Med.*

Ctr., Ltd., 712 So. 2d 826, 828 (Fla. 3d DCA 1998), and exists today only when there is no surviving spouse. § 768.21(3), Fla. Stat. Many more such cases are in the pipeline at this time because of the *Engle* litigation, where the *Engle* class consists of smokers who developed "creeping diseases" like lung cancer that take decades to develop. It is without question an older population of claimants. When they died from such diseases, their surviving children were more often than not over the age of twenty-five, the age at which a child ceases to be a minor under the Act. § 768.18(2), Fla. Stat. Those adult children can only recover damages if the decedent died without a spouse. § 768.21(3), Fla. Stat.

The *Engle* class consists of smokers whose smoking-related diseases first manifested from 1990 to 1996. *R.J. Reynolds Tobacco Co. v. Ciccone*, 190 So. 3d 1028, 1042 (Fla. 2016). By the time this Court authorized individual class member suits in 2006, a significant number of class members had already lost their spouses to death by natural cause or disease, leaving exclusively adult children to carry the standard of a wrongful death suit once the smokers themselves died. Indeed, because all smokers who could qualify for *Engle* class membership were themselves adults, it has often fallen to adult children to care for them, just as Gwen did for her mother in this case. It should come as no surprise that a jury could make a substantial award to an adult child who fills that role when there is no surviving spouse, or that such awards are comparable to those for surviving spouses. Cancer and other diseases

caused by smoking can kill slowly, and patients who suffer from lung cancer often undergo a particularly difficult course. Diagnosis may result in disabling treatment, followed by the hope and despair of remission and relapse, with a difficult and slow decline into death. And these circumstances often require substantial care from loved ones who have to experience the suffering as they try their best to mitigate it. Compelling differences in a case like this provide just one of the reasons why pre-existing decisions should not operate to set the ceiling as to what one class of claimants can recover. If they did, Reynolds and Philip Morris could control that ceiling indefinitely, by strategically declining to seek appellate review of jury awards near the perceived or established ceiling.

A reasonable jury and trial judge could easily view the evidence in this case differently from the circumstances described in *Ahmed*. There, the injured parent died just twenty-nine days after a train crash. 653 So. 2d at 1055. In *Suarez*, the injured parent appears to have died instantaneously after crashing into a ferry boat, and "did not suffer, in front of his family." 768 So. 2d at 1131. The adult survivors in those cases never had the multi-year, tumultuous experience of a loved one undergoing the ravages of cancer, which Gwen witnessed regularly, personally, and intensely.

The results in *Ahmed* and *Suarez* also predate by several years (sixteen and twenty-one, respectively) the decision in this case, a factor which the Fourth District

previously reasoned also makes such comparisons "of limited value." *See Hyundai Motor Co. v. Ferayorni*, 842 So. 2d 905, 909 (Fla. 4th DCA 2003) (reversing order of remittitur in wrongful death case where trial court "relied heavily" on decisions that were between five and fourteen years old). Reynolds certainly urged the trial court to consider *Ahmed* and *Suarez* (R.14263-64), but given the very different evidence in this case, the trial court reasonably found them inapposite.

Importantly, the Fourth District's decision in this case rests on its presumption that the relationship between an adult child and a parent is always and necessarily less compelling than other family relationships vindicated by the Wrongful Death Act. The Act itself and common sense suggest otherwise. The elements of noneconomic damages are the same for adult and minor children (those under the age of twenty-five). §§ 768.18(2), 768.21(3), Fla. Stat. Moreover, the elements of noneconomic damages for all children are defined in materially similar terms as the elements of noneconomic damages for a spouse. *Compare* § 768.21(2), Fla. Stat. (spouse recovers for the loss of the decedent's companionship and protection and for mental pain and suffering from the date of injury") *with* § 768.21(3), Fla. Stat. (children recover for lost parental companionship, instruction, and guidance and for mental pain and suffering from the date of injury").

In fact, the remedy of an adult child, under the terms of the Act, operates to substitute for the remedy of the surviving spouse, when there is no spouse remaining

(as is often true in this litigation). *See* § 768.21(2), Fla. Stat. (adult child's remedy exists when "there is no surviving spouse"). This is consistent with the policy behind the Act, to "shift the losses" resulting from a wrongful death "from the survivors of the decedent to the wrongdoer." The right of "close relatives" to recover for their own pain and suffering under the Act is the legislatively-created, "reasonable alternative [to] dividing among the survivors" a "decedent's pain and suffering." *Martin v. United Sec. Servs., Inc.*, 314 So. 2d 765, 771 (Fla. 1975).

The Fourth District's decision effectively declares a rule that an adult child's loss is always less compelling than the loss of a spouse or minor child. *See Odom*, 210 So. 3d at 700 ("awards of such magnitude are reserved" for "closer relationships" like that of a spouse) (citing *Townsend*, 90 So. 3d at 312 (affirming $10.8 million in noneconomic damages for surviving spouse)). Indeed, the courts have affirmed multiple eight-figure noneconomic damage awards for spouses in this litigation, and as much as $7.5 million for minor children. *E.g.*, *R.J. Reynolds Tobacco Co. v. Schoeff*, 178 So. 3d 487, 488 (Fla. 4th DCA 2015) ($10.5 million for surviving spouse), *quashed on other grounds*, 2017 WL 6379591; *R.J. Reynolds Tobacco Co. v. Grossman*, 211 So. 3d 221, 228-29 (Fla. 4th DCA 2017) ($7.5 million for minor child). Meanwhile, adult children have recovered as much as $2

million in other Engle-progeny cases (R.14263), with those results undisturbed on appeal.[3]

The Fourth District's declaration about the value of an adult child's relationship is incompatible with the applicable standard of review, and relieves an appellant of the burden to show that a particular award is excessive. But it is also inconsistent with legislative policy to compensate statutory survivors for their actual losses. Contrary to what the court's decision implies, not every marital relationship produces a more compelling loss when one spouse dies. *See Adkins v. Seaboard Coast Line R. Co.*, 351 So. 2d 1088, 1092 (Fla. 3d DCA 1977) (evidence of marital discord, including decedent's intent to divorce his wife, was relevant to surviving spouse's claim for noneconomic damages). The same is true for other relationships. *See Collins v. Fla. Towing Corp.*, 262 So. 2d 459, 461 (Fla. 1st DCA 1972) (in case involving death of a minor child, jury could properly consider fact that father left his wife and child for another woman, when deciding amount of father's noneconomic damages). Likewise, not every case involving an adult child is as compelling as this

[3] Reynolds called the trial court's attention to the results in two cases, *Cheeley* and *Mrozek*, where adult children recovered $1.5 million and $2 million in noneconomic damages, respectively. (R.14263) The final judgments in both cases were affirmed. *R.J. Reynolds Tobacco Co. v. Cheeley*, 186 So. 3d 1038 (Fla. 4th DCA 2016) (per curiam); *Lorillard Tobacco Co. v. Mrozek*, 106 So. 3d 479 (Fla. 1st DCA 2012). Adult surviving children also recovered $2 million each in *R.J. Reynolds Tobacco Co. v. Marotta*, 214 So. 3d 590 (Fla. 2017). *See* 4D14-3867, Appellee's Appendix, Tab 12 at 3 (jury's verdict in *Marotta*).

one. In *Suarez*, the verdicts for the decedent's children were excessive where it was undisputed that their relationships with their father had "deteriorated" because of the father's girlfriend. 768 So. 2d at 1136. There was no such evidence here.

Certainly, the First and Fourth Districts reversed substantial awards for surviving children in *Webb* and *Putney*. For reasons addressed in this brief, Plaintiff does not agree that these cases were correctly decided. Still, the Fourth District failed to consider important distinctions that the trial court drew between them and the facts of this case. (R.14694-95) In *Webb*, the jury's $8 million award was twice what the plaintiff's lawyer suggested. 93 So. 3d at 339. The decedent lived to age 78, and his daughter was already 54 when he died. *Id.* Here, Juanita was 58, and Gwen was 42. As the trial court reasoned, the "difference is obvious." (R.14695) Perhaps most importantly, the First District concluded that an $8 million award was the product of passion and prejudice resulting from evidence of role that the decedent played in helping his daughter to care for her own seriously disabled child. *Id.*

The Fourth District found no such passion and prejudice in this case. What it did instead was interpret *Webb* to make irrelevant all evidence of a decedent and survivor's relationship prior to the time the decedent was injured. *See Odom*, 210 So. 3d at 700 (The "evidence of the parties' relationship before the decedent's illness and death [is] not a proper basis for awarding compensatory damages."). That cannot be correct. In order to measure what a survivor has lost, a jury necessarily must

consider what she had. Paradoxically, the Fourth District acknowledged no less on the very next page of its opinion, when it identified the duration of a marriage as a factor which supports an eight-figure award for a surviving spouse. *Id.* at 701 (citing *Townsend*, 93 So. 3d at 312). While a survivor's noneconomic damages do not begin to accrue until "the time of injury," §§ 768.21(2), (3), Fla. Stat., the content, duration, and quality of the family relationship beforehand is of crucial relevance in measuring what the injury has taken away.

As for *Putney*, the trial court stated that the facts here were "simply different":

> Plaintiff and the Decedent were only sixteen years apart and enjoyed a relationship that was described as that of close sisters, as much as a mother-daughter relationship. Plaintiff lived with her mother, for many of the years of her adult life. Their family was close-knit and they spent considerable time together, apparently unlike the children and parent in *Putney*. Plaintiff and the Decedent were either together every day, or spoke every day, which also suggests a different relationship from those described in *Putney*. Moreover, even when Plaintiff no longer lived by the Decedent (as of 1980), this remained the case and the Decedent was an integral part of Plaintiff's family (with her own children).

(R.14695-96) The Fourth District did not disagree with this assessment. Rather, it just repeated the idea that the parent/adult child relationship cannot, as a matter of law, support a substantial award of noneconomic damages. 210 So. 3d at 700-01.

Even if the results in other cases favored a ceiling on such damages, such a small sample of cases spanning more than twenty-five years would not provide a proper basis for the imposition of such a ceiling. Using the Fourth District's reasoning, if one were to add a single case from outside Florida, the result would be

different because the court would have had to erect a higher ceiling. In *Evans v. Lorillard Tobacco Co.*, 990 N.E.2d 997, 1006 (Mass. 2013), the Massachusetts Supreme Court affirmed a $10 million compensatory damage award to the surviving adult son of a deceased smoker after that award had been remitted from $21 million. A review of the trial court's remittitur order, *Evans v. Lorillard Tobacco Co*., No. 04-2840, 2011 WL 7090720 (Mass Super. Ct. 2011), reveals, like here, an "exceptionally close relationship" between the deceased smoker and her adult son, although he experienced no loss of financial support either. *Id.* at *2. As to the remitted amount of $10 million, the trial judge reasoned, "I am satisfied that the largest reasonable compensatory award for his significant loss is $10 million. *Id.* at *3. The Massachusetts Supreme Court expressly affirmed that finding. 990 N.E.2d at 1006.

The remedy of noneconomic damages recoverable by a survivor in Massachusetts is comparable to that in Florida. A survivor is entitled to "the fair monetary value" of the loss of the decedent's "society, companionship, comfort, guidance, counsel, and advice." Mass. Gen. Laws ch. 229 § 2. When the *Evans* trial court remitted the award to $10 million, it employed the same reasoning that a Florida trial judge would need to apply in determining the appropriate level of a remittitur. In Florida, as in Massachusetts, the remitted amount of damages must be "the highest amount which the jury could properly have awarded." *Lassiter*, 349 So.

2d at 649, *cited in Concept, L.C. v. Gesten*, 662 So. 2d 970, 974 (Fla. 4th DCA 1995) ("This, of course, is exactly the procedure that should be followed in granting a remittitur."); *see also Young v. Becker & Poliakoff, P.A.*, 88 So. 3d 1002, 1007 (Fla. 4th DCA 2012) (affirming remittitur when trial court explained that verdict exceeded the "highest amount" that evidence supported). Of course, the results will be different in every case. Still, adding *Evans* to the mix provides a strong indication that the trial court did not act unreasonably. It further suggests that $6 million did not "exceed the maximum limit of a reasonable range within which the jury may properly operate." *Lassiter*, 349 So. 2d at 627; *see also Spohn Hospital v. Mayer*, 72 S.W.3d 52, 67-68 (Tex. App. 2001) (upholding jury award of $1,900,000 for daughter of 86 year-old man with one-year life expectancy), *rev'd on other grounds*, 104 S.W.3d 878 (Tex. 2003).

C. The Jury's Verdict Was Supported by the Evidence, and Was Not the Product of Passion, Prejudice, or Factors Outside the Record.

As the trial court reasoned, the evidence of Gwen's pain and suffering was "not disputed" in this case. (R.14696) The Fourth District did not say otherwise; to the contrary, as the court stated, "the evidence established that Plaintiff and her mother had a very close and unique relationship." 210 So. 3d at 701. Under the legal rules established by the decisions of this Court, that supported the jury's decision to make a substantial award of noneconomic damages. With "unique" facts and a

"very close" relationship, it was incumbent upon the Fourth District to provide a reason why the verdict was excessive, rather than merely referring to four different cases.

The court did list the factors set forth in the remittitur statute, section 768.74(5), Florida Statutes, which provide guidance to the courts in deciding whether there should be a remittitur. 210 So. 3d at 699.[4] But the court did not identify any such factor as being present. It could not have accepted Reynolds's arguments, made for the first time on appeal, which sought to identify alleged sources or proof of passion and prejudice. § 768.74(5)(a), Fla. Stat. *See, e.g.*, *Aills v. Boemi*, 29 So. 3d 1105, 1109-10 (Fla. 2010) (contentions on appeal must be the same as in the trial court, and grounds not presented to the trial court will not be considered); *see also Blair v. Chrysler Credit Corp.*, 260 So. 2d 236, 236-37 (Fla. 3d DCA 1972) (reversing remittitur where record did not support trial court's finding of passion and prejudice).

[4] As this Court has explained, while the statute provides criteria for the courts to consider, it did not alter "longstanding principles" applicable to the granting of new trials on damages. *Poole v. Veterans Auto Sales & Leasing Co., Inc.*, 668 So. 2d 189, 191 (Fla. 1996); *see also Emmons v. Akers*, 187 So. 3d 900, 902 (Fla. 4th DCA 2016) (remittitur statute "did not alter 'longstanding principles' governing a trial court's deference to a jury's assessment of damages"). Courts must continue to avoid sitting as a "seventh juror" and substituting their judgment for that of the jury. *Id.*

Because the Fourth District failed to meaningfully apply the remittitur statute, the court erred in concluding that the trial court abused its discretion. *Schoeff*, 2017 WL 6379591, at *10-11. The only factors that the Fourth District even arguably considered are those set forth in sections 768.74(5)(d) and (e), which relate to the quantum of evidence in relation the jury's verdict. *See* §§ 768.74(5)(d), Fla. Stat. (whether award "bears a reasonable relation" to injury and damages); (e) (whether award "supported by the evidence" and "adduced in a logical manner by reasonable persons"). The result, however, was a foregone conclusion because the court's opinion suggests that the application of these factors to the case of an adult survivor would always produce the same result "no matter how strong the emotional bond" proven by the survivor. 210 So. 3d at 701. As the trial court noted (R.14695), such a rigid rule actually deprives the trial court of its statutory authority to review a verdict for excessiveness. This Court should conclude that the trial court acted reasonably because the jury's verdict in this case was not "so excessive" to suggest the presence of passion or prejudice; nor was it "so much greater than it should have been" as to "shock the judicial conscience." *Laskey*, 239 So. 2d at 14; *see id.* ("Not every verdict which raises a judicial eyebrow should shock the judicial conscience.").

When considering whether the verdict in *Webb* was the product of passion and prejudice, the First District discussed the fact that the jury awarded twice what the

plaintiff suggested. 93 So. 3d at 339. Plaintiff believes that the First District overstated the significance of this factor in *Webb*. *See Schoeff*, 2017 WL 6379591, at *10 (jury can "properly award damages equal to or in excess of those requested by counsel" and this "single factor is insufficient to render an award excessive" or "unreasonable"); *see also Rudy's Glass Constr. Co. v. Robins*, 427 So. 2d 1051, 1053 (Fla. 3d DCA 1983) (rejecting argument that was motivated by improper considerations when it awarded twice the amount requested by plaintiff).

Still, Plaintiff urges this Court to consider the parties' suggestions in closing arguments. Plaintiff's counsel recommended that the jury award $5 million (T.29.4348), and while the jury awarded $1 million more, that difference hardly suggests the presence of passion and prejudice. *See Philip Morris USA, Inc. v. Cuculino*, 165 So. 3d 36, 39 (Fla. 3d DCA 2015) (standing alone, jury award of twenty-five percent more than figure suggested by plaintiff, did not suggest presence of passion and prejudice); *Schoeff*, 2017 WL 6379591, at *3, 11 (trial court properly exercised discretion in denying motion for remittitur where jury awarded $30 million in punitive damages even though plaintiff requested jury not to award more than $25 million).

In this case, the truth is that the jury had only Plaintiff's suggestion to guide it. While not contesting any of Plaintiff's damage evidence, Reynolds suggested no figure. It merely urged the jury not to make Gwen a "very wealthy person"

(T.29.4353, T.30.4441), without specifically indicating what figure would constitute unjust wealth. Reynolds could not have been clearer that this was the jury's call alone: "We simply leave it to your good judgment and common sense…. We leave that question to you." (T.30.4441) Where Reynolds made the strategic choice to rely on the jury's judgment, it is difficult once again to see how the trial court abused its discretion in denying Reynolds's motion. *See Allred*, 298 So. 2d at 365 (reinstating damage verdict where "opposing counsel ha[d] an equal chance to advance his suggestions, leaving the ultimate decision of the award to the jury."); *City of Tampa v. Companioni*, 74 So. 3d 585, 587 (Fla. 2d DCA 2011) (upholding substantial verdict where defendant declined to guide jury); *Aills v. Boemi*, 41 So. 3d 1022, 1028 n.3 (Fla. 2d DCA 2010) (reasoning it is more difficult to argue that a verdict below plaintiff's request is excessive when defendant fails to suggest figure) (citing *Hawk v. Seaboard Sys. R.R.*, Inc. 547 So. 2d 669, 674 (Fla. 2d DCA 1989) (Altenbernd, J., concurring)).

Judge Altenbernd's guidance in *Hawk* has been followed in certain federal cases. *See Simmons v. Bradshaw*, No. 14-80425-CIV-COHN, 2016 WL 4718410, *17 (S.D. Fla. May 4, 2016) (denying remittitur of $16.7 million in noneconomic damages where defendants failed to suggest a range); *Five for Entertainment S.A. v. Rodriguez*, No. 11-24142-CIV-SEITZ, 2014 WL 12503331, *5 (S.D. Fla. Aug. 15, 2014) ("In determining whether to grant remittitur, a court must also consider the

actions of the defendant."). Moreover, as Judge Posner has explained, when a defendant "goes for broke and asks the jury to award nothing, it has only itself to blame for "having gambled and lost." *Kasper v. St. Mary of Nazareth Hosp.*, 135 F.3d 1170, 1178 (7th Cir.1998) (Posner, C.J.); *see also Ocampo v. Paper Converting Mach. Co.*, No. 02C4054, 2005 WL 2007144, *5 n.12 (N.D. Ill. Aug. 12, 2005) (denying motion to remit a multi-million dollar noneconomic damage award where defendant made "a strategic decision" not to suggest alternative figure).

If there was a risk inherent in the pose Reynolds struck at trial, that risk was created by Reynolds, not by the presence of passion or prejudice. *See Waddell v. Shoney's Inc.*, 664 So. 2d 1134, 1136 (Fla. 5th DCA 1995) (quashing remittitur where defendant "did not suggest an appropriate amount of damages" to the jury); *see also Walls v. Armour Pharm Co.*, 832 F.Supp. 1505, 1521 (M.D. Fla. 1993) ("Despite having heard" plaintiff's suggested figure, defendant's counsel, "for reasons best known to itself, never argued damages, but simply argued that [defendant] should not be found liable."), *reversed in part on other grounds, Christopher v. Cutter Laboratories*, 53 F.3d 1184 (11th Cir.1995). Simply stated, when a party makes the strategic choice to avoid guiding a jury, it should not be

rewarded with an appellate veto of the jury's award. A contrary rule invites gamesmanship and abuses of the right to seek post-trial review of a jury's verdict.[5]

II. The District Court Erroneously Purported to Cap the Noneconomic Damages of Surviving Adult Children.

The courts of this state are powerless to order a remittitur merely because they disagree with the result in a particular case: "In tort cases damages are to be measured by the jury's discretion. The court should never declare a verdict excessive merely because it is above the amount which the court itself considers the jury should have allowed." *Bould*, 349 So. 2d at 1184-85, *quoted in Ashcroft v. Calder Race Course, Inc.*, 492 So. 2d 1309, 1314 (Fla. 1986); *Adams v. Saavedra*, 65 So. 3d 1185, 1189 (Fla. 4th DCA 2011).

The Fourth District failed to adhere to this well-established rule when it declared that adult children can never recover a "multi-million dollar" award for

[5] In this case, Reynolds initially asked the trial court to remit the jury's award "to the $400,000 to $500,000 range." (R.14258) At the hearing before the trial court, Plaintiff suggested that Reynolds was not actually interested in a remittitur, because Plaintiff would not accept a remittitur at that level. (R.15470) Rather, Reynolds was trying to position itself for a new trial no matter how the trial court ruled on the remittitur because (1) Reynolds would reject any figure that Plaintiff was likely to accept, and (2) two recent decisions of the district courts had held that a party requesting a remittitur can obtain a new trial, even when a remittitur is ordered. (R.15469-74) When the trial court asked Reynolds "whether or not a remittitur in this case is tantamount to a new trial," Reynolds raised the figure it would accept to $750,000 (R.15491-92), a figure it already knew that Plaintiff would not accept. (R.15470; 15494)

noneconomic damages. 210 So. 3d at 701. Legislating from the bench, the court effectively capped the recovery for one class of wrongful death claimants at less than $2 million,[6] irrespective of the evidence actually presented to a jury. Doing so cannot be reconciled with the court's obligation to apply an abuse of discretion standard of review. Nor is it compatible with the trial court's obligation to review each verdict independently. *See* § 768.74(6), Fla. Stat. (vesting "the trial courts of this state with the discretionary authority" to review jury awards for excessiveness or inadequacy).

But the Fourth District's new cap was inappropriate for two other reasons as well. First, as this Court has recognized, our jury system must tolerate some inconsistency in jury awards. *See Laskey*, 239 So. 2d at 14 ("[T]he law must permit a reasonable latitude for inconstancy of result in the performance of juries. The trial judge's review of that performance is likewise sustainable within a broad range…."); *see also Malpass v. Highlands Ins. Co.*, 387 So. 2d 1042, 1043-44 (Fla. 3d DCA 1980) (recognizing that different juries may be "less or more generous" on the same facts).

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[6] In common usage, "multi-million" means "involving two or more million." Merriam-Webster, Learner's Dictionary, "multimillion," *available at*, www.learnersdictionary.com/definition/multimillion (viewed December 26, 2017); *see also* American Heritage Dictionary of the English Language, "multimillionaire" (person with "at least two million dollars"), *available at*, www.ahdictionary.com/word/search.html?q=multimillionaire (viewed December 26, 2017).

Second, policy judgments about the kinds of relationships that merit compensation are for the Legislature in the first instance. If a cap can be imposed without violating a claimant's access to courts or the right to a jury trial, it is likewise up to the Legislature to enact such a cap. *See University of Miami v. Echarte*, 618 So. 2d 189, 196 (Fla. 1993) (Legislature "has the final word on declarations on public policy" when it comes to restrictions on noneconomic damages). The courts are simply powerless to declare an arbitrary limit on the right of one class of individuals to recover money damages.

III. The Right to Recover Noneconomic Damages under the Wrongful Death Act Does Not Depend on Proof that a Survivor Is Economically Dependent on a Decedent.

The Fourth District's decision states that a wrongful death survivor's financial independence is a factor which militates against a substantial award of noneconomic damages. The court cited *Suarez* to support this idea, where the Third District did identify a survivor's financial independence as partial justification for the remittitur it required. *See Odom*, 210 So. 3d at 701 (citing *Suarez*, 768 So. 2d at 1136 (verdict excessive because, *inter alia*, children were not "financially dependent" and resided apart from decedent)). The Third District cited no authority for the idea that a survivor's economic loss is part of noneconomic damages. Still, the Fourth District repeated this factor in explaining why it was reversing the trial court's order: "Plaintiff was not living with Ms. Thurston and was not financially or otherwise

dependent on her." Rather, she had her own children and a long-time partner. *Odom*, 210 So. 3d at 701. Plaintiff accepts the idea that a survivor's living arrangement—*e.g.*, whether she lives near or with the decedent—is a factor to consider in measuring her noneconomic damages. Notably, the Fourth District failed to acknowledge the unrebutted evidence referenced by the trial court that Gwen remained dependent on her mother in other ways. (*E.g.*, T.18.2706-07; 18.2779) There is no legal basis, however, to require that a survivor have an economic loss in order to prove her noneconomic losses.

The Wrongful Death Act draws a clear distinction between a survivor's right to recover economic damages, defined as "support and services," and the right to recover noneconomic damages, which in the case of a child consists of things like lost companionship and pain and suffering. §§ 768.21(1), (3), Fla. Stat. The Act defines "support" to include "contributions in kind as well as money." § 768.21(3), Fla. Stat. It defines "services" to be those "regularly performed by the decedent" that become a "necessary expense" to a survivor. § 768.21(4), Fla. Stat. "Services" are recognized to "vary according to the identity of the decedent and survivor." *Id.* But they are determined in part by the financial circumstances of the decedent, whose income, property, or wealth must be counted on to provide the support and services which may be lost upon her death. *See* § 768.21(1), Fla. Stat. ("In evaluating loss of support and services, the survivor's relationship to the decedent, the amount of the

decedent's probable net income available for distribution to the particular survivor, and the replacement value of the decedent's services to the survivor may be considered."). Basic principles of statutory construction lead to the conclusion that, while financial dependence is relevant to support and services, it is irrelevant to the amount of a survivor's pain and suffering. *E.g.*, *Leisure Resorts, Inc. v. Frank J. Rooney, Inc.*, 654 So. 2d 911, 914 (Fla. 1995) (where term appears in one part of a statute, but not another, Court "will not imply it where it has been excluded"). A contrary rule would elevate the value of pain and suffering of survivors in relatively wealthier families over the value of such damages in relatively less well-off families.

It is illogical to suggest that a wrongful death survivor's noneconomic damages are excessive because she did not have (or seek) economic damages. To the extent that the Fourth District imposed a requirement of financial dependence to claim noneconomic damages, this was error.

CONCLUSION

This Court should quash the decision of the Fourth District, and remand with instructions to affirm the trial court's judgment.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been sent by electronic mail to Clerk of Court and to all counsel on attached list this 26th day of December, 2017.

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CERTIFICATE OF COMPLIANCE

I CERTIFY that the foregoing is in Times New Roman 14-point font.

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