Filing # 56911413 E-Filed 05/25/2017 10:15:22 AM

RECEIVED, 05/25/2017 10:18:29 AM, Clerk, Supreme Court

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 ON JURISDICTION 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
Suite 200
Washington, DC 20006
Telephone: (202) 737-0500
Facsimile: (202) 626-3737

Counsel for Respondent R.J. Reynolds Tobacco Company

<u>**TABLE OF CONTENTS**</u>

STATEMENT OF THE CASE AND OF THE FACTS 1

SUMMARY OF THE ARGUMENT 3

ARGUMENT 4

CONCLUSION 8

CERTIFICATE OF SERVICE 10

CERTIFICATE OF COMPLIANCE 11

TABLE OF AUTHORITIES

Page(s)

Cases

Aills v. Boemi,
41 So. 3d 1022 (Fla. 2d DCA 2010) 5

Bould v. Touchette,
349 So. 2d 1181 (Fla. 1977) 5

Citrus County v. McQuillin,
840 So. 2d 343 (Fla. 5th DCA 2003) 5

Fla. Dairies Co. v. Rogers,
161 So. 85 (1935) 5

The Florida Star v. B.J.F.,
530 So. 2d 286 (Fla. 1988) 5

Gresham v. Courson,
177 So. 2d 33 (Fla. 1st DCA 1965) 5

Jenkins v. State,
385 So. 2d 1356 (Fla. 1980) 4

Lassiter v. International Union of Operating Engineers,
349 So. 2d 622 (Fla. 1976) 4

Lorillard Tobacco Co. v. Alexander,
123 So. 3d 67 (Fla. 3d DCA 2013) 5

MBL Life Assurance Corp. v. Suarez,
768 So. 2d 1129 (Fla. 3d DCA 2000) 6

Metropolitan Dade County v. Dillon,
305 So. 2d 36 (Fla. 3d DCA 1974) 5

Pendarvis v. Pfeifer,
182 So. 307 (Fla. 1938) 5

Philip Morris USA Inc. v. Cohen,
102 So. 3d 11 (Fla. 4th DCA 2012) 5, 8

Philip Morris USA Inc. v. Putney,
199 So. 3d 465 (Fla. 4th DCA 2016)..5, 6

R.J. Reynolds Tobacco Co. v. Webb,
93 So. 3d 331 (Fla. 1st DCA 2012) 6

Reaves v. State,
485 So. 2d 829 (Fla. 1986) 4

STATEMENT OF THE CASE AND OF THE FACTS

Petitioner has identified no decision that directly and expressly conflicts with the opinion below. The Fourth District applied the same standards and methods that are uniformly employed by all Florida courts in addressing remittitur motions. The opinion below shows that 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. The Court should reject petitioner's effort to create a conflict where none exists.

1. Although petitioner was an independent 42-year old adult when her mother died, the jury awarded her $6 million in non-economic consortium damages for the loss of her mother. Op. 6. In its post-trial motions, respondent asked the trial court to remit the award or grant a new trial on damages because the award was unsupported by the evidence and out of line with the philosophy and trend of awards affirmed in comparable cases. Op. 3. The trial court denied the motion by signing an order drafted entirely by petitioner's counsel.

2. On appeal, the Fourth District reviewed the trial court's ruling "under an abuse of discretion standard." Op. 3 (quotation marks omitted). The Fourth District first outlined the relevant considerations under Florida's remittitur statute, Op. 3, including "[w]hether the amount awarded bears a reasonable relation to the amount of damages proved and the injury suffered," *id*. (quoting § 768.74(5)(d)).

In doing so, the Fourth District emphasized the deference afforded to juries in assessing non-economic 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." Op. 4. The Fourth District therefore 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.*

Applying these principles, the Fourth District noted that courts "may consider the philosophy and general trend of decisions in comparable cases," Op. 4, a well-established method of assessing whether an award is excessive. The court thus carefully examined the facts of other appellate decisions in cases involving an adult child suing for the death of a parent. Op. 4-6. Its review of these cases showed that even when an adult child had a close relationship to 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. Op. 6.

Having reviewed the comparable cases, the Fourth District then addressed the relevant facts of this case. While 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. Op. 6. Rather, petitioner "was married with two children of her own," and her mother was living with a long-time partner. *Id*. Comparing these facts to "the philosophy and general trend" in similar cases, the Fourth District found that the $6 million award was excessive and, accordingly, that "the trial court abused its discretion when it denied [petitioner's] motion." *Id.*

SUMMARY OF THE ARGUMENT

This Court lacks conflict jurisdiction because the Fourth District's opinion is entirely consistent with all Florida decisions reviewing remittitur rulings. Far from announcing a conflicting rule of law, the court explained that (a) trial judges enjoy discretion in deciding remittitur motions, (b) juries are afforded great deference in determining non-economic damages, and (c) a jury award can be set aside only if it exceeds the maximum limit of a reasonable range. To determine whether the $6 million award here exceeded a reasonable range, 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 similar cases, a method uniformly employed by all Florida courts. The Fourth District's application of that method surely presents no conflict: Florida courts have consistently found awards of this magnitude to be excessive in wrongful death cases involving an independent adult child seeking damages for the loss of a parent. The Court should decline jurisdiction.

ARGUMENT

Petitioner fails to show any "conflict of decisions," *Jenkins v. State*, 385 So. 2d 1356, 1359 (Fla. 1980), much less a conflict that is "express and direct" and appears "within the four corners" of the Fourth District's opinion, *Reaves v. State*, 485 So. 2d 829, 830 (Fla. 1986). Instead, her invocation of the Court's conflict jurisdiction is based on her assertion that the Fourth District did not actually apply the abuse of discretion standard its opinion said it was applying. Pet. 3, 4. But a baseless accusation that the unanimous panel below was being disingenuous when it wrote that it was reviewing the trial court's ruling "under an abuse of discretion standard," Op. 3, and when it concluded that "the trial court abused its discretion," Op. 6, cannot manufacture a conflict where none exists. The reality is that the Fourth District applied the same standard and engaged in the same analysis uniformly used by all Florida courts, including in the decisions petitioner cites as alleged conflict cases.

1. Quoting decisions from its sister districts, the Fourth District noted both the discretion that trial courts enjoy in deciding a remittitur motion, Op. 3, 6, and the "great deference" afforded to juries in assessing non-economic damages, Op. 4. The Fourth District also held that an award is excessive only "when it exceeds the maximum limit of a reasonable range," Op. 4, a standard that comes directly from this Court's decisions in *Lassiter 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), which petitioner cites as conflict cases, *see* Pet. 1, 3, 5, 6. The Fourth District's opinion cannot possibly establish "a point of law contrary to a decision of this Court or another district court," *The Florida Star v. B.J.F.*, 530 So. 2d 286, 289 (Fla. 1988), when it reiterates the very principles stated in the alleged conflict cases.

2. Petitioner also cannot credibly claim that the Fourth District's application of these principles conflicts with any other decision. To determine whether the $6 million award "exceeds the maximum limit of a reasonable range," the Fourth District compared the facts of this case to "the philosophy and general trend of decisions" in similar cases, Op. 4, a method this Court has employed since 1935, *see, e.g., Fla. Dairies Co. v. Rogers*, 161 So. 85, 88 (1935); *Pendarvis v. Pfeifer,* 182 So. 307, 313 (Fla. 1938), and that all district courts have applied since then, *see, e.g.*, *Gresham v. Courson*, 177 So. 2d 33, 39-40 (Fla. 1st DCA 1965); *Aills v. Boemi*, 41 So. 3d 1022, 1028 (Fla. 2d DCA 2010); *Metropolitan Dade County v. Dillon,* 305 So. 2d 36, 40-41 (Fla. 3d DCA 1974); *Lorillard Tobacco Co. v. Alexander*, 123 So. 3d 67, 78 (Fla. 3d DCA 2013); *Philip Morris USA Inc. v. Cohen*, 102 So. 3d 11, 14 (Fla. 4th DCA 2012); *Philip Morris USA Inc. v. Putney*, 199 So. 3d 465, 470 (Fla. 4th DCA 2016); *Citrus County v. McQuillin*, 840 So. 2d 343, 347 & n.2 (Fla. 5th DCA 2003). As the Second District explained in *Aills*

(another case petitioner cites as setting forth the correct standard, Pet. 8), the "comparison of verdicts is a recognized method of assessing whether a jury verdict is excessive or inadequate." 41 So. 2d at 1028. More specifically, it is a common way of evaluating "'whether the amount awarded bears a reasonable relation to the amount of damages proved and the injury suffered,'" *id*. (quoting § 768.74(5)(d)), one of the considerations now codified in Florida's remittitur statute to determine excessiveness.

Nor is there any conflict in the Fourth District's determination of "the philosophy and general trend" of the relevant decisions and its application to the facts of this case. The Fourth District carefully reviewed all Florida appellate decisions involving an adult child seeking damages for the loss of a parent. Op. 4-6. The court's review showed that the Florida courts have consistently found multi-million dollar awards 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 was excessive), even where the adult child had a close relationship with the parent, *see R.J. Reynolds Tobacco Co. v. Webb*, 93 So. 3d 331, 337-38 (Fla. 1st DCA 2012) ($8 million excessive), or was devastated by the parent's suffering and death, *see Putney*, 199 So. 3d at 470 ($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] the judicial eyebrow" but was not excessive. 653 So. 2d 1055, 1058-60 (Fla. 4th DCA 1995).

Given that the $6 million award here was an order of magnitude greater than the highest award ever affirmed in a case involving an adult child and that Florida appellate 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 refused to enter a remittitur. Op. 6. This was not a conclusion reached without affording appropriate deference. Far from acting as "a seventh juror" (Pet. 7) or "substituting its own judgment for that of the trial court" (Pet. 1), 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. Op. 6. Petitioner has no basis for her assertion that the Fourth District failed to exercise the required "caution" in its comparison (Pet. 8); nor has she identified any case that conflicts with the Fourth District's application of the relevant principles or its result.

3. Unable to show conflict, petitioner instead accuses the Fourth District of "[l]egislating from the bench" by announcing "a cap" on the recovery of non-

economic damages for adult children in wrongful death cases. Pet. 1, 4, 7-8. The Fourth District did no such thing. To the contrary, the opinion below emphasized that (a) juries are afforded "great deference" in determining non-economic 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." Op. 4 (emphasis added). These unequivocal statements—which petitioner does not and cannot challenge—foreclose any notion of a cap.

The court's holding is only that this $6 million award was excessive "in light of the facts and circumstances which were presented to the trier of fact," § 768.74(1); Op. 3, where 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." Op. 6. That holding is grounded in settled law that "an award of non-economic damages must bear a reasonable relation to the philosophy and general trend of prior decisions in such cases." *Cohen*, 102 So. 3d at 18. Requiring a "reasonable relation" to similar cases does not impose a cap or purport to foreclose a higher award in a case with different facts.

CONCLUSION

Because there is no conflict, this Court should deny the petition.

Respectfully submitted,

/s/ *Val Leppert*
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 S. Bucholtz
Admitted *Pro hac vice*
KING & SPALDING LLP
1700 Pennsylvania Avenue, NW
Suite 200
Washington, DC 20006
Telephone: (202) 737-0500
Facsimile: (202) 626-3737
jbucholtz@kslaw.com
KSTobacco@kslaw.com

Counsel for Respondent
R.J. Reynolds Tobacco Company

CERTIFICATE OF SERVICE

I certify that on 25th day of May, 2017 this brief was e-filed with the Court and a copy was 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 HEREBY 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