IN THE SUPREME COURT OF FLORIDA

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

Petitioner,

v.

R.J. REYNOLDS TOBACCO COMPANY,

Respondent.

Case No. SC17-563

L.T. Nos. 4D14-3867
50-2008-CA-038863-AJ

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

PETITIONER'S BRIEF ON JURISDICTION

Rosalyn Sia Baker-Barnes
Mariano Garcia
T. Hardee Bass
SEARCY DENNEY SCAROLA BARNHART & SHIPLEY, P.A.
2139 Palm Beach Lakes Blvd.
West Palm Beach, FL 33409
(561) 686-6300

Daniel R. Hoffman
David J. Sales
DAVID J. SALES, P.A.
1001 N. U.S. Highway One
Suite 200
Jupiter, FL 33477
(561) 744-0888

Counsel for Petitioner

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STATEMENT OF THE CASE AND OF THE FACTS

Gwendolyn Odom invokes this Court's conflict jurisdiction to determine whether a trial court's denial of a motion for remittitur is (a) committed to the discretion of a trial court, or (b) to be resolved by a district court of appeal imposing a cap on damages for a certain category of wrongful death survivors, no matter what the evidence shows about the relationship between a survivor and the decedent. This Court requires the district courts to review such rulings for an abuse of discretion, *e.g.*, *Lassitter v. Int'l Union of Operating Eng'rs*, 349 So. 2d 622, 627 (Fla. 1976), requires deference to jury awards of noneconomic damages, *e.g.*, *Braddock v. Seaboard Air Line R. Co.*, 80 So. 2d 662, 668 (Fla. 1955), and places the burden on an appellant to show that an award is unsupportable or the product of passion or prejudice, *e.g.*, *Bould v. Touchette*, 349 So. 2d 1181, 1184-85 (Fla. 1977). In this case, the district court performed a *de novo* review, substituted its own judgment, and established a noneconomic damage cap for such survivors.

Odom brought a wrongful death action against R.J. Reynolds Tobacco Company, with claims for strict liability, negligence, fraud by concealment, and conspiracy to commit fraud by concealment. (A.2) The jury found for Ms. Odom, awarding her $6 million in compensatory (noneconomic) damages. (A.2) In a post-trial motion, Reynolds moved to remit the damage award. The trial court denied the motion for remittitur. (A.3) On appeal, the district court held that the compensatory

damage award was excessive. (A.6) The court quoted the remittitur statute, section 768.74, Florida Statutes, and identified the factors which guide a trial court in deciding a motion for remittitur. (A.3) The district court did not, however, state that the trial court failed to properly apply those factors; nor did the district court indicate that any such factor (*e.g.*, passion or prejudice, Fla. Stat. § 768.74(5)(a)) played a role in the jury's verdict.

Instead, the district court simply compared results in other decisions where the district courts of appeal had either rejected or approved wrongful death recoveries for adult children. (A.4-6) The court acknowledged the "evidence established" that Ms. Odom and her mother "had a very close and unique relationship," and that she was "devastated by her [mother's] decline and subsequent death." (A.6) Still, according to the Fourth District, two decisions that required remittitur of awards of $8 and $5 million for adult surviving children

> 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 a 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.

(A.6 (citing *R.J. Reynolds Tobacco Co. v. Webb*, 93 So. 3d 331 (Fla. 1st DCA 2012); *Philip Morris USA Inc. v. Putney*, 199 So. 3d 465 (Fla. 4th DCA 2016)) The court reasoned that the relationship between an independent adult child and a parent "is

simply not the type of relationship which can justify" a "multi-million dollar" award. The court said this is so "no matter how strong" the evidence may be. (A.6) "Accordingly," the court held "that the trial court abused its discretion when it denied RJR's motion for remittitur or a new trial." (A.6)

SUMMARY OF ARGUMENT

This Court has conflict jurisdiction because the district court misapplied this Court's decisions holding that an appellate court may reverse the denial of a remittitur only where jurors and a trial judge act unreasonably. While the district court acknowledged the abuse of discretion standard, it actually conducted a *de novo* review, establishing a bright-line rule which caps the recovery of noneconomic damages for one class of claimants to something less than a "multi-million dollar" amount. The district court's bright-line rule derived exclusively from comparisons with other cases, and the view that an adult survivor child must remain dependent on a decedent to obtain a "multi-million dollar" award for noneconomic damages. The decision not only misapplied the correct standard of review, but also misapplied precedent requiring deference to jury awards of noneconomic damages. *Lassitter*, 349 So. 2d at 627; *Braddock*, 80 So. 2d at 668; *Bould*, 349 So. 2d 1185.

ARGUMENT

THE COURT SHOULD RESOLVE CONFLICTS REGARDING REVIEW OF ORDERS DENYING REMITTITUR MOTIONS.

Contrary to precedent of this Court, the review conducted by the district court afforded no deference to the trial court's ruling, or the jury's award, and fashioned an unyielding, bright-line rule. The district court's reasoning directly conflicts with decisions of this Court and other district courts of appeal requiring deference to trial courts in rulings on motions for remittitur, and deference to juries in awarding noneconomic damages. Legislating from the bench, the district court effectively capped the recovery for one class of wrongful death claimants at less than $2 million,[1] irrespective of the evidence actually presented to a jury.

The Fourth District's decision states that it was reviewing the trial court's order for an abuse of discretion. (A.3) This Court has conflict jurisdiction under article V, section 3(b)(3) because the opinion, in fact, showed no deference to the trial court's discretion. *Compare Sosa v. Safeway Prem. Fin. Co.*, 73 So. 3d 91, 97-98, 102-03 (Fla. 2011) (exercising conflict review for misapplication of abuse of discretion standard where district court had effectively conducted *de novo* review)

[1]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 March 27, 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 March 27, 2017).

with Safeway Prem. Fin. Co. v. Sosa, 15 So. 3d 8, 15 (Fla. 3d DCA 2009) (purporting to review decision for abuse of discretion); *see also Custer Med. Ctr. v. United Auto. Ins. Co.*, 62 So. 3d 1086, 1088-94 (Fla. 2010) (exercising conflict jurisdiction where district court correctly articulated but, in reality, misapplied the proper standard of review to lower court decision).

Not only does that abuse of discretion standard apply to orders denying a remittitur, but this Court has articulated a doubly-deferential standard:

> 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, 349 So. 2d at 622. The burden on the appellant is substantial, as explained by other district courts:

> [A] trial judge's 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."

Lorillard Tobacco Co. v. Alexander, 123 So. 3d 67, 71 n. 1 (Fla. 3d DCA 2013) (quoting *Smith v. Goodpasture*, 179 So. 2d 240, 240-41 (Fla. 2d DCA 1965)). Thus, when a trial judge sits through a trial to view the impact of the defendant's conduct on the plaintiff, assesses the credibility of the witnesses and concludes that the jury's verdict, however high, is not subject to remittitur, an appellate court may reverse only upon a reasoned determination that no reasonable person could reach that conclusion. *Rety v. Green*, 546 So. 2d 410, 418-19 (Fla. 3d DCA 1989).

And that is just the first level of deference. Under the second level, a jury's determination of noneconomic damages is entitled to the highest level of deference because this task is peculiarly a matter of human judgment that should rest in jurors, not judges. *See Braddock*, 80 So. 2d at 668 (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*, 349 So. 2d at 1184-85; *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*, *R.J. Reynolds Tobacco Co. v. Townsend*, 90 So. 3d 307, 311 (Fla. 1st DCA 2012).

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") (citation omitted). 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).

But the district court's decision did just that by failing to apply either kind of deference, by making no inquiry into whether it was obvious that the six jurors and the trial court acted unreasonably, and by reversing without finding the jury was swayed by passion or prejudice, or even attempting to apply such factors. The presence of a conflict is further apparent because the district court (a) acknowledged that the "evidence established" a "very close and unique relationship," leaving Ms. Odom "devastated," and (b) articulated a bright-line rule that caps the noneconomic damages of independent, adult survivors in wrongful death cases to something less than a "multi-million dollar" award. The district court made it clear that this limit holds "no matter how strong" the relationship between the survivor and decedent.

Such a rule terminates the abuse of discretion standard, eliminates the deference owed to a jury's decision, and shifts the burden to an appellee to justify jury and trial court actions.

This kind of legislation from the bench is not appropriate because 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). It also raises serious concerns about impairment of the constitutional right to a jury trial. *E.g.*, *Smith v. Dep't. of Ins.*, 507 So. 2d 1080, 1088-89 (Fla. 1987) (arbitrary cap on damages may deny claimant constitutional redress of injury and right to jury trial). The district court's near-complete reliance on two other tobacco cases with adult survivors (A.6) also conflicts with the Second District's recognition that such comparisons may be relevant, but must be made "with caution." *Aills v. Boemi*, 41 So. 3d 1022, 1028 (Fla. 2d DCA 2010) (noting that "no injury is exactly like another and different individuals may be adversely affected to a greater or lesser degree by similar injuries") (citing *Loftin v. Wilson*, 67 So. 2d 185, 189 (Fla. 1953)).

Review is also warranted because the district court's decision applies without limitation to all wrongful death cases involving independent adult children, and fails to recognize the unique role that they often fulfill in caring for parents who experience catastrophic illness or injury resulting in death. In 1990, the legislature amended the Wrongful Death Act to add a right of recovery for adult children (those over the age of 25). *Mizrahi v. North Miami Med. Ctr.,* 712 So. 2d 826, 828 (Fla. 3d DCA 1998). It exists today only when there is no surviving spouse. Fla. Stat. § 768.21(3). The purpose of wrongful death remedies, of course, is to shift the loss of survivors, including noneconomic damages, "to the wrongdoer." Fla. Stat. § 768.17.

The district court's decision presumes that certain survivors—independent adult children—always occupy a different footing from other statutory survivors, when in fact their losses may be more compelling (or indeed less so). Certainly, in cases where a person is older and languishes with a chronic condition caused by tortious conduct, adult children are often left alone to care for that person. In *Engle*-progeny litigation, where death often results from diseases like lung cancer and COPD, class members frequently experience extended periods of tremendous suffering and incapacity. The Wrongful Death Act recognizes that a survivor who experiences her own pain and suffering as a result can recover for such elements because they are measured from the decedent's "date of injury," regardless of whether the survivor is a spouse, a child, or a parent. Fla. Stat. § 768.21(2), (3), (4).

Still, separate and apart from the Act's damage remedies, the law recognizes that there is a high degree of variability when it comes to families, relationships, and the noneconomic losses which flow from illness or injury and death. A survivor with a "unique and very close" relationship, "devastated" by her loss, should have her loss measured by a jury, subject to discretionary review by a trial court, and proper review by an appellate court. This issue goes to the very core of the fundamental right to a jury trial, a right particularly deserving of protection and vindication by this Court. This Court has previously warned appellate courts "against the temptation to substitute [their] 'verdict' for that of the jury," *Griffis v. Hill*, 230 So. 2d 143, 145 (Fla. 1969), and protection from this temptation is particularly warranted in this case.

Finally, the conflicts discussed merit resolution because this Court recognizes the importance of ensuring the correct standard is applied on recurring issues. *See e.g.*, *Van v. Schmidt*, 122 So. 3d 243, (Fla. 2013) (new trial orders); *Sosa*, 73 So. 3d at 97 (class certification orders); *Custer Med. Ctr.*, 62 So. 3d at 1092 (second-tier certiorari review). Jury verdicts are frequently tested in the appellate courts on review of remittitur orders in all kinds of cases, and the Court should correct an obvious departure from the standards governing that review.

CONCLUSION

For all of these reasons, this Court should accept review.

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 31st day of March, 2017.

/s/ David J. Sales /s/
David J. Sales
Florida Bar No: 794732
DAVID J. SALES, P.A.
1001 U. S. Highway One, Suite 200
Jupiter, FL 33477
Telephone: 561-744-0888
Facsimile: 561-0880
Counsel for Petitioner
david@salesappeals.com

CERTIFICATE OF COMPLIANCE

I CERTIFY that the foregoing is in Times New Roman 14-point font and complies with the font requirements of Fla. R. App. P. 9.210(a)(2).

/s/ David J. Sales /s/
Fla. Bar No. 794732

ATTORNEY LIST
Gwendolyn E. Odom, etc. v. R.J. Reynolds Tobacco Company, et al.

Attorney for Plaintiffs

Rosalyn Sia Baker-Barnes
T. Hardee Bass
Mariano Garcia
SEARCY DENNEY SCAROLA
BARNHART & SHIPLEY, P.A.
2139 Palm Beach Lakes Blvd.
West Palm Beach, FL 33409
tobacco@searcylaw.com

Attorney for R.J. Reynolds

Jeffrey L. Furr
KING & SPALDING LLP
227 W. Trade Street, Suite 600
Charlotte, NC 28202
jfurr@kslaw.com

William L. Durham, II
Jason E. Keehfus
Chad A. Peterson
Philip R. Green
Kathryn S. Lehman
Val Leppert
KING & SPALDING LLP
1180 Peachtree St., N.E.
Atlanta, GA 30309
bdurham@kslaw.com
jkeehfus@kslaw.com
cpeterson@kslaw.com
pgreen@kslaw.com
klehman@kslaw.com
vleppert@kslaw.com
vleppert@kslaw.com
KSTobacco@ksslaw.com

Jeffrey S. Bucholtz
KING & SPALDING LLP
1700 Pennsylvania Ave., NW
Suite 200
Washington, DC 20006
jbucholtz@kslaw.com

Stephanie E. Parker, Esquire
John F. Yarber
John M. Walker
JONES DAY
1420 Peachtree Street, N.E., Suite 800
Atlanta, GA 30309
separker@jonesday.com
jyarber@jonesday.com
jmwalker@jonesday.com

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

Eric L. Lundt
Robert C. Weill
SEDGWICL LLP
One Biscayne Tower, Suite 1500
Miami, FL 33131
eric.lundt@sedgwicklaw.com
robert.weill@sedgwicklaw.com
david.saltares@sedgwicklaw.com

APPENDIX (“A”)

DECISION OF THE DISTRICT COURT

DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT

R.J. REYNOLDS TOBACCO COMPANY,
Appellant,

v.

GWENDOLYN E. ODOM, Personal Representative of the **ESTATE OF JUANITA THURSTON,**
Appellee.

No. 4D14-3867

[November 30, 2016]

Appeal and cross-appeal from the Circuit Court for the Fifteenth Judicial Circuit, Palm Beach County; Timothy McCarthy, Judge; L.T. Case No. 502008CA038863XXXXMBAJ.

Jeffrey S. Bucholtz, Val Leppert, William L. Durham II, Philip R. Green and Jeffrey L. Furr of King & Spalding LLP, Washington, DC, Atlanta, GA, and Charlotte, NC, for appellant.

David J. Sales of David J. Sales, P.A., Jupiter, and Rosalyn Sia Baker-Barnes, Mariano Garcia and T. Hardee Bass of Searcy Denney Scarola Barnhart & Shipley, P.A., West Palm Beach, for appellee.

DAMOORGIAN, J.

R.J. Reynolds Tobacco Company ("RJR") appeals the final judgment entered in favor of Gwendolyn Odom as Representative of the estate of her deceased mother, Juanita Thurston ("Plaintiff"). RJR argues for reversal on multiple grounds. First, it argues that the court erred in denying its motion to remit the jury's compensatory damages award. Second, it maintains that the court improperly denied its motion for directed verdict on Plaintiff's concealment and conspiracy claims because Plaintiff failed to prove that her mother relied on a false or misleading statement made by RJR after May 5, 1992. Third, it asserts that certain comments made by Plaintiff's counsel during closing of the punitive phase necessitate a new trial. Fourth, it argues that the court's application of the *Engle*[1] findings violated its due process rights. Plaintiff cross-appeals, arguing that in the

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

event of a new trial: 1) the trial court provided an erroneous instruction on the applicable statute of repose, and 2) improperly ruled that Plaintiff was not permitted to pursue punitive damages for her product defect and negligence claims.

We affirm on the reliance and due process issues without further comment. *See Hess v. Philip Morris USA, Inc.*, 175 So. 3d 687, 698 (Fla. 2015); *Philip Morris USA, Inc. v. Douglas*, 110 So. 3d 419, 430–35 (Fla. 2013). As discussed further below, we also affirm on the closing comments issue. However, we reverse and remand for remittitur of the jury's damage awards. In the event that the parties reject the court's remittitur and a new trial on damages results, we grant Plaintiff the relief requested in her second point on cross-appeal.

Background

Plaintiff filed suit against RJR asserting membership in the *Engle* class because her mother died from lung cancer "caused by her addiction to cigarettes." In her suit, Plaintiff alleged causes of action for strict liability, negligence, fraud by concealment, and conspiracy to commit fraud by concealment. The case proceeded to trial in two phases. In the first phase, the jury was asked to: 1) determine whether Ms. Thurston was a member of the *Engle* class; 2) if so, whether RJR's conduct was the legal cause of her death; and 3) determine damages/entitlement to punitive damages. The jury found in favor of Plaintiff and awarded her $6 million in compensatory damages. It allocated Ms. Thurston's comparative fault for her injuries at 25%. It also found that punitive damages were warranted.

The second phase of the trial concerned the proper amount of punitive damages. During Phase II, RJR argued to the jury that the "conduct that injured Juanita Thurston . . . ended at least 25 years ago" and since then, RJR had "turned the corner, changed its ways, became a new company and started doing things the right way, acting as a responsible company in the tobacco industry." In support of its position, RJR presented testimony from its vice president of cigarette product development, who testified that RJR was focused on developing safer alternatives to smoking. In turn, during its closing, Plaintiff's counsel argued that despite its rhetoric, RJR deserved to be punished for Ms. Thurston's death and had yet to accept responsibility or apologize for its actions. At the conclusion of Phase II, the jury awarded Plaintiff $14 million in punitive damages.

Following the trial, RJR moved to set aside the verdict in accordance with its motions for directed verdict on the detrimental reliance issue. Alternatively, it asked for a new trial on the grounds that Plaintiff

improperly disparaged RJR for defending itself during closing arguments. Lastly, RJR moved for remittitur of the compensatory award, arguing that the award was excessive when compared to other awards made to surviving adult children. The trial court denied all of RJR's motions and entered judgment in favor of Plaintiff for $18.5 million. This appeal follows.

Analysis

a) Remittitur of the Compensatory Damage Award

"We review an order denying a motion for remittitur or a new trial under an abuse of discretion standard." *City of Hollywood v. Hogan*, 986 So. 2d 634,647 (Fla. 4th DCA 2008).

Pursuant to Florida's remittitur and additur statute, section 768.74 of the Florida Statutes, the trial court has the responsibility to review the amount of an award and determine if it is excessive or inadequate "in light of the facts and circumstances which were presented to the trier of fact." § 768.74(1), Fla. Stat. (2014). "If the court finds that the amount awarded is excessive or inadequate, it shall order a remittitur or additur, as the case may be." § 768.74(2), Fla. Stat. (2014). In making its determination, the trial court is guided by the following statutory considerations:

> (a) Whether the amount awarded is indicative of prejudice, passion, or corruption on the part of the trier of fact;
>
> (b) Whether it appears that the trier of fact ignored the evidence in reaching a verdict or misconceived the merits of the case relating to the amounts of damages recoverable;
>
> (c) Whether the trier of fact took improper elements of damages into account or arrived at the amount of damages by speculation and conjecture;
>
> (d) Whether the amount awarded bears a reasonable relation to the amount of damages proved and the injury suffered; and
>
> (e) Whether the amount awarded is supported by the evidence and is such that it could be adduced in a logical manner by reasonable persons.

§ 768.74(5), Fla. Stat. (2014).

Compensatory damages are intended to redress or compensate for a concrete loss. *R.J. Reynolds Tobacco Co. v. Townsend*, 90 So. 3d 307, 310 (Fla. 1st DCA 2012). Where the loss is of a non-economic nature, however, such as for mental pain and anguish and for loss of consortium, the valuation is inherently difficult. *Id.* at 310–11. 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 fact that a damage award is large does not in itself render it excessive nor does it indicate that the jury was motivated by improper consideration in arriving at the award.'" *Id.* (quoting *Allred v. Chittenden Pool Supply, Inc.*, 298 So. 2d 361, 365 (Fla. 1974)). Rather, a compensatory damage award is only excessive if it is so large that it exceeds the maximum limit of a reasonable range. *Id.* "In reviewing an award of damages for excessiveness, the court may consider the philosophy and general trend of decisions in comparable cases." *R.J. Reynolds Tobacco Co. v. Webb*, 93 So. 3d 331, 337 (Fla. 1st DCA 2012).

When it comes to wrongful death awards, including those in the *Engle* context, courts have drawn a distinction between compensatory damages awarded to surviving spouses and to adult children. In *Webb*, the First District reversed an $8 million award to an adult surviving child of a cigarette smoker on the grounds that it was excessive as compared to other awards. 93 So. 3d at 337, 339. It explained:

> Of the thirty-five *Engle* cases we examined in which the jury awarded compensatory damages, the juries awarded compensatory damages as great as $7 million in only eight cases. Of these eight cases, three were cases in which the plaintiff was the cigarette smoker and the verdicts included economic damage awards. In the others, the decedents died at a much younger age than Mr. Horner did, or were survived by a spouse, by spouse and child, or by two or more children. Our research has failed to uncover a single case in which an adult child received a wrongful death award of this magnitude that was affirmed on appeal (either in *Engle* progeny cases or other wrongful death actions).

Id. at 337–38 (footnotes omitted).

The *Webb* court arrived at this decision even though the evidence established that the adult child plaintiff and her decedent father shared a very "close relationship." *Id.* at 338. Specifically, the evidence established that the adult child became deaf as an adult and also had a special needs child who required around-the-clock care. *Id.* at 338–39. Due to her and

her child's disabilities, the adult child moved across the street from her father who was instrumental in caring for his grandchild until the grandchild died of her disability. *Id.* The court held that rather than serving as justification, this evidence actually tainted the jury's award. *Id.* at 339. In other words, it held that evidence of the parties' relationship before the decedent's illness and death was not a proper basis for awarding compensatory damages. *Id.* Rather, the *Webb* court clarified that the proper measure of damages should have been based on "evidence of [the decedent's] illness, subsequent death, and the noneconomic consequences of the death itself." *Id.* Because the evidence established that at the time her father died, the adult child plaintiff was "not wholly dependent on his companionship, instruction and guidance," the court held that the jury's award could not stand. *Id.*

Citing to *Webb* in *Philip Morris USA Inc. v. Putney*, 199 So. 3d 465, 470–71 (Fla. 4th DCA 2016), this Court considered whether the following evidence concerning the impact of a decedent's illness and subsequent death on her adult children was sufficient to justify a $5 million award to each child:

> One of [the decedent's] sons testified how he visited his mother as often as he could once he heard of her lung cancer diagnosis, but it was difficult to do because he had his own family. He further testified that his mother never forgot birthdays and she gave all three of her children a goodbye letter on her last birthday. Another of [the decedent's] sons testified that his mother's diagnosis had an emotional impact on him, and he would visit or call every day. Not surprisingly, he misses his mother most on special occasions, such as holidays and birthdays. The Plaintiff, [the decedent's] daughter, testified that when she learned of her mother's diagnosis, she was too emotional to talk about it. She accompanied her mother to chemotherapy treatments, which 'killed' her on the inside, because it made her think about losing her mother. The Plaintiff also told the jury how her mother was so ill on the Plaintiff's birthday that her mother could not say 'happy birthday,' and she went into a coma soon after, dying nine days later. The Plaintiff's boyfriend testified as to how upset the Plaintiff had been since her mother's death and how it devastated her.

Analyzing similar cases, we held that awards of such magnitude are reserved for cases involving "much closer relationships between the parties and the decedents during the decedent's illness." *Id.* at 471. For example,

we noted that in *Townsend*, a $10.8 million compensatory award was affirmed in favor of the wife of a deceased smoker where the wife and the decedent were married for 39 years and the wife had to be separated from her husband while he received treatment for financial reasons, was not able to retire as a result of his illness, and then personally cared for him as he "laid dying" for six months. *Id.* (citing *Townsend*, 90 So. 3d at 307). Based on *Townsend* and other precedent, we concluded that in the *Putney* case, "there was not evidence of the type of close or supportive relationship that would justify such an award." *Id.*

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. Although the evidence established that Plaintiff and her mother had a very close and unique relationship, at the time of Ms. Thurston's illness and death, 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. Although Plaintiff took her mother to many of her appointments and was devastated by her decline and subsequent death, the relationship between an adult child living independent of their parent is simply not the type of relationship which can justify the magnitude of the Plaintiff's compensatory damage award. Accordingly, we hold that the trial court abused its discretion when it denied RJR's motion for remittitur or a new trial.

"Because the award of compensatory damages must be vacated, we also vacate the award of punitive damages." *Webb*, 93 So. 3d at 339–40.

b) Closing Comments During the Punitive Phase

"A trial court's denial of a motion for mistrial and a motion for new trial based on improper closing arguments are reviewed for abuse of discretion." *Whitney v. Milien*, 125 So. 3d 817, 818 (Fla. 4th DCA 2013).

A recent line of cases from this Court establishes that "[i]t is improper for counsel to suggest in closing argument that a 'defendant should be punished for contesting damages at trial' or that defending a 'claim in court' is improper." *Allstate Ins. Co. v. Marotta*, 125 So. 3d 956, 960 (Fla. 4th DCA 2013) (quoting *Intramed, Inc. v. Guider*, 93 So. 3d 503, 507 (Fla. 4th DCA 2012)). In the tobacco context, we have held that if preserved, comments disparaging a tobacco company for failing to take responsibility warrant a new trial. *Compare Philip Morris USA, Inc. v. Tullo*, 121 So. 3d 595 (Fla. 4th DCA 2013) (comments disparaging the tobacco company for defending itself and for failing to take responsibility for its actions were improper but did not warrant a new trial because they were unpreserved), *with Cohen v. Philip Morris USA, Inc.*, 41 Fla L. Weekly D2073, D2075 (Fla. 4th DCA Sep. 7, 2016) (court did not abuse its discretion in granting a new trial based on objected to closing comments by plaintiff concerning the tobacco company's failure to take responsibility), *and R.J. Reynolds Tobacco Co v. Calloway*, 41 Fla. L. Weekly D2188, D2192 (Fla. 4th DCA Sep. 23, 2016) (preserved objections to tobacco plaintiff's "failure to accept responsibility" comments during closing comments mandated reversal).

During its Phase II closing, Plaintiff's counsel made several arguments focusing on RJR's failure to accept responsibility. These comments were similar to those identified as improper in *Tullo*, *Cohen*, and *Calloway*. However, although indistinguishable in substance, the comments are distinguishable in their context.

Explaining the *reason* why such comments are improper, the *Intramed* Court wrote:

> The closing argument shifted the focus of the case from compensating the plaintiff to punishing the defendant. The life expectancy of the plaintiff and the cost of her future care were legitimate issues for the defense. **The purpose of damages here was to compensate, not to make the defendant care, 'take responsibility,' or say it was sorry. Counsel's arguments improperly suggested that the**

> **defendant should be punished for contesting damages at trial** and that its defense of the claim in court was improper.

93 So. 3d 503 at 507 (emphasis added).

Indeed, in *Tullo*, *Cohen*, and *Calloway*, the problematic comments were all made during the phase of the trial wherein the jury was asked to consider the issue of compensatory damages. On appeal in both *Cohen* and *Calloway*, the plaintiffs argued that the comments were permissible because, in addition to determining the proper amount of compensation, the jury was asked to determine if punitive damages were warranted. We rejected these arguments on the grounds that the comments, while perhaps relevant to the issue of punitive damages, may have tainted the jury's compensatory liability determination. *Cohen*, 41 Fla. L. Weekly at D20753; *Calloway*, 41 Fla. L. Weekly at D2190 (explaining that "[a]lthough plaintiff asserts that the punitive damages claim made these comments appropriate because the issue of entitlement to such damages was at issue [in the phase wherein the comments were made], so too was the claim for compensatory damages"). *See also R.J. Reynolds Tobacco Co. v. Gafney*, 188 So. 3d 53, 58 (Fla. 4th DCA 2016) (holding that "when both [punitive and compensatory] claims are at issue, a plaintiff may not utilize 'send a message' and conscience of the community arguments when discussing whether the plaintiff should be compensated, due to the potential for the jury to punish through the compensatory award").

In this case, the challenged comments were made <u>after</u> the jury determined the issue of compensatory damages and during the phase wherein the jury was charged with the sole task of determining the proper amount of punitive damages. Thus, the concerns espoused by *Intramed*, *Tullo*, *Cohen*, and *Calloway* are simply not present in this case. As such, the fact that RJR failed to acknowledge its conduct was wrongful was a proper topic for discussion. *See Lorillard Tobacco Co. v. Alexander*, 123 So. 3d 67, 81 (Fla. 3d DCA 2013) ("Unlike compensatory damages, which are intended to redress a concrete loss, punitive damages, like criminal penalties, are intended to punish past conduct and to deter future behavior.").

<u>Conclusion</u>

We reverse both the compensatory and the punitive damage awards and remand the case with directions that the trial court grant the motion for remittitur or order a new trial on damages only. We affirm the judgment in all other respects. However, in the event of a new trial, Plaintiff is entitled to seek punitive damages on her product defect and

negligence claims pursuant to *Soffer v. R.J. Reynolds Tobacco Co.*, 187 So. 3d 1219, 1227 (Fla. 2016).

Reversed and remanded.

CIKLIN, C.J., and MAY J., concur.

* * *

Not final until disposition of timely filed motion for rehearing.