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 REPLY BRIEF

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ARGUMENT

I. This Court Has Jurisdiction.

Reynolds accuses Petitioner of "misleadingly cobbl[ing] together dicta" from the Fourth District's decision as part of "an effort to manufacture conflict jurisdiction where none exists." (Ans. Br. 14) In fact, the key language from the Fourth District's decision is contained in three consecutive paragraphs which are quoted without gaps in Petitioner's initial brief. (In. Br. 6) In the first sentence of those three paragraphs, the Fourth District clearly set forth its holding:

> Read together, *Webb* and *Putney*[1] 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.

R.J. Reynolds Tobacco Co. v. Odom, 210 So. 3d 696, 701 (Fla. 4th DCA 2016). In a pattern repeated from its jurisdictional brief, Reynolds refuses to even acknowledge the entirety of the Fourth District's unmistakable language: "no matter how strong" the bond, a similarly situated claimant cannot recover a "multi-million dollar" award, even if her suffering is "tremendous."[2]

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[1] *R.J. Reynolds Tobacco Co. v. Webb*, 93 So. 3d 331 (Fla. 1st DCA 2012) and *Philip Morris USA Inc. v. Putney*, 199 So. 3d 465 (Fla. 4th DCA 2016).

[2] Both amicus briefs supporting Reynolds's position similarly fail to acknowledge the entirety of this language.

While Reynolds will not utter all of these words, it tells this Court they are "mere dicta" and do not represent a "precedential holding" of the Fourth District. (Ans. Br. 11) It reads the opinion as leaving open "the possibility of a higher award," when the opinion expressly forecloses such an award. (Ans. Br. 23) But the above-quoted paragraph is the unmistakable holding of the Fourth District.[3] The Fourth District certainly knows these same words represent its holding, rather than mere dicta. In *R.J. Reynolds Tobacco Co. v. Grossman*, 211 So. 3d 221 (Fla. 4th DCA 2017), the identical block quote included just above appears, in full, and is described as its holding. *See id.* at 228 ("Most recently, in *Odom*, we held that….").

The failure to acknowledge the Fourth District's true holding exposes the defects in Reynolds's arguments, and in particular the argument that this Court cannot exercise conflict jurisdiction. Reynolds contends that the Fourth District satisfied its obligation to review the denial of a remittitur for an abuse of discretion because the Fourth District identified such an abuse as the relevant standard of review. (Ans. Br. 16) Still, the court's holding in this case will necessarily lead to the same result in every case, "no matter" the evidence, where a jury awards $2 million or more to such a claimant. There is no room to exercise discretion in this setting. Indeed, had the Fourth District's decision appeared just a few years earlier, the trial courts of this

[3] *See, e.g.* Black's Law Dictionary (2014 ed.) ("**holding** … **1.** A court's determination of a matter of law pivotal to its decision; a principle drawn from such a decision"); *id.* ("**establish** … **1.** To settle, make, or fix firmly").

state would have been obliged to remit various compensatory damage awards, instead of denying motions for remittitur as they did. *See* Appendix of FJA as Amicus Curiae, 6-7 (identifying denials of motions for remittitur where adult children recovered $2 million or more); *Pardo v. State*, 596 So. 2d 665, 666 (Fla. 1992) (in the absence of an interdistrict conflict, district court decisions bind all Florida trial courts). Merely stating that the Fourth District's decision and reasoning lack precedential value (Ans. Br. 23) does not make it so. *See Twyman v. Roell*, 166 So. 215, 217 (Fla. 1936) (decision constitutes precedent when questions raised and adjudicated are "in point with those presented in the case at bar").

This Court requires application—not mere articulation—of the abuse of discretion standard when reviewing orders denying a motion for remittitur. *See Lassitter v. Int'l Union of Operating Eng'rs*, 349 So. 2d 622, 627 (Fla. 1976) ("The correctness of the jury's verdict is strengthened when the trial judge refuses to grant a new trial or a remittitur. The appellate court may review the trial court ruling only for an abuse of discretion."); *see also McLin v. State*, 827 So. 2d 948, 950, 956 (Fla. 2002) (exercising conflict jurisdiction where district court misapplied standard of review, despite "correctly enunciating" the proper standard). It prohibits appellate judges from overturning a jury's verdict because they believe the jury awarded too much. *Bould v. Touchette*, 349 So. 2d 1181, 1184 (Fla. 1977). When the Fourth District held that there is an upper limit on the damages recoverable by one class of

wrongful death survivors, it did precisely what this Court prohibits, and necessarily applied a *de novo* standard of review. In doing so, it misapplied this Court's precedents, giving rise to conflict jurisdiction. *See Custer Med. Ctr. v. United Auto. Ins. Co.*, 62 So. 3d 1086, 1088-89, 1093 (Fla. 2010) (exercising jurisdiction where Fourth District "misapplied the standard of review," despite stating that it "premised" its decision on the proper standard); *see also Wallace v. Dean*, 3 So. 3d 1035, 1040 n.6 (Fla. 2009) (collecting select cases where misapplication of precedent was the basis for conflict jurisdiction).[4]

Reynolds argues that the Fourth District applied the proper standard because its decision covers the same ground as the trial court's order. (Ans. Br. 17-18) That is not correct. While the Fourth District may have considered the same authorities considered by the trial court, 210 So. 3d at 699, it failed to credit the trial court's reasons for distinguishing those same authorities, based on evidence which the trial court heard at trial and recited in its order. R.14695-96. The Fourth District also failed to acknowledge the trial court's conclusion that the verdict was based on the evidence, and not the product of passion, prejudice or matters outside the record. R.14695-97. When it came to measuring the jury's verdict against the evidence, the

[4] In making these arguments, Plaintiff does not "insist[]" that the Fourth District was "being disingenuous." (Ans. Br. 17) There must be room for Plaintiff to make her arguments without having to field an accusation that she has somehow attacked the Fourth District.

Fourth District failed to explain why it was rejecting the trial court's view. In doing so, the Fourth District failed to honor its obligation to "fully recognize the superior vantage point of the trial judge" and test its ruling against the measure of "reasonableness." *Canakaris v. Canakaris*, 382 So. 2d 1197, 1203 (Fla. 1980). That measure is the essence of the abuse of discretion standard. *Id.*

Reynolds also argues that the trial court's order deserves less deference because it was drafted by Plaintiff's counsel, citing *In re T.D.*, 924 So. 2d 827 (Fla. 2d DCA 2005). (Ans. Br. 18) This line of authority, however, is concerned with a trial court's adoption of findings of fact and conclusions of law submitted by one side (*i.e.*, where there is no jury and most often in a divorce case), without affording the other side an opportunity to either object or make his or her own submission. *E.g.*, *Perlow v. Berg-Perlow*, 875 So. 2d 383 (Fla. 2004). This Court has expressly authorized trial judges in that setting to solicit proposed findings of fact and conclusions of law from one party so long as the opposing party receives due process. *Id*. at 388. In all events, Reynolds's argument is particularly meritless in this case, where (1) a jury had already returned a verdict deciding disputed facts, (2) the trial court solicited and received proposed orders on post-trial motions from both sides, and (3) the court indicated that it would review the authorities cited by the parties before entering an order. (In. Br. 23) *See Rosenbloom v. Rosenbloom*, 892 So. 2d 531, 535 (Fla. 4th DCA 2005) (accepting trial court's statement that it would

conduct further review before ruling); *see also T.D.*, 924 So. 827 at 830 n. 2 (submissions by both parties sufficient to apprise trial court of parties' positions).

Reynolds next argues that the Fourth District applied the proper standard of review because it considered the results in other cases, and the jury's verdict in this case exceeds the amounts approved or rejected in those cases. (Ans. Br. 18-20) The Fourth District did more than just consider those results. It said those results supplied the basis for its holding that a multi-million dollar verdict for the same class of claimants is necessarily excessive. 210 So. 3d at 701. Reynolds also ignores the consequence of its argument. (In. Br. 26) If prior results in reported cases established a ceiling for recoveries by one class of claimants, parties like Reynolds could control that ceiling indefinitely, by strategically declining to seek appellate review of jury awards near the established ceiling. As the FJA's appendix reveals, Reynolds has effectively done just that, avoiding appellate review of awards of $1.5 and $2 million for adult children, after trial courts denied Reynolds's motions to remit those same awards. Appendix of FJA as Amicus Curiae, 5-7. By avoiding appellate review of those awards, Reynolds is able to maintain the posture that any award greater than $1 million is excessive, because that amount was held excessive nearly 20 years ago in *MBL Life Assur. Corp. v. Suarez*, 768 So. 2d 1129 (Fla. 3d DCA 2000).

Because the Fourth District misapplied this Court's decisions concerning the applicable standard of review, and for the reasons set forth in Petitioner's Brief on Jurisdiction, the Court properly decided to exercise its jurisdiction.

II. The Trial Court Properly Exercised Its Discretion in Denying the Motion for Remittitur.

"This Court will not upset a jury damages award for alleged excessiveness unless it can be said that the excess is such as to shock the juridical conscience, or indicates that the jury has predicated its conclusion on passion or prejudice." *Food Fair Stores of Fla., Inc. v. Macurda*, 93 So. 2d 860, 862 (Fla. 1957). This legal maxim holds even when members of the Court would not have arrived at the same figure. *Id.* Moreover, even when a "disproportion" exists between a particular verdict and "smaller verdicts" in other cases, that is insufficient for the Court "to conclude that the jury here was motivated unduly by passion or prejudice. After all, that is the test." *Id.* Like the Fourth District's opinion, Reynolds fails to address the trial court's consideration of these critical elements. Like the Fourth District, it continues to focus primarily on the results in other cases with a single type of claimant. (Ans. Br. 31-41)

Notably, the Fourth District itself has repeatedly recognized these same elements—a conscience-shocking result, and the presence of passion and prejudice—as *necessary* to overturn a jury's verdict. "'Remittitur 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 or prejudice.'" *Philip Morris USA Inc. v. Putney*, 199 So. 3d 465, 470 (Fla. 4th DCA 2016) (quoting *Progressive Select Ins. Co. v. Lorenzo*, 49 So. 3d 272, 278 (Fla. 4th DCA 2010)); *accord*, *City of Delray Beach v. DeSisto*, 197 So. 3d 1206, 1210 (Fla. 4th DCA 2016). Reynolds wanted the trial court to find that its conscience was shocked by the jury's verdict, and that it was the product of passion and prejudice. Reynolds submitted a proposed order which would have found precisely that. (R.14683) But the trial court rejected that proposed order. Instead, the trial court expressly found that its conscience was not shocked, and that Reynolds had failed to identify any alleged passion and prejudice. (R.14696-97) Despite repeatedly recognizing the importance of these elements in other cases, in this case, the Fourth District did not even acknowledge them, or explain why the trial court's rejection of Reynolds's arguments was unreasonable.

Like the Fourth District, Reynolds presumes that the relationship between an adult child and her parent is necessarily less compensable than the relationship between spouses, or the relationship between a minor child and a parent. (Ans. Br. 28-29; 38-40) Elsewhere, Reynolds says that the Fourth District left open the possibility that an adult child's award could exceed that of a spouse. (Ans. Br. 31) But the Fourth District was very specific on this point, holding as a matter of law that relatively larger awards are "reserved" for "closer relationships" such as that between spouses. 210 So. 3d at 700. Certainly, the spousal relationship occupies an important

place, and many widows and widowers experience intense pain and suffering following the death of their spouse. (Ans. Br. 28) That does not exclude the possibility that an adult child may experience comparable pain and suffering, particularly where the relationship is "very close and unique," as the Fourth District acknowledged existed in this case. *Id.* at 701. A "unique" relationship should justify a "unique" award, even if that award was substantially higher than others.[5]

The damage evidence in this case was undisputed and unrebutted. When the trial court denied the motion for remittitur, it could have reasonably concluded that Gwen's relationship was in fact unique, just as the Fourth District acknowledged. Gwen never knew her father, and the relationship she had with her mother demonstrated a special closeness, making them "more like sisters," a fact recognized by the trial court. (T.2690-91; 2697-98; R.14695-96) In referencing this evidence, Plaintiff was not asserting a claim for the "loss of a sibling relationship." (Ans. Br.

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[5] *See* Random House College Dictionary 1436 (rev. ed. 1979) ("**unique** … **1.** Existing as the only one or as the sole example … in type of characteristics. **2.** having no like or equal; standing alone in quality; incomparable…."). While this $6 million award was appropriately "unique" in the setting of a relationship between an adult child and a parent, it was well below the amount frequently awarded by juries and affirmed by the district courts of appeal in the setting of a spousal relationship. *See, e.g.*, *Philip Morris USA, Inc. v. Ledoux*, 230 So. 3d 530 (Fla. 3d DCA 2017) ($10 million); *R.J. Reynolds Tobacco Co. v. Schoeff*, 178 So. 3d 487, 490 (Fla. 4th DCA 2015) ($10.5 million), *quashed in part on other grounds, Schoeff v. R.J. Reynolds Tobacco Co.*, 232 So. 3d 294 (Fla. 2017); *Philip Morris USA Inc. v. Cohen*, 102 So. 3d 11, 19 (Fla. 4th DCA 2012) ($10 million), *quashed on other grounds and reinstating verdict*, No. SC13-35, 2016 WL 375143 (Fla. Jan. 29, 2016); *Lorillard Tobacco Co. v. Alexander*, 123 So. 3d 367 (Fla. 3d DCA 2013) ($10 million).

30) Rather, she was demonstrating that this relationship was indeed unique and defied the type of pigeon-holing which Reynolds successfully urged on the Fourth District.

Moreover, like the Fourth District, Reynolds fails to account for the full range of damages recoverable under the Wrongful Death Act. As Plaintiff previously explained (In. Br. 25-26), due to the demographics of the *Engle* class, the losses experienced by surviving adult children in this litigation are themselves different from what courts and juries may see in other cases. Lung cancer most frequently appears in smokers after their children have grown, and many decedents have had to endure their cancer without a spouse. Reynolds does not deny this is so. Here, Juanita had no spouse, and the evidence was undisputed that Gwen assumed the primary role in caring for her mother when she was sick with cancer and until she died. (*E.g.*, Ex.JT003:176, 215, 298; T.2774-79)

The jury's award included compensation for the pain and suffering Gwen experienced as her mother's primary care giver, from the time Juanita was diagnosed until she died more than two years later. It is more than reasonable for jurors and judges to make an allowance for such pre-death damages, which are obviously absent when a loved one dies instantaneously or within a short time after an accident. *See, e.g.*, *Suarez*, 768 So. 2d at 1137 (where injured parent appears to have died instantaneously after crashing into a ferry boat, and "did not suffer, in front of his family"). Reynolds says that "'sudden death' can produce more emotional

suffering." (Ans. Br. 36) Perhaps in some other case, but that is precisely the kind of call that juries are supposed to make. It was at least reasonable to see this case as the jury and trial court did.

Reynolds continues to put *Suarez*, *Webb*, *Putney* and *Nat'l R.R. Passenger Corp. v. Ahmed*, 653 So. 2d 1129 (Fla. 4th DCA 1995), front and center to justify the Fourth District's decision in this case. (Ans. Br. 31-36) Plaintiff previously discussed these decisions, which were also cited by the Fourth District. (In. Br. 24-31) Reynolds disagrees with Plaintiff's perspective as to *Webb* and *Putney*, but it fails to explain why the trial court acted unreasonably in distinguishing them. For example, the First District thought Mr. Webb's advanced age was important, and so did the trial court in this case. *See Webb*, 93 So. 3d at 337-38 (noting that decedent lived to age 78, and outlived his grandchild, and also noting that largest *Engle*-progeny verdicts involved decedents who "died at a much younger age"). Moreover, both *Webb* and *Putney* concluded that the verdicts were sufficiently conscience-shocking to require remittitur. *Id.* at 339; *Putney*, 199 So. 3d at 471.

Reynolds also discounts the First District's finding of passion and prejudice in *Webb* (Ans. Br. 31-32), but that court devoted three full paragraphs of its opinion to describing emotionally-charged testimony regarding Ms. Webb and her severely handicapped daughter. After reviewing that evidence, the court said that the amount of the jury's award "*suggests that it is the product of passion, an emotional response*"

to that same testimony. 93 So. 3d at 338-39 (emphasis added). Nothing like that occurred in this case.

Reynolds also cites *Searcy v. R.J. Reynolds Tobacco Co.*, No. 09-cv-13723, 2013 WL 5421957 (M.D. Fla. Sept. 12, 2013). (Ans. Br. 36-37) In *Searcy*, Reynolds cited the same four cases to argue that the court was required to remit the jury's verdict to "no more than $500,000." *Id*. at *5. Finding the case "akin to" *Webb* and *Putney*, the court concluded that a remittitur was required, but struggled to determine the proper amount. *Id.* at *6. That court decided that $1 million was "appropriate," where it heard little evidence to demonstrate an exceptional relationship. *Id.* Moreover, there is no indication in this memorandum order how long the decedent lived, how long she was expected to live, or for what period of time she was sick with lung cancer.

In all events, Reynolds's arguments confirm that such comparisons are "fraught with danger" because every case is different and must be judged on its own. *Loftin v. Wilson*, 67 So. 2d 185, 189 (Fla. 1953). Based on the authorities cited by the Fourth District, Reynolds has urged a $500,000 ceiling in *Searcy*, the same $500,000 ceiling in this case in a post-trial motion (R.14258), and subsequently a $750,000 ceiling, when arguing that same motion.[6] (R.15492-93) Now, however,

[6] These figures necessarily represent a purported ceiling because, if a trial court orders a remittitur, a jury's verdict "can only be reduced to the highest amount which the jury could properly have awarded." *Lassiter*, 349 So. 2d at 627

since Ms. Webb obtained a $900,000 verdict when her case was retried, Reynolds is willing to concede that the evidence in this case "could justify" a "somewhat higher" award because Juanita died at age 58, and Ms. Webb's father died at age 78. (Ans. Br. 32) The trial court called this difference "obvious." (R.14695) Indeed, it means that the loss of Gwen's parental relationship would have likely extended 20 or more years longer than Ms. Webb's. That was certainly a reasonable distinction for the trial court to draw, and that distinction supported its ruling. *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).

Reynolds itself uses cases involving other types of family relationships to argue that the trial court abused its discretion. When Reynolds draws such comparisons, however, it does not do so fairly, as a number of its citations reveal. (Ans. Br. 39-40) *See, e.g.*, *Rochelle v. State Dep't of Corr.*, 927 So. 2d 997, 997-98 (Fla. 1st DCA 2006) (affirming remittitur where there was a "lack of evidence" on damages experienced by mother of prison inmate who died in custody); *Glabman v. De La Cruz*, 954 So. 2d 60, 62-63 (Fla. 3d DCA 2007) (ordering remittitur where verdict "could only" be the product of highly emotional testimony by decedent's father which caused "the trial judge to cry"). Those cases are far less relevant than the example of *Evans v. Lorillard Tobacco Co.*, 990 N.E.2d 997 (Mass 2013), which,

as Plaintiff previously showed (In. Br. 32), involved the same kind of case, with the same category of claimant, with the Massachusetts Supreme Court affirming a $10 million award.

Reynolds relegates *Evans* to a footnote, contending there is insufficient information to draw a reasonable comparison. (Ans. Br. 38 n. 6) Plaintiff was not trying to draw a point-by-point comparison with *Evans*. Rather, she was trying to demonstrate that if $10 million is not excessive according to the highest court of another state, it was reasonable to conclude that $6 million was "not so inordinately large as to obviously to exceed the maximum limit of a reasonable range within which the jury may properly operate." *Lassitter*, 349 So. 2d at 627; *cf. Aills v. Boemi*, 41 So. 3d 1022, 1029 (Fla. 2d DCA 2010) (affirming order of remittitur and noting that trial court considered relatively large verdict in Massachusetts, *inter alia*, to justify its ruling).

Plaintiff has one comment concerning Reynolds's response to the data included in the FJA's appendix. It is certainly true that the Wrongful Death Act defines a "minor" child as one under the age of 25. § 768.18(2), Fla. Stat. The damages recoverable by those "minor" children and those 25 and older, however, are precisely the same. § 768.21(3), Fla. Stat. This definition only becomes significant when a decedent leaves no surviving spouse, in which case children 25 and older have a claim for noneconomic damages. *Id.* That does not mean that their

claim is somehow inferior or "subordinate" as Reynolds contends. (Ans. Br. 30) But Reynolds suggests that the age is otherwise significant, so that recoveries of $2,000,000 or more by certain "minor" children included in the appendix should not be considered in assessing the trend of verdicts. The ages of those same "minor" children were, respectively, 22 (*Brown*), 23 and 20 (*Marotta*), 23 and 24 (*O'Hara*), 24 (*Ahrens*), 19 and 20 (*Wallace*), and 22 (*Schleider*). Appendix of FJA as Amicus Curiae, 6-8. These claimants were "minors" as defined by the Act. That does not mean that they were not otherwise adults in every other sense of the word. As adults, they would still be subject to the Fourth District's rule that forecloses a larger award.

Finally, Plaintiff urges the Court to take note of the fact that Reynolds made no response to her arguments that the denial of remittitur was justified in this case because Reynolds failed to suggest any figure to the jury. (In. Br. 36-38) Reynolds expressly told the jury that it was relying on the jury's "good judgment and common sense" to decide the issue of damages. (T.4441) Where Reynolds made the strategic choice to avoid guiding the jury, it is difficult to see how the trial court abused its discretion in denying the motion for remittitur.

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 7th day of March, 2018.

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

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