FIRST DISTRICT COURT OF APPEAL
STATE OF FLORIDA

No. 1D20-232

TERESA STARR BLUNDELL,

Appellant,

v.

R. J. REYNOLDS TOBACCO CO.,

Appellee.

On appeal from the Circuit Court for Duval County.
Adrian G. Soud, Judge.

July 21, 2021

OSTERHAUS, J.

Teresa Starr Blundell seeks a new punitive damages trial on grounds that the trial court abused its discretion by allowing R.J. Reynolds Tobacco Co. to introduce as mitigation evidence the amounts paid to states under two tobacco-litigation settlement agreements. We affirm because the terms of these settlements, including the multi-billion dollar sums that Reynolds has paid and continues paying under them, were relevant to the jury's job of discerning the appropriate degree of punishment and deterrence to be imposed due to Reynolds's *Engle*-related misconduct.

I.

Teresa Blundell, as personal representative of the estate of her mother, filed an *Engle*-progeny wrongful death action against Reynolds and Philip Morris USA, Inc. The case went to trial, and the Estate won $500,000 in compensatory damages on its negligence and strict liability claims. The Estate appealed the final judgment arguing it should also have been allowed to seek punitive damages. This Court initially affirmed based on then-existing *Engle*-related law. But the Estate later prevailed on the punitive damages issue, and the case was remanded back for a punitive damages trial.

At the punitive damages trial, Reynolds's case included mitigation evidence from witnesses regarding the obligations incurred by Reynolds under two litigation settlement agreements entered with various states – the Florida Settlement Agreement and the Master Settlement Agreement ("Settlement Agreements" collectively). The testimony made a brief reference to Reynolds having paid about $61 billion under the Settlement Agreements since 1998, with payments continuing indefinitely. Ultimately, the jury found for Reynolds that punitive damages were not warranted. The trial court denied the Estate's motion for new trial and entered a final judgment in Reynolds's favor. This timely appeal follows.

II.

Generally, "a trial judge's ruling on the admissibility of evidence will not be disturbed absent an abuse of discretion." *Rozar v. R. J. Reynolds Tobacco Co.*, 292 So. 3d 1202, 1205 (Fla. 1st DCA 2020) (quoting *Pantoja v. State*, 59 So. 3d 1092, 1095 (Fla. 2011)). "A trial court's evidentiary decisions 'should not be overturned if the record supports a finding [that] the evidence is relevant and not more prejudicial than probative.'" *Id.* (quoting *Kopsho v. State*, 84 So. 3d 204, 217 (Fla. 2012)); *see also* § 90.403, Fla. Stat.

The Estate argues that the trial court abused its discretion by admitting evidence of Reynolds's payments under the Settlement Agreements, which it considered to be unfairly prejudicial under § 90.403, and by allowing arguments that the payments visited a "punishment" upon Reynolds. The Estate's position is that only

express punishments and punitive damage awards may be presented as mitigation evidence and considered by the factfinder as misconduct-related punishment in a punitive damages trial. The Estate thus faults the trial court for allowing Reynolds to introduce evidence of the $61 billion paid under the Settlement Agreements to resolve *Engle*-type litigation with the states because these payments did not settle merely punitive damage claims and weren't denominated expressly as punishments.

A quick word about punitive damages generally. Florida law authorizes punitive damages in civil actions like this one when a defendant has acted particularly badly. *See* § 768.72, Fla. Stat. (allowing punitive damages where clear and convincing evidence shows a defendant was personally guilty of intentional misconduct or gross negligence). Plaintiffs have no right to punitive damages. *St. Regis Paper Co. v. Watson*, 428 So. 2d 243, 247 (Fla. 1983) (first citing *Fisher v. City of Miami*, 172 So. 2d 455 (Fla. 1965); then citing *Fla. E. Coast Ry. Co. v. McRoberts*, 149 So. 631 (1933)). Rather, punitive damages are awarded to punish wrongdoers and to deter them from committing similar bad acts in the future. *Id.* at 247 (first citing *Mercury Motors Express, Inc. v. Smith*, 393 So. 2d 545 (Fla. 1981); then citing *Wackenhut Corp. v. Canty*, 359 So. 2d 430 (Fla. 1978); and then citing *Campbell Gov't Emps. Ins. Co.*, 306 So. 2d 525 (Fla. 1974)); *see also W.R. Grace & Co.-Conn. v. Waters*, 638 So. 2d 502, 503 (Fla. 1994). In a punitive damages trial, "[t]he jury's major duty in determining the amount of punitive damages is to assess the appropriate degree of punishment to be imposed on the defendant commensurate with the enormity of the offense." *St. Regis Paper Co.*, 428 So. 2d at 246 (first citing *Rinaldi v. Aaron*, 314 So. 2d 762 (Fla. 1975); then citing *Lehman v. Spencer Ladd's, Inc.*, 182 So. 2d 402 (Fla. 1965); and then citing Fla. Std. Jury Instr. (Civ.) 6.12). A jury may choose to award no punitive damages, or an amount "appropriate to meet the goals of punishment and deterrence." *Id.* at 247.

Persons defending themselves at a punitive damages trial may broadly present "any mitigating circumstances" relevant to the issue of whether they should be punished or deterred. *See Rinaldi*, 314 So. 2d at 763; *Johns-Manville Sales Corp. v. Janssens*, 463 So. 2d 242, 248 (Fla. 1st DCA 1984) (citing *Rinaldi* in making the point "that matters in aggravation or mitigation of punitive

damages are relevant and admissible in evidence"). Along this line, this court in *Janssens* identified a number of factors relevant in a punitive damages case, including:

> (1) The amount of the plaintiff's litigation expenses; (2) the seriousness of the hazard to the public, (3) the profitability of the marketing misconduct (increased by an appropriate multiple); (4) the attitude and conduct of the enterprise upon discovery of the misconduct; (5) the degree of the manufacturer's awareness of the hazard and of its excessiveness; (6) the number and level of employees involved in causing or covering up the marketing misconduct; (7) the duration of both the improper marketing behavior and its cover-up; (8) the financial condition of the enterprise and the probable effect thereon of a particular judgment; and (9) the total punishment the enterprise will probably receive from other sources.

Janssens, 463 So. 2d at 248 (quoting Owen, *Punitive Damages in Products Liability Litigation*, 74 Mich. L. Rev. 1257, 1319 n.5 (1976)); *see also St. Regis Paper Co.*, 428 So. 2d at 246–47 (holding that the jury, in assessing punitive damages, may consider "the nature, extent, and enormity of the wrong, the intent of the party committing it and all circumstances attending the particular incident, as well as any mitigating circumstances" (quoting *Rinaldi*, 314 So. 2d at 763)).

Here, we agree with the trial court that the multi-billion-dollar sum Reynolds paid to settle *Engle*-type claims under the Settlement Agreements was relevant and admissible. Reynolds's mitigation evidence regarding the Settlement Agreements included not only that it paid billions to settle the state-related litigation, but also that it took action such as making information available on its website about the dangers of smoking and the benefits of quitting; voluntarily disclosing product ingredients; making efforts to develop less harmful cigarettes, tobacco products, and nicotine replacements; creating a document archive to make internal company documents produced in legal cases publicly available; promoting smoking cessation products, and supporting other government compliance efforts. As part of this

evidence, witnesses testified briefly that Reynolds had paid approximately $61 billion to the states, including billions to Florida, to settle claims arising from the same *Engle*-oriented misconduct, with payments continuing indefinitely.

The only Florida appellate court to have previously addressed this Settlement Agreement-payments issue found this information to be relevant mitigation evidence that need not be excluded. *See Liggett Grp. Inc. v. Engle*, 853 So. 2d 434, 470 (Fla. 3d DCA 2003), *aff'd in part, rev'd in part on other grounds*, 945 So. 2d 1246 (Fla. 2006); *see also* § 90.403, Fla. Stat. (addressing when relevant evidence is inadmissible). In fact, the Third District deemed the payment information "crucial mitigation evidence . . . to support the argument that [the *Engle* defendants] had already received heavy financial obligations and binding deterrent measures for precisely the same conduct." *Id.* at 470. And, here, we agree with its conclusion that the Settlement Agreements "clearly qualify as evidence relevant to punishment and deterrence [that Reynolds was] entitled to have the jury consider . . . as potential mitigating factors in determining the need for further punishment and deterrence." *Id.* at 469.

What is more, the payouts made under the Settlement Agreements meet this court's test for relevance under *Janssens*. Specifically, they implicate Reynolds's attitude and conduct in response to *Engle*-related claims, as well as Reynolds's awareness of the problem, financial condition, and the jury's "total punishment" calculus. *See Janssens*, 463 So. 2d at 248. The facts in *Janssens* shed helpful light here. The defendant in *Janssens* made similar mitigation arguments in defending against a punitive damages case involving asbestos. After an unfavorable result, the defendant manufacturer sought appellate relief on the basis that substantial past and future litigation burdens had "more than adequately punished [it] by the expenditure of funds in the defense of thousands of suits already filed and many thousands more yet to be filed nationwide." *Id.* at 252. In response to the argument, this court recognized the defendant's past and future litigation-related burdens to be factors that had been "properly argued" to the jury and would not be reweighed by the appellate court:

> [The defendant's contentions] are more properly argued to the jury as factual matters to be considered in avoidance or mitigation of punitive damages. It is for the jury, not the court, to accept or reject these arguments in the exercise of its discretion to allow or deny an award of punitive damages.

Id.

Owens-Corning presented similar mitigation evidence in a different asbestos case reviewed by the Florida Supreme Court. *Owens-Corning Fiberglas Corp. v. Ballard*, 749 So. 2d 483, 487-88 (Fla. 1999). The uncontradicted evidence was that Owens-Corning had paid "$182 million . . . for resolution of 179,000 prior asbestos claims during [a thirty-year] period." *Id.* The Florida Supreme Court reviewed this evidence without contesting its relevance or admissibility. And it ultimately found no abuse of discretion in the trial court's conclusion that "Owens-Corning's past and future liability in asbestos cases would have no significant impact on the corporation." *Id.* at 488. The Court then approved a $31 million punitive damages award against Owens-Corning. *Id.*

Similar to the *Janssens* and *Owens-Corning* cases, Reynolds presented mitigation evidence of its burden of having already paid billions to the states to settle *Engle*-type claims involving the same tortious conduct. Reynolds could properly argue to the jury that these payments (along with other sanctions) had meted out a stiff punishment and effective deterrence which should be considered as part of the jury's resolution of the appropriate degree of sanctions here. In response, as in *Owens-Corning*, the Estate was free to argue that these prior litigation-related obligations were insignificant and that more punishment and deterrence were necessary. In any event, the trial court's decision to allow this mitigation evidence here was consistent with Florida law and prior precedent. *Cf. Humana Health Ins. Co. of Fla., Inc. v. Chipps*, 802 So. 2d 492, 496–97 (Fla. 4th DCA 2001) (reversing because "[t]he jury should have been allowed to consider any evidence which would have had the effect of 'reducing or softening the moral or social culpability attaching to the defendant's act'") (quoting *McClelland v. Climax Hosiery Mills*, 169 N.E. 605, 608 (1930)

(Cardozo, C.J., concurring)) (citing *St. Regis Paper Co.*, 428 So. 2d at 246–47)).

Furthermore, we understand basic due process considerations to support Reynolds's right to present such evidence. Irrespective of whether a large settlement or damage award paid by a defendant is considered compensatory or punitive in nature, such payments can punish a tortfeasor and deter future misconduct. *See State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 419 (2003) (referring to punitive damages as "further sanctions" beyond compensatory damages "to achieve punishment or deterrence"); *Memphis Cmty. Sch. Dist. v. Stachura*, 477 U.S. 299, 307 (1986) (recognizing deterrence to be "an important purpose" of compensatory damages). As a due process matter, we cannot see forbidding Reynolds from presenting evidence and arguing that the Settlement Agreements—with their massive multi-billion-dollar payouts—materially punished and deterred their *Engle*-related conduct given that "the Due Process Clause prohibits a State from punishing an individual without first providing that individual with 'an opportunity to present *every available* defense.'" *Philip Morris USA v. Williams*, 549 U.S. 346, 353 (2007) (emphasis added) (quoting *Lindsey v. Normet*, 405 U.S. 56, 66 (1972)).

Conversely, the cases cited by the Estate don't support its argument for narrowing Reynolds's ability to put on this mitigation evidence. No cases forbid defendants in these situations from presenting evidence of substantial obligations incurred as a result of litigation involving the same underlying misconduct. In *W.R. Grace & Co.-Conn.*, 638 So. 2d at 506, for instance, the Florida Supreme Court acknowledged that the defendant could introduce mitigation evidence of previous "punitive damages" awards, but it didn't address or restrict mitigation evidence of other damages awards or settlements arising from the same misconduct. The Florida Supreme Court's footnote in *Owens-Corning Fiberglas Corp.*, 749 So. 2d at 488 n.7, similarly stated that punitive awards in other cases could be considered in deciding the amount of punitive damages. But it didn't prohibit evidence of other awards or settlements. To the contrary, as discussed above, Owens-Corning presented evidence of having paid $182 million "for resolution of 179,000 prior asbestos claims." *Id.* at 488.

For these reasons, we conclude that the trial court did not abuse its discretion as a matter of law, or under § 90.403, by allowing mitigation evidence regarding the Settlement Agreements amounts paid by Reynolds, or by permitting Reynolds to refer to these payments as punishment.

III.

We therefore AFFIRM the final judgment.

ROWE, C.J., concurs; MAKAR, J., specially concurs with opinion.

Not final until disposition of any timely and authorized motion under Fla. R. App. P. 9.330 or 9.331.

MAKAR, J., concurring specially.

The crux of this case is an "All Cases" order, entered by an administrative circuit judge in 2017, that applied to all *Engle*-progeny cases pending in Duval County.[*] The order resolved whether and how the Master Settlement Agreement and Florida Settlement Agreement could be used as evidence at trial, stating:

> *Defendants may introduce such evidence* [i.e., the MSA and FSA], *but may only make brief reference to the agreements*; Defendants may not introduce the agreements themselves. Introduction by Defendants of the MSA and FSA opens the door to Plaintiffs' introducing evidence of Defendants' noncompliance with the MSA, but again, such evidence may only be by brief reference.

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

As the emphasized language demonstrates, the order was a compromise between plaintiffs (who wanted to exclude the settlement agreements entirely) and the tobacco companies (who wanted to use them to mitigate their damages).

Admission of the settlement agreements, as Judge Osterhaus explains, was not an abuse of the trial court's discretion. The question of whether the defendant in this case, R.J. Reynolds Tobacco Company, exceeded the legitimate scope of the order by making more than a "*brief* reference to the agreements" is a closer question; what the administrative judge meant by "brief" is unknown, leaving interpretation in the hands of trial judges (and now, this panel on appeal).

In this specific case, the lengthy record does not sustain that a reversible violation of the All Cases order occurred. The lion's share of the evidence on mitigation of punitive damages focused on Reynolds' activities to alleviate the past and future harms of its products, as Judge Osterhaus emphasizes. In contrast, the references to and characterizations of the settlement agreements were minimal and thereby "brief" within the overall context of this case. Affirmance is thereby warranted.

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