IN THE CIRCUIT COURT OF THE 11TH
JUDICIAL CIRCUIT IN AND FOR
MIAMI-DADE COUNTY, FLORIDA

LYNN FRENCH,

Plaintiff,

GENERAL JURISDICTION DIVISION

CASE NO. 00-01706 CA 22

vs.

PHILIP MORRIS INCORPORATED ("PHILIP MORRIS U.S.A."), R.J. REYNOLDS TOBACCO COMPANY, LORILLARD TOBACCO CO., and BROWN & WILLIAMSON TOBACCO CORP., Individually and as Successor to the AMERICAN TOBACCO COMPANY,

Defendants.
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AMENDED
ORDER ON DEFENDANTS' POST-TRIAL MOTIONS

The Court has considered the post-trial motions of the defendant tobacco companies seeking to set aside a jury verdict of 5.5 million dollars awarded to Lynn French, a flight attendant found to have contracted chronic sinusitis from exposure to second-hand smoke while working on airplanes before the smoking ban went into effect. Of a large number of pending cases filed by individual flight attendants, this was the first to result in a jury verdict for a plaintiff.[1]

The plaintiff, Ms. French, and approximately 3000 other non-smoking flight attendants are members of the plaintiff-class in the case of Norma Broin, et al. v. Philip Morris Companies., Inc. et al, Case No. 91-49738 in the 11th Judicial Circuit in Dade County, Florida, which was settled during the

[1] *Three other flight attendant cases have been tried thus far in Dade County, two resulting in a verdict for the defendant tobacco companies and the other ending in a mistrial.*

first phase of a long complex trial. The class action trial was to proceed in two stages, the first to determine questions common to class members, including "general causation," that is, whether certain diseases were caused by exposure to second-hand smoke, and the second, to consider the individual claims of the flight attendants and to assess damages if the jury found the individual had a disease caused by exposure to second-hand smoke.

The presentation of Ms. French's case was governed by the terms of the Broin settlement agreement, an agreement which has already been subjected to judicial scrutiny.[2] In their post-

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[2] *The settlement, challenged by certain class members, was found to be "fair adequate and reasonable" by the trial judge whose finding was affirmed by the Third District Court of Appeal in Ramos v. Philip Morris Companies, Inc., 743 So. 2d 24 (3d DCA 1999). The agreement provides for the payment of 46 million dollars in attorneys fees to plaintiff's class counsel, a contribution of 300 million dollars by the defendants to a research foundation, and preserves the flight attendants' right to pursue individual claims for damages, even if their claims would have been barred by the statute of limitations. In addition, the agreement gives certain procedural benefits to individual claimants found to have any of six specified diseases as set forth in paragraph 12(d).*

> *(d) With respect to any Retained Claims seeking damages on account of lung cancer, chronic bronchitis, emphysema, chronic obstructive pulmonary disease, or chronic sinusitis, brought by a member of the Class or his or her survivor, the burden of proof as to whether Environmental Tobacco Smoke ("ETS") can cause one of the above-described diseases ("general causation") shall be borne by the Settling Defendants and the Jury shall be so instructed; in all other respects, including the issue of whether an individual plaintiff's disease was caused by ETS ("specific causation"), the ordinary burdens of proof applicable to any Retained Claims shall remain unaltered. In addition, the altered burden of proof provided herein with respect to general causation shall in no way affect the ability of the Settling Defendants to introduce any evidence or arguments as to general causation, specific causation, or alternative causation, or to introduce any other evidence or argument which the Settling Defendants would otherwise be entitled to present, at any future trial*

trial motions, the defendants repeat the arguments made before trial, and again challenge this court's interpretation of the Broin settlement agreement. In particular, the defendants complain that this court did not require the plaintiff to prove all of the elements of her claims against the defendants for strict liability, negligence and breach of warranty. Instead, finding that the terms of the settlement agreement had implicitly reshaped the issues for trial in the individual cases, I allowed the case to proceed only on the issue of causation, that is, did the plaintiff's exposure to second-hand smoke cause her chronic sinusitis.

Plainly, by the terms of the agreement, the defendants had the burden of proving that the disease of chronic sinusitis could not be caused by exposure to second-hand smoke. If they failed, then it was the plaintiff's burden to prove that, in fact, her chronic sinusitis[3] was caused by such exposure and to further prove the extent of her damages.

Although the defendants argue that the terms of the Broin settlement agreement did not foreclose their ability to require that the plaintiff prove all of the elements of her claims, I concluded that the burden-shifting provision in the Broin settlement did just that. In other words, if there is a presumption that second-hand smoke causes chronic sinusitis in non-smokers, it follows that cigarettes are presumed to be unreasonably dangerous and/or that manufacturing such a product is something that

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> *in which Retained Claims are brought. The Settling Defendants' agreement to alter the burden of proof as provided herein is not an admission of any sort, and shall not be construed, now or at any future trial or proceeding as an admission of causation or any other fact or legal contention.*

[3] *The parties stipulated that the plaintiff did, in fact, have chronic sinusitis.*

a reasonably careful person would not do.[4]

The court acknowledges that the agreement could be interpreted differently. However, if the defendants' position were accepted, each of the 3000 flight attendants would have to prove that cigarettes are unreasonably dangerous to non-smokers, rendering the burden-shifting provision meaningless.[5] It is more logical to conclude that in settling the class action lawsuit, the parties intended that the focus in the individually- retained claims would be on whether the plaintiff's disease was actually caused by exposure to second-hand smoke, and if so, what damages were sustained.[6]

The defendants also complain that I did not require the plaintiff to prove either that the cigarettes to which she was exposed were manufactured by the defendants or the extent to which each defendant contributed to the harm. It is true, as the defendants maintain, that these issues are not

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[4] *Because the jury was asked to resolve only the factual issues regarding causation, the court did not address defendants' motions for a directed verdict on the various counts. However, even if the defendants are correct that breach of warranty would not apply to non-smokers, and that count were dismissed, it would not affect the outcome of the case as presented to the jury.*

[5] *This could also lead to a result not intended by the defendants. In proving how dangerous cigarettes are, a plaintiff could offer evidence that exposure to second-hand smoke causes lung cancer and a myriad of other diseases more serious than the one actually suffered by a particular plaintiff, all of which evidence was excluded as irrelevant in our case. Each case would balloon into the original Broin trial, with months of testimony about the effects of second-hand smoke including testimony of many flight attendants about the diseases they contracted.*

[6] *This was the conclusion reached by the judge who presided over the Broin case and approved the settlement. See Judge Kaye's order of October 5, 2000 attached hereto as an exhibit. In an effort to clarify the meaning of the agreement prior to the trials in the 3000 individual pending cases, the defendants challenged Judge Kaye's order. However, finding that the issue was not ripe for review, the Third District Court of Appeal declined to take jurisdiction. Philip Morris v. Jett, 802 So. 2d 353 (3d DCA 2001).*

specifically addressed in the Broin settlement agreement. However, in settling the class action lawsuit, the defendants agreed to pay 46 million dollars in attorney's fees, at least 3 million dollars in costs, and to contribute 300 million dollars to establish a foundation to conduct research on the detection and cure of smoking related diseases. By agreement among the defendants, each contributed to these settlement amounts based on their market share as set forth in exhibit C to the settlement agreement.[7] Certainly it could not have been contemplated by the settling parties that each individual flight attendant would have to prove precisely which cigarettes she was exposed to during the flights, that those cigarettes were manufactured by the defendants, and the extent to which her condition was caused by each defendant. Nor would it make sense to adopt what is apparently the plaintiff's position, that the judgment should be entered against the defendants jointly and severally. Although arguably the plaintiff could have offered evidence to show that the defendants should be held jointly responsible for any damages to the plaintiff, such as evidence of a conspiracy to hide information about the dangers of second-hand smoke, the plaintiff did not seek to do so. And, of course, the jury was not asked to make any such factual finding. Therefore, I conclude that the only reasonable form of judgment in this case is one which apportions the damages among the defendants based on their market share as set forth in the settlement

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[7] *Exhibit C states: The Settling Defendants' respective shares of payments due pursuant to this Agreement are as follows:*

Phillip Morris Incorporated 50.1%
R.J. Reynolds Tobacco Company 24.7%
Brown & Williamson Tobacco Corporation 16.4%
Lorillard Tobacco Company 8.8%

agreement.[8]

Lastly, I address the defendants' motion for a remittitur. Applying the standards set forth in Florida Statutes §768.74(5), I have determined that the award of 5.5 million dollars in this case is excessive.[9] Had the plaintiff described her condition to a jury that had not been advised that her illness resulted from exposure to second-hand smoke, I have no doubt the verdict would have been significantly smaller. I have concluded that prejudice against the tobacco companies, a present-day popular villain, interfered with the jury's ability to assess the damages based on a reasonable view of the evidence. This prejudice was, to some extent, fed by plaintiff's counsel.

The only evidence bearing on damages came from the testimony of the plaintiff and her treating doctor, Michael Persky. The plaintiff is a very attractive 56-year-old woman, engaged in a successful and ongoing 26-year career as a flight attendant. She appeared to be thoroughly composed and in no physical distress as she sat through the two-week trial at counsel table.[10] She testified that after two years of flying, she began having symptoms in 1978 such as a stuffy nose, problems breathing and low

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[8] *The requirement that a plaintiff plead and prove that, after making a reasonable effort to identify which manufacturer is responsible for her injuries, she is unable to do so, is obviated by the settlement agreement. Similarly, since the defendants stipulated to their market share, it is not necessary to determine the geographic limits of the relevant market. (Presumably, the relevant market is the United States.) See, Conley v. Boyle Drug Company, 570 So. 2d 275 (Fla. 1991) in which the court adopted a market share theory finding that no defendant should be held liable for more harm than it statistically could have caused in the respective market.*

[9] *The jury awarded 2 million dollars for past pain and suffering and 3.5 million dollars for future pain and suffering. There were no damages sought for medical bills, lost wages, reduced earning capacity or any other economic damages.*

[10] *Plaintiff's counsel's assertion in plaintiff's post-trial submission, that the jury must have taken into account "Ms. French's obvious discomfort in court throughout the entire trial" is not supported by anything in the record and is contrary to the court's observation.*

energy for which she sought medical treatment. She was given antibiotics and decongestants and her condition improved, at least temporarily. Her symptoms recurred and in 1989 she came under the care of an ear, nose and throat specialist, Dr. Michael Persky. At that time she was experiencing headaches, pressure behind her eyes and breathing problems. She underwent sinus surgery which helped her and improved her condition for about two years. Then she again began experiencing a stuffy nose, and has had to accept the fact that her condition is chronic and that she will have to take antibiotics for the rest of her life. However, she has not visited the doctor for treatment for her sinusitis for the past three years. She has continued to work as a flight attendant, full time, while successfully balancing her duties as a mother and wife. And there was no evidence that any of her daily activities have been significantly restricted by her illness.

Dr. Michael Persky, the plaintiff's treating doctor, traveled from California to testify in her behalf. His description of her presenting complaints, though more detailed and clinical were essentially the same as the plaintiff's: frontal headaches with throbbing pain, green phlegm with post-nasal drip, hoarseness. He treated her with high doses of antibiotics and nasal decongestants. In October 1989 he performed endoscopic sinus surgery, under general anesthesia. He stated that "she tolerated the procedure very well and ... had a pretty stable and normal post-operative course." He has continued to prescribe antibiotics for Ms. French but has not seen her for sinus problems since October 1999.[11] Though he believes the cilia in her upper respiratory tract were affected by exposure to cigarette

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[11] *There was evidence that he treated the plaintiff for an unrelated matter, collagen injections, in December 2001. However, his office notes make no reference to sinusitis complaints at that time.*

smoke, he testified that the effect was most likely not permanent.

Plaintiff's counsel's description that "Lynn French wakes each day to a sea of painful and debilitating maladies caused by cigarettes smoke" is, most respectfully, his own invention. He adds to the symptoms actually reported by the plaintiff and her doctor, as described above, those discussed by other witnesses as possible symptoms and complications of sinusitis, such as life threatening orbital abscesses and asthma. There was no evidence that the plaintiff had such symptoms, was likely to develop them, or was even fearful of developing them.

In view of the evidence of the plaintiff's pain and suffering, the award of 5.5 million dollars is, indeed, shocking. Plaintiff's counsel attempts to equate the condition of Ms. French to the condition of plaintiffs in cases he claims present "comparable injuries" and in which the courts have found that a remittitur of multimillion dollar awards was improper. The case plaintiff cites as "most on point" is Oakes v. Pittsburgh Corning Corp., 546 So. 2d 427 (3d DCA 1989). If the only evidence in Oakes, were as described in plaintiff's submission, that the plaintiff suffered from "shortness of breath and coughing spells," certainly a remittitur of the award of 2.5 million dollars would have been upheld on appeal. However, as set forth in the Third District's opinion, the evidence of Mr. Oakes' suffering was overwhelming.[12] It is not remotely comparable to the evidence in our case.

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[12] *A partial recitation of Mr. Oakes' problems follows:*

> *John Oakes, a sixty-five year old man at the time of trial has progressive pulmonary asbestosis, as well as other diseases caused or aggravated by his occupational exposure to asbestos. As a result of his asbestosis, Mr. Oakes is continually short of breath, even at rest. Minimal exertion, such as walking across the living room or climbing onto a doctor's examining table, makes him even more short of breath, requiring the administration of supplemental oxygen. For the twenty months preceding the trial, he has kept a*

Likewise, plaintiff cites Wisner v. Illinois Central Gulf Railroad, 537 So. 2d 740 (La. 1st Cir. 1989), to show that an award of 2.2 million dollars for injuries from exposure to toxic chemicals, injuries presumably similar to those sustained by Ms. French, should not have been reduced by the trial judge. Again, the plaintiff mischaracterizes the injuries suffered by Mr. Wisner, greatly minimizing them so as to make it appear that Wisner and Ms. French are in the same boat. Ms. French, however, is much more fortunate. Mr. Wisner, a 35-year-old state trooper who was in top physical condition before his exposure to the toxic fumes, was left with emphysema, fibrous pleuritis, cardiac performance of a 60-year-old, and lungs which functioned at about 50% of their capacity. In addition, he suffered from severe depression, impotence and loss of vision, each of these conditions having been described in detail at trial by the plaintiff's medical experts. The fact that the award in his case was upheld, in no

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> *portable breathing machine at his home, which he uses at least every three to four hours and which supplies him with the supplemental oxygen that he needs to keep himself alive. He will require supplemental oxygen for the rest of his life. He often suffers from coughing spells that are so severe that they cause him to faint. His violent coughing alone does not liberate the mucus that is clogging his lungs, and bystanders must pound on his chest to allow him to breathe. He has suffered at least three broken ribs from this pounding on his chest; these fractures were visible on x-rays of his chest taken by the Defendants' expert medical witness. Since the development of his asbestosis, Mr. Oakes has been diagnosed with coronary artery disease and congestive heart failure. Both of these cardiac complications are attributable, at least in part, to the pulmonary problems caused by his asbestosis. Moreover, Mr. Oakes cannot have surgery to alleviate these conditions, because his asbestos-related pulmonary disease precludes the use of anesthesia. Both his pulmonary disease and his heart disease are thus incurable and terminal.*
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> Oakes, *546 So. 2d at 429* n.2.

way bears on the reasonableness of the award to Ms. French.

Although it is clear that the jury's award to Ms. French is excessive and does not reasonably relate to the damages described at trial, it is difficult to determine the amount of excess. The court is mindful of the requirement that the amount of the remittitur "should be arrived at by 'reasoning actuated and controlled by the facts in the record and guided by an honest, sincere purpose to do justice to both parties' in light of those facts." Normius v. Eckerd Corporation, 813 So. 2d 985, 988 (2d DCA 2002) (quoting De La Vallina v. De La Vallina, 107 So. 339, 339 (1926)).

Perhaps the easiest solution here would be to reduce the damages to the amount requested by the plaintiff in closing: $1,060,000.[13] The fact that the jury's award was more than five times the amount requested, can be considered in assessing the reasonableness of the award. In a recent wrongful death case, Florida Power and Light Company v. Goldberg, 27 Fla. L. Weekly D1177 (Fla. 3d DCA May 22, 2002), the defendant challenged the award of $37,372,000 to parents of a child killed in an automobile accident, but did not request a remittitur. On appeal, the court affirmed the trial court's denial of a new trial but, sua sponte, remitted the award to $10,000,000 stating that that amount did not shock the conscience of the court nor was it grossly disproportionate to awards in similar cases. The court then adverted to the fact that the plaintiff's counsel, in closing, argued that $10,000,000 was appropriate and that the defendant did not dispute that figure.

I do not believe that the appellate court in Goldberg intended to imply that a remittitur should be

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[13] *"While a jury is not bound by lawyers' arguments, those arguments are certainly relevant in determining the reasonableness of the jury's decision."* Parker v. Hoppock, *695 So. 2d 424, 428 (4th DCA 1997).*

governed by the amount of damages suggested by counsel in closing argument. There are many reasons, including ones of tactics, that counsel suggest an amount of damages to a jury or refrain from doing so. In the Goldberg case, presumably the court found $10,000,000 to be an appropriate award in light of the evidence and did not select that figure merely because plaintiff's counsel had done so.

Though there are many cases involving the wrongful death of children which could have guided the court in setting a reasonable damage award in Goldberg, there are apparently no reported cases where a plaintiff suffered chronic sinusitis from exposure to any chemical or condition. Therefore, we must look at cases in which multi-million dollar awards have been found appropriate and compare the evidence of those injuries to injuries sustained by Ms. French. In doing so, I find that a substantial remittitur is required. For reasons reviewed herein, the judgment shall be reduced to $500,000, $300,000 for past pain and suffering and $200,000 for future pain and suffering.

In accordance with Florida Statute §768.74(4), the plaintiff shall file a written agreement with, or rejection of, the remittitur within ten days from the date this order becomes effective. In the event the plaintiff rejects the remittitur, plaintiff will be entitled to a new trial on damages only.

I have considered the many other grounds raised by the defendants in their post-trial motions and find them to be without merit.

The Court retains jurisdiction to enter a final judgment consistent with this order and to consider an award of costs and attorney's fees if applicable.

DONE AND ORDERED in Chambers at Miami-Dade County, Florida this ___ day of September, 2002.

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Fredricka G. Smith
Circuit Court Judge

Copies furnished to:

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