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Case No. SC20-291
L.T. Case No.: 1D17-210

IN THE SUPREME COURT OF FLORIDA

LINDA PRENTICE, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF JOHN C. PRICE,

PLAINTIFF/PETITIONER,

V.

R.J. REYNOLDS TOBACCO COMPANY

DEFENDANT/RESPONDENT,

On Review from the District Court of Appeal,
First District, State of Florida

APPENDIX TO ANSWER BRIEF OF RESPONDENT R.J. REYNOLDS TOBACCO COMPANY

Jason T. Burnette
Florida Bar No. 125200
Brian Charles Lea
Florida Bar No. 1011371
JONES DAY
1420 Peachtree St., N.E., Ste. 800
Atlanta, GA 30309-3053
Telephone: (404) 581-8724
Facsimile: (404) 581-8300
jtburnette@jonesday.com

Troy A. Fuhrman
Florida Bar No. 985211
Marie A. Borland
Florida Bar No. 0847984
HILL WARD HENDERSON
101 East Kennedy Boulevard,
Suite 3700
Tampa, FL 33601
Telephone: (813) 221-3900
Facsimile: (813) 221-2900
troy.fuhrman@hwhlaw.com
marie.borland@hwhlaw.com

Counsel for Respondent R.J. Reynolds Tobacco Company

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FIRST DISTRICT COURT OF APPEAL
STATE OF FLORIDA

No. 1D17-2104

R.J. REYNOLDS TOBACCO COMPANY,

Appellant/Cross-Appellee,

v.

LINDA PRENTICE, as Personal Representative of the Estate of John C. Price,

Appellee/Cross-Appellant.

On appeal from the Circuit Court for Duval County.
Tyrie W. Boyer, Judge.

October 24, 2019

ROWE, J.[1]

R.J. Reynolds Tobacco Company (RJR) appeals from a final judgment entered in favor of Linda Prentice, as personal representative of the Estate of John C. Price (the Estate), on her wrongful death claim. RJR raises several grounds for reversal and the Estate raises several issues on cross-appeal. We write only to address RJR's argument that the trial court erred by denying

[1] Judge Rowe did not participate in the oral argument held on July 18, 2018, but she did review the video recording of the argument.

RJR's request for a special jury instruction on conspiracy to commit fraudulent concealment. The trial court's refusal to give the special jury instruction on conspiracy to commit fraudulent concealment was an abuse of discretion because the proposed instruction was a correct statement of the law, was supported by the facts, was necessary for resolving the issues, and the failure to give the instruction was prejudicial.

Facts

Price filed an individual *Engle*[2] lawsuit before his death, alleging that his Chronic Obstructive Pulmonary Disease was caused by his addiction to smoking cigarettes manufactured and marketed by RJR. After Price died, the Estate maintained the suit as a wrongful death action. The Estate alleged causes of action for strict liability, negligence, fraudulent concealment, and conspiracy to commit fraudulent concealment.

Price began smoking when he was 12 years old. By the time he was 16, Price was smoking a pack a day. Price smoked two to three packs of cigarettes a day for most of his adult life. He did not quit smoking until he was 58, when he was diagnosed with COPD. He died 16 years later, at the age of 74.

As with other *Engle*-progeny cases, the Estate presented evidence that major tobacco companies in the United States, including RJR, made fraudulent statements about the hazards of smoking as early as December 4, 1953. Over a fifty-year period, the tobacco companies concealed information about the addictive nature of nicotine and the harmful effects of smoking while engaging in marketing efforts to encourage people to smoke.

The jury returned a verdict for the Estate on the negligence and strict liability counts. And while the jury found that the major tobacco companies conspired to conceal health information or information about addiction, the jury did not find that RJR's concealment or omission of material information about the health

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

effects and addictive nature of smoking cigarettes was a legal cause of Price's death.

The jury awarded $6.4 million dollars in compensatory damages, apportioning 60% of the fault for the legal cause of Price's death to Price and 40% to RJR. The jury found that punitive damages were warranted but awarded none.

Analysis

We review the failure to give a proposed jury instruction for an abuse of discretion. *See R.J. Reynolds Tobacco Co. v. Jewett*, 106 So. 3d 465, 467 (Fla. 1st DCA 2012). A trial court abuses its discretion when it does not give a requested instruction that (1) accurately states the law, (2) is supported by the facts of the case, and (3) is necessary for the proper resolution of the issues by the jury—if the requested instruction is not covered by other instructions given to the jury and the failure to give the requested instruction is prejudicial. *Id.*

RJR argues that the trial court abused its discretion when it instructed the jury on the count of conspiracy to commit fraudulent concealment. RJR argued that for the Estate to prove its conspiracy claim, it would need to show that Price relied to his detriment on a specific statement that concealed or omitted material information about the health risks of smoking. During the charge conference, RJR requested the following instruction:

> The next issue for your determination is whether Mr. Price reasonably relied to his detriment on a statement that concealed or omitted material information regarding the health effects of smoking cigarettes or their addictive nature, and that was made in furtherance of Defendant's agreement to conceal health information or information regarding addiction and, if so, whether such reliance was a legal cause of Mr. Price's COPD and death. In order to be a legal cause of COPD and death, Plaintiff must show that Mr. Price relied on statements by Defendant or any of the other companies involved in the agreement that omitted material information concerning the health effect of cigarettes or their addictive nature or both made at any

> time during or after December 1953. I hereby instruct you that Plaintiff has made no claim for conspiracy to conceal information regarding smoking and health or addiction before December 1953.
>
> Reliance on a statement made in furtherance of an agreement to conceal is a legal cause of COPD and death if it directly and in natural and continuous sequence produces or contributes substantially to producing such COPD and death so that it can reasonably be said that, but for the reliance on the statement omitting the material fact, the COPD and death would not have occurred.

RJR argued that the proposed instruction was proper because conspiracy to commit fraudulent concealment requires proof of reliance on a false or misleading statement made by RJR.

The trial court declined to give the requested instruction and instead gave the following instruction that did not require the jury to find that Price relied on a specific statement:

> The next issue for your determination is whether the conspiracy to withhold health information or information regarding addiction and any acts proven in furtherance of that conspiracy were relied upon by John Price to his detriment and were a legal cause of John Price's death.
>
> In regard to this civil conspiracy finding I instruct you that R.J. Reynolds is responsible for every act committed by each of the co-conspirators taken in furtherance of the conspiracy. John Price's reliance to his detriment on a concealment or omission by any of the tobacco companies or tobacco industry groups involved in the conspiracy is a legal cause of John Price's death if it directly and in a natural and continuous sequence produced or contributed substantially to producing his death so that it can reasonably be said that but for John Price's reliance his death would not have occurred.

Based on this Court's recent decision in *R.J. Reynolds v. Whitmire*, 260 So. 3d 536 (Fla. 1st DCA 2018),[3] this was error.

In *Whitmire*, RJR argued on appeal that the trial court erred when it denied RJR's motion for directed verdict because the *Engle* plaintiff in that case failed to allege that he detrimentally relied on a fraudulent statement by RJR. This Court acknowledged that "the Engle findings generally establish that [RJR] made misleading statements and concealed material information." *Id.* at 540. But we agreed with RJR's argument about individual reliance on specific statements and held that to support a claim for fraudulent concealment, an *Engle* plaintiff must "prove that they relied to their detriment on false statements from the tobacco companies." *Id.* at 539.

Here, no other jury instruction informed the jury of the need to find that Price detrimentally relied on a false or misleading statement by RJR. RJR's proposed instruction was a correct statement of the law supported by the facts of the case and necessary for the jury to resolve properly the issues. *Jewett*, 106 So. 3d at 467. The failure to give the requested instruction was prejudicial because the jury might have reasonably been misled by the instruction that was given. *See Fla. Power & Light Co. v. McCollum*, 140 So. 2d 569, 569 (Fla. 1962) (concluding that the proper "inquiry is whether the jury might reasonably have been misled" and concluding that such constitutes a miscarriage of

[3] Despite statements to the contrary in the dissent, our decision in *Whitmire* does not conflict with our earlier decision in *R.J. Reynolds Tobacco Co. v. Martin*, 53 So. 3d 1060 (Fla. 1st DCA 2010). *Martin* established that reliance can be proven by circumstantial evidence. *Whitmire*, 260 So. 3d at 540. But as we explained in great detail in *Whitmire, Martin* should not be read to circumvent earlier decisions from the Florida Supreme Court holding that "plaintiffs must prove such reliance based on some evidence to support the inference and the supreme court's holdings on the merit of circumstantial evidence to support liability." *Id.* at 540; *Hess v. Philip Morris USA, Inc.*, 175 So. 3d 687 (Fla. 2015) ("The plaintiff 'must certainly prove detrimental reliance' to prevail on a claim of fraudulent concealment.").

justice under the civil harmless error statute in effect then); *Veliz v. Am. Hosp., Inc.*, 414 So. 2d 226, 228 (Fla. 3d DCA 1982) ("An instruction which tends to confuse rather than enlighten the jury is cause for reversal if it may have misled the jury and caused them to arrive at a conclusion that otherwise they may not have reached."). Thus, reversal is required.

Disposition

Having reversed the judgment on the conspiracy count, we must consider the appropriate scope of remand. In the concluding sentence of the Initial Brief, RJR asks this Court to "order a new trial or, in the alternative, reduce the judgment by Mr. Price's share of comparative fault."[4] *See* Fla. R. App. P. 9.210(b) (requiring that an initial brief contain "a conclusion, of not more than 1 page, setting forth the precise relief sought"). We begin by observing the discretion vested in an appellate court to direct a new trial on one or more issues. *See Tracey v. Wells Fargo Bank, N.A.*, 264 So. 3d 1152 (Fla. 2d DCA 2019) (discussing the principles governing an appellate court's authority when reversing a trial court judgment). Section 59.35, Florida Statutes (2017), provides:

> An appellate court may, in reversing a judgment of a lower court brought before it for review by appeal, by the order of reversal, if the error for which reversal is sought is such as to require a new trial, direct that a new trial be

[4] RJR thus did not limit its prayer for relief to requesting a reduction in the compensatory damages award to account for comparative fault. Rather, its prayer for relief in the alternative was linked to RJR's fifth claim of error—that the trial court should have applied the comparative-fault statute even though the Estate prevailed on its conspiracy claim. RJR asserts that the comparative-fault statute applies to all *Engle*-progeny cases "regardless of whether or not the plaintiff prevails on individual claims of concealment or conspiracy." Thus, the alternative prayer for relief pertained only to RJR's fifth claim. In its fourth claim of error regarding the jury instruction on the conspiracy claim, RJR does not so limit its prayer for relief.

> had on all the issues shown by the record or upon a part of such issues only.

Thus, remand directions are within the discretion of the appellate court. *Tracey*, 264 So. 3d at 1161 ("Remand directions . . . seem always to turn upon some basic postulate of fairness, which is, in turn, an exercise of a court's discretion."); *see also Yates v. St. Johns Beach Dev. Co.*, 165 So. 384, 385 (Fla. 1935) ("It is a long-standing legal principle that appellate courts have broad powers to "make such disposition of the case as justice requires.").

But that discretion is not without limits. *Id.* For example, after granting a new trial on one issue, an appellate court must order retrial of other issues when the issues are "inextricably intertwined." *See Gasoline Prods. Co. v. Champlin Refining Co.*, 283 U.S. 494 (1931). This is so because if the trial court "were to retry only one of two such intertwined issues to a second jury, while maintaining the vitality of the first jury's findings on the other issue, it would cause confusion and uncertainty and, thus, an unfair trial." *Morrison Knudsen Corp. v. Fireman's Fund Ins. Co.*, 175 F.3d 1221, 1255-56 (10th Cir. 1999). Courts have found issues of liability and damages to be inextricably intertwined when a trial on damages alone would require the jury to consider the same evidence as a trial on both liability and damages. *See Lawson v. Swim*, 258 So. 2d 458, 459 (Fla. 1st DCA 1972) (after reversing on damages, directing new trial on damages and liability "because the evidence as to both issues is so inextricably interlaced that the new jury should be allowed to consider and determine both issues"); *Equitable Life Assurance Soc'y of U.S. v. Fairbanks*, 400 So. 2d 550, 553 (Fla. 4th DCA 1981). Courts have also found issues of liability and comparative fault to be inextricably intertwined. *See, e.g., Lenhart v. Basora*, 100 So. 3d 1177 (Fla. 4th DCA 2012) ("To parse out the comparative negligence of the parties, the trier of fact must hear the 'totality of fault' of each side."); *Currie v. Palm Beach Cty.*, 578 So. 2d 760, 764 (Fla. 4th DCA 1991) ("One of the issues tried to the jury was whether [plaintiff] was comparatively negligent. Evidence on this issue necessarily impacts both liability and damages.").

Here, the jury found for Price on her claims for negligence and conspiracy, but not on her claim for fraudulent concealment. The

jury awarded compensatory damages and apportioned fault between Price and RJR. And in a separate phase, the jury declined to award punitive damages against RJR. Based on our review of the record, particularly the instructions read to the jury and the verdict form, we conclude that the issues of negligence, conspiracy, comparative fault, compensatory damages, and punitive damages are inextricably intertwined and must be retried.[5]

The following instructions were given to the jury: First, the jury was instructed to determine whether Price was a member of the *Engle* class. To do this, the jury had to find that Price was addicted to cigarettes containing nicotine, and that addiction was a legal cause of his COPD. Then, if the jury found that Price was a member of the *Engle* class, it next had to consider two theories of strict liability.

First, the jury had to decide whether RJR's concealment or omission of material information about the health risks and addictive nature of cigarette smoking was relied on by Price to his detriment and was the legal cause of his death. Second, the jury had to determine that RJR conspired with other tobacco companies to withhold health information or information about addiction and that any acts proven in furtherance of that conspiracy were relied on by Price to his detriment and were a legal cause of his death.

If the jury found that the greater weight of the evidence supported one or more of Price's claims, then it had to assign a percentage of fault to Price for his death. This determination was to be followed by a finding on the amount of damages suffered by

[5] We do not disturb the jury's verdict for RJR on the fraudulent concealment count. The Estate did not cross-appeal the judgment entered on the fraudulent concealment claim. *See Webb Gen. Contracting, Inc. v. PDM Hydrostorage, Inc.,* 397 So. 2d 1058, 1059-60 (Fla. 3d DCA 1981) ("The function of a cross-appeal is to call into question error in the judgment appealed, which, although substantially favorable to the appellee, does not completely accord the relief to which the appellee believes itself entitled.")

Price's wife as a result of his death, including any damages that she was reasonably certain to suffer in the future. Finally, the jury was asked to determine whether punitive damages were warranted as a punishment to RJR and as a deterrent to others.

The verdict form mirrored the instructions given to the jury. The jury was asked if Price was a member of the *Engle* class. If it answered affirmatively, the jury had to determine whether RJR's concealment or omission of information was the legal cause of Price's death and whether RJR's involvement in the conspiracy to conceal or omit information was a legal cause of Price's death. Next, the jury allocated fault between Price and RJR and decided the total amount of damages suffered by Price's wife. Finally, the jury had to determine whether clear and convincing evidence showed that punitive damages were warranted against RJR.

Thus, the verdict on comparative fault reflected the jury's finding that RJR was liable for the claims of negligence and conspiracy. The jury was not instructed to and did not separate out the amount of fault assigned to each claim. This also holds true for the jury's award of damages.[6] On remand, a second jury could find that RJR did not conspire to conceal fraudulent information. In that event, it is unclear how the second jury could apportion fault between RJR and Price without reconsidering the findings of the first jury on the negligence claim. Because the issues here are inextricably intertwined, we reverse and remand

[6] Despite the Estate's assertion, a new trial on multiple issues is not prohibited by the two-issue rule. This is because RJR timely objected to the use of the general verdict form approved by the trial court and submitted a special verdict form including a correct statement of the conspiracy claim. *Whitman v. Castlewood Int'l Corp.*, 383 So. 2d 618, 619 (Fla. 1980) ("[W]here there is no proper objection to the use of a general verdict, reversal is improper where no error is found as to one of two issues submitted to the jury on the basis that the appellant is unable to establish that he has been prejudiced"); *see also Liggett Group, Inc. v. Davis*, 973 So. 2d 467, 473 (Fla. 4th DCA 2007) (declining to apply the two-issue rule where "a general verdict form was submitted, without objection").

for a new trial on the negligence and conspiracy claims, and on compensatory damages, comparative fault, and punitive damages.

REVERSE and REMAND for a new trial.

B.L. THOMAS, J., concurs; MAKAR, J., dissents with opinion.

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

MAKAR, J., dissenting.

In this tobacco tort case, the jury ruled in favor of the deceased's estate on three different claims: that R.J. Reynolds (RJR) acted negligently, that RJR was strictly liable for the harm to the deceased, and that RJR engaged in a conspiracy to conceal material information about the dangers of smoking. It awarded $6.4 million in compensatory damages but no punitive damages despite determining they were warranted.

As to the conspiracy claim, RJR argues on appeal that the jury was not properly instructed on the element of *reliance*, the same argument it made in *R.J. Reynolds Tobacco Co. v. Martin*, 53 So. 3d 1060, 1069 (Fla. 1st DCA 2010) ("RJR also argues that Mrs. Martin failed to prove the reliance element of her fraudulent concealment claim because she put on no direct evidence showing Mr. Martin relied on information put out by the tobacco companies omitting scientific findings on the harmful effects of smoking."). This Court in *Martin* rejected RJR's argument, noting that:

> the record contains abundant evidence from which the jury could infer Mr. Martin's reliance on pervasive misleading advertising campaigns for the Lucky Strike brand in particular and for cigarettes in general, and on the false controversy created by the tobacco industry during the years he smoked aimed at creating doubt among smokers that cigarettes were hazardous to health.

Id. This case is identical to and governed by *Martin*. As in *Martin*, John Charles Price, the now-deceased smoker in this litigation, was aware of the pervasive misleading advertising campaign, which affected his smoking decisions. When asked how RJR's ads injured him, he testified they presented the "Marlboro Man" as if to "make everything look hunky-dory" and "Joe Camel" and the "Old Gold Dancers" who "made [smoking] look like the thing to do, the in crowd. You're in the in crowd." In other words, they made smoking attractive and cool, but concealed or failed to disclose its serious known health risks that would have made it unattractive, not so cool, . . . and fatal. Under *Martin,* the jury was entitled to infer that the misleading ads detrimentally affected Mr. Price's smoking behavior, thereby establishing reliance.

Martin applies notwithstanding the recent panel decision in *R.J. Reynolds Tobacco Co. v. Whitmire*, 260 So. 3d 536, 540 (Fla. 1st DCA 2018) (which was argued during the same session as this case). First of all, a panel by itself cannot overrule a district precedent. *In re Rule 9.331, Determination of Causes by a Dist. Court of Appeal En Banc, Fla. Rules of Appellate Procedure*, 416 So. 2d 1127, 1128 (Fla. 1982) [hereinafter *In re Rule 9.331*] (". . . the suggestion that each three-judge panel may rule indiscriminately without regard to previous decisions of the same court is totally inconsistent with the philosophy of a strong district court of appeal which possesses the responsibility to set the law within its district."). So, it can't be, in theory, that *Whitmire* overruled *Martin*.

Instead, the panel majority in *Whitmire* sought to distinguish *Martin*. It conceded *Martin*'s central premise, "that detrimental reliance on false statements can be proved through inference," 260 So. 3d at 540, but held nonetheless that a jury cannot infer reliance from the "abundant evidence" of a pervasive and misleading advertising campaign to which smokers nationwide were subjected based on "general evidence of the plaintiff's life and behavior," *Id.* It found in RJR's favor because the evidence in that case gave "*no indication* that the [decedent-smoker] relied on any false information disseminated by the tobacco companies." *Id.* at 540–41 (emphasis added). In contrast, Mr. Price's deposition testimony (read at trial) indicates that the pervasive tobacco advertisements

duped him into thinking smoking was the thing to do when the tobacco companies knew, but concealed, smoking's devastating health consequences, which is precisely the type of evidence that demonstrates detrimental reliance. *Hess v. Philip Morris USA, Inc.*, 175 So. 3d 687, 698 (Fla. 2015).[1]

Notably, this is not a case where a tobacco company was "silent" and failed to make actionable misleading statements that concealed information; instead, as in *Martin*, it involves the same "abundant evidence" of "pervasive misleading advertising campaigns" presented in tobacco tort cases by which reliance can be inferred. *Martin*, 53 So. 3d at 1069. In contrast to *Martin*, however, *Whitmire* appears to require proof that a plaintiff-smoker detrimentally relied on a specific false *statement* to prevail on a fraudulent concealment theory versus proof of detrimental reliance on inaccurate representations *that withheld or concealed material information*. On this point, *Martin* and *Whitmire*—like dysfunctional family members—appear to be hopelessly in conflict; and *Whitmire* is an outlier statewide on whether reliance on a specific statement is required. *See Cote v. R.J. Reynolds Tobacco Co.*, 909 F.3d 1094, 1108 (11th Cir. 2018) (surveying Florida appellate cases and concluding that "Florida courts have consistently held that *Engle*-progeny plaintiffs are not required to show reliance on a specific statement."). Our court either ought to renounce *Martin* and adopt *Whitmire* (or vice versa), certify conflict with other districts with whom we disagree, or certify a

[1] The only issue in *Hess* was whether proof of detrimental reliance is required during the repose period. The deceased smoker "believed and trusted the cigarette companies" and was "taken in by [their] advertisements," but did so outside the repose period. *Hess*, 175 So. 3d at 690. The supreme court held "that for statute of repose purposes it is not necessary that the smoker relied during the twelve-year repose period" and that "evidence of the defendant's wrongful conduct within the repose period" is sufficient. *Id.* at 698. To avoid potential confusion, the court reiterated that "*Engle*-progeny plaintiffs must certainly prove detrimental reliance in order to prevail on their fraudulent concealment claims," but that such proof may be outside the repose period, thereby breaking no new ground as to *how* detrimental reliance can be proven. *Id.*

question of great public importance. Disharmonious precedents serve only to undermine the stability and uniformity of our laws. *In re Rule 9.331,* 416 So. 2d at 1128 ("... if intra-district conflict is not resolved within the district courts by en banc decision, totally inconsistent decisions could be left standing and litigants left in doubt as to the state of law.").

Next, RJR—even if it was entitled to the jury instruction it sought on its conspiracy claim—would be entitled to a new trial *on that claim only*. It would not be entitled to a new trial on the negligence and strict liability claims, which are each a separate and independent basis for liability against RJR. Common sense tells us that a tortfeasor who injures another person by negligence (or strict liability)—as in this case—can be held liable for those acts regardless of whether the tortfeasor's conspiracy to injure that person succeeded or failed. Imagine if Alice negligently knocked Humpty Dumpty off the wall, but hadn't conspired (or failed to conspire) with anyone to hurt him. Why would a jury verdict and a damage award for Mr. Dumpty on his negligence count against Alice be in doubt? Whether or not Alice conspired to hurt Mr. Dumpty doesn't affect the fact that Alice negligently injured him. A retrial of the conspiracy claim against RJR would have no effect on, and provide no basis for negating, the negligence and strict liability claims against RJR for which the jury found liability and damages (the latter would be the same with or without a conspiracy).

Moreover, RJR *didn't even ask* for the scope of relief granted on appeal.[2] It sought a new trial as to the conspiracy claim, but it made no argument that a new trial on all three counts was necessitated because of the claimed conspiracy instruction error (it sought, at a minimum, an adjustment to the monetary judgment on the other counts "to account for comparative fault" percentages the jury agreed upon). It cited no case for the proposition that it

[2] RJR only sought a new trial as to all claims based on its three evidence-based appellate arguments (exclusion of its expert's testimony, exclusion of portions of Mr. Price's testimony, and admission of "hypothetical patient" testimony, none of which are the basis for relief in this appeal.)

gets a retrial on the negligence and strict liability counts for the claimed conspiracy instruction omission, and none exist.[3] Tellingly, RJR said *nothing* in response to the estate's point that the "jury's verdict on the negligence and strict-liability counts are not implicated at all by the conspiracy instruction. No matter what, then, these counts still stand." Ans. Br. at 55. For all these reasons, a retrial on all claims should not be granted on appeal where no legal argument or briefing by RJR was made in this Court seeking such relief.

Jeffrey A. Yarbrough, Robert B. Parrish, and David C. Reeves, of Moseley, Prichard, Parrish, Knight & Jones, Jacksonville; Jason T. Burnette, Charles R.A. Morse, Stephanie E. Parker and John M. Walker of Jones Day, New York, NY; Tony A. Fuhrman and Marie A. Borland of Hill, Ward & Henderson, Tampa, for Appellant/Cross-Appellee.

Celene H. Humphries, Maegen Peek Luka, and Thomas J. Seider of Brannock & Humphries, Tampa; Gregory D. Prysock and Katherine M. Massa of Morgan & Morgan, P.A., Jacksonville; and Keith R. Mitnik of Morgan & Morgan, P.A., Orlando, for Appellee/Cross-Appellant.

[3] The Second District in *Philip Morris USA, Inc. v. Duignan*, 243 So. 3d 426, 445 (Fla. 2d DCA 2017), reversed and required a new trial as to all claims in that case, but not on the reliance issue; instead, relief was based solely on a matter *unrelated* to the substantive tort claims. *Id.* ("we reverse and remand for a new trial on all issues *based on the trial court's readback instruction*.") (emphasis added).

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

GENERAL JURISDICTION DIVISION

HOWARD A. ENGLE, M.D., ROBERT W. ANGELL, RAYMOND LACEY, FROZENE D. STEEVENS, FRANK AMODEO, MARY FARNAN, LOREN E. LOWERY, ANGIE DELLA VECCHIA and MICHAEL MATYI, on behalf of themselves and all others similarly situated,

Plaintiffs,

vs.

R.J. REYNOLDS TOBACCO COMPANY, PHILIP MORRIS INCORPORATED, ("PHILIP MORRIS U.S.A."), LORILLARD TOBACCO COMPANY, LORILLARD, INC., THE AMERICAN TOBACCO COMPANY, BROWN & WILLIAMSON TOBACCO CORP., LIGGETT GROUP, INC., BROOKE GROUP LTD., INC., DOSAL TOBACCO CORP., COUNCIL FOR TOBACCO RESEARCH-U.S.A., INC., and TOBACCO INSTITUTE, INC.,

Defendants.

COPY

CASE NO. 94-08273 CA22

TRIAL
Volume 92

TRANSCRIPT OF PROCEEDINGS

in the above-styled cause before the Honorable Robert Paul Kaye, Circuit Judge, at the Dade County Courthouse, 73 West Flagler Street, Miami, Florida, on Friday, October 9, 1998 at 9:48 a.m.

that when and if it comes up in the context of a specific witness or document.

MS. ROSENBLATT: Your Honor, approximately four months ago, there was a cutoff date for filing motions in limine. There was never a motion in limine as to youth marketing. There was solely a motion in limine as to Joe Camel. And the basis for that -- which we felt we refuted -- was that, since that campaign started in the mid or late '80s, it wouldn't have affected particular class members.

And we felt -- and I think the voir dire process established that even young smokers and smokers of three and four years who have chronic bronchitis, have disease entities, yes, it would.

Your Honor, this is an example -- and I've prepared a -- and it's not yet complete because we just got their memo. I saw it for the first time on Wednesday. It was filed on Tuesday. It's untimely. And the defendants seized upon Your Honor's comment at a side bar during voir dire.

I wasn't here. I read the transcript where Your Honor had mistakenly thought that there had been some kind of ruling by Judge Postman, brought it up, and the defendants said: Great. Let's file a motion. Judge, because this is an integral part of any tobacco

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case, certainly our case.

It's very critical, and there are many, many documents on the issue of intent. And when it came up time and again in Broin, Your Honor excluded it. You said there's no nexus, and we argued. You said you're going too many steps. If this were an active smokers' case, totally different.

But you're saying, well, it's the tobacco company's intent to addict smokers. They do it by targeting and getting children, young smokers to smoke in order to get them addicted before they can make a choice. That replaces the smokers. And then those people are on the airplanes -- no, no, that's too many steps, you said. We're not dealing with active smokers.

Well, we're dealing with active smokers. With the exception of two or three class reps, most of them started at 11, 12, 13 years of age. Most of the class statistically, our experts will show that the majority of the smokers, the vast majority start before they're 18.

And there's an intention through the documents. It's clear. And through the testimony, there's an intention on the part -- an intent to create an addictive substance, to market and to also design

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the cigarettes, to design them to appeal to youngsters in order to have people that are too young to make informed, mature decisions do that.

That's an integral part of the case, and I think a four-month late motion in limine based upon a comment by Your Honor, I don't think it's fair. I'm going to be submitting a subsequent -- not subsequent -- my response to their memo because this just came up, and I think it is an important part.

I don't think it's going to be the focus in any way of opening statement, but it's part of the case. It's very critical on the issue of intent and on the issue of the intent to addict, on fraud, on conspiracy, on strict liability, on tort and basically every count in our complaint. And it's there. It wasn't -- much of it was there.

There were very small portions that dealt with warnings that were preempted. The majority remains in the Engle second amended complaint or amended complaint, and it's part of this case, Your Honor.

THE COURT: I think maybe the comments made by the Court may have been taken out of the context. I think the meaning of the Court at that time was in reference to Joe Camel advertising. And I was under

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

GENERAL JURISDICTION DIVISION

HOWARD A. ENGLE, M.D., ROBERT W. ANGELL, RAYMOND LACEY, FROZENE D. STEEVENS, FRANK AMODEO, MARY FARNAN, LOREN E. LOWERY, ANGIE DELLA VECCHIA and MICHAEL MATYI, on behalf of themselves and all others similarly situated,

Plaintiffs,

vs.

R.J. REYNOLDS TOBACCO COMPANY, PHILIP MORRIS INCORPORATED, ("PHILIP MORRIS U.S.A."), LORILLARD TOBACCO COMPANY, LORILLARD, INC., THE AMERICAN TOBACCO COMPANY, BROWN & WILLIAMSON TOBACCO CORP., LIGGETT GROUP, INC., BROOKE GROUP LTD., INC., DOSAL TOBACCO CORP., COUNCIL FOR TOBACCO RESEARCH-U.S.A., INC., and TOBACCO INSTITUTE, INC.,

Defendants.

COPY

CASE NO. 94-08273 CA22

TRIAL
Volume 107

TRANSCRIPT OF PROCEEDINGS

in the above-styled cause before the Honorable Robert Paul Kaye, Circuit Judge, at the Dade County Courthouse, 73 West Flagler Street, Miami, Florida, on Monday, October 26, 1998 at 9:35 a.m.

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2A and 3A			12018

— — —

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(Whereupon, the following proceedings were had:)

THE COURT: Good morning, all. Have a seat, please.

I can't tell if there's anything new on my desk or not, it's so high full of papers.

Anybody give me anything new today?

MS. ROSENBLATT: Not from us.

THE COURT: It's all old stuff?

THE CLERK: (Handing).

THE COURT: This is new? Let's see what else. Okay. This is something regarding Dr. Benowitz.

MS. ROSENBLATT: I think that had been served last week. Just objections.

THE COURT: Those are the objections.

And this one, which relates to Dr. Carr and Dr. Davis.

MS. ROSENBLATT: The other doctors that will be testifying this week. We have those.

THE COURT: Okay. Now, I guess, then, we're all set to go.

The jury is here?

THE BAILIFF: Yes, Your Honor.

THE COURT: Bring the jury in.

MS. ROSENBLATT: Your Honor, the mikes are off, I believe. I think on Friday we had taken them

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off.

THE COURT: You mean on the podiums?

MS. ROSENBLATT: Should we plug them in?

THE COURT: I guess so. But be advised, as soon as they're on, it's tough for you to talk over there.

MS. ROSENBLATT: So maybe at breaks we should just unplug them for privacy.

THE COURT: I will have to figure out some way to do that.

MS. ROSENBLATT: Apparently it picks up every nuance, the reporters say.

THE COURT: Apparently it picks up the defense, too.

MS. ROSENBLATT: At lunch break I will take those two out.

THE BAILIFF: Bringing in the jury. Jurors entering the courtroom.

(The jurors entered the courtroom.)

THE COURT: Well, good morning, all. Have a seat. Everybody have an enjoyable few days off?

THE JURORS: Yes.

THE COURT: Good. I've never seen a happier jury. Glad you feel good. We're about to begin another week with the same rules that apply as we

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proceed along. We have a witness ready to go?

MR. ROSENBLATT: Yes, Your Honor.

Dr. Benowitz.

THE COURT: Let's proceed.

Thereupon:

NEAL BENOWITZ, M.D.

having been called as a witness, was duly sworn, examined, and testified as follows:

DIRECT EXAMINATION

BY MR. ROSENBLATT:

Q. Good morning, Dr. Benowitz. Please tell the ladies and gentlemen of the jury your full name and your professional address.

A. It's Neal Benowitz, and I'm based at San Francisco General Hospital, 1001 Potrero Avenue, San Francisco, California.

Q. You are of course a medical doctor?

A. Yes, I am.

Q. Now, what I'm going to do initially, Doctor, the jury is familiar with what a curriculum vitae is, and I'm initially going to go down your curriculum vitae.

Let me start with your medical education, background and training, and actually, even before you received your MD degree, what did you major in in

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Q. Than the machine?

A. Than the machine does. And they smoke faster than once a minute. On average, a person smokes once every 35 seconds, and they can smoke more than that. And most apparently for the low-yield cigarettes, smokers learn though not told about these ventilation holes, but the holes are placed down close to where the fingers or lips go on the cigarette. The smokers learn if they hold a cigarette a certain way, the draw is better, the taste is better. Or, if they put their lips a little further up the cigarette, the taste is better. What they are really doing unconsciously is blocking the ventilation holes.

So what's been known, as I said, since the '70s, is in fact what people really take in has got no relationship at all to the FTC method. So people can smoke a cigarette that supposedly delivers .2 milligrams of nicotine and get the same nicotine level and same tar exposure as well as somebody smoking a cigarette that delivers 1.5 milligrams.

Q. Depending how the individual smoked that cigarette?

A. Right.

Q. And the machine I presume smokes it the same way all the time?

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A. That's right. And we and others have studied big populations of smokers and looked at the kind of cigarette smoke versus the kind of intake of nicotine, and there is virtually no relationship. So the FTC method was nothing that really predicted what people took in.

This conference then sat down and said: Okay, what do we do about this? And we talked about some suggestions about public education, about labeling, about giving the public information that if, in fact, you want to have a low-yield cigarette, you can't take big puffs, you shouldn't take frequent puffs, and the vent holes we said should be marked and should be explained to people. If you don't want to get more nicotine than you're supposed to, or more tar, then don't block these holes.

So it was a two-day conference basically trying to translate what we knew about the FTC method to help smokers, if they wanted to reduce toxic exposures, to do so.

Q. Now, you've talked about ventilation holes. Let me hand you a cigarette, and please describe to the jury exactly what we're talking about when we talk about these ventilation holes which smokers can either consciously or unconsciously cover up with their

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fingers or with their mouth. (Handing)

A. Okay. This is a True cigarette.

Q. That's the brand, True?

A. That's the brand.

About two-thirds of the cigarette is the tobacco rod, which is where the tobacco sits, and it's covered with paper. The third, which would be near the smoker's mouth, has the filter and some paper which overlies the filter and connects it to the tobacco rod.

About half an inch or so from where the smoker would put the cigarette in their mouth, if we look carefully, you'll see little tiny perforations. They're hard to see if you don't look for them. But these are the ventilation holes.

If you put your finger -- if you hold a cigarette, it's very easy to put your finger over these holes, or you can put it deeper in your mouth and block it with your lips.

If you block these holes, the yield of the cigarette might increase two or three times or more, depending how the ventilation is.

This is something that most low-yield cigarettes have, and it's something that cigarette smokers are never told about.

Q. Now, the ventilation holes are not in the

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tobacco part of the cigarette; they're in the filter part of the cigarette?

A. They're in the filter, just about where you hold the cigarette or put your lips over the cigarette.

Q. Now, the FTC, that's the Federal Trade Commission?

A. Correct.

Q. And it's the Federal Trade Commission that uses the smoking machines or has ordered that the tobacco companies use them? How does that work?

A. Well, in the past, the Federal Trade Commission did the testing themselves. They had the machines. In recent years, they've stopped doing the testing. The tobacco industry does it, and the tobacco industry submits the test data to the Federal Trade Commission, which then publishes the data on an annual basis.

Q. Okay. Dr. Benowitz, you've been a consultant for the United States Occupational Safety and Health Administration, as well as for the United States -- the FDA, Food and Drug Administration; is that correct?

A. Yes.

Q. Now, with respect to the 1998 Surgeon General's Report, the title of which is Report on Tobacco Use Among United States Racial Ethnic Minority

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TRIAL
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I N D E X

WITNESS	PAGE
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(Whereupon, the following proceedings were had:)

THE COURT: Have a seat. All right.

Doctor, if you'll resume the stand.

Okay.

Are you ready?

MR. ROSENBLATT: Yes, Judge.

THE COURT: Let's get the jury in, please.

THE BAILIFF: Yes, Your Honor.

(The jurors entered the courtroom.)

THE COURT: All right. You may be seated. Thank you.

Let's proceed.

DIRECT EXAMINATION (Continued)

BY MR. ROSENBLATT:

Q. Okay, Doctor. When we -- when we broke for lunch, I had -- I was asking you some questions about the document of a Dr. Dunn of Philip Morris, the title of which is, Motives and Incentives in Cigarette Smoking.

Now, you've got a copy of that in front of you?

A. Yes, I do.

Q. Okay. I believe I was on Page 4, and I'm still on Page 4.

About the middle of the page, Dr. Dunn says:

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No one has ever become a cigarette smoker by smoking cigarettes without nicotine.

What is your opinion of that statement? Is that a true statement?

MR. SCHNEIDER: Objection, Your Honor.

THE COURT: In the context of an opinion, whether it's correct or incorrect, I think it's basically where we're at. Do you agree with the statement or disagree with the statement I think would be the better question.

MR. ROSENBLATT: Fine. Fine, Judge.

BY MR. ROSENBLATT:

Q. Do you agree or disagreement with the statement?

Let me repeat it one more time. No one has ever become a cigarette smoker by smoking cigarettes without nicotine.

A. I am certainly not aware of anyone who has continued to smoke cigarettes without nicotine. People have tried that for certain periods of time, but I'm not aware of anyone who kept on smoking without nicotine.

Q. And Dr. Dunn's next statement on Page 4 is, quote: Most of the physiological responses to inhaled smoke have been shown to be nicotine related.

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Do you agree or disagree with that statement?

A. I agree with that statement.

Q. Physiologic responses, meaning what?

I mean, what does that mean to you?

A. Well, a number of physiologic responses have been studied, including brain wave activation, heart rate changes, skin temperature changes, hormone release, all of those effects of cigarettes can be mimicked by giving -- also subjective responses, how people feel, can in many ways also be mimicked by just giving nicotine.

Q. Go to Page 5, please, the second paragraph, where Dr. Dunn says as follows: The cigarette should be conceived not as a product but as a package. The product is nicotine.

And going down toward the middle of the page: Think of the cigarette pack as a storage container for a day's supply of nicotine.

And a couple lines further down, quote: Think of the cigarette as a dispenser for a dose unit of nicotine.

Do you agree or disagree with those statements?

A. Well, it's certainly -- all of my research has supported this concept, and most of the research

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that has been published about smoking supports this idea.

Q. And then on Page 6, the middle of the page, Dr. Dunn says, quote -- that's after he lists five items, but after Number 5, he says, quote: Smoke is beyond question the most optimized vehicle of nicotine, and the cigarette the most optimized dispenser of smoke.

Do you agree or disagree with that statement?

A. I agree. This really goes back to the paper that I discussed talking about arterial levels, high levels of nicotine going to the brain quickly, and this, I think, is widely accepted by scientists that this is true.

Q. I believe everybody recognizes that nicotine occurs naturally in the tobacco plant, but I'd like for you to explain to the jury what the difference is, if there is a difference, between the nicotine which exists naturally in the agricultural tobacco plant and the nicotine that ultimately makes its way into the final cigarette that people put in their mouths and light up.

A. Well, when cigarettes are made, they're made from a combination of natural tobacco leaves that are shredded and then reconstituted tobacco. The different

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types of tobacco leaves actually contain different amounts of nicotine, and they can be blended in such a way to achieve a desired level of nicotine.

The reconstituted tobacco is actually things like stems and parts that would not really work well, in terms of just shredded leaves, and they're processed in a way sort of like making paper. They're ground up or finely shredded nicotine and other substances are extracted from that. Then it's processed in such a way to make a sheet that can be also shredded.

Then nicotine and other substances are added back so one can adjust how much nicotine one adds back to also control levels of nicotine in cigarettes.

So, in fact, particular brands of cigarettes have highly controlled levels of nicotine. They're not just simply blended according to taste; they have consistent nicotine levels from cigarette to cigarette within a brand.

MR. HEIM: Your Honor, objection. Move to strike.

Could we chat about this for a second?

THE COURT: All right. Sidebar.

(The following proceedings were had at sidebar:)

MR. ROSENBLATT: You know, I'd appreciate it

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Q. Inside and outside the industry?

A. Yes.

Q. Now, in 1964, the advisory committee to the Surgeon General had decided that, as it was looking at the issue then, smoking was not an addiction; correct?

A. Well, they -- they called it habituating based on some criteria that were operative at that time.

Q. Right. And I'm going to cover that subject with you, too. But the question that I -- the only reason I asked you that question at this moment was that, as far as you know, none of the information that tobacco companies had on behavioral pharmacology of nicotine before 1964 would have changed the Surgeon General's categorization in 1964 of smoking as a habituation and not an addiction; is that right?

A. I'm not aware of such research specifically.

Q. Doctor, I'm going to shift to another subject that you talked about I think this morning, and what I want to talk to you a little bit about is low-tar, low-nicotine cigarettes and the subject of compensation.

Okay?

A. Yes.

Q. All right. Now, between 1955 and, say, 1987,

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I guess you could pick 1997, but -- the average tar and nicotine yield of American cigarettes has declined substantially; has it not?

A. Yes.

Q. So that the unfiltered cigarettes that were smoked by many smokers, if not most smokers, prior to the 1960s, had a much higher tar and nicotine level than the -- than the cigarettes that are smoked today, at least as determined on the FTC testing machine?

A. That's correct.

Q. And the first step that was taken by the tobacco companies to achieve that, to achieve that end, was the use of filters?

A. Yes.

Q. And even today, would you agree that that was probably the most important step, the use of filters on cigarettes?

A. Yes.

Q. Other design changes to cigarettes that have taken place over the years, use of reconstituted tobacco and expanded tobacco -- you know what I mean by expanded tobacco, the puffed tobacco?

A. Yes.

Q. That's also been used to reduce the tar and nicotine yields?

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A. Yes.

Q. Okay. More porous papers, as a design technique, to bring tar and nicotine yield down?

A. Yes.

Q. And based on your study and your knowledge, it's a fact, is it not, that the tobacco companies were encouraged by the public health community to bring those tar and nicotine yields down?

A. Yes.

Q. And at least as of the mid 1980s -- well, let me ask you this question. That whole process of redesigning the cigarette to bring the tar and nicotine levels down, when would you say that got under way? '50s or '60s?

A. Well, particularly in the '60s. I think after the Surgeon General's Report linking cancer to smoking, I really don't remember the exact beginning of it, but I think it began in the '60s.

Q. But actually filters started coming on the cigarettes before the '60s; didn't they?

A. Yes.

Q. So there was some work even before the Surgeon General's Report to reduce tar and nicotine levels?

A. Yes.

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Q. And in the mid 1980s, you, yourself, thought that tobacco companies should be encouraged to continue bringing those tar and nicotine levels down?

A. Yes. And I still believe that's true.

Q. And you say that you still believe that that's true. What you mean is that you still believe that the lower tar and nicotine levels are something that should be sought?

A. Right. But I think that there also has to be some information provided to consumers as to how to smoke cigarettes to effectively reduce those yields. I think now low-yield cigarettes don't accomplish what they are purported to accomplish, which would be lower health risks.

Q. And, in fact, the government has actually issued pamphlets on that subject, haven't they, to try to explain to people how to get the benefit of lower tar and nicotine?

A. Actually it's been discussed. I've not seen those pamphlets. If they are available, I've not seen them.

Q. You know it's been discussed about the government informing people of how to better get the advantages of lower tar nicotine cigarettes?

A. Yes. And I've written about that myself,

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about the sort of education the consumer needs to have to really reduce yields.

Q. Part of that education from the '70s have been that if people -- that if smokers aren't going to quit, they ought to switch to lower tar and nicotine yields; correct?

A. Yes. I think the public health community did that. I think it turned out not to have the benefits that the public health community anticipated because of the compensation problem.

In fact, there's even some concerns that lung cancers, rather than decreasing, have shifted in type so that people inhale more deeply and they get different kinds of lung cancer than they used to.

So whether there's been a health benefit has really been questioned. The concern in the health community is whether giving people the alternative of a low-yield cigarette gave them an out, rather than quitting.

So, there's actually been a lot of debate in the health community whether this has been a good or bad thing.

Q. So some people said in the -- in the health community, some people said, we're not so sure it's a good idea to have low-tar, low-nicotine cigarettes

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because people may go there instead of discontinuing smoking. And other people in the public health community said, yeah, go there, go do it, get the tar and nicotine levels down.

So there was a debate over this subject; right?

A. There has been. And I just add that if someone is supporting low-yield cigarettes, one needs to support public information along with it, because the current low-yield cigarettes are not doing what they're supposed to.

Q. But in terms of you, Dr. Benowitz, which side of that debate are you on?

I know you say the consumer needs to have more information about this, but which side of the debate are you on?

Are you one that says, don't have lower tar, lower nicotine cigarettes, or are you one of the ones who are saying, yeah, do, keep those -- you need to have low-tar and low-nicotine cigarettes?

Are you the former or the latter?

A. I think there should be a progressive reduction in tar exposure and other carcinogen exposure, but I think there needs to be education for how to effectively get there.

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Q. So I gather what you're saying is you are not in the camp that says, don't have the low-tar, low-nicotine cigarettes?

A. No. But I think that we've all been sort of misled by the benefit we thought was going to occur. It has not occurred.

Q. But the message to the tobacco companies from the public health community, from the government, was, we want you to develop lower tar, low-nicotine cigarettes.

A. That's correct.

Q. Okay. And the tobacco companies responded to that message and have developed low-tar, low-nicotine cigarettes; correct?

A. Yes. They have done that.

Q. Now, Doctor, I wasn't sure when you were talking about a conference that you attended this morning, not a conference that you attended this morning, the conference that you referred to this morning, whether it was the Scarborough Conference on Preventive Medicine, but I wanted to ask you some questions about that conference.

Do you recall that conference that you attended?

A. I was at a conference at Scarborough either

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

GENERAL JURISDICTION DIVISION

HOWARD A. ENGLE, M.D., ROBERT W. ANGELL, RAYMOND LACEY, FROZENE D. STEEVENS, FRANK AMODEO, MARY FARNAN, LOREN E. LOWERY, ANGIE DELLA VECCHIA and MICHAEL MATYI, on behalf of themselves and all others similarly situated,

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CASE NO. 94-08273 CA22

TRIAL

Volume 121

TRANSCRIPT OF PROCEEDINGS

in the above-styled cause before the Honorable Robert Paul Kaye, Circuit Judge, at the Dade County Courthouse, 73 West Flagler Street, Miami, Florida, on Wednesday, November 4, 1998 at 9:30 a.m.

causation, and specifically causation relative to tobacco.

Q. What about the research that was demonstrated in the Tobacco Institute document, did you agree or disagree with the so-called research conclusions?

MR. HEIM: Objection to the form of the question.

THE COURT: The latter part of the question is: Did you agree or disagree with the so-called research?

MR. HEIM: First part, characterization.

THE COURT: Without the word "so-called."

BY MR. ROSENBLATT:

Q. Did you agree or disagree with the research conclusions as reflected in this document?

A. No. I disagreed substantially with the research conclusions, or the conclusions. They really were not research conclusions in the document.

Q. Dr. Burns, the 1981 Surgeon General's Report was entitled: The Health Consequences of Smoking, and the title was: The Changing Cigarette?

A. Yes.

Q. A Report of the Surgeon General?

A. That's correct.

Q. What did you have to do with the 1981 Surgeon

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General --

A. I was one of the associate scientific editors for that volume.

Q. And tell us about the thrust, what the Surgeon General's Report was referring to when it talked about the changing cigarette.

A. Between the 1950s and the time that this report was released, which was the very early 1980s, substantial changes had been made in cigarettes. A majority of the cigarettes had become filtered cigarettes, and the machine-generated tar and nicotine yield of those cigarettes had declined substantially.

And therefore, this report was intended to look at everything we knew about those changes in cigarette engineering and manufacture, to see whether they produced a difference in disease risk consistent with the tar and nicotine that had been produced for those cigarettes.

Q. Did the lower tar and nicotine products in terms of the changing cigarette reduce the disease risk to smokers? In other words, by smoking cigarettes containing less tar and nicotine, from the smoker's standpoint, did it become a less dangerous or less hazardous cigarette?

A. Well, I think in order to answer that

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question it's important to make a distinction. The distinction is between the tar and nicotine measured when the machine smokes the cigarette, and the tar and nicotine delivered to the individual smoker when the smoker smokes the cigarette.

There has been, for some time, interest in trying to reduce the tar actually delivered to the smoker.

What this report, however, demonstrates is that the people who smoke cigarettes, who have a greater than 50 percent reduction in tar when measured by machine, have nowhere near that kind of reduction in disease risk. There is essentially no reduction in lung disease risk or cardiovascular disease risk. There is a small reduction, in the order of about 15 percent, in lung cancer risk, provided the individual does not compensate by increasing the intensity or the amount that they smoke when they use those cigarettes.

One of the principal concerns that came out, as we reviewed the scientific literature for this volume, is that when you smoke these cigarettes that deliver less tar and nicotine to the machine, people change the way they smoke them.

They increase the puff size. They take a bigger puff. They take more puffs. They shorten up

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TRIAL
Volume 123

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in the above-styled cause before the Honorable Robert Paul Kaye, Circuit Judge, at the Dade County Courthouse, 73 West Flagler Street, Miami, Florida, on Thursday, November 5, 1998, at 12:08 p.m.

at this point.

Your opinions are something different. I haven't read the articles. I don't know what's in it, and I don't know what you may want to make reference to in it. But follow the question carefully and then, if you're asked for your opinion about something, that's a different story, okay?

THE WITNESS: Yes.

THE COURT: All right.

THE BAILIFF: Come on in.

(The jurors entered the courtroom.)

THE COURT: Okay. Let's proceed.

BY MR. ROSENBLATT:

Q. Dr. Siegel, in the course of your career, have you had occasion to do research on and actually write articles which were published in peer review journals about the advertising effect or impact of tobacco advertisements on youth?

A. Yes.

Q. And what is your opinion on that subject, the impact or lack of impact of tobacco advertising on youth?

MR. KIRBY: Objection, foundation and relevancy.

THE COURT: Overruled.

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THE WITNESS: My opinion is that it's clear from the research literature that cigarette advertising does have an impact on youth, and specifically cigarette advertising causes kids to start smoking. I think the best estimate from the literature is that approximately one out of every three kids who starts --

MR. KIRBY: Objection, hearsay.

THE COURT: Overruled.

Go ahead.

THE WITNESS: The scientific literature well researched, well documented in peer-reviewed literature --

BY MR. ROSENBLATT:

Q. You had said one out of the three when the objection was made.

A. It indicates that approximately one out of every three children who start smoking start because of cigarette advertising. In other words, if you were to eliminate cigarette advertising, if there was no cigarette advertising, then we'd only have two-thirds of the smokers that we have now.

Q. So the research reveals, as to the other two-thirds, what causes most kids to begin smoking?

A. Well, there's a variety of factors including influences of parents and peers, social influences.

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But the point I'm trying to make is that cigarette advertising is a big chunk of the cause for kids to start smoking.

Q. Based on the research that you've done in this area about the impact of tobacco advertising on nonsmoking youth who take up smoking -- let me ask it -- let me ask it another way.

Have you -- now when you talk about youth, what age group? The one-third figure you gave in terms of youth, what age parameters are we talking about?

A. Well, we're talking about kids who are under the age of 18. When I say "youth," that's what I mean.

Q. Based on your research of tobacco advertising and its impact on nonsmokers, do you have an opinion on the subject of whether tobacco advertising is only used to get present smokers to switch from one brand to another?

MR. KIRBY: Objection, foundation and relevance.

THE COURT: Overruled.

THE WITNESS: I think it's very clear that cigarette advertising is not merely intended to get people to switch brands. It's clear that cigarette advertising is intended to recruit new smokers, specifically among kids.

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BY MR. ROSENBLATT:

Q. What do you base that on?

A. I base that on the bulk of the scientific evidence that I've reviewed and contributed to over the past 13 years.

Q. Have you written on the -- written anything on the subject of marketing in the area of public health?

A. Yes.

Q. Tell us about that. What have you written, and how has it related to the issue of smoking and health and addiction?

A. Well, I've written several articles and one book on the issue of marketing and public health. I just published a book this past September on marketing and public health.

I've also written several articles that have been published on mass media and its effects on trying to keep people from smoking. So, in other words, the reverse of advertising: Can you do advertising to actually stop kids from starting to smoke? I've written from articles on that.

I've also written articles on the opposite, cigarette advertising and its impacts on kids and cigarette marketing practices and their impact on kids.

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Q. What would you describe generally -- I think everyone knows what we mean by "advertising." But when you talk about cigarette marketing practices that you've written about and that you've researched, what are we talking about?

What does that broad, general heading include?

A. Cigarette marketing is basically any activity that is designed or intended to try to promote the use of cigarettes. And the kinds of things that I'm talking about that the cigarette companies have done to try to promote cigarette use include things like advertising, the typical kind of advertising that we're all aware of like billboards and newspaper ads, television advertisements, things like that, that everyone understands represent advertising.

But it also encompasses other practices such as sales promotions, such as T-shirts that have cigarette logos on them, caps, other kinds of paraphernalia that attracts kids to smoke.

There are also other things that the tobacco industry has done to promote cigarettes, and they include things like public relations. How has the industry worked with the public relations? How has it portrayed smoking in the media? How has it used its

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influence to try to convince smokers of the lack of health risks of smoking? How has it used its influence to try to convince smokers that smoking is not really addictive?

MR. HEIM: Your Honor, I'm going to object to the latter part and move to strike that.

THE COURT: I'll sustain it unless we can get a different predicate.

MR. ROSENBLATT: I'm not now on that subject.

BY MR. ROSENBLATT:

Q. You mentioned a book that you've written, but it has not actually been published as yet?

A. No, it has been.

Q. It has been?

A. Yes.

Q. And the title of that is?

MR. KIRBY: Objection, Your Honor. May we approach?

THE COURT: Yes, if you'd like.

(The following proceedings were had at sidebar:)

MR. KIRBY: Now, Your Honor, we are with respect to the document we don't have a clue about. I've never seen the book. I don't have the book.

THE COURT: Never been revealed?

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Q. Had you completed --

A. No.

Q. Okay. Then continue.

A. I was talking about the information that -- you had asked me what information the cigarette companies had that they didn't disclose --

Q. To the public health --

A. -- to the public health community related to cigarette addiction and the health risks of smoking. And I already mentioned -- the beginning part of my answer was they knew cigarettes were addictive and they knew the specific mechanism by which cigarettes were addictive.

What I was trying to say is that they also knew that they could tightly control the level of nicotine in cigarettes delivered to the smoker in order to enhance the addiction.

They knew, for example, in 1963 that they could tightly regulate the dose of nicotine delivered by the cigarette.

They knew in 1964 that there were two different forms of nicotine. There was a bound form and a free form that we sometimes called the freebase nicotine form. They knew that it was the freebase nicotine form that most rapidly entered the brain

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creating a much stronger addictive effect.

They knew in 1966 that, by controlling the pH, by controlling the acidity of the cigarette, they could increase the amount of nicotine that was present in that free form in order to enhance the nicotine delivery to the smoker.

And they knew in the mid 1960s, at least one of the companies was using that technology to, again, manipulate the nicotine level in the cigarette. They were adding ammonia to cigarettes to enhance the addictive -- to enhance the amount of nicotine in the free form and enhance the addictive nature of the cigarette.

The companies also knew back in 1953 that cigarettes were carcinogenic, that they caused cancer. They clearly knew this in 1953. That information was never disclosed to the public.

They also knew that cigarette smokers compensate for the amount of nicotine in a cigarette by inhaling more or less.

So, in other words, a smoker who smokes a low nicotine cigarette actually inhales the same amount of nicotine as a smoker who inhales a high nicotine cigarette because the smoker actually puffs deeper to bring more nicotine into the body. They knew that in

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1974.

The public health community, on the other hand, didn't know that until the 1980s when research showed that. The cigarette companies knew that low nicotine cigarettes were not any safer because the cigarette smokers were compensating to make up for the behavior. They knew that low nicotine cigarettes really didn't do anything for health because the smoker is going to smoke the same amount, get the same nicotine in the system.

The public health community didn't know that until the late 1980s, and, in fact, most doctors would actually advise their patients to switch to low nicotine cigarettes because the doctors -- and if you look at medical textbooks, medical textbooks advised doctors that that was a way to --

MR. KIRBY: Objection.

THE WITNESS: The general consensus or the general feeling of the scientific community was that low nicotine cigarettes were safer. The companies knew this wasn't the case in 1974, continued to market and advertise the low nicotine cigarettes.

So there has been four decades, I believe, in which the cigarette companies, as early as 1953 in the case with the health effects and as early as 1962 with

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IN THE CIRCUIT COURT OF
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IN AND FOR DADE COUNTY, FLORIDA

GENERAL JURISDICTION DIVISION

HOWARD A. ENGLE, M.D., ROBERT W. ANGELL, RAYMOND LACEY, FROZENE D. STEEVENS, FRANK AMODEO, MARY FARNAN, LOREN E. LOWERY, ANGIE DELLA VECCHIA and MICHAEL MATYI, on behalf of themselves and all others similarly situated,

Plaintiffs,

vs.

R.J. REYNOLDS TOBACCO COMPANY, PHILIP MORRIS INCORPORATED, ("PHILIP MORRIS U.S.A."), LORILLARD TOBACCO COMPANY, LORILLARD, INC., THE AMERICAN TOBACCO COMPANY, BROWN & WILLIAMSON TOBACCO CORP., LIGGETT GROUP, INC., BROOKE GROUP LTD., INC., DOSAL TOBACCO CORP., COUNCIL FOR TOBACCO RESEARCH-U.S.A., INC., and TOBACCO INSTITUTE, INC.,

Defendants.

COPY

CASE NO. 94-08273 CA22

TRIAL

Volume 124

TRANSCRIPT OF PROCEEDINGS

in the above-styled cause before the Honorable Robert Paul Kaye, Circuit Judge, at the Dade County Courthouse, 73 West Flagler Street, Miami, Florida, on Friday, November 6, 1998 at 9:30 a.m.

the vapor phase. This would impact on the upper airway nicotinic stimulation and determine how much nicotine could be absorbed from the mouth. That is if you have high pH, you can absorb a lot from the mouth. Whereas when smoking the usual blond cigarettes, the smoke of which is of an acidic pH, you don't absorb anything from the mouth.

The higher the pH the more nicotine impact there would be on the throat. One would experience more irritation, more of a nicotine-type sensation. I don't think that differences in pH would make much of a difference in bioavailability, although it would impact on how strong the cigarette tasted.

Do you see that, Doctor?

A. Yes. I see it.

Q. Have you reviewed that prior to coming into court today?

A. No.

Q. Now, Dr. Siegel, you testified yesterday concerning the topic of low-tar, low-nicotine cigarettes, correct?

A. Correct.

Q. And you understand and agree, don't you, Dr. Siegel, that for many years, and indeed up to the present time, that the government and other scientists

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in the public literature have made statements to the effect that lower tar cigarettes may be less hazardous for smokers, correct?

A. That's correct.

Q. And, in fact, if you go back to the 1950s, when much of the controversy arose, there was a mouse skin painting test by Dr. Wynder; correct?

A. Yes.

Q. And Dr. Wynder took tobacco tar condensates and painted them on the backs of mice and measured what effects he observed, correct?

A. That's correct.

Q. And his conclusion was that tar was something that should be lowered, correct?

A. That's correct.

Q. And, in fact, he said that if you could lower tar 40 percent, that that would be a great advantage to smokers, correct?

A. Correct.

Q. And you understand that between the 1950s and the present time, there has been a reduction in tar by the FTC method of more than 66 percent, correct?

A. That's correct.

Q. For example, in the 1950s, tar was at 38 milligrams on a sales-weighted average basis, correct?

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A. I don't know the exact numbers, but I agree that it is -- that there has been a tremendous decrease in the tar levels.

Q. And the same is true with respect to nicotine. Nicotine in the 1950s was roughly at 2.7 milligrams delivery, sales-weighted average, and it's now down to 1 or below 1, correct?

A. That's not correct, in terms of the delivery to the smoker. And let me explain this, because I think it's important for people to understand --

Q. Well, Dr. Siegel, if you would answer my question, I was asking about FTC.

A. I'm trying to answer the question.

Q. No.

THE COURT: You asked him whether or not it's correct. "No, it's not." That's the answer to the question. He's entitled to explain.

BY MR. SCHNEIDER:

Q. All right. Go ahead.

A. The question is whether or not there's been a drastic reduction in the nicotine delivery. The answer is no, there's been no change to the nicotine delivery to the smoker, and I want to explain why that is.

This FTC method that's used for testing to see what the nicotine content of cigarettes is is

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basically a machine. And what the machine does is take a certain puff mechanically of the smoke, and then that smoke that's puffed by the machine can be analyzed to see how much nicotine is in there.

And it's true that the cigarette companies have lowered over the years the amount of nicotine that is in that puff that the machine takes. However, smokers don't smoke -- smokers are not machines, and there are many differences between the way a smoker smokes and the way a machine smokes.

Smokers do many things differently. For one thing, their fingers can block the filter vents, which drastically alters the delivery of tar and nicotine.

In addition, smokers don't necessarily smoke the same amount as the machine. And, in fact, what we now know is that the lower the nicotine level of the cigarette, the more the smoker inhales, the more the smoker smokes.

Because they're addicted to nicotine, they have to deliver a constant amount of nicotine to the body or they'll go into withdrawal and they won't be able to deal with stress and their receptors will be all off balance in their brain and their hormones will be all off balance. So to correct that, the smoker smokes a constant amount.

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So while it's true that the nicotine levels of the cigarettes have dropped as measured by this FTC machine, the amount that smokers are inhaling has been relatively constant.

Q. All right. Doctor, the concept you're talking about is compensation, correct?

A. That's part of the concept, yes.

Q. All right. We'll come back to that in a moment.

In terms of the deliveries measured by the FTC machine method, you agree, correct, that they have dropped?

A. As measured by the FTC machine, yes.

Q. For both tar and nicotine, correct?

A. That's correct.

Q. All right. Now, you indicated yesterday that the whole notion of compensation came as news to the public health community, and they didn't know about it until sometime in the '80s, correct?

A. I don't think there was a -- no, I didn't say that. I think that there wasn't a full understanding in the public health community, a full awareness, a wide-spread awareness of this among physicians and public health practitioners, to the extent that they were truly aware that smokers were behaving this way,

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that they were compensating.

So that I don't think the public health community truly understood that low-nicotine cigarettes really weren't much safer than high-nicotine cigarettes.

Q. All right. Well, let's discuss that topic of low-tar, low-nicotine cigarettes and what was being said by the public health community about whether or not they may or may not be safer, okay?

Let me show you a copy of Defendants' Exhibit 15023. Now, Dr. Siegel, Defendants' Exhibit 15023 is a Public Health Service technical report on tar and nicotine from November 25, 1966, correct?

A. Correct.

Q. And from your knowledge of the Surgeon General's Reports, do you understand that this technical report, from the Public Health Service, has been subsequently referred to in Surgeon General Reports in 1979 and 1981, for example?

A. I believe it has, yes.

Q. All right. Now, this technical report is addressing whether or not low-tar cigarettes may provide a benefit to smokers, correct?

A. Correct.

Q. And this was in 1966, correct?

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A. That's correct.

Q. And if you look on Page 2, at the bottom, this document, released by the Public Health Service in 1966 says, paragraph number 1: The preponderance of scientific evidence strongly suggests that the lower the tar and nicotine content of cigarette smoke, the less harmful would be that effect -- be the effect.

Do you see that?

A. Correct.

Q. It then goes on to say, paragraph number 2: We recommend to the Surgeon General that action be encouraged which will result in the progressive reduction of the tar and nicotine content of cigarette smoke, correct?

A. Yes.

Q. So the public health community was recommending that cigarettes with lower tar, lower nicotine be created, correct?

A. Correct.

Q. All right. If you take a look at Page 3, paragraph number 2, but look at the introductory sentence: This judgment was arrived at with full recognition of the following:

And then paragraph number 2, it says: The potential benefit to the individual consumer who might

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shift to a lower tar and nicotine cigarette would be negated if this shift were accompanied by an increase in the number of cigarettes consumed, or in the length of each cigarette used.

There is evidence that, by and large, this does not occur; that the shift to low tar and nicotine cigarettes tends to be accompanied by the same level of consumption or an even lower level rather than by an increased consumption. Correct?

A. Correct.

Q. And this is a public health document in 1966?

A. That's right.

Q. Now, you're familiar with a scientist from Great Britain by the name of M.A.H., three initials, Russell, correct?

A. Not offhand, no.

Q. Are you familiar with the journal, The Lancet?

A. Yes.

Q. Have you done a review of the Surgeon General Reports to find out how many times articles by M.A.H. Russell have been cited in the Surgeon General Reports?

A. No.

Q. You do recognize The Lancet as an authoritative journal, correct?

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Human Services, correct?

A. That's correct.

Q. And if I could direct your attention to -- this is an excerpt of the report. If I could address your attention to what's marked as Page 79 in Chapter 6. Do you see that?

A. Yes.

Q. Now, let me address your attention to the bottom of the page, Page 79. And before I do, let me ask you a couple of questions about compensation.

We've talked about the FTC tar and nicotine method for measuring cigarette deliveries, correct?

A. That's right.

Q. And one of the issues is whether or not a smoker that switches from a cigarette that has an FTC machine measuring delivery of, say -- one figure of, say, 30 milligrams of tar, whether, when they switch down to a lower-tar cigarette, whether they will have a benefit, correct?

A. I don't think that's the issue. I think the issue is whether or not when a smoker, who is clearly at increased risk of disease because of their smoking, wants to substantially improve their health, whether or not switching to a low-tar, low-nicotine cigarette is the appropriate action for that person to take.

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Q. All right. Dr. Siegel, one of the issues is whether or not, if you took people who smoked, by FTC machine delivery, one brand of cigarettes with a level of 15 or 20, and compared them to people who smoked ten-milligram cigarettes or nine-milligram cigarettes, to see whether or not they appear to have less risk; that's one of the inquiries that science has made, correct?

A. That's correct.

Q. And you have been suggesting, have you not, Dr. Siegel, that because some people may compensate and smoke a high-tar cigarette -- excuse me -- smoke a low-tar cigarette, the same as they would a high-tar cigarette to get the same delivery, that that eliminates any possibility that they would be at less risk, correct?

A. No. That's not my testimony.

My testimony relates to the low-nicotine cigarette and the use of the term "low nicotine" as a suggestion that a cigarette will either improve your health by switching to a lower-nicotine cigarette, or that somehow it will be easier to quit smoking, and the -- because -- my point is that because smokers compensate, because they smoke about the same amount of nicotine, it doesn't matter whether they smoke a

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low-nicotine or a high-nicotine cigarette. They're going to bring in the same amount of nicotine.

Therefore, from the perspective of the health benefit, there's really not going to be as much of a health benefit as you would think from smoking a low-nicotine cigarette.

And in terms of trying to quit smoking, switching to a low-nicotine cigarette is really not going to help. And my testimony is that the tobacco companies had this information and that they didn't share it, and that despite having that information, they continued to suggest to their customers that --

MR. KIRBY: Objection. Preemption.

THE COURT: Sustained.

THE WITNESS: Okay. So my testimony is that the companies had this information and did not share it.

BY MR. SCHNEIDER:

Q. All right. Now, Dr. Siegel, we have been discussing whether or not moving from a high-tar cigarette to a low-tar cigarette might be associated with less risk. That's one of these topics we've been discussing, correct?

A. That's correct.

Q. And have you been suggesting that because

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reflecting that consideration is to be given to designing low-tar cigarettes with a relatively higher yield of nicotine in the pursuit of what might be a less hazardous cigarette, correct?

A. That's right.

Q. And have you seen this document before you testified?

A. I have not seen this document, but I was well familiar with the concept of designing such a cigarette.

Q. And you call the efforts to focus on manipulation and see if you can -- to focus on nicotine and make a low-tar, relatively medium-nicotine, you call that manipulation, don't you, Doctor?

A. No. That's not what I mean by manipulation.

What I mean by manipulation is when a cigarette company intentionally alters the level of nicotine in the cigarettes, alters the nicotine dose that smokers get, with the express purpose of trying to addict smokers and young children to their cigarettes. That's what I mean when I say "manipulation."

Q. And so, Doctor, to the extent that the companies explored techniques such as the ones being suggested by the public health community, to pursue efforts to monitor nicotine levels or to try to keep

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nicotine at a medium level and tar low, in the pursuit of a less hazardous cigarette, you're not suggesting that's manipulation, correct?

A. No. What I said, when I refer to manipulation of cigarette levels, it means the cigarette companies alter the nicotine level in the cigarettes with the express purpose of trying to addict smokers and young children to maintain using their products.

Q. And with respect to public health suggestions, with respect to how to make a low-tar cigarette with a medium-nicotine delivery, or other suggestions that the public health community makes, those you do not call manipulation, correct?

A. As I said, the specific suggestion of the public health community talking about making a low-tar, high-nicotine cigarette, is not what I -- what I'm referring to manipulation, that's not what I'm referring to.

I'm referring to the intentional control, regulation of the dose of nicotine in cigarettes to try to enhance the addictive quality of the cigarettes in order to sell more cigarettes and make more of a profit.

Q. All right. Now, Dr. Siegel, it is correct,

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IN THE CIRCUIT COURT OF
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GENERAL JURISDICTION DIVISION

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R.J. REYNOLDS TOBACCO COMPANY, PHILIP MORRIS INCORPORATED, ("PHILIP MORRIS U.S.A."), LORILLARD TOBACCO COMPANY, LORILLARD, INC., THE AMERICAN TOBACCO COMPANY, BROWN & WILLIAMSON TOBACCO CORP., LIGGETT GROUP, INC., BROOKE GROUP LTD., INC., DOSAL TOBACCO CORP., COUNCIL FOR TOBACCO RESEARCH-U.S.A., INC., and TOBACCO INSTITUTE, INC.,

Defendants.

COPY

CASE NO. 94-08273 CA22

TRIAL
Volume 135

TRANSCRIPT OF PROCEEDINGS

in the above-styled cause before the Honorable Robert Paul Kaye, Circuit Judge, at the Dade County Courthouse, 73 West Flagler Street, Miami, Florida, on Monday, November 16, 1998, at 1:00 p.m.

Q. Well, tell me about magazines and the obvious areas that you are not -- that you don't think are very sensitive.

A. We're probably in the six to eight million dollar range of Montclair and Misty, and a little more than that in Carlton so far.

MR. ROSENBLATT: Page 61, Line 15.

Q. What percentage of the market, the overall cigarette market, do you think is in the low tar, low nicotine?

A. Low tar would probably be around -- not ultra low tar, but low tar, high 40s, 48, 50 percent.

Q. Why do you think that is?

A. Low tar, as a segment, started developing, I think, way back in the '60s. People wanted low-tar cigarettes.

Q. Why do you think that? Why do they want low-tar cigarettes?

MR. ROSENBLATT: Then I go to Line 15.

Q. What is tar? When we say low tar, high tar, what is tar?

A. It's a condensate, that's all I know, going through a filter pad that's called tar.

Q. Who's the top science person or top research person at American Tobacco?

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IN THE CIRCUIT COURT OF
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COPY

CASE NO. 94-08273 CA22

TRIAL
Volume 136

TRANSCRIPT OF PROCEEDINGS

in the above-styled cause before the Honorable Robert Paul Kaye, Circuit Judge, at the Dade County Courthouse, 73 West Flagler Street, Miami, Florida, on Tuesday, November 17, 1998 at 9:35 a.m.

A. We had so many different means of doing that. I mean, as I mentioned, we had expanded tobacco, we had -- first of all, when you go out to buy tobacco, you have a choice of the kinds to buy. So you can buy --

Q. Like burley --

A. Burley, bright. And even within the burley and bright, you have a knowledge of where you can get tobacco that has, for example, higher alkaloids, higher nicotine.

In some of the products, particularly the lower tar, Merit is a good example from Philip Morris where we increased the burley, we had a lower tar product with higher nicotine, and we did that by increasing the relative amount of burley in that particular blend.

So you could change by blend and by these various components that you used and by what you purchased.

Q. Did Philip Morris manipulate nicotine?

A. Yes.

Q. Were there many ways that it was able to manipulate nicotine?

A. There are dozens of ways of manipulating nicotine, and it's very complicated to describe all of

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them. But I just gave you the simple one of just using higher alkaloid tobacco, that's a simple way. But many other ways in the design of cigarettes that you can change the nicotine delivery.

Q. Explain a couple of those, how can you change the nicotine delivery to the consumer, the smoker, by manipulating the nicotine?

A. Depending how you design a cigarette to produce lower tar. For example, one way to design it is simply to use less tobacco, then it would produce less tar, because when you burn a certain amount of tobacco you get a certain amount of tar. If I just use less tobacco, I would get less tar.

The other way to do it that we did is to use what they call dilution or ventilation where you put holes in the filter so that when the consumer draws on the cigarette, some of the air that you draw in comes through those holes instead of coming down the rod to give you both nicotine and tar.

Now, you would expect that when you did that, that you would get an equal amount of nicotine and tar. That is, they would both be reduced about the same. And from the period from before 1975, that was, in fact, what was done. The tobacco was -- the filters and the tobacco and the holes were put in such a way

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that it came down, tar and nicotine came down together.

Around 1975, Philip Morris and also others in the industry changed the design of cigarettes such that the ventilation, dilution and that kind of change caused the tar to come down more than the nicotine. So you would end up getting more nicotine to maintain the satisfaction of smoking the product than you would get tar, which presumably contained the cancer-causing materials.

Q. Now, the concept of the tar following the nicotine, in other words, if you lower the tar, the nicotine automatically comes down, did Philip Morris have the technology to lower the tar and keep the nicotine high?

A. Yes, many. I just discussed several different ways.

Q. When you were at Philip Morris, did you know a scientist there by the name of Wakeham, W-A-K-E-H-A-M?

A. Dr. Helmut Wakeham, yes.

Q. What was his position at Philip Morris?

A. Actually Dr. Wakeham was a former vice-president of research and development. And he actually preceded my initial boss, Dr. Seligman. And at the time that I joined, he had been recently

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IN THE CIRCUIT COURT OF
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HOWARD A. ENGLE, M.D., ROBERT W. ANGELL, RAYMOND LACEY, FROZENE D. STEEVENS, FRANK AMODEO, MARY FARNAN, LOREN E. LOWERY, ANGIE DELLA VECCHIA and MICHAEL MATYI, on behalf of themselves and all others similarly situated,

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CASE NO. 94-08273 CA22

TRIAL

Volume 140

TRANSCRIPT OF PROCEEDINGS

in the above-styled cause before the Honorable Robert Paul Kaye, Circuit Judge, at the Dade County Courthouse, 73 West Flagler Street, Miami, Florida, on Thursday, November 19, 1998 at 9:35 a.m.

came from the ART process from the alkaloid-reduced alcohol. In the process of removing the nicotine, you also remove the nitrosamines. And the levels of nitrosamines in that particular cigarette were lower.

Q. On the subject of nicotine, are you familiar with the term "titrate"? I don't know if I'm pronouncing it right or not. I'm probably not.

A. I'm familiar with that term titrate, yeah.

Q. And what is that?

A. It would be a method by which you would achieve a certain level of a component in a substrate.

Q. Were you involved in any efforts to at least attempt to do research on titration levels related to cigarette inhalation and/or nicotine inhalation?

A. I was involved in some studies to determine, or develop procedures for the determination of nicotine retention as a function of various inhalation parameters, how deeply you inhale, how long you held the smoke in your lungs before you exhaled. There was some evidence that indicated that changing your smoking parameters tended to change the level of retention of smoke components.

Q. Then in lay person's terms, what does that mean?

A. In the early '80s there were some studies

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that were done with regards to the, what we refer to as a full flavor cigarette or a Marlboro type cigarette, which delivered, say, 15 milligrams of tar and a milligram of nicotine. And then there were studies that were done with cigarettes that were highly filtered which delivered, like a Cambridge which maybe only delivered a milligram and a half of tar and a tenth of a milligram of nicotine. And the people that smoked those cigarettes, the low delivery cigarettes tended to smoke them differently than people who smoked the higher delivery cigarette. They would tend to take a larger puff, more frequently, inhale it deeper and hold it in longer.

Q. Do you know whether they'd also tend to smoke more cigarettes under those circumstances?

A. I think they did tend to smoke more, best of my recollection.

Q. And what was the research that you were involved in or attempted to implement that was related to this?

A. This study on the way that people smoked was being done by Jan Jones. And she had developed a vest that you could wear that would actually measure the way a person inhaled and smoked.

It was a vest with a portable recorder on it

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15406

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

GENERAL JURISDICTION DIVISION

HOWARD A. ENGLE, M.D., ROBERT W. ANGELL, RAYMOND LACEY, FROZENE D. STEEVENS, FRANK AMODEO, MARY FARNAN, LOREN E. LOWERY, ANGIE DELLA VECCHIA and MICHAEL MATYI, on behalf of themselves and all others similarly situated,

Plaintiffs,

vs.

R.J. REYNOLDS TOBACCO COMPANY, PHILIP MORRIS INCORPORATED, ("PHILIP MORRIS U.S.A."), LORILLARD TOBACCO COMPANY, LORILLARD, INC., THE AMERICAN TOBACCO COMPANY, BROWN & WILLIAMSON TOBACCO CORP., LIGGETT GROUP, INC., BROOKE GROUP LTD., INC., DOSAL TOBACCO CORP., COUNCIL FOR TOBACCO RESEARCH-U.S.A., INC., and TOBACCO INSTITUTE, INC.,

Defendants.

COPY

CASE NO. 94-08273 CA22

TRIAL
Volume 141

TRANSCRIPT OF PROCEEDINGS

in the above-styled cause before the Honorable Robert Paul Kaye, Circuit Judge, at the Dade County Courthouse, 73 West Flagler Street, Miami, Florida, on Thursday, November 19, 1998, at 1:36 p.m.

Q. It's I-N?
A. Yes.
Q. What is that?
A. It's a research facility in Cologne, Germany.
Q. And what kind of research does that facility do, if you know?
A. They do chemical and biological research.
Q. Is it a Philip Morris facility?
A. Yes, it is.
Q. Do you know what any of the results of their research was or is?
(Fast forwarding)
A. No. Other than what I've stated just then about the mouse skin painting and stuff, I understand that it was done there.
Q. Did you ever see any publications related to any of the research done at that facility?
A. No.
Q. Do you know whether any of the research at that facility was ever published?
A. No. Now, well, when you say published, I assume that you mean in open literature.
Q. I mean in the open literature, you're correct?
A. No, I don't have any knowledge of it.

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report.

Q. Did you rely -- in preparing your memorandum, did you rely in any way on the publication from Dr. Hoffmann?

A. I would assume, since I referenced it, that I did.

(Fast forwarding)

Q. Do you have an hypothesis of what the answer would have been had you done the research?

(Fast forwarding)

A. I have a hypothesis, yes.

Q. And what is that?

A. That we would have found that people would have -- if they took larger puffs and inhaled it deeper, held it longer, they would absorb more nicotine, that the preliminary results that she had obtained, Jan had obtained, which indicated that that's the way people were tending to smoke when they went from high delivery cigarettes to low delivery cigarettes, the conclusion I believe would have been that people were tending to titrate themselves to a certain level of nicotine.

(Fast forwarding)

Q. Were you ever told to edit scientific reports to omit reference to subjects that might be considered

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

GENERAL JURISDICTION DIVISION

HOWARD A. ENGLE, M.D., ROBERT W. ANGELL, RAYMOND LACEY, FROZENE D. STEEVENS, FRANK AMODEO, MARY FARNAN, LOREN E. LOWERY, ANGIE DELLA VECCHIA and MICHAEL MATYI, on behalf of themselves and all others similarly situated,

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Defendants.

COPY

CASE NO. 94-08273 CA22

TRIAL

Volume 146

TRANSCRIPT OF PROCEEDINGS

in the above-styled cause before the Honorable Robert Paul Kaye, Circuit Judge, at the Dade County Courthouse, 73 West Flagler Street, Miami, Florida, on Tuesday, November 24, 1998 at 9:30 a.m.

Morgan, who is a friend and colleague of mine, who are much more of an expert in that area. This is something a little -- again, I'm not an expert in that area, but I did experiments in that area because of the projects I was involved in and learned about it in school 15 years before.

Q. Did you learn that nitrosamines were in fact being extracted from the product?

A. Yes, in a variety of ways, some better than others. Again, that's what Philip Morris did. It examined every possible way to do something. It didn't go off in a direction and look at one way to do something, because that's dangerous. So you may not make the right choice.

So, scientifically, it was doing what you would do: Explore three, four, five, whatever different ways to do the same thing and then choose the best way.

Q. Did Philip Morris R&D manipulate nicotine?

A. Yes. I mean, there were a variety of ways that can be done. And again, the manipulation or adjustment of things like nicotine levels in the cigarette was something that was researched, studied, explored and done by a variety of means.

Q. Explain some of the techniques whereby Philip

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Morris had the technology to manipulate nicotine either up or down the scale.

A. Well, nicotine is in the leaf that's burned when you smoke and winds up in the smoke. And there are a lot of things that affect that or impact that.

The kind of leaf you use -- because, I mean, leaf is not leaf. There are a lot of different kinds of tobaccoes in the world.

And Philip Morris, maybe more so than anybody else, studied the chemistries and mechanics and everything there was to study about leaves of a certain type grown wherever, in the United States, South America, Europe, Far East, wherever, and would know about things like nicotine levels in those types of leaves, sugar levels, because sugar has to do with the sweetness and flavor, and there were other flavor components also.

But when you burn this leaf, if you change anything, almost anything about the cigarette, if you change the amount of tobacco in the cigarette, the density of the packing of the tobacco, if you make it less, make it more, you can elevate or depress the amount of nicotine being delivered to the person.

If you change the amount of holes that are in the cigarette paper that's around the tobacco, you

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dilute it more so there's more air coming in. You can change, elevate or lower it, depending upon how you change the perforations, by the structure of the filters that are on almost all cigarettes, all cigarettes I guess now.

The way those filters are designed both physically and chemically, you can change the way you either let nicotine pass or let it get trapped along with things like tars, all the gook that's in the smoke.

And a variety of other methods -- I mean, there's a fairly long list. These were all being scientifically in a detailed manner investigated by various people at a company like Philip Morris.

Q. And being done?

A. Yeah, all of these things I mentioned one way or the other were used in products.

Q. When we look at a Philip Morris document or hear an expert refer to, for example, lowered biological activity or the concept of biological activity as related to a cigarette, what are you scientists talking about? How is that term being used?

A. Well, very directly, I mean, to me, as a scientist, especially coming out of a medical background, biological activity is kind of a polite

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

GENERAL JURISDICTION DIVISION

HOWARD A. ENGLE, M.D., ROBERT W. ANGELL, RAYMOND LACEY, FROZENE D. STEEVENS, FRANK AMODEO, MARY FARNAN, LOREN E. LOWERY, ANGIE DELLA VECCHIA and MICHAEL MATYI, on behalf of themselves and all others similarly situated,

Plaintiffs,

vs.

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COPY

CASE NO. 94-08273 CA22

TRIAL

Volume 149

TRANSCRIPT OF PROCEEDINGS

in the above-styled cause before the Honorable Robert Paul Kaye, Circuit Judge, at the Dade County Courthouse, 73 West Flagler Street, Miami, Florida, on Monday, November 30, 1998 at 9:40 a.m.

He was actually doing research on looking at chemotherapy, agents that they could deliver to lung tissue for treatment, and he made an observation that he wanted to check out with me. He said: Did you ever hear of anybody inhaling a cigarette filter fiber?

THE COURT: I don't want to get into anything he was talking about. Just get into your research and what you found.

A. (Continuing) I said: I never heard of that, but I would review the literature.

I reviewed the literature and could not find anything within the literature about cigarette filter fibers being inhaled.

We pursued this and developed some research related to the fact that cigarette filters, in fact, are defective. The fibers literally dangle off the end of a cigarette. In fact, I brought some slides along today --

THE COURT: We'll get into that later.

A. -- that could show, if you look under a high-powered microscope at a regular cigarette filter, a cigarette filter is made out of cellulose acetate which is basically a type of plastic. In fact, it's very much like film.

We began looking at the patents for cigarette

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filters that existed back in the '50s, when they started the creation of cigarette filters. In fact, one of the earlier patents was by Kodak, because they make film. Eastman Tennessee has been a long-time producer of cigarette filters.

Film is translucent, by the way, clear; you can see through film. Cigarette filters, the cigarette filters on a pack of cigarettes, are white. They are painted with titanium dioxide, sort of like white shoe polish. It's a pigment with a milky white appearance.

But the original patent actually from Kodak talked about the fact that you would never want to block all the tar in a cigarette -- that was one of the reasons that they created the filter, was to try to filter out some of the tar -- because the tar is largely a taste component in a cigarette. That's why you get a lot of the taste from a cigarette.

So the fibers that are bundled together in a cigarette filter are literally microscopic to the eye. There are about 18,000 individual fibers bundled together, and they're not tight together. And, in fact, throughout the cutting, the way they make cigarettes on a high-speed cigarette-making machine, they cut the filter, and it creates a -- it cuts the filter and creates fragments.

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And the fragments, in fact, are loose and the fibers themselves are loose. So we undertook these experiments to see whether they come off; whether this thing that we observed in the lung of a smoker was, in fact, a cigarette filter fiber.

And you can do very simple tests: Tongue test, if you touch a cigarette filter to your tongue and put a piece of scotch tape to your tongue and take the tape off and put it down on a microscope slide, you will find that the fibers have come off that easily.

Then we undertook a study, and Dr. Pauly has done these studies on autopsies of patients, where we harvested the filter fibers out of the lungs of cigarette smokers. And we only find them in smokers of filtered cigarettes, not in nonfiltered cigarettes, not in nonsmokers.

We've done sophisticated, basically forensic pathology techniques to demonstrate these, in fact, are cigarette filter fibers and not other kinds of fibers like from your clothes or in the air or whatever. And we published a number of studies on this topic.

We wrote a grant to the National Cancer Institute to document this, and we've been working on this grant for the last two and a half years.

And have looked at other defects: charcoal in

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a Lark cigarette, which there is a little charcoal cavity, and the charcoal in fact migrates. We've demonstrated that the charcoal granules in a Lark cigarette actually come off.

We've done studies to look at what smokers, when they inhale the cigarettes, how many of the fibers come off. This is not an easy thing to do, but we've been able to do and demonstrate that the fibers come off easily.

Q. You're talking about your own research?

A. Yes, of course. And then I've gone ahead and done some research to find out whether smokers are aware of this, and most smokers are not aware of the effect.

MR. KIRBY: Objection, Your Honor. Preemption.

THE COURT: Not yet. Overruled.

A. (Continuing) Most smokers are not aware of this problem.

We did a study with people at the Department of Motor Vehicles. We went up, and there was an easy place to do interviewing with people, and identified smokers and ex-smokers and asked them whether they had ever heard of the fact that cigarette fibers come off the end of a cigarette.

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The final set of slides that I have relate to the new products; and new products, one might even construe as potentially safer products that the industry has devised, and in fact, are even marketing right now.

This is a product called Eclipse. It's produced by the R.J. Reynolds Tobacco Company. Several years ago I was invited to a meeting at the R.J. Reynolds Tobacco Company to be introduced to this product before it was launched in a test market in Chattanooga, Tennessee, where I spent the day having their scientists explain to me the benefits of Eclipse.

And, in fact, Eclipse offers some substantial benefits because it's not like any conventional cigarette that's currently being sold. This is a product that heats rather than burns tobacco. And as a result, when you heat it rather than burning it, you're not generating the pyrolysis products -- the tar, in other words -- that you get when you burn a conventional cigarette.

As a result of not burning anything, just heating -- and what you heat is a carbon tip, which I will show you a picture of in a second -- you are basically -- when you are just heating it, you're basically not generating any tar or dirt or sidestream

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smoke, which is why they can make the claim "less sidestream smoke."

This is what an Eclipse cigarette looks like. It actually looks like a conventional cigarette. The one labeled G is showing you the Eclipse cigarette unsmoked. The one that's labeled H is a completely-smoked Eclipse cigarette. That's what it looks like after it is done.

So, because you are heating this material rather than burning it, you're not actually going to have anything to snub out. You have the spent item there, H.

The inside of it does not look like a conventional cigarette at all. In fact, this is not blending tobacco in any way whatsoever. This is a completely nonnatural, completely manufactured product.

The carbon tip at the end is literally like a high-processed carbon, like you would find in your charcoal grill; carbon like that that you would light. It's the heat generator for this.

They wrap that with a sheath of tobacco. They do this because the sheath of tobacco, when you light the cigarette, will give you the smell of the smoke, and also the first two drags will give you a little bit of tar. So you get this tar a little bit

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because of the first two drags of the cigarette, I was told when I attended the meeting at Reynolds, which is what dictates whether a smoker will like a cigarette or not.

The sheath of tobacco is wrapped in fiberglass. And that fiberglass is there as an insulator because the carbon tip, when it's burning, will lose mass, and it would fall out on the ground and you would have a lit charcoal briquet that would cause a fire. This would be a problem.

So they have fiberglass that melts around the carbon tip. That also prevents burning. When you put the product down, the carbon tip is not going to cause a fire. In fact, this product is probably a lot more fire safe than the conventional cigarette, because of the glass wrap.

E is tobacco. It's actually very light-colored tobacco. It's a reconstituted tobacco sheath that's impregnated with glycerin. The glycerol in this product is extensive, about 50 percent.

This is done because that's the carrying agent for nicotine in the vapor to the smoker. There's also -- you can't see here, but on the inside of an Eclipse cigarette there is an aluminum foil on this part labeled E. There is an inner sheath of aluminum

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foil almost like the aluminum foil you would find from a stick of gum. That is wrapped on the inside with what appears to be tobacco paper, and that is there as a result of preventing spotting of the glycerin, which is so moist on the paper.

And also acting as a heat conductor, because this super-heats the material. You generate a nicotine vapor, a few bits of tar that you get from the sheath of tobacco that's wrapped around the carbon tip. There's also tobacco bits impregnated inside the carbon tip, and then you pass it over the second column of genetically-engineered, reconstituted tobacco and then into the smoker.

So they're literally getting a nicotine vapor. This is a nicotine delivery device.

There's a little problem with this product, however. Actually, my interest, and one of the reasons I agreed to go down to the R.J. Reynolds Tobacco Company to meet with their scientists when they invited me to their meeting to learn about their product, was this product generates a lot less biological activity.

In other words, if you compare the tar from an Eclipse cigarette to the tar from a conventional cigarette, you would find that it's very different. It's different in terms of the chemicals that are

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generated and the biological activity as measured by things like those mouse painting experiments.

None of the mice with Eclipse tar get the tumors, yet they get the tumors with the tar of a conventional cigarette. This is very important. This may actually be indicative if there is potentially a safer product out there.

Although none of the advertising tells consumers that the biological activity of the Eclipse cigarette is lower, which I find interesting, because secondhand smoke -- well, smokers are concerned about that. The main thing they are concerned about is cancer and heart disease and emphysema. And if they could smoke and not get those things, that would certainly be a great benefit.

And none of that has been communicated to the consumers. Although, when I was at Reynolds, I learned that a large share of their employees have been smoking Premier cigarettes and Eclipse cigarettes. They get these free, at their plant.

MR. NEWSOM: Your Honor, I object to what he says. It's hearsay as to what he learned at Reynolds.

THE COURT: Sustained.

Let's move on with what this shows.

A. (Continuing) Okay. I can move on to this

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particular study. This relates however to the problem of the glass.

When I was at the meeting at Reynolds, we asked the folks there about the glass insulator, whether it breaks off and whether there might be any problem from the heat source end migrating down to the filter tip.

If you look at an Eclipse cigarette, you can literally see the glass dangling right off the end of the heat source end. They make this product very similar to making a regular cigarette. High speed-making machines, they cut the carbon tip and the glass, and the glass shatters, and you get fragments, bits and particles.

So we were curious as to whether these glass fibers would end up on the filter tip end. And so we did a study to look at this. You can see some of the particles there from the glass.

We looked at the inside of the packs. We got some Eclipse cigarettes that were available in Chattanooga and also Lincoln, Nebraska, their two test markets.

We opened up the packs very carefully and basically counted up the glass fibers that were at the bottom of the pack. And there were thousands; in fact,

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about -- on an average of 7,000 bits, fragments of glass dust at the bottom of the pack.

Then we looked very carefully at the filters to see whether the cellulose acetate, the plastic matrix that a person is going to put into their mouth, actually had any of these glass fibers there.

We were told, by the way, at Reynolds, that this is a not a problem; that smokers would not get exposed to the glass.

Our study concluded otherwise. In fact, as you can see, out of the different cigarettes that we looked at, the various packs, 95 percent of the cigarettes in the Eclipse packs were contaminated with glass. That means that every time a smoker puts an Eclipse cigarette in their mouth or even touches an Eclipse cigarette, they are getting exposed to glass.

Now, this is not glass you can easily see. It's broken-up dust, basically. Glass, by the way, is potentially a very dangerous thing to inhale into your lungs, and this is putting it directly into your body. So we believe that Eclipse smokers are ingesting and inhaling, in addition to plastic, cellulose acetate filter fibers, also glass with the Eclipse cigarette.

And this is just showing you, again, the glass material on the Eclipse. This is on the filter

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end. A is on the inside of the filter. If you see an Eclipse cigarette, actually the filter is more of a holder, it's not a filtering device, because there is no tar or very little tar to filter.

So they actually have a hole they drill in it. It directs you right to the column. They do this so you can pull the nicotine with less resistence. One of the problems with earlier versions of Eclipse and Premier cigarette that preceded it was keeping the product lit and having to suck very hard. So they tried to address that problem by drilling a hole in the filter.

It's not a filter, really; it's a cigarette holder. But you can see the glass contaminating this.

We've done a study to look at all the marketing material that Reynolds has put out on Eclipse cigarette in Lincoln and Chattanooga, and we have not come across anything that mentions the issue of --

MR. KIRBY: Objection, Your Honor; preemption.

THE COURT: No. Overruled.

A. -- the glass.

In fact, they talk about it as an insulating material. They don't talk about fiberglass, which is what it is, and smokers are not aware of the fact they

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IN THE CIRCUIT COURT OF
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IN AND FOR DADE COUNTY, FLORIDA

GENERAL JURISDICTION DIVISION

HOWARD A. ENGLE, M.D., ROBERT W. ANGELL, RAYMOND LACEY, FROZENE D. STEEVENS, FRANK AMODEO, MARY FARNAN, LOREN E. LOWERY, ANGIE DELLA VECCHIA and MICHAEL MATYI, on behalf of themselves and all others similarly situated,

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Defendants.

COPY

CASE NO. 94-08273 CA22

TRIAL
Volume 160

TRANSCRIPT OF PROCEEDINGS

in the above-styled cause before the Honorable Robert Paul Kaye, Circuit Judge, at the Dade County Courthouse, 73 West Flagler Street, Miami, Florida, on Tuesday, December 15, 1998, at 1:55 p.m.

Miami, Florida **Taylor, Jonovic, White & Gendron** (305) 358-9047

BY MR. ROSENBLATT:

Q. Dr. Mele, did Philip Morris, during the period of time that you were there, have the scientific technology to remove all the nicotine from a cigarette if that's what they chose to do?

A. Correct, yes, they did.

Q. And did they, in fact, make cigarettes, some cigarettes -- I'm not talking about commercial necessarily, without --

A. They would make experimental cigarettes, as requested by Mr. Frank Ryan and Bill Dunn in the behavioral research unit. They could take out nicotine, they could add in nicotine, they could manipulate the levels of nicotine. These were all experimental cigarettes that were used in smoking studies with humans at the company.

Q. During the period of time that you were employed at Philip Morris, did Philip Morris, through its scientists, organic chemists, discover analogs, substitutes for nicotine, to meet the criteria of retaining the effects of nicotine on the brain and at the same time eliminating any possible adverse effects on the heart?

MR. HEIM: Well, objection, Your Honor. He has no expertise to -- I would like to talk about this.

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

GENERAL JURISDICTION DIVISION

HOWARD A. ENGLE, M.D., ROBERT W. ANGELL, RAYMOND LACEY, FROZENE D. STEEVENS, FRANK AMODEO, MARY FARNAN, LOREN E. LOWERY, ANGIE DELLA VECCHIA and MICHAEL MATYI, on behalf of themselves and all others similarly situated,

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Defendants.

COPY

CASE NO. 94-08273 CA22

TRIAL
Volume 234

TRANSCRIPT OF PROCEEDINGS

in the above-styled cause before the Honorable Robert Paul Kaye, Circuit Judge, at the Dade County Courthouse, 73 West Flagler Street, Miami, Florida, on Tuesday, March 2, 1999, at 1:30 p.m.

That compensation, if it occurs and to the degree that it occurs, will be somewhere in the middle, not complete; compensation is not zero. So it's somewhere in the middle.

In any event, even with compensation, on the average smokers as a group, if they're switched to lower tar products, will get less tar and nicotine. Not as much less as predicted by the FTC tar numbers because that's an arbitrary standardized measurement, but they still get less.

Q. Less than what?

A. Than if they were still smoking the higher tar product.

Q. Now, let me change the subject again. It's in this same area. I want to talk about pH and ammonia.

There has been the allegation in this case that the cigarette companies manipulate the nicotine in a cigarette and they use ammonia as one way of doing it. And there's also been testimony that the defendants have raised the pH of the mainstream smoke in order to increase the availability, bioavailability of nicotine to the smoker, and one way it's been claimed that it has been accomplished is by using ammonia in the manufacturing process. Are you familiar

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with those allegations?

A. Yes, I am.

Q. Is ammonia a natural constituent of tobacco?

A. There are ammonia compounds, ammonium compounds in tobacco naturally, largely coming from fertilizer application.

Q. Does the RJ Reynolds Tobacco Company use ammonia or ammonium compounds in its reconstituted tobacco process?

A. We have a number of different versions of our reconstitution process. There are several versions that use ammonia or ammonia compounds in that processing, yes.

Q. Now, why do you do that?

A. We do that because ammonia and ammonia compounds, we've known this for years, react with sugars, particularly certain types of sugars that are in the tobacco. They react to form a very flavorful class of compounds called pyrazines, and some pyrazines are also quite flavorful. So that's a well-known series of reactions to form pyridines and pyrazines. It affects the taste characteristics of the product.

Q. Now, when did Reynolds start using ammonia in its reconstituted tobacco process?

A. The first commercial application was with

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Camel in 1974.

Q. When was the next commercial application?

A. The next large commercial application was in 1979 with Winston.

Q. '74 was Camel, and '79 was Winston.

Now, was anything occurring in the marketplace in 1974 that caused Reynolds to consider using ammonia in its process?

A. Yes. One of the major things that was happening in the market -- we had already done a lot of research trying to understand the reactions between ammonia and sugars and how those materials form pyrazines, but in 1974 one of our competitors was seeing increasing success in the marketplace and that product was Marlboro.

And by trying to reengineer that product, take it apart and understand how it's built, we believe that Philip Morris was using ammonia and ammonia compounds in its processing to improve flavor.

Q. Now, does ammonia affect taste?

A. Yes, very definitely.

Q. Dr. Townsend, I've handed you a document that is marked as Defendants' Exhibit 20147 dated January 29th, 1976. It is titled: Effect of Treatment of Tobacco with Ammonia or Various Ammonium Salts on the

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Levels of Pyridines and Pyrazines in Smoke. Can you tell us what this is?

A. This is an internal research report by several RJR scientists who are looking at the chemistry and the resulting taste effects of ammonia sugar reactions.

Q. Was this document prepared and maintained in the ordinary course of the business of Reynolds?

A. Yes.

MR. KIRBY: Your Honor, I would move this into evidence under the business records exception.

THE COURT: All right. So admitted.

THE CLERK: Defendant's 20147 in evidence.

(Defendants' Exhibit 20147 was admitted into evidence.)

BY MR. KIRBY:

Q. Now, Dr. Townsend, if you would turn to the abstract of the article on Page 3?

A. Okay.

Q. And the abstract I believe you have told us is intended to be a summary of the research that follows?

A. Right.

Q. There are a lot of names of chemicals in here that are unpronounceable. Without reading all the

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chemical names, could you just explain the scientific and chemical points that this abstract is discussing?

A. Sure, I don't agree that these names are unpronounceable, but I will skip over them.

This abstract summarizes the research of the reaction of tobacco, of ammonia and ammonia compounds with sugars and tobacco to form a huge list of pyrazines, primarily pyrazines, there's a few pyridines in here. It says: In general the ammoniation of tobacco products increases this class of compounds and also talks about chemical mechanisms to explain why that occurs.

Q. Now, if you would turn to Page 15, and there is a discussion there of competitive brands?

A. Right.

Q. Do you see that?

A. Yes.

Q. And do you see the paragraph, the second paragraph on that page that begins with "Examination"?

A. Right.

Q. Now, can you tell us what was observed in this research study in this competitive brands analysis?

A. Sure. What these scientists did was evaluate various commercial products from the marketplace, and

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they found that unfiltered Marlboro smoke had higher levels of pyrazines and pyridines compared to unfiltered Winston smoke, which was at that point not ammoniated. Marlboro had high levels of pyridines, Winston had low levels. Filtered Marlboro smoke also showed higher levels of pyridines.

So again, one of our competitors showed higher levels. It went on to evaluate unfiltered Kools, which we believed were ammoniated commercial products, and found that there really wasn't much difference in pyridines from Kools compared to our product Salem. But filtered Kool did show lower levels compared to our Salem product at that point. So Marlboro clearly had higher levels, Kools did not.

Q. Dr. Townsend, I've handed you a document that is marked as Defendants' Exhibit 23661, dated March 20, 1980. It's titled: Method to Improve Quality of Tobacco Via Sugar Ammonia Reactions. Can you tell us what this document is?

A. This, again, is an internal research and development report that summarizes the work of two of our scientists in the area of sugar ammonia reactions.

Q. Was this prepared and maintained in the ordinary course of the business of RJ Reynolds Tobacco Company?

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A. Yes, it was.

MR. KIRBY: Your Honor, I move admission of Defendants' Exhibit 23661.

THE COURT: Admit it.

THE CLERK: Defendant's 23661 will be admitted.

(Defendants' Exhibit 23661 was admitted into evidence.)

BY MR. KIRBY:

Q. Dr. Townsend, could you explain the research that was taking place here where they're talking about sugar ammonia reactions?

A. Yes. In this work the scientists were preparing various samples of tobacco that were treated with different types of ammonia compounds and different levels of ammonia compounds to cause that reaction to form pyrazines.

The researchers went on to evaluate the smoke qualities, the taste qualities of those products in taste panels, and in fact found that the ammonia treated samples in general were smoother, there was less harshness and had improved flavor.

So this was a product development effort aimed at trying to figure out what attributes were changed in the consumer's response to these products.

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Q. In response to --

A. The ammoniation process, sorry.

Q. Let me ask you to turn to the last page, Page 3. Would you read the concluding paragraph?

A. Right. It is the author's belief that the above-treated flue-cured tobacco produced a smoother, more flavorful cigarette because of the low temperature sugar ammonia reactions which were allowed to take place on the surface of the tobacco leaf before incorporation of the flue-cured tobacco into the blend.

That was a long sentence.

Q. Dr. Townsend, I've handed you a document that's marked as Defendants' Exhibit 23679. Can you identify that?

A. Yes. This is a quarterly report prepared by Dr. Charles Green. It's to his supervisor, Mary Stowe.

Q. Do you know Dr. Green?

A. I know Dr. Green very well. He and I have worked on many projects together.

Q. Did Dr. Green and others routinely prepare similar quarterly reports in the course of their regular business at Reynolds?

A. Yes, that was routine reporting.

Q. And this is such a document that was prepared and maintained in the ordinary course of Reynolds'

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business?

A. Yes.

MR. KIRBY: Your Honor, I would move the admission of Defendants' Exhibit 23679.

THE COURT: Admit.

THE CLERK: 23679 into evidence.

(Defendants' Exhibit 23679 was admitted into evidence.)

BY MR. KIRBY:

Q. What is the subject of this quarterly report?

A. Tobacco ammoniation.

Q. Looking at the page that is titled Tobacco Ammoniation, could you go to the second full paragraph?

A. Sure.

Q. And read, if you would, the first few sentences regarding Dr. Green's position as to the effect of ammoniation on tobacco smoke?

A. Okay. There is general agreement that ammoniation of tobacco has two general effects on its smoking properties. Compared to an untreated control, the smoke of an ammoniated product is milder and less irritating.

A key step to observation of less irritation from ammoniated products is the removal of excess unreacted ammonia from the treated tobaccos. This has

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been accomplished either by a waiting period between ammoniation and use, or by steaming the ammoniated tobaccos. Concurrent with the reduction in irritation, ammoniated tobaccos produce a smoke with altered flavor and aroma properties. The flavor becomes more chocolate-like, and this is associated with the presence of higher levels of smoke pyrazines. Because of these flavor changes, ammoniated tobaccos are generally regarded as being more burley-like.

This factor must be considered in the use of treated tobaccos as part of cigarette blends. The attributes of ammoniated tobaccos, less irritation and more chocolate flavor, have also been used to describe major product differences between our products and those of our major competitor. We do not know if this gives them a competitive advantage in the marketplace.

Q. Now, Dr. Townsend, what percentage of Reynolds' products contain ammoniated reconstituted tobacco sheet?

A. Today, only about 20 percent of the products we make contain ammoniated tobacco.

Q. Now, if the purpose of ammoniation, the manufacturing process is to produce these pyrazines or pyridines because they taste good, why not ammoniate all of your products?

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A. Well, because the formation of these pyrazines or pyridines improve the taste for some smokers. There are some smokers who don't prefer that taste.

So we provide different products for different smoker wants. Some smokers prefer the more flavorful, more chocolate-like taste that's less irritating and less harsh. Other smokers prefer the products that are not ammoniated and don't have that high chocolate aroma.

Q. Now, what are Reynolds' two best selling brand families?

A. The two largest brand families that we have currently are Winston and Doral.

Q. Are they ammoniated?

A. No, they're not.

Q. Now, Dr. Townsend, we've seen some internal research reports from Reynolds suggesting the use of ammoniated tobacco to improve smoothness and taste. Were there scientists at Reynolds that theorized about using ammonia for reasons other than improving taste?

A. Yes.

Q. Who did that?

A. There were several scientists at Reynolds who speculated that adding ammonia or ammonia compounds

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could change the pH -- change the pH of smoke and consequently the availability or bioavailability of nicotine. Claude Teague was one such scientist. John Woods, Dr. Woods was another scientist who speculated that, along with scientists in the outside scientific community.

Q. Now, I have mentioned and you have mentioned pH. What is it?

A. PH. PH is a measure of acidity or basicity. It's a term used in general chemistry. It's a logarithmic scale to indicate acidity or basicity being -- low numbers being very acid. The range goes from 0 to 14. So 0 would be extremely acid, 14 would be extremely basic, and 7 would be exactly neutral, would be neither acid nor base.

Q. The term that has also been used in connection with this proceeding, free nicotine?

A. Right.

Q. What is free nicotine?

A. Well, nicotine is a base. Nicotine is a basic molecule. And one of the things that can happen to a basic molecule is it can react or attach itself to an acid. So a proton or an acid molecule, an acidic molecule, can actually react with a basic molecule like nicotine and form a salt.

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There are two forms of nicotine in smoke, or there are two forms of nicotine in solution as well. And there's the free nicotine, which doesn't have this acid attached to it. That's the free nicotine. There's also the salt nicotine that does have this attached to it now. The salt nicotine is not volatile. The free nicotine --

Q. What does that mean?

A. Volatile? It means it doesn't have sufficient vapor pressure; it's not going to be in the air or in the surrounding gases around a particle, smoke particle. It's all going be to be trapped in the particle itself.

The free nicotine that doesn't have the acid associated with it is volatile. It's actually semi-volatile. It's not real, real volatile, but it's enough so that some nicotine can be present in the vapor phase around the particle.

Q. Okay. Now, we've talked about pH and we've talked about free nicotine. Is there a relationship between pH and free nicotine?

A. Sure, there is. I mean, this is basic chemistry, that if one has a basic molecule like nicotine that can be present either in the free form or in the salt form, pH can and will affect the fraction

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of nicotine that's present in the salt versus the free form.

Q. When you say "the fraction," you mean the amount that's in one form versus the other?

A. Exactly.

Q. Now, has this relationship between pH and free nicotine been a secret?

A. No, it's not a secret at all and hasn't been. I think, again, as I just indicated, there are several researchers at Reynolds who have speculated about the relative importance of free nicotine in pH. There's scientists outside the industry that have published papers and spoken to this same theory.

Q. How long has the scientific community been aware of this relationship?

A. For free nicotine, the earliest reference I can find is a 1972 article. And actually, that work was published or presented actually at the Second World Conference on Smoking and Health in 1971.

So it's been known in the scientific community at least as early as 1971. That's the earliest reference I can find.

Q. Dr. Townsend, I've handed you a document that is Defendants' Exhibit 24589. Do you recognize that as an article from the Journal of the National Cancer

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Institute published in June of 1972 by the United States Department of Health, Education and Welfare?

A. Yes.

Q. Is this the article which you were referring to?

A. That's right.

Q. Let me ask you to turn to --

THE COURT: Sidebar, counsel.

(The following proceedings were had at sidebar:)

MR. ROSENBLATT: You know, about seven out of the eight last documents were never disclosed to us or given to us.

MR. KIRBY: They were all disclosed, Your Honor.

MR. HEIM: You have a list.

MR. ROSENBLATT: They're not on the list, Robin is telling me.

MS. BERGER: On Sunday what we were provided with, only one of all the documents that were just admitted were not given to us. Only one was.

MR. KIRBY: I'll have to get my people to address this. I can't do it on the fly. But it's my understanding that there are no documents that we are using that have not been identified to the plaintiffs.

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THE COURT: Either Sunday's list or prior list, right?

MS. BERGER: They were all identified on that list. When you asked them to cut it down and provide us with the documents, a more workable set, none of them except one were disclosed to us.

THE COURT: It was on the original list which was then culled.

MS. BERGER: Which we had no copies until now.

THE COURT: This is a different story here. The others were business record type documents. This is something different.

MR. ROSENBLATT: Right. This is hearsay, not written by him. But of course it's not coming in for the truth, Judge; it's coming in for some other esoteric purpose.

THE COURT: Like all these papers.

MR. ROSENBLATT: Which you didn't let in in my case. And they got in more documents through this witness than I got in through 30 witnesses.

MR. MOSS: Well, I don't think that's accurate or fair.

MR. HEIM: Well, you don't have business records. There's a difference.

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THE COURT: Why should the plaintiff have business records? He should have had all your business records.

MR. HEIM: That's what we've been doing for the last two weeks.

THE COURT: There are business records then?

MR. HEIM: Some are, some aren't.

MR. ROSENBLATT: Mark that.

MR. KIRBY: I'm ready with my mantra. The plaintiffs' objection is that this is hearsay. Hearsay is a statement. That's a statement other than the one made by the declarant while testifying at trial. Meets that. Offered in evidence to prove the truth of the matter asserted.

Now, what this document says is that there is a relationship between pH and nicotine, just as the witness testified. I am not offering this document to prove that a relationship exists. Mr. Rosenblatt snickers and laughs. His own witnesses in this case have testified that the relationship exists. I am offering this to show that --

THE COURT: Keep your voice down.

MR. KIRBY: -- that in the Journal of the National Cancer Institute itself they said that there was a relationship. I'm not offering it to prove the

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relationship exists. This shows that the National Cancer Institute itself was aware of the relationship in 1972 and the United States Department of Health, Education and Welfare published it for the world to know.

THE COURT: Don't you think that's bolstering?

MR. KIRBY: I don't think it's bolstering. Your Honor, there is no other practical way.

THE COURT: No kidding? They had the same problem. All right. Sustain the objection. It's not necessary.

(The sidebar conference was concluded, and the following proceedings were held in open court:)

THE COURT: Let's move along.

BY MR. KIRBY:

Q. Dr. Townsend, in 1979 did the Surgeon General of the United States discuss the issue of pH and free nicotine?

A. Yes, he did.

MR. KIRBY: Your Honor, the 1979 Surgeon General's Report is in evidence.

THE COURT: I hear you. I'm aware.

BY MR. KIRBY:

Q. Now, Dr. Townsend, I have handed you portions

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of the 1979 Surgeon General's Report, which is in evidence in this case; and I want to direct your attention to Page 14-108, if you'd look at the left-hand column there?

A. I'm sorry, I have Page 14-87. I don't have 108. In fact, I have several copies of 14-87.

Q. Do you have this, 14-108?

A. No.

Q. I messed up. Let me fix it. Sorry about that.

A. That's all right. 14-108, I'm with you.

Q. If you will look in the left-hand column there, about six lines up from the bottom?

A. Right.

Q. Could you read that sentence, please, beginning with "Since cigarettes"?

A. Sure. This whole section is talking about nicotine actually. It says: Since cigarettes in the United States and in most foreign countries made of flue-cured tobacco -- are blends with flue-cured tobacco as a major ingredient or in a few cases are blends with Turkish tobacco, the pH of the resulting mainstream smoke is below 6.5 and thus contains only protonated nicotine. Nicotine salts, however, are a part of the particulate matter and are therefore not

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amenable to cigarette filtration.

Q. The Surgeon General is setting forth the mainstream, the pH of mainstream smoke of U.S. cigarettes; is that right?

A. That's right. And he says that most of the cigarettes, then, are below 6.5, and if the pH is 6.5, all of the nicotine or virtually all the nicotine is present as the protonated or the salt form.

Q. Well, that's what I wanted to ask you. What does -- the Surgeon General uses the term "protonated," P-R-O-T-O-N-A-T-E-D, protonated nicotine. What is that?

A. Protonated is where the acid has bound with the basic molecule, like I was talking about a minute ago, where you form the salt when an acid reacts with nicotine. So the protonated form is the salt form, not the volatile form.

Q. And below a pH of 6.5, the mainstream smoke essentially contains only the protonated nicotine?

A. That's right.

Q. Is that the same thing as saying it does not contain the free nicotine?

A. That's right.

Q. Now, if you would turn to Page 14-86 of that same Surgeon General's Report, there is a diagram in

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the upper left-hand corner; and the figure there is titled: Degree of Protonation of Nicotine in Relation to pH.

A. Right.

Q. And then there's a reference to Henderson/Hasselback. What is the Surgeon General talking about here, what is this?

A. What this is is a calculation using the Henderson/Hasselback equation that defines the amount of free nicotine versus protonated or salt nicotine as a function of pH. This is something that's defined through basic chemical principles, the Henderson/Hasselback equation.

Q. Now, how long has that equation been applied to tobacco smoke?

A. Well, the equation has been around for quite some time. It's been applied to tobacco smoke at least as early as 1972 with the publication by Jerry Morrie where he's applied this Henderson/Hasselback equation to tobacco smoke and to nicotine.

Q. Now, Dr. Townsend, have you prepared a chart that would assist the jury in understanding this relationship between pH and free nicotine as set forth in the 1979 Surgeon General's Report?

A. I have prepared a chart, and I hope it helps.

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Q. Now, Dr. Townsend, this demonstrative exhibit is titled: Calculated Percent Free Nicotine.

What does this chart tell us about the amount of free nicotine in cigarette smoke?

A. Well, if I may step down?

MR. KIRBY: Your Honor?

THE COURT: I told him any time he needs to.

A. What this chart shows, actually this is just a portion of the Henderson/Hasselback equation, which is a basic equation useful in chemistry.

But this is a calculated amount or percent of free nicotine or the volatile nicotine as a function of pH. As the pH becomes more basic, as I've already said, there's going to be more free nicotine or more of the volatile form of it present.

As the pH becomes more acid down to lower numbers, then there's going to be less free nicotine or the volatile nicotine. What this shows -- and this is the range for cigarette smoke, usually from about 5.5 pH units up to about 6.5 pH units. What this shows is, even at 6.5 there's a very, very small fraction of the total nicotine present as the free nicotine. And the Surgeon General in fact said there's virtually -- the nicotine is virtually all present as the protonated form at this range.

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Now this is for cigarette smoke. If you compare this to cigar smoke, it turns out for several reasons, mainly due to the tobacco wrapper, the cigarette smoke from cigars is much more basic and it's usually in the range of about seven-and-a-half to eight-and-a-half pH units.

Well, at that pH range, you can see from the Henderson/Hasselback equation that there was a lot larger fraction of free nicotine or the volatile nicotine. And it's in high fraction of volatile or free nicotine that makes cigar smoke difficult to inhale, makes it irritating and strong, because a large percentage of the nicotine is present as the free form, unlike cigarette smoke.

Q. Now, Dr. Townsend, can the use of ammonia increase the pH of cigarette smoke?

A. Sure. If one puts large amounts of ammonia in tobacco or in tobacco processing, it's entirely possible to increase the pH of cigarette smoke.

Q. Now, does the level of ammonia or ammonium compounds used by Reynolds in the 20 percent or so of its cigarettes on the market that contain ammoniated tobacco, does the level of ammonia that Reynolds uses raise the pH of the mainstream smoke?

A. No. For those products that we ammoniate at

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the levels of ammonia or ammonium compounds that we use, they're not sufficiently high to increase the pH. The pH of cigarette smoke of our products hasn't changed over time.

Q. Dr. Townsend, do you still have there on the witness stand the 1976 document titled: Effective Treatment of Tobacco with Ammonia or Various Ammonium Salts on the Levels of Pyridines and Pyrazines?

Let me ask you to look at Page 16 of that document, and it is Defendants' Exhibit 20147 in evidence.

A. Okay, I'm on Page 16.

Q. What is set forth in that table?

A. This is an analysis of competitive brands. Actually, it's an analysis of Marlboro, Winston, Kool and Salem commercial products. It's looking at smoke yields, some individual constituents yields. It's also looking at pH, among other things.

Q. Now, pH is reflected under the column that says, "Analysis Smoke"?

A. That's right.

Q. And is it an analysis of the pH in the smoke of Marlboro, Winston, Kool and Salem commercial cigarettes?

A. That's right.

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Q. Cigarettes that Real People Smoke?

A. That's right.

Q. Now, is the measurement for any of those above 6.5?

A. No.

Q. Now, Dr. Townsend, I've handed you a document that is Defendants' Exhibit 24655. It's dated January 15th, 1975, and it is titled: Smoke Balance, Factors and Control, Updated Review and Analysis of 1974 Competitive Brand Data.

Is this similar to the other research reports that we've seen today?

A. Yes, this is an internal research report.

Q. Was it prepared and maintained in the ordinary course of the RJ Reynolds Tobacco Company?

A. Yes.

MR. KIRBY: Your Honor, I would move the admission of Defendants' Exhibit 24655.

THE COURT: Admit it.

THE CLERK: 24655 admitted.

(Defendants' Exhibit 24655 was admitted into evidence.)

BY MR. KIRBY:

Q. Let me ask you to turn to Page 5 of this January 15th, 1975 report.

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A. Okay.

Q. Do you see the section titled: Smoke pH and Calculated Free Nicotine?

A. Yes.

Q. Now, does -- on that page, does that page list a number of brands and the calculated pH of the mainstream smoke of those cigarettes?

A. Yes. I'd say there's 20 or 25 commercial brands here.

Q. And is this calculated in accordance with this equation that you were telling us about that's set forth in the same equation that the Surgeon General used?

A. Well, there's two columns here. The smoke pH number is a measured number. The free nicotine number, which is the right-hand column, is a calculated number; and it clearly says that calculated free nicotine -- calculated using the Henderson/Hasselback equation from the measured pH number.

Q. And these report on measurements taken for the year 1974?

A. That's right.

Q. Are these for filter cigarettes?

A. Yes, these are all filtered cigarettes, I believe.

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Q. Now, in 1974 did the Camel filter cigarette have added ammonia as part of its blend?

A. In 1974 the Camel filter was ammoniated -- Camel filter cigarette was ammoniated.

Q. Now, is the pH of the smoke of that Camel cigarette reflected in this document?

A. Yes. And the number is 6.19. I would round that to 6.2.

Q. Now, in 1974, same year, was the Winston cigarette ammoniated?

A. No, it wasn't. We didn't ammoniate Winston cigarettes until 1979.

Q. And what is the pH of the Winston cigarette that's not ammoniated?

A. This table shows it to be 6.16. Again, I would round that to 6.2.

Q. The ammoniated Camel was 6.19?

A. Right.

Q. The nonammoniated Winston was 6.16?

A. Right.

Q. What is the difference in those two numbers?

A. I think there is no difference in those two numbers. They're within the experimental error of the test method.

Q. Are you familiar, Dr. Townsend, with the pH

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data for Reynolds' cigarettes tracked over time?

A. Yes, I'm very familiar with it.

Q. Have you prepared a chart that would assist you in reviewing with the jury the pH data for Reynolds' brands over time?

A. Yes.

Q. Dr. Townsend, what does this demonstrative exhibit demonstrate?

A. This is a comparison of the pH measurements for Winston filter cigarette or Winston red pack over time beginning in 1972 up through 1988.

I'd like to point out, if we go back and look at our internal historical data on pH, there's a fair amount of data, but it's not a measurement that we routinely make in manufacture or quality assurance. But we have some data, and I think the time frame is limited. But this is the available time frame we have.

What this shows is that the pH, the measured pH for Winston smoke, bounces around a little bit, is pretty much around 6.0 to 6.1. What we also know is if we make repeated measures of pH on the same sample, exactly the same sample, the variability is about plus or minus .2.

So there's really no substantial difference or significant difference really among any of those

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numbers. I would say that there's no change for pH in Winston in spite of the fact that in 1979, right in the middle of the chart, we ammoniated that product. So we ammoniated the product, no difference in smoke pH.

Q. Now, the Winston cigarette, is that cigarette ammoniated today?

A. No, it isn't.

Q. When did Reynolds stop using ammoniated reconstituted tobacco sheet in Winston cigarette?

A. In 1997 --

COURT REPORTER: I'm sorry. What was the year?

A. 1997. We changed the entire --

Q. In 1997 the ammoniation process stopped?

A. In 1997 we stopped ammoniating Winston.

Q. Let me ask you this: When that happened, did the pH of the smoke change?

A. No, I went back and looked at it. We have -- the pH of Winston smoke before we took the -- before we stopped the ammoniation was 6.0. After we stopped the ammoniation, we took the ammonia out, the pH was 6.0. So ammoniated or not ammoniated, same pH.

Q. How can that be? How can it be if you're using ammonia and ammonia is a base, why doesn't it raise its pH of the smoke?

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

GENERAL JURISDICTION DIVISION

HOWARD A. ENGLE, M.D., ROBERT W. ANGELL, RAYMOND LACEY, FROZENE D. STEEVENS, FRANK AMODEO, MARY FARNAN, LOREN E. LOWERY, ANGIE DELLA VECCHIA and MICHAEL MATYI, on behalf of themselves and all others similarly situated,

Plaintiffs,

vs.

R.J. REYNOLDS TOBACCO COMPANY, PHILIP MORRIS INCORPORATED, ("PHILIP MORRIS U.S.A."), LORILLARD TOBACCO COMPANY, LORILLARD, INC., THE AMERICAN TOBACCO COMPANY, BROWN & WILLIAMSON TOBACCO CORP., LIGGETT GROUP, INC., BROOKE GROUP LTD., INC., DOSAL TOBACCO CORP., COUNCIL FOR TOBACCO RESEARCH-U.S.A., INC., and TOBACCO INSTITUTE, INC.,

Defendants.

COPY

CASE NO. 94-08273 CA22

TRIAL
Volume 251

TRANSCRIPT OF PROCEEDINGS

in the above-styled cause before the Honorable Robert Paul Kaye, Circuit Judge, at the Dade County Courthouse, 73 West Flagler Street, Miami, Florida, on Monday, March 15, 1999 at 9:30 a.m.

example, the Surgeon General, commented on this issue, as well?

A. Yes, they have. In the '84 Surgeon General Report he makes a comment to that effect.

Q. Let me show you Defendants' Exhibit 15825, and ask if you can identify that as an excerpt from the 1984 Surgeon General's Report?

A. Yes. That's what it is.

Q. And can you identify for us the page on which the Surgeon General states what you have set forth, that smokers do not compensate by increasing their cigarette consumption rate on average?

A. It's on Page 342.

Q. All right. Now, I'm going to go ahead and cross off cigarette consumption rate as the method by which smokers compensate, and ask you to look at number two, ventilation hole-blocking.

What is ventilation hole-blocking?

A. Well, it refers to ventilation holes in the cigarette. A modern-day, low-delivery cigarette has holes in the tipping paper of the filter. And this allows air, room air, to go into the filter and dilute the smoke that's formed during the combustion process. And that is referred to as filter-tip ventilation.

Now, obviously, those holes are designed to

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reduce the delivery by air dilution, and if someone were to block those holes, either with their fingers or their lips, and if they were to block them in a very significant way, that would reduce the dilution through the filter, and, therefore, that could increase delivery of the cigarette.

And that has been suggested as one way in which people compensate, by blocking the holes with lips or fingers.

Q. Have you studied the issue of whether or not ventilation hole-blocking occurs in smokers who compensate?

A. Yes.

Q. Have you reviewed outside scientific literature with respect to that issue, as well?

A. Yes, I have.

Q. Now, can I ask you to come down one more time and ask you to draw for us this issue of ventilation hole-blocking, in terms of a cigarette?

A. Yes.

Q. There you are.

A. Thank you. Artist at work again.

I draw a cigarette.

Okay. This is the tobacco rod, the white you normally see on the cigarette. This is the filter. In

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IN THE CIRCUIT COURT OF
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IN AND FOR DADE COUNTY, FLORIDA

GENERAL JURISDICTION DIVISION

HOWARD A. ENGLE, M.D., ROBERT W. ANGELL, RAYMOND LACEY, FROZENE D. STEEVENS, FRANK AMODEO, MARY FARNAN, LOREN E. LOWERY, ANGIE DELLA VECCHIA and MICHAEL MATYI, on behalf of themselves and all others similarly situated,

Plaintiffs,

vs.

R.J. REYNOLDS TOBACCO COMPANY, PHILIP MORRIS INCORPORATED, ("PHILIP MORRIS U.S.A."), LORILLARD TOBACCO COMPANY, LORILLARD, INC., THE AMERICAN TOBACCO COMPANY, BROWN & WILLIAMSON TOBACCO CORP., LIGGETT GROUP, INC., BROOKE GROUP LTD., INC., DOSAL TOBACCO CORP., COUNCIL FOR TOBACCO RESEARCH-U.S.A., INC., and TOBACCO INSTITUTE, INC.,

Defendants.

CASE NO. 94-08273 CA22

TRIAL

Volume 314

TRANSCRIPT OF PROCEEDINGS

in the above-styled cause before the Honorable Robert Paul Kaye, Circuit Judge, at the Dade County Courthouse, 73 West Flagler Street, Miami, Florida, on Friday, May 14, 1999 at 9:40 a.m.

out in 1955 with the cowboy motif -- was because the cigarette has remained the same. You're telling us Camel is different: Every couple of months it's a different cigarette?

A. No, not every couple of months, of course not. But we are constantly looking for improvements in the product. You know, I would say, I don't know exactly how often we would change it, but it's not unusual to change a style of Camel. We introduced an improved Camel Lights last year. We're working on Camel filters right now. If we identify an improvement, we'll change it.

So, yeah, we have -- I mean, we're constantly trying to make the product better. That's part of what we do.

Q. I'd like for you to be specific and not just talk about improving the products. I want to know how tobacco has been improved in the last 30 years in Camel.

A. Well, it's the combination of what tobaccos you put in the product and how you process it.

Q. How have you changed that?

A. Well, that's the R&D people do that. I can't tell you the specific changes, but from a consumer standpoint it made the product smoother. Smokers say

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that it is a smoother product; it has less after-taste. And so we've gotten closer to what smokers would like in the product.

Q. You still sell Camels unfiltered?

A. Yes.

Q. And you're telling us that today's unfiltered Camel cigarette has different tobaccos or is in some way different from the Camel cigarette that existed during the 26 years of decline?

A. It changed. Even Camel nonfilter changed during those 26 years. It had, you know, changes in tar: It became lower in tar over time. I mean, sure, even Camel nonfilter has changed.

But we do more changes on our Camel Lights and Camel filters because those are the growing styles, and we're constantly looking for how we can improve the product with smokers.

Q. You accept the fact that all the adult smokers that you have been talking about, adult smokers, began smoking when they were under 18, 18 or under?

A. Yeah. I think that the federal government that does the study says that most people become daily smokers between like 17 and a half and 19. That's not everybody, but...

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

GENERAL JURISDICTION DIVISION

HOWARD A. ENGLE, M.D., ROBERT W. ANGELL, RAYMOND LACEY, FROSENE D. STEEVENS, FRANK AMODEO, MARY FARNAN, LOREN E. LOWERY, ANGIE DELLA VECCHIA and MICHAEL MATYI, on behalf of themselves and all others similarly situated,

Plaintiffs,

vs.

R.J. REYNOLDS TOBACCO COMPANY, PHILIP MORRIS INCORPORATED, ("PHILIP MORRIS U.S.A."), LORILLARD TOBACCO COMPANY, LORILLARD, INC., THE AMERICAN TOBACCO COMPANY, BROWN & WILLIAMSON TOBACCO CORP., LIGGETT GROUP, INC., BROOKE GROUP LTD., INC., DOSAL TOBACCO CORP., COUNCIL FOR TOBACCO RESEARCH-U.S.A., INC., and TOBACCO INSTITUTE, INC.,

Defendants.

CASE NO. 94-08273 CA22

TRIAL
Volume 337

TRANSCRIPT OF PROCEEDINGS

in the above-styled cause before the Honorable Robert Paul Kaye, Circuit Judge, at the Dade County Courthouse, 73 West Flagler Street, Miami, Florida, on Monday, June 14, 1999, at 9:35 a.m.

APPEARANCES:

STANLEY M. ROSENBLATT, ESQ.
SUSAN ROSENBLATT, ESQ.
CLIFFORD DOUGLAS, ESQ.
On behalf of Plaintiffs

DECHERT PRICE & RHOADS
ROBERT C. HEIM, ESQ.
SEAN P. WAJERT, ESQ.
On behalf of Defendant Philip Morris

COLL DAVIDSON CARTER SMITH SALTER & BARKETT
NORMAN A. COLL, ESQ.
On behalf of Defendant Philip Morris

ZACK KOSNITZKY
STEPHEN N. ZACK, ESQ.
On behalf of Defendant Philip Morris

CARLTON FIELDS WARD EMMANUEL SMITH & CUTLER
R. BENJAMINE REID, ESQ.
On behalf of Defendant R.J. Reynolds

JONES, DAY, REAVIS & POGUE.
RICHARD M. KIRBY, ESQ.
DIANE G. PULLEY, ESQ.
On behalf of Defendant R.J. Reynolds

KING & SPALDING
MICHAEL RUSS, ESQ.
RICHARD A. SCHNEIDER, ESQ.
On behalf of Defendant Brown & Williamson

CLARKE SILVERGLATE WILLIAMS & MONTGOMERY
KELLY ANNE LUTHER, ESQ.
On behalf of Defendants Liggett Group
and Brooke Group

SHOOK HARDY & BACON
EDWARD A. MOSS, ESQ.
WILLIAM P. GERAGHTY, ESQ.
On behalf of Defendant Brown & Williamson
JAMES T. NEWSOM, ESQ.
On behalf of Defendant Lorillard

DEBEVOISE & PLIMPTON
ANNE COHEN, ESQ.
JOSEPH R. MOODHE, ESQ.
On behalf of Defendant The Council for Tobacco Research

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APPEARANCES (Continued)

GREENBERG TRAURIG HOFFMAN LIPOFF ROSEN & QUENTEL
DAVID L. ROSS, ESQ.
On behalf of Defendant Lorillard

MARTINEZ & GUTIERREZ
JOSE MARTINEZ, ESQ.
On behalf of Defendant Dosal Tobacco Corp.
and Tobacco Institute

KASOWITZ BENSON TORRES & FRIEDMAN
AARON MARKS, ESQ.
NANCY STRAUB, ESQ.
On behalf of Defendants Liggett Group
and Brooke Group

HUNTON & WILLIAMS
P. NOEL CLINARD, ESQ.
On behalf of Philip Morris

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I N D E X

WITNESS	PAGE
None.	

E X H I B I T S

PLAINTIFFS' EXHIBITS	OFFERED PAGE	ADMITTED PAGE	FOR ID PAGE
None.			

E X H I B I T S

DEFENDANTS' EXHIBITS	OFFERED PAGE	ADMITTED PAGE	FOR ID PAGE
None.			

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(Whereupon, the following proceedings were had:)

THE COURT: Good morning, all.

Have a seat, please.

Okay, what's new?

MR. HEIM: Well --

THE COURT: I shouldn't have asked.

MR. HEIM: No, I think this will be helpful to the Court. If some of us on the defense side look a little bleary-eyed this morning, it's not because we were at South Beach this weekend.

What we have done, to try to help consolidate some of this, and provide Your Honor with one reference place where you can just look at everything, is to put together some materials in an organized form.

And I'd like to present that to the Court this morning and just show you what we've done to try to make this more usable.

What this is, Judge -- and I have a copy for the plaintiff. If I just may hand this up to Your Honor, I'd like to run you through it so you know what you have in this book. I have an extra one here, too, if it's useful to the Court.

Now, Your Honor, if you'll turn to the table of contents, the very first page in this binder of materials that I've given the Court, the very first

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thing under tab A is an outline of plaintiffs' proposed Phase I verdict form questions, our counterproposals that were made both by the defendants, and, to the extent they varied, B&W.

So if you would look under, for example, if you look under tab A, you'll see that, on Page 2, there's plaintiffs' proposal laid out for you on causation.

MS. ROSENBLATT: Where is it here? I'm missing -- I don't seem to have the table of contents.

THE COURT: Why don't you let her look at this book.

MS. ROSENBLATT: I just have copies of pleadings.

MR. HEIM: Let me give her the book, because Mr. Martinez isn't here, and I'll give it to Susan.

THE COURT: Or you could use the clerk's book.

MS. ROSENBLATT: I'll make a copy.

MR. HEIM: Keep it, we'll make an extra.

So, Your Honor, go to Page 2. You'll see there's plaintiffs' proposal. Then the next page, on Page 3, has defendants' objections, then our proposal.

Then, at the bottom of Page 5, because that's one where there's a minor disagreement, you'll see

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the --

THE COURT: That is helpful.

MR. HEIM: Then on the next question, for example, just to do one more, on Page 7 you have plaintiffs' proposal on addiction and you have --

THE COURT: Right.

MR. HEIM: Then you'll notice, at the bottom, it says: Defendants' Primary Proposal, no question on addiction.

Then the next page it says, if the Court is inclined to give a question, there's our back-up proposal. That's tab A.

Let me go to B so you know what you have. B takes essentially what are plaintiffs' questions on fraud and misrepresentation.

The plaintiffs' view was: You don't need to have specificity, but if Your Honor is inclined to have specificity, the way they said to do it was here is basically around 50 questions that might be asked.

So if you look at the very first one, following the cover page, their first question was: Did one or more of the defendant tobacco companies manipulate the levels of nicotine in cigarettes?

And then we state why that's not a proper question; for the reasons listed under the bullet

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points it's not an actionable misrepresentation of fact, who knows what is meant by manipulate, and so forth and so on. And it's duplicative of three other questions that they ask.

So for each one of their questions, we comment on their questions for those questions. And I think, I want to come back to that, but that's the format.

If you turn page after page, you'll see a question by the plaintiffs and then the defendants' bullet point objections, all in one place. And then the next question and then the next series of objections and why it's not the kind of question that should be asked.

THE COURT: There are 37 of those for which you have posed objections, 37 individual questions as I see it, through Page 16 of that section.

MR. HEIM: That's correct.

THE COURT: Then it goes into conspiracy. And they are different.

MR. HEIM: And we treat those separately.

THE COURT: Then there is no proposal on any of these questions for the defense.

MR. HEIM: No, because we've already submitted our proposal with regard to that. And Your

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Honor already has that.

THE COURT: Okay.

MR. HEIM: We're just pointing out what's wrong with their questions.

All C is, under tab C, is just a memorandum explaining the central problems with the way those questions are cast. So C is just a legal memorandum that backs up the objections.

So if Your Honor wanted to look -- it puts them in groupings, as well, deals with them in groups.

THE COURT: Who stayed up all night and did this?

MR. HEIM: Well, this is one of those times where I was there late. I was there later than I'm usually there. But it was a joint effort.

THE COURT: No. It's very well done. Thank you.

MR. HEIM: And then D. What tab D is deals with the jury instructions. And when we do the jury instructions today, I think this will enable us to go faster, because what D does is take the plaintiffs' proposed jury instructions, and one by one -- for example, if you were to go to Jury Instruction No. 6, which was the last one we were talking about before we ended on Friday, which is on Page 10 of that section,

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under the D section, Your Honor would look at their proposed jury instruction, look over and you would see exactly what the defendants' objection was to that proposed jury instruction.

And we've done that for each one of them. So each jury instruction we go through and do that.

And then E is something that we had already filed earlier, but I figured, put it in the book so that it's all in one place.

That's the preliminary draft of proposed Phase I jury instructions. Your Honor has that already, but now it's in the same book.

And F and G, tab F is -- surprisingly, when we looked back at our preliminary draft for Phase I jury instructions, we recalled that we were fussing around so much with what we thought was a proper preemption instruction, we hadn't included it in the basic ones, so I included it separately under tab F.

And then G, just so you know what G is, Your Honor, tab G is those situations where we have essentially a motion pending where we've said, for example, the issue of warranty shouldn't be submitted to the jury, or the issue of intentional infliction of emotional distress shouldn't be submitted to the jury because they're not proper claim of actions in a class

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action case.

But if Your Honor were to decide against the defense on those points, here is our view of how that would be asked, not the question that the plaintiff submitted. So that's the -- and you'll see that for intentional infliction, warranty, risk utility and punitive damages.

So that's the construct of this book, which I had suggested on Friday that we might do, because it just seemed to me that there were too many things floating around that were hard for me to keep managed on, and I thought this might be useful to Your Honor.

THE COURT: You really impressed me, I'll tell you that, with the amount of work that was done in a very short period of time. Very good.

MR. HEIM: Thank you. And my suggestion to the Court -- Susan, I can see, wants to comment -- but my suggestion to the Court is that a useful place to begin this morning is to -- and an important place to begin this morning is to look at some of their proposed fraud questions, because fraud is a central part of what they want to do here.

And they have these, a bunch of these questions that are supposedly fraud questions in which we point out in -- under tab B, really aren't the kind

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of proper question under Florida law under which to submit a fraud question, even a specific question, to a jury. And I think if we ran through those, Your Honor would see what these problems are. So I think it's important to do that, and that would be my suggestion as to where to start.

MS. ROSENBLATT: Your Honor, I have a few comments about this. I've just glanced through it. I recognize Your Honor is very happy to receive it and it's tabbed and it's organized. But all it is is an attack on what we have submitted.

What Mr. Heim discussed Friday was and what I thought we were doing, here is the plaintiffs' instruction on vicarious liability, here's the plaintiffs' instruction on fraud. What's your position? What's the defense? Here's the defense comparable instruction, here they are back to back, this is the choice, Your Honor will draft a combination.

What we have instead is only the defendants' position on everything. There is not a word in this about the plaintiff objects to or anything about the plaintiffs' position on anything; nor is there a back-to-back comparison.

And I think this will take -- it's organized

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and it's tabbed, but I think this will take us more time to follow this format, and it's very unfair to the plaintiff because I think what we should do is what we have been doing, is to go through what the plaintiff has presented, has the defense presented something comparable? Compare the two.

Obviously, I have to present my argument orally unless I present each objection and prepare something comparable. But I don't have the staff to do this over a weekend.

THE COURT: I understand your problem. You give me your presentation, they'll use this as a workbook. That's all it is is a workbook.

MS. ROSENBLATT: But this doesn't really follow -- in other words, this doesn't present what I've submitted next to what they've submitted. That was the whole point of doing this, to have the instructions back to back that are comparable.

All this is is this is what the plaintiff submitted and this is, what I think, it's a --

THE COURT: I have your instructions. We're going to go through your instructions and you'll explain to me why you think these instructions are appropriate. They'll say: All right, Judge, we think it's inappropriate. Turn to Page 16. This is the

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reason why.

I don't have any problem with that.

MS. ROSENBLATT: But we need to also look at what they have suggested, which is not --

THE COURT: And in the back of it is theirs. They're in here, I have a copy of it also.

MS. ROSENBLATT: Not the way it had been explained, where it would be together, that was supposed to save a lot of time, to say: Okay, here is the one on fraud that Susan has. Here is the defense one.

It's not back to back.

THE COURT: Look at E is their instructions, so if you want to put your finger in E and, as we get into all of these, you can flip back and forth. I mean, it really is, it's there.

MS. ROSENBLATT: My comment was it wasn't a neutral presentation.

THE COURT: It's not suppose to be neutral.

MS. ROSENBLATT: I thought it was something --

THE COURT: It was something to assist the Court. It's well put together. It's a large volume of work and very organized, and all of that. For people who like organization, it's great.

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People who can't get into this organization as easily as they can, we'll have to work with what you've got. Yours is here in organized form and I can certainly compare yours to theirs in an organized form. It's not where I'm going to be impressed with this to the point where I say: Gee whiz, I agree with you, defense, because you did all that work. I'm not going to do that.

If it helps the course --

MR. HEIM: Nor did we expect the Court to do that. We thought you would agree with it on the merits, not the binder.

THE COURT: So, we are up to, as I remember seeing it, is it 6?

MR. HEIM: Did Your Honor want to start there as opposed to looking at something which we haven't done yet, which is their specific fraud questions?

THE COURT: I was just going through one at a time for plaintiff. My tab is on Engle No. 7.

MR. HEIM: Plaintiffs' Jury Instruction No. 7.

MS. ROSENBLATT: Yes, we're on No. 7.

THE COURT: I thought we've already talked about the others. And if we have to go back and talk with them some more, we could.

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MR. HEIM: The only point I was making was that the thing that we had not talked about yet, that I think we should at some point, is their back-up fraud questions, because we had not touched on those yet.

We had talked about their basic verdict form and the defense basic verdict form, but we had not done their back-up fraud questions, which is our tab B.

THE COURT: When we finally get to -- Engle 4 was multiple claims, various parties; we went through that.

And 5 was comparative issues. 6 was vicarious liability issues. We hadn't even gotten up to those things. When we get there, we'll get to the fraud area.

As I said, we'll go through these in the order that the plaintiff presented it, and then we'll go back in the order that you want to.

MS. ROSENBLATT: We had presented a very basic instruction about American Tobacco having merged with Brown & Williamson and being responsible for their liabilities. If the defense has one, we can address that one. I didn't see one that the defense had. But that's a necessary one, since American was a defendant in the lawsuit, and we need to explain that fact to the jury.

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MR. SCHNEIDER: Your Honor, we object to this instruction, and I have a simple solution, I believe. You recall that we discussed last week where the plaintiffs had listed on their form Brown & Williamson Tobacco Corporation, and then they would have a separate listing, Brown & Williamson Tobacco Corp. as a successor to the American Tobacco Company.

What I think would be the most appropriate and simplest thing would be, on the verdict form wherever there's references to list of defendants, that we list Brown & Williamson Tobacco Corporation and also list separately the American Tobacco Company.

That company was listed on the caption. It was in existence at the time the case was filed. Issues as to successor liabilities is not an issue in Phase I; that's a subsequent issue.

What's been tried in Phase I are the conduct of the companies and issues about awareness and other such matters. It simply should list Brown & Williamson Tobacco Corporation and then the American Tobacco Company. The jury is familiar with those two entities. That's all they need to know.

I would submit that telling them whether there was a merger and successor liabilities, that's something they don't need to be concerned with. The

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plaintiffs want to be sure that Brown & Williamson and American is listed on the form, and I think that it should be. So I would say that we don't need this charge. It just injects an issue into Phase I that you don't need.

MS. ROSENBLATT: Your Honor, it would be very confusing to the jury, since there was no defense lawyer, as such, for American Tobacco. And I believe that Nick Brooks and Sharon Boyse, that came out that American was taken over by Brown & Williamson.

I mean, that's just a basic fact that's been an instruction in any case involving American Tobacco. And that's one of the places, this may have been, I believe, from Carter, or one of the cases where that was instructed to the jury.

I think it's too confusing otherwise. And that's a fact. It's true, it can't prejudice them, it's just a simple fact. It's going to confuse the jury more if they don't understand the reason there wasn't a lawyer for American Tobacco, the Brown & Williamson lawyer is there for both of them, and Brown & Williamson took over.

I mean, they may think, in their minds, well, we heard from the testimony that Brown & Williamson took over American Tobacco. What does that mean? Who

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is responsible? This answer is, Brown & Williamson is responsible for American Tobacco. So I think that's important to have in there.

MR. SCHNEIDER: Your Honor, by the way, in our binder at tab D, Page 11, is where we set forth our objection. From this point forward you'll be able to follow along, but it's on Page 11, tab D.

THE COURT: Uh-huh.

MS. ROSENBLATT: And there was also a similar instruction in Minnesota.

MR. SCHNEIDER: That doesn't look like the same page to me, Judge. Got tab D?

THE COURT: Oh, D as in David.

MR. SCHNEIDER: Page 11. Then you'll be able to follow along from that point forward.

THE COURT: Hold on.

Okay.

MR. SCHNEIDER: Your Honor, you might want to flip over to that page, so as we go, you'll be able to follow along.

MR. HEIM: Judge, one of the things I forgot to mention about this organization, and probably isn't the best part of it now that I look at it, as Doc says, from this point on, you'll be able to read virtually every one.

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What I didn't mention to Your Honor, if you see that tab that says Exhibit, if you turn back there, you'll see plaintiffs' jury instructions and if you go to Engle No. -- what are we doing? 7? So if you find that at the bottom of the page, it has Juror Instruction No., you'll see 7, and then you'll see a 1 next to it. And that's the key to the objections.

So that's the instruction, and then the specific objection is listed there. And that way you have, you do have the instruction. It would have been -- as we tried to figure out an organization, now that I'm seeing it here, it would have been better to put that one behind this one so you didn't have to flip back and forth. So we weren't perfect.

THE COURT: I'll figure it out.

MR. HEIM: But that's the organization.

THE COURT: That's fine.

MR. SCHNEIDER: Your Honor, again, taking you back to Page 11 in this instruction, all that needs to be on the verdict form is Brown & Williamson Tobacco Corporation and the American Tobacco Company. They have heard evidence on both entities. The plaintiffs are speculating: Oh, the jury is going to wonder, well, who is responsible for the liabilities of the American Tobacco Company?

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That's not an issue for the jury to decide in Phase I. That's a later issue, and I think it's needlessly confusing, no evidence before the jury on that topic. There shouldn't be an instruction about whose responsible for what liabilities when.

The comparison to the later cases like the Widdick case, for example, that was a case that was filed after the American Tobacco Company was merged. This case was filed while American Tobacco Company was in existence. Unless there's some ruling otherwise, that's how we proceeded. And the simplest thing to do, list Brown & Williamson Tobacco Corporation and the American Tobacco Co. Each time that I've gotten up before the jury, I've said: I'm so and so and I represent Brown & Williamson and the American Tobacco Company. No problem with a lawyer representing two entities.

MS. ROSENBLATT: I'm pretty sure -- and that's the last I'll say on this subject, not a critical subject, but I'm pretty sure, from the inception of the trial, whenever the Court read the caption, and the way Brown & Williamson amended their pleadings was Brown & Williamson, as successor of the American Tobacco Company. There is no American Tobacco Company today; Brown & Williamson subsumed it. So I

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just think it's necessary. I don't think it warrants all this discussion. It's enough.

THE COURT: Okay.

Let's look at 8.

MS. ROSENBLATT: 8 is a very important instruction, because what the jury is determining is generic causation. And why this is so important is, if Your Honor denies our motion for a directed verdict, because of this mechanism 100 percent, the jury could be misled into believing that generic causation needs to be determined 100 percent with mechanism, as the defense is arguing.

This follows verbatim, and modified because of the situation here, which is generic as opposed to specific, the 5.1 standard jury instruction on cause, intervening cause and concurring cause. And doesn't have to be. The only cause -- and it goes through precisely the standard instruction on that. And the issue they are going to determine, unless Your Honor rules on that generic causation motion for us, will be the issue of causation as to whether it's a cause in some smokers.

And they need some guidance under the law as to the greater weight of the evidence and what constitutes a legal cause. And it's a very, very

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critical and important instruction. I don't know -- I didn't see a defense instruction on generic causation, but if there is one, I'd like to be able to compare it, because without it there would be a glaring deficiency.

MR. MOODHE: Your Honor, there is no glaring deficiency, because proximate cause is not at issue in Phase I. This is a proximate cause instruction that is derived, I believe, from the proximate cause instruction associated with the negligence standard jury instructions.

What the jury is being asked to determine, if anything, in connection with this issue of whether smoking causes disease, is a more limited proposition, it is a more limited causation, in fact, proposition.

The evidence in this case has been, I think, well explained to the jury as to what each side's position is as to the minimum amount of scientific proof that is necessary to establish as a matter of scientific proof, as opposed to legal proof, whether smoking causes any particular disease.

And it is our position that the epidemiology is not enough. Plaintiffs' position is that suffices. But that is a matter not of law, but of science. What we're dealing with in Phase I is causation in fact and question of scientific proof, not legal proof.

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So to give the jury a legal cause instruction is really giving them the wrong issue to be decided. And for the Court to give any instruction on causation we believe is inappropriate comment on the evidence. It is up to the jury, we believe, to determine whether the evidence that has been produced in this trial and the explanations that they have heard from experts, both on the plaintiffs' side and defendants' side, as to what evidence you do need before you make a scientific statement of causation has been well laid out. And that's for the jury to decide.

And we do not believe it is appropriate for the Court to take a position on that issue through an instruction, particularly an instruction that is a proximate cause instruction, which is not the issue here at all.

MS. ROSENBLATT: Your Honor, it's precisely the issue. In the toxic tort cases, the more likely than not standard applies. That's why epidemiology is sufficient assuming there is an expert that will then opine based on the epidemiology.

That was the whole point of the Dupont case, because there wasn't epidemiology. That's the point of the Frye cases, the Daubert cases. The more likely than not standard does apply but, according to the

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greater weight of the evidence and the general causation criteria, the "but for" test, that's under --

There's a manual of scientific evidence in Federal Court that's used, they talk about the essential link or "but for" test, which is the test in scientific -- it's completely analogous to legal cause. Without that, the jury will be completely misled, and they could believe that 100 percent proof of mechanism is required, which is flat out against Florida law and law everywhere.

I mean, it's more likely than not, and they are deciding generic causation, but generic causation will end up being specific causation, we suggest in the vast majority of, for example, lung cancer cases, since we know over 90 percent of lung cancers are from smoking.

So, unless there's some alternative occupation where someone worked in a coal mine or an asbestos plant, this generic causation will be the ultimate causation. In order to determine it, the jury needs guidance. That's the purpose of having the instruction.

For example: In order to be --

You know, just going to the second paragraph: In order to be regarded as a legal cause of lung cancer

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or other diseases or medical conditions, cigarette smoking need not be the only cause. Cigarette smoking may be a legal cause of lung cancer, other diseases or medical condition, even though it operates in combination with the act of another natural cause or some other cause if such natural cause occurs at the same time as the cigarette smoking and if the cigarette smoking contributes substantially to some medical condition.

This is the whole definition of cause, which clearly applies, because no one has ever said, nor is it our burden to say that cigarette smoking is the only -- and it doesn't work in combination, it's the "but for" test. If someone didn't smoke, would they develop lung cancer? And that's the test that applies in Florida and in most jurisdictions. And without that guidance, and that was the purpose of our motion for directed verdict and motion to strike, following the Dupont case, that there's been evidence which could easily mislead the jury, from Sharon Boyse, for example. Even though she concedes smoking causes lung cancer, she said: In order to be 100 percent positive, I need to know the mechanism.

And our response, of course, is: Well, we don't need to -- 100 percent, there are very few things

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in science that are 100 percent.

Then there couldn't be any -- I mean, the absurdity of the defense position, Your Honor, if you think of an individual case, did -- Mr. Carter's lung cancer, was it caused from smoking? Could they possibly prevail upon any judge that it's 100 percent required that his smoking caused it?

No, it's the greater weight of the evidence, 51 percent. But they want to apply a 100 percent standard in this initial trial, not to get to the specific cause, and mislead the jury. So this is a very important instruction to us.

MR. MOODHE: Your Honor, just a short further comment on that. I think, when Mrs. Rosenblatt talks and you listen to her argument, she talks about whether X caused disease in the individual.

All right, the absence of the individual in Phase I is why you can't have this type of instruction, because, in the normal case, you have a witness, you have a plaintiff who's in the box, and somebody comes in and looks not just at a bunch of statistics, but they look at the specific medical information relating to that individual. And that's why you have a legal definition.

You aren't deciding generic causation.

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You're deciding a specific proximate cause.

The second point is, that reveals why this instruction is not appropriate, cigarette smoking can't be the legal cause of any disease, because cigarette smoking is not an unlawful act. The legal cause of any compensable injury is a wrong.

And so when you're talking about legal cause, and talking about generic causation, you're mixing up two very different concepts.

As I have said, the jury has heard each parties' respective positions on causation. They understand the debate among the scientific and medical experts that has occurred in this courtroom, as to the level of proof that would be required or should be required as a matter of scientific judgment, before definitively and ending debate forever as to the proposition of whether smoking causes any particular disease. And that is all they need.

The verdict form will present the question, and the jury does not need any instruction, certainly one that crosses the line between a comment on the evidence and a proper instruction on the law, particularly when the concepts that are being used are legal concepts of cause that cannot be adjudicated at this time in this trial.

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THE COURT: Okay.

MR. KIRBY: Your Honor, may I put it in the context of a specific verdict form question? For example, if you look at plaintiffs' verdict form question on strict liability, which is their No. 3, and I'll just read it -- I picked it because it was the shortest one: Did one or more of the defendant tobacco companies place cigarettes on the market that were defective, unreasonably dangerous and a legal cause of loss, injury or damage to some smokers?

And you may recall last week you and I had a discussion about why it would be inappropriate to ask, in a Phase I common issues trial, the tag line that I just read, that is: Were the cigarettes unreasonably dangerous and defective and a legal cause of loss, injury or damage?

And the reason it would be inappropriate to ask that question on the verdict form is, as you and I have discussed in the past, we're not deciding proximate cause of any injury in Phase I. And yet the very jury instruction under consideration is in fact a proximate cause jury instruction as the comment to Standard 5.1 was to express the essential elements of proximate cause, without using that term, which is misunderstood by juries.

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So what we've got here is a proximate cause jury instruction in the context that proximate cause is not being decided.

THE COURT: Page 13 is blank. Is that on purpose or an error or what?

MR. MOODHE: If you want to make some notes on it.

MS. ROSENBLATT: Your Honor, I'm probably repeating myself, and I apologize, from last week, but we are determining proximate cause here. We are determining, for all those diseases, do they -- do real people get these diseases? Do they cause it in people? Do people die? 430,000 deaths a year, we had lots of testimony on that. Of course we are determining proximate cause.

And this generic cause deals with the Florida class, we know statistically 430,000 people die a year from smoking-related diseases. We know that 1 in 10 heavy smokers get lung cancer. There's been evidence even from the defense experts on that. So we have some givens. We have some people with real disease. We are dealing with proximate cause.

This is a semantical exercise to try to trivialize the issues, but generic causation and proximate cause is a legal cause. The individuals need

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to identify themselves. The fact that there was injury, if the jury finds in our favor, is a given. People died, people were injured in Florida, as well.

THE COURT: Instruction No. 9: Strict liability.

MS. ROSENBLATT: This one was out of the Standard Jury Instructions 4 and 5. We use the risk of danger in design -- that's on the third paragraph -- outweighs the benefit of the product. And there's two criteria that the Court put in brackets, in the standard instruction.

And the way it reads, with the two in brackets, "A product is unreasonably dangerous because of its design if," and it has a bracket, "[the product fails to perform as safely as an ordinary consumer would expect]," end bracket, "Or," bracket, "[the risk of danger in the design outweighs the benefit]," end bracket.

And the comment was that it's not -- they're basically providing both and not saying that they both need to be presented. We used that one, we could use both of them and put it in.

And the only thing that we added to the standard instruction, which is the last paragraph, which follows the Ferayorni versus the Hyundai Motor

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Company, 711 So.2d 1167, where product may also be defective because of a defective warning.

Then we indicate -- that would be prior to July 1, 1969. Then we follow with the failure to warn, July 1, 1969. This is pretty much the standard. Yes. We do say whether the defect was a legal cause of loss, sustained by class members or we could say "some smokers," but there has been evidence that there are deaths and diseases and medical conditions caused from cigarette smoking, so it's appropriate to have this as a complete cause of action. And that's why we've put it in in that fashion.

MR. MOODHE: Your Honor, if you will observe, at our tab D, Page 14 is where we lay out our general and specific objections to this particular instruction.

First of all, if you look at comment 2 to the Standard Jury Instruction 5 on, Product Liability 5, you will see that comment 2 indicates that the courts in Florida have not adopted the risk benefit test for determining whether a product is unreasonably dangerous. And therefore, that is why that language is in brackets in the instruction.

The fact of the matter is that Florida law is that the consumer expectations test is the appropriate standard for determining strict liability on a design

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defect, which is what we're talking about in connection with this language.

There is no manufacturing defect allocation in this complaint. And failure to warn we can deal with separately. But in terms of the design defect, the standard instructions themselves note that risk benefit has not been adopted by the Courts.

Nevertheless, defendants recognize that in certain situations, courts have given the alternative instruction, that is, they have instructed on consumer expectations as one theory and risk utility as a second alternative theory.

But in those instances where courts have done that, they have specifically instructed on the seven factors that are found in the Auburn Machinery case in terms of what factors the jury should and must consider in connection with making that risk utility evaluation.

And that language you will find is at the bottom of our Page 15 carrying over to the top of page 16 at tab D.

So to the extent that the plaintiffs abandoned what is clear Florida law, but not even instructing on consumer expectations, then instructing on the disfavored risk utility, this is hardly in compliance with the standard jury instruction on

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product liability.

In addition, for the reasons which I don't think we'll need to repeat all the time, but legal cause, of course, is not being determined here. Proximate cause is not being determined here. So that portion of the instruction should not be given to the jury. This jury cannot determine whether any particular claim is the legal cause of injury because neither proximate cause connected to an individual class member nor injury from an individual class member has been put into play or evidence put on about it at this time.

Just so Your Honor knows, to be completely -- disclosing what's happened in the other tobacco cases, the four individual tobacco cases, the judge has instructed in the alternative on these two theories; and in each of those cases the judge has instructed the jury on the seven Auburn Machinery factors.

THE COURT: I read that.

MS. ROSENBLATT: Your Honor, when I look at the standard instruction, both tests for unreasonably dangerous are in brackets, consumer expectation and, as I said, the risk utility. Then when you read the comment, basically, and I'll read it, the standard instructions are not telling you which or both to use.

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Under the comment under 2, the second paragraph: Product liability 5 defines "unreasonably dangerous" both in terms of consumer expectations, see Comment i, 402A of the Restatement, and in terms weighing the design risk against its utility, as expressed in decisions from other jurisdictions, of Cassisi versus Maytag, 396 So.2d 1140-1145, that in dicta had quoted from a California Reporter case, Barker.

The comment continues: Absent more definitive authority in Florida, the committee recommends neither test to the exclusion of the other and expresses no opinion about whether the two charges should be given alternatively or together. Products liability 5 provides language suitable for either standard, or both, determined by the trial court to be appropriate.

And that basically is precisely what I said. And these are the appellate committees and Florida Supreme Court has adopted and accepted these instructions. So it is not, as counsel says, that one is out and one is in. It's basically up to the court to do both, to do one.

And to my knowledge there hasn't been any further, further law on that, excluding one to the

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other. And then you go to the next page, No. 3 on the same comments: Obvious defects, opportunity to inspect disclaimers. These concepts are not covered by the standard charges, and they say "See Auburn." So they specifically made a decision not to put that in the standard charges.

So we would object to that. And it's something that could have been included, comes up many times, but it's just not considered part of the standard charges.

MR. MOODHE: Your Honor, I think counsel has indicated, at a minimum, at a minimum, that her proposed charge is incorrect because, at a minimum, she abandoned the consumer expectations test wholesale, instead went for risk utility instruction to the exclusion of the consumer expectations test.

So even under her own view, plaintiffs proposed instruction doesn't cut it.

In addition, we think it is appropriate, as recognized by the other Florida courts, to instruct on the Auburn Machinery, because it gives the jury some ability to understand what Florida law requires or what the law of other jurisdiction requires, in terms of evaluating risks and benefits. Otherwise, the jury doesn't have any center of gravity about how to go

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about that process.

Finally, Your Honor, I neglected to address the failure to warn aspects of this instruction, if I could take a minute to do that. Our comments on that are found on Page 16 of tab D.

THE COURT: Wait a minute. Their failure to warn is the next one, 10.

MR. MOODHE: Well, there are two instructions.

MS. ROSENBLATT: The failure to warn that we have in this is out of a Fourth District Court of Appeal. And there was a decision that part of a strict liability count can be failure to warn. And I limited it to prior to '69.

The next one is the one that simply talks about: Don't consider any failure to warn after '69.

That's why I thought it was an appropriate time to do it.

THE COURT: Go ahead.

MR. MOODHE: Your Honor, just to go back, effective warning is mentioned in the last paragraph of the strict liability instruction.

THE COURT: I see it.

MR. MOODHE: The Comment 2 to PL5 says that, pending further development of Florida law, the

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committee has reserved the question of whether there can be strict liability for failure to warn and if so, what duty is imposed on the manufacturer and seller, as as we pointed out on Page 16.

So, again we have a situation where Florida law has not yet recognized this theory. But I think, Your Honor, there are is a complete answer to this under the law, which is that you can't have a strict liability instruction on failure to warn, because of the following two indisputable propositions.

Number 1, as plaintiffs themselves concede in the instructions, any strict liability failure to warn claim after July 1, 1969 is wholly preempted. That's the first premise.

The second indisputable proposition is that strict liability, even as a theory, was not adopted as a cause of action in this state until West v. Caterpillar, in 1976. So that the theory isn't available as to any claims that existed prior to 1976.

Therefore, since you can't have any claims prior to '76, and all claims after 1969 are preempted, it follows, as a matter of inexorable logic, that you simply cannot have a strict liability, failure to warn claim in this case. And the only reason we're grappling with this issue, frankly, Your Honor, is

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because we're talking about events that are more than 20 years, 25 years old.

MS. ROSENBLATT: Your Honor, that argument, most respectfully, is illogical. Products liability case -- they argued their statute of repose. I presented a response.

Basically, last year, when we argued the statute of repose, defense counsel stated to the court: We recognize the Diamond exception in products cases. We're arguing fraud. They took an about-face. I pointed all that out and dictated it. You'll have it later today.

What they're saying is, you can't have a strict liability case, and they're looking at the time the Court adopted the law. You're talking about a latent disease, latent medical conditions. And counsel also said that the court said that they're waiting for the law to develop.

If you look at the instructions, it was last updated 3-89. The law did develop, we have a 1998 case, which is the Ferayorni, F-E-R-A-Y-O-R-N-I, versus Hyundai Motor Company, Fourth District, April 8th, 1998, rehearing denied June 18th, 1998 at 711 So.2d 1187.

That was the specific question. And they

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discussed the West Case. I don't have extra copies, but I'll provide it to Your Honor and defense counsel. And that there is a failure to warn claim under strict liability in tort.

And that now has developed. So we feel that, prior to July 1, 1969, that is appropriate. And it's certainly not prohibited. All that the court said, all that the standard instructions indicated is, as of March '89, the law had not yet developed to that point, and it has since developed. So, we feel that that's significant.

Should I proceed to the next one, Your Honor, the failure to warn?

THE COURT: Yes.

MS. ROSENBLATT: Okay. This is what we consider to be a simple, a simplistic way of explaining to the jury that: "Since July 1, 1969 there have been required Surgeon General warnings appearing on packages of cigarettes sold in the United States. Pursuant to federal law, you may not base any finding of liability on a determination that after July 1969," I even highlighted that, "one or more of these defendants should have included an additional or more clearly stated warnings on their cigarette packages or on advertisements."

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Then I go on to explain the "federal law does not limit the liability of any Defendant against claims that its product was defective in design in other respects, or that the Defendant was negligent in other respects in the design of its product.

And what it does not do -- but it does limit the liability on failure to warn. I think this explains to the jury precisely what the state of the law is.

MR. MOODHE: Your Honor, again, our specific objections on Engle No. 10 Proposed Instruction are set forth on Page 17 of tab D.

This basically, I think, should be compared to the proposed preemption instruction that we have proposed to the Court. I think that's juxtaposition that the Court ought to have in mind in approaching this issue, because it is presented as being an instruction intending to limit the plaintiffs' claims on failure to warn.

As we've pointed out, however, this failure to warn claim, the instruction here is not a correct statement of preemption doctrine, nor is it, we think, a sufficient explanation of what the preemption doctrine mandates in terms of the ability of the jury to consider certain types of claims and evidence

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pertaining to those claims in this case.

As we also pointed out, we think that it is incorrect to say that a design defect after July 1, 1969, is not preempted.

Let me explain our rationale for that. Our rationale is that, if Congress has made a determination that cigarettes, as sold in this country and designed in this country, can be sold without -- as long as they bear warnings without holding a manufacturer liable, that in effect Congress has determined that cigarettes as designed are not actionable as long as they carry those warnings.

And that logic, while it has not been adopted in any tobacco cases, was adopted by the 9th Circuit Court of Appeals in the Papike versus Tambrands case, so it is our view that, based on that logical reasoning, that design defect claims would also be preempted.

And finally, Your Honor, I think we have indicated that, in the language toward the end of this, there is language about concealment or suppression of information. Again; that is not actionable, as a matter of law, under a theory of law. And to have that language in the instruction, and it is one of the things that is woven throughout plaintiffs'

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instructions, we think that sort of language has to be extricated from any of these instructions, including any instruction the Court will be giving on preemption.

MS. ROSENBLATT: We object. And I was glancing over the defendant's proposed -- first of all, the word "preemption" doesn't necessarily even have to be used.

For example, the third paragraph begins with, this is the defendants, which is under their tab F: Congress determined that the federally mandated warnings were sufficient to warn consumers about the risks of smoking. Congress therefore prohibited any person from July 1, '69, from claiming or suggesting that consumers should be provided any additional information or warning beyond the warnings on the packs of cigarettes.

That's an inaccurate statement. Congress didn't prohibit someone from filing a lawsuit. That was the Cipollone case. There are a lot of differences of opinions and interpretations on preemption. And Congress shouldn't even be involved in terms of this instruction.

All the jury needs to know is that you can't base your decision that there should have been better or different warnings after July 1, 1969. And we

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totally disagree, because there's a whole line of Florida law that, once you speak, once you present information, you've got to tell the whole truth.

And that incorporates fraud -- I've got the case with me when we come to that count, that incorporates the fraud counts in each of the counts.

What I would suggest, you know, rather than start debating what's in and what's out, to simply have the instruction this way, the first few sentences: Since July 1, 1969 there have been required Surgeon General warnings appearing on packages of cigarettes sold in the United States. Pursuant to federal law, you may not base any finding of liability on a determination that after July 1, 1969, one or more of these defendants should have included additional or more clearly stated warnings on their cigarette packages or in advertisements.

Then go to the final sentence: Federal law does not limit the liability of any Defendant against claims of failure to warn prior to July 1, '69.

And the other aspects will be covered in other instructions. We prefer to have it in but, as a compromise, that would very simply explain to the jury that the first two sentences and the last sentence without the word "finally," because I was trying to

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have balance and say: Well, that's out, but, however, these are in. But if we take out the "these are in" aspect, I think that that's a neutral, fair way to clearly present it.

Congress shouldn't be involved. There's no prohibitions. Simply a fact that they're not to make a determination based upon post July 1, '69 failure to warn. And it's related to cigarette packages and advertisements.

That's specifically from Cipollone.

MR. MOODHE: Your Honor, I think that in order to, for the jury to understand and properly apply this very, very important concept, which even Your Honor, I think, at times has admitted it's not an easy one, sometimes, to get a hold of. It's better on this particular subject to say more than less.

I think the defendants' instruction correctly lays out the law as we understand it, and does so in a fashion that we think will be helpful to the jury in really being able to sort through what it can and cannot do in this area.

I don't think a shortened instruction on this very important concept is an appropriate way to go with this jury.

The other point I neglected to make before,

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and just to keep the record straight, if there's any instruction here because of the arguments I've made before regarding preemptive effects of the cigarette labeling legislation, and the fact that West wasn't adopted until 1976, at best, at most the plaintiffs can only have a negligent failure to warn claim, not a strict liability failure to warn claim.

So to that extent, the Court, I think, would be appropriate in considering the need for the type of language that plaintiffs have proposed here vis-a-vis that more limited theory of liability on a failure to warn.

THE COURT: Engle 11.

MS. ROSENBLATT: This is based upon the standard jury instructions, Product Liability 1/2 and 5, dealing together with express and implied warranties; and discusses also, then goes on to the greater weight of the evidence, and combines it here.

I don't know which -- we are addressing at the same time, I would assume, any defense counterproposals. We're not going to then go through the defense, we're doing them simultaneously. That's my understanding.

MR. HEIM: That's certainly not what we're doing.

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THE COURT: Well, we're trying to do that, find out what you want and what they want.

MS. ROSENBLATT: I don't know which one is your implied warranty instruction. So we can address that now.

MR. MOODHE: Your Honor, we haven't been doing that because last Friday you specifically said: We'll go through plaintiffs, then we'll go back through yours.

THE COURT: I understand that, what I meant by that was if you have anything you want to present on it, fine. As long as you're talking about the same subject, more logical to talk about what they want, what you want. I didn't mean it in that context.

MS. ROSENBLATT: We thought special instructions --

THE COURT: That's what I was talking about, special instructions. I mean, if you're going to talk express and implied warranty on one side, might as well go ahead and express it on the other so I get an idea what you're talking about.

MR. HEIM: What we'll do, Your Honor, is we'll start doing that at this point. But if there is any that we didn't do, we'll go back.

THE COURT: But the question is, where is it

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located?

MR. HEIM: Ours would be in the back-up instructions --

MR. MOODHE: It's tab G.

MR. HEIM: Tab G. Because these are things which we have said shouldn't be submitted at all to the jury.

MS. ROSENBLATT: Are they a number on this list?

THE COURT: I'm looking for it. Express and implied.

MR. MOODHE: Unfortunately, tab G is not paginated.

MS. ROSENBLATT: Is it on the list, the initial list, proposed Phase I jury instructions?

MR. MOODHE: No, it's not. It's in tab G.

Binder, Susan. If you go four pages into it, you'll see an instruction which begins: Plaintiffs have also alleged that defendants breached specific representations.

That and the following instruction are our breach of warranty instructions.

MS. ROSENBLATT: Well, we object to theirs, because there's case law that when smokers are provided free cigarettes, samples and so forth, that creates

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privity, and it's not limited to a sale. And since we didn't have plaintiffs testifying, I mean, it puts in, you know, we would object to that privity aspect of it.

MR. MOODHE: Your Honor, would plaintiffs counsel care to cite to us to the case law that found that giving free samples of cigarettes creates privity or cause of action for breach of express or implied warranty?

MS. ROSENBLATT: It's in the memorandum of law that was filed last year. Based on the case law, Your Honor permitted the amendment of the complaint. I don't know if I have it; if not, I'll send another copy of the memo over.

MR. MOODHE: Your Honor, as I recall the case law cited in there, none of them dealt with smokers and giving free samples. But in any event, Your Honor, we think, as we have argued before, and I don't want to burden the Court with reargument, that privity can only be established through a sale and not through a handful of free samples, or even a boxcar load of free samples of cigarettes to the plaintiffs.

I think we've made clear that cannot be, because there is no evidence of that type of privity relationship and cannot be any evidence of that tpye of privity relationship in this case. These claims ought

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not to be given.

Secondly, with respect to the issue of -- and by the way, our objections are set forth on Page 18 of tab D.

Of course, we have the recurring issue of legal cause and injury as being inappropriate matters to instruct the jury about. But there is no evidence in this record that would allow an implied warranty of fitness for a particular purpose.

That branch of warranty theory is intended to cover products that are basically made to order for a particular consumer. And that is when you get into this language of being fit for the particular purpose that the consumer or the purchaser of the product had intended to use the product.

And because there's no question about the fact that cigarettes are not customized for any particular consumer, that is simply an inappropriate instruction on the basis of the evidence in this case.

We think that the language we have included in our instructions is a fairer and more precise statement of the issues and the legal principles surrounding the issues that this jury is going to have to decide in this case. And it also has the advantage of separating out the very different theories of

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express warranty, which deal with specific representations of fact versus implied warranty, which is not based on evidence of specific representations, but on the notion of what might have been implied in terms of reasonably foreseeable use of product.

MR. SCHNEIDER: Your Honor, just a couple of additional comments, because, as you know, we have made a motion for directed verdict on the warranty questions in this case, and we have argued it a couple of times.

One of the issues that I brought to Your Honor's attention was the issue of notice of breach, and because there is no evidence of notice of breach at all in the first phase evidence, we have not posed a question on that topic nor an instruction, because there's simply no evidence at all and there should be a directed verdict on that basis.

In addition, we've pointed out other grounds, such as the statute of limitations problem, and the problem with the very fact that plaintiffs are claiming warranties about facts different from what the warnings say.

But nonetheless, I wanted to just make reference to the fact that we do have our directed verdict motion pending on those two counts, Count IV and Count VIII.

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THE COURT: Okay.

MS. ROSENBLATT: The next one, which is 5.2, is the standard jury instruction, products liability as to legal cause. It is verbatim, I believe, from the standard instructions. And it goes through the general causation law in Florida: A defect in a product is a legal cause of loss, injury or damage, if it directly and in natural --

And a concurring, intervening -- I don't know which instruction is the counterpart for the defense so I can address that.

MR. MOODHE: Your Honor, we don't have a competing instruction because, as we have explained to the Court before, we do not believe that the Court ought to be instructing on proximate cause at this time in the trial. That is an issue for Phase II and Phase III.

In addition, I think we have -- and our objections again are set out at Page 19 of tab D. I don't want to reiterate, but I incorporate the arguments we previously made with respect to what this jury ought to be instructed about in terms of cause, which is simply, if we're going to instruct on anything, it would not be certainly on legal cause.

Moreover, this particular instruction, which

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I think is intended to go to the strict liability claim, incorporates incorrectly an intervening concurring instruction.

So, even as a pure matter of which instruction to give, it is incorrect because it mixes up negligence concepts, causation instructions with those that were set up for strict product liability. But as I say, our position is proximate cause, which is what this instruction is all about, is not an appropriate matter for this jury at this point in time.

MS. ROSENBLATT: Then we have Engle No. 13: Greater weight of the evidence.

This is the products liability No. 5 instruction. And that's, again, precisely out of the jury instructions, out of the standard instructions, which is, greater -- what greater weight of the evidence means under Florida law. And I don't know if there's any -- I think we're in agreement on that one.

MR. MOODHE: With two minor points. One, for consistency, I think the Court has to determine whether it's going to instruct on the standard of proof after each claim or issues relating to claims or it's going to do it once for the entirety.

I think there's some inconsistency, just a matter of picking one or the other. In terms of the

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language, the only objections we have are to the use of the terms "Florida Class" and "Defendant Tobacco Companies."

We think that is an improper characterization. It's argumentative. Use "Plaintiffs" and "Defendants," that's fine, but to set up these terms of art that are undefined, and to us it connotes some sort of argumentative notion that there is a class versus the evil tobacco companies. We don't want that. We think simply "Plaintiffs," "Defendants" is the way to go.

MS. ROSENBLATT: The problem with "Plaintiffs," "Defendants" is not all counts are against all defendants. CTR and Tobacco Institute are not defendants on the strict liability and the warranty claims.

So, therefore, rather than repeat each tobacco company's name, this was limited to the defendant tobacco company as opposed to the Tobacco Institute and Council for Tobacco Research.

And this is a class of Florida smokers. It's not a national, it's a Florida class. We're not trying to -- we're just trying to be totally neutral and accurate.

So we could say "all defendants with the

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exception of the Council for Tobacco Research and the Tobacco Institute," if that's their preference. I just thought it made more sense, when we're dealing with everyone, we say "Defendants," and when we're dealing only with tobacco companies, we say "Defendant Tobacco Companies" because it's not the same defendants under each count.

They are all defendants are under the counts of fraud and misrepresentation, civil conspiracy and emotional distress. The other counts are limited to the actual tobacco companies. And that's the reason for the distinction.

THE COURT: Okay.

MR. MOODHE: We'd be happy with excluding CTR and T.I. Otherwise the verdict form, itself --

THE COURT: Just trying to make it simple if we can so the jury will understand it. I think simplicity is the key to it all.

MS. ROSENBLATT: The next one was a Minnesota instruction from the Minnesota Attorney General's case. And it distinguishes for "Those of you that have sat on a criminal case will have heard of 'proof beyond a reasonable doubt.'" It was given there. It seemed to make sense, so we proposed it be given here, and it's the truth, it's a fact.

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MR. ROSENBLATT: And it's simple.

MR. MOODHE: And it's simply wrong to give it. I don't think we need to say much about it. We think it's an inappropriate thing to tell the jury to start talking about burden of proof in a criminal case. I won't be guided by what the Minnesota court did.

THE COURT: This is the old story about the attorneys acting like airplanes, the balancing, greater weight.

All right.

MS. ROSENBLATT: Then we have our fraud and misrepresentation, which is from the standard jury instruction, I guess "MI" standing for Miscellaneous 8.

We did put in, since there's evidence of concealment, so we put in concealment. I believe that's the modification. And the reason we did, there are a line of Florida cases that address the issue of where a manufacturer speaks, where a defendant speaks, they've got to tell the whole truth, even if they never had a duty in the first instance. And it's equally applicable to fraud cases.

And I know I copied the case I had argued last week. And I have to locate it. And that's why we put that in. And I'll find the case in a moment. It's here somewhere. And I'm not sure which instructions

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were submitted by the defense on that. And I'll address that if they give me the number.

Which is the fraud?

THE COURT: I think theirs is 13, Defendants' 13. Check me if I'm wrong on that.

MS. ROSENBLATT: This is not the standard instruction. It's either knowledge or a defendant being without knowledge, if it's truth or falsity, so I don't see where that's even -- it says 6, the defendant must have knowingly issued the statement, either knowingly or -- it's just not following the standard instruction, and we would object on that basis.

I'll see if I can locate that case.

MR. MOODHE: While plaintiffs' counsel is looking for the case law, let me direct Your Honor's attention to Page 22 of our tab D, which sets forth our various objections to the instruction that plaintiffs have proposed.

Again, we are not trying, and I'm not, and we are not in a position to try complete causes of action with respect to any of the claims in this case, and that most certainly includes a fraud cause of action.

What we have done in our proposed instruction, our proposed instructions, Your Honor, are keyed off our proposed questions. So what we have done

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is take the elements that we believe might be determined by the jury on a common basis in Phase I and given some instructions to the jury about what each of those elements means.

Admittedly, it does not track the Florida Standard Jury Instruction because we think the Florida Standard Jury Instruction simply cannot be parsed in an intelligent way that would make it beneficial for the jury in circumstances that we find ourselves in Phase I.

With regard to certain specific objections we have to plaintiffs' proposed instruction, first of all, they consistently use the term "fraud and misrepresentation." There is -- this is an instruction for fraudulent misrepresentations, the plaintiffs have not made a claim, they have not pled a claim for negligent misrepresentation in this case; so to suggest, by the term "fraud and misrepresentation," that they are two different concepts, it's not only incorrect, it's confusing to the jury.

We think we have argued to Your Honor before and shown you the case law that there is no claim recognized under Florida law for an omission or concealment in the circumstances of this case.

And the Florida Standard Jury Instruction

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reflects that. They do not have language suggesting that the omission or a concealment can be the basis of a claim for misrepresentation, and that is consistent with the case law.

Talking about the case law, if Mrs. Rosenblatt has in mind the case of Barnum and Pozin, which were cited in support of this concealment proposition. If you look at both of those cases, only one of which is a Florida decision, the other is an Eleventh Circuit, but both of those, while they do have language in the overview of the case, talking about they didn't disclose bits of information X, when they are discussing the analysis of the claim, they make quite clear that what was involved was a positive representation that was known to be false because of the other information that the maker of the statement had at the time.

So it was the -- what was involved there was a positive misrepresentation that was proved false because of the fact that the maker of the statement knew he had other information that contradicted the statement. And that's all those cases stand for.

In addition, as we pointed out, again, reliance is not a Phase I issue and shouldn't be instructed to the jury, nor is legal cause or proximate

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cause for an injury.

Moreover, the notion that somehow there's a difference between smokers and the public is a misconception. In this case, only smokers who are members of the class can recover. If in fact a misrepresentation was made to some other members of the public, these class members cannot make a claim for it.

So to put in this language "public, including smokers," suggests that somehow the jury might find actionable, if they were to find a false statement, actionable a false statement made to the public that was not directed to the class members here. And we think that is a confusing and overbroad concept.

We have given Your Honor a set of instructions in No. 13, which we do think is an appropriate way to deal with the specific issues that may be deemed common issues for resolution, relevant to a fraud claim, and we would stand on those.

MS. ROSENBLATT: The class members are current smokers, former smokers and survivors of smokers who died and former smokers who died from diseases caused from smoking cigarettes.

So when we say "the public," those individuals would necessarily be part of the public, and we say "including smokers" just to make it clear.

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We could say "including smokers, former smokers and survivors."

These were misrepresentations made to the public. And one of the cases I was relying on -- and I don't have extra copies here, so I'll present it later, is Nicholson versus Kellin. That is 481 So.2d 931, the Fifth District, 1985, and it was a fraud and conspiracy to commit fraud case.

And one of the defenses in the case was that the defendants had no duty to disclose information. And this is the holding of the court, and this case has been followed by the Third District Court of Appeal and basically by every District Court of Appeal that I've seen, in the Shepard's, and it's a green light for good law, and it's an opinion written by Judge Upchurch, of the Fifth District Court of Appeals.

And just a short quote: Fifth, the Lipshultzes contend that they owed Nicholson and Ariko no fiduciary duty and hence their mere nondisclosure of all material facts is not actionable. However, even assuming that a party to a transaction owes no duty to disclose facts within his knowledge or to answer inquiries respecting such facts, if he undertakes to do so, he must disclose the whole truth.

See Vokes versus Arthur Murray, 212 So.2d

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906, Fla.2d DCA 1968.

Here, Nicholson and Ariko allege that Kellin and Lipshultz disclosed some facts, and thus they were under a duty to do so in a non-negligent or nonfraudulent fashion.

So, this is a case of fraud and conspiracy to commit fraud. And the Court said: Assuming there was absolutely no duty at all, once you start to disclose, you've got to provide all the information.

And that fits like a glove. I mean, that's exactly the situation here. Once you start to disclose information about your product, you've got to disclose all material facts. And whether it applies to CTR, if you do press releases, you've got to do them fairly. You've got to disclose the other side. You've got to disclose all the information.

The Tobacco Institute, when you know of all the information of smoking being linked to disease, you can't present the position of a few consultants to the industry.

And the fraud, it's clear that concealment is very important, concealment in connection with representations or not telling the whole truth. So that's why we put it in and that's why we feel it's important.

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And we also said it made the statements misleading, because that's the point. Without the whole truth, they're misleading. So it is concealment, but it's simply not concealment in the abstract. If they didn't open their mouths, if they did nothing, then would not have had, perhaps, that duty. But we don't have to address that issue because, not only did they speak, they spoke constantly to the public; and because of that they had a duty to tell the whole truth.

MR. MOODHE: Your Honor, I haven't had a chance to look at the Nicholson case, specifically. I simply looked at the cases they cited. But it doesn't sound to me, by the description, that it's any different than the proposition I stood up here and suggested in the Varnum case, which is what was not disclosed was information that rendered the positive representation false.

That's what those cases that I've looked at in this area stand for; not a mere concealment or suppression of information, but when you have failed to disclose contradictory information that renders the statement made false. So false statements still is at the core of any fraud claim.

The idea that we have -- and I think it's an

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overstatement to suggest that once you open your mouth you have to tell everyone everything you know. Well, that I think would eliminate advocacy from any public forum or private forum.

If I had to stand up here and give both sides to a position in a debate or anything else, they would claim that was fraudulent if I failed to do so. In fact what you need to look at is what I have said as a matter of fact, and whether it is true or not, based on the information and the information I knew, as to whether I knowingly made a false statement.

So I think that this notion that fraud by concealment is somehow some other branch of a fraudulent misrepresentation is simply just misreading of the case law. The cases I've looked at always talk about a positive representation that's been rendered false by the omission of information.

MR. HEIM: Your Honor, as we've been at it a while, do you want to take a short break?

THE COURT: She says "Yes." She controls everything. Sure, let's take a short break.

(A short recess was taken.)

THE COURT: Okay, let's resume.

MR. MOODHE: Your Honor, if I may, I took a few minutes of the break to go down to the library and

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retrieve a copy of the Nicholson versus Kellin case that plaintiffs cited you to.

I think you will see, from the description of the summary there, there were alleged numerous false representations, and that the issue in this case was whether those representations really were rendered false by the failure to disclose the fact that the people upon whom -- the Lipshultzes, who were suppose to be running this business, were in fact not going to be running this business as they were in fact representing to be.

There were misrepresentations as to their intention to honor or a guaranty to certain financial aspects of the business. I think, if you just take a quick look through that, you'll see that this is no different than the type of case I was talking to you about earlier this morning.

THE COURT: Okay.

MS. ROSENBLATT: The next one, Your Honor, is 15(a). We proposed a special instruction, fraud by concealment, and we took the language out of the case law in Florida, and we've cited two of the cases, the third case -- two cases we were relying on are Alepgo, A-L-E-P-G-O Corp. versus Pozin, 114 So.2d 646, that's the Florida Third DCA, 1959. And review was denied,

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117 So.2d 842 by the Florida Supreme Court.

That's been followed extensively. And the Eleventh Circuit case applying Florida law, which is V-A-R-N-U-M versus Nu-Carriers, Inc., 804 F.2d 638, Eleventh Circuit, 1986, and United States certiorari was denied at 481 U.S. 1049.

We will provide copies of these cases to the Court and defense counsel.

And the third one, because I only have one copy, is Nicholson versus Kellin, that I referred to earlier, the Fifth District, 1986, each of these cases stands for the proposition that where someone does not have a duty to speak, if he speaks, he must disclose all material facts and he must disclose them truthfully.

The specific language I had relied on, in the Nicholson case, it's actually helpful on the conspiracy, as well, when we get to the conspiracy instructions, but, where the Court says, clearly and unequivocally, if there's no duty, whatsoever, to disclose facts, if you do so, you must disclose the whole truth.

And that's precisely what we say has happened here. There have been a lot of misleading statements, half truths, and because of the concealment that has

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occurred, and we set that forth in the requested special instruction on fraud by concealment.

MR. MOODHE: Your Honor, let me say, for the plaintiffs, I went to the trouble of getting the Varnum cases, and Mr. Kirby highlighted them, as to the appropriate portions of the opinion dealing with the fact that what was involved here were specific misrepresentations -- positive representations that were false. I don't think we need to talk any more about it.

MS. ROSENBLATT: Do we have copies of those, if they were highlighted?

THE COURT: Hold on, I'll let you know exactly what he did.. We can get copies made for you now, if you want, so that you'll know. Let me take look at the highlighted portion.

MS. ROSENBLATT: For example, second page of the opinion -- I have it printed from the computer -- the defendant had revealed that he had lost an employee, but he did not volunteer or reveal the importance of her absence, that was significant.

And again, by not revealing certain information, it was found that he misled the plaintiff in that case. And that's what we find in each of these cases that involve fraud, that once you speak, you must

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speak truthfully, and you must not tell everything you ever knew, but you must state anything material to that subject matter.

And, just using as one example, the hundreds of booklets and pamphlets put out by the Tobacco Institute, once they undertook the duty to speak on behalf of their member tobacco companies, they had to tell the whole truth, and they had to speak honestly and truthfully and reveal all material facts. And they concealed material facts. So we feel these cases apply and support the instruction.

THE COURT: Okay. 16.

There are 30 of these things, I understand.

MS. ROSENBLATT: This is a negligent misrepresentation instruction from Miscellaneous 8(b), and we also cited the Florida Supreme Court 1997, that had with the adoption of that had been basically through this case in 1997. The Gilchrist Timber Company versus ITT Rayonier, 696 So.2d 334, Florida 1997. Our count is for fraud and misrepresentation.

We feel that the count incorporates negligent misrepresentation, as well, which is a much lesser standard of a reasonable care. We would feel that if the Court disagrees that this has been tried before the jury, certainly that if they don't for some reason find

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that the false statement was made knowing it was false, that certainly they were under an obligation to, under the exercise of reasonable care, to have known the statement was false by investigating it.

So we would ask if, for any reason, it doesn't incorporate the negligent misrepresentation, and we think it does when you read the complaint and the misrepresentation aspect of that count, that then the complaint would conform to the evidence, and we have negligent misrepresentation and we have fraud, and that should be incorporated, as well. And this is under the Florida Supreme Court case.

MR. MOODHE: Your Honor, I don't disagree that Gilchrist adopted negligent misrepresentation that the cognizable theory of liability under Florida law, that is not our objection.

Our objection is that this claim has not been pled. What was pled was fraudulent misrepresentation. Let me address for a moment that this notion has been oft repeated by Ms. Rosenblatt, over the last couple of weeks, that you can simply conform the pleadings to the evidence. That is a device that is used when, for example, the allegation of the complaint is that so and so ran the stop light at 4:00 in the afternoon, and the evidence comes in and shows, well, it's really closer

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to 5:00. You're conforming the pleadings to the evidence in a nonmaterial way.

That is not a back door for amending the complaint at the 11th hour, improperly, to allege new theories of liability. It's just not meant for that. It's a much more limited purpose. So that is not a basis for, at this point, adding a negligent misrepresentation claim at this point in time in this case.

The fact of the matter is that we have been defending against fraud. That's what was alleged and that is what we have designed our defense to rebut.

To the extent that this -- and if you need to look at the instruction itself, there is not a standard instruction on negligent misrepresentation at this point. As I understand it, this is an adaptation of a negligent misrepresentation instruction.

And I think we have set forth, at Page 25, tab D, our specific objections to this instruction, including the fact that there are elements that cannot be tried in Phase I and as indicated both by the trial plan order and by the arguments we previously made.

So, principally for the reason that there is and cannot be such a late amendment of the complaint at the close of evidence to allege a whole new theory of

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liability, particularly one against which we have not defended and one which elements that can't be resolved in Phase I at this point in time. We would object to any instruction along this line.

MR. SCHNEIDER: Your Honor, I briefly supplement that with the case of Schopler versus Smilovits, 689 So.2d 1189, 1997, which says: The claimant is not given the luxury of simply pleading items "I was defrauded", and then fleshing out the claim at trial by proof as to precisely what the fraud was.

Later, it says: Under the facts and circumstances of this case, waiting until the close of all the evidence and the argument on motions to dismiss and for directed verdict is too late to request that the pleadings be conformed to the evidence.

And I've got it highlighted for you and for plaintiffs, as well.

MS. ROSENBLATT: The standard instruction does provide, on Page 2, Miscellaneous 8, negligent misrepresentation, and the defense continuously say, "They brought a claim for fraudulent misrepresentation."

We brought a claim, Count 2 claims against all defendants for fraud and misrepresentation.

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Misrepresentation was separated from fraud. So that's under Count 2 of our complaint.

And the way we pled the complaint, this was, of course, all the motions and so forth, actually before Judge Solomon. I don't know if they were raised again before Judge Postman. There had been motions to dismiss and so forth, and they were denied, and we reincorporate the earlier allegations in the complaint under each of the counts.

So we have a separate count for misrepresentation from fraud. It's not in the conjunctive as the defense said. And, I believe, in reading through this count and the allegations of the complaint, it incorporates, as well, negligent misrepresentation, which is a much lesser standard.

MR. MOODHE: Your Honor, just to correct the statement that Ms. Rosenblatt just made, it is not a separate count for fraudulent misrepresentation and a separate count for negligent misrepresentation, a single count, Count V, that is titled and headed Fraud or Misrepresentation. But all of the allegations in that count are allegations of fraud. They speak of intent, they speak of statements knowingly made falsely, but there is no allegation in there that is based on a breach of a duty of care. They are all

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intent allegations.

And the fact of the matter is, as Your Honor knows, you can't combine two separate theories in a single count. Fraudulent misrepresentation and negligent misrepresentation are separate theories. If they were going to plead it, they're required to plead it in a separate count and to include the elements of of that claim in a separate count. They have not done so.

Your Honor, just to make sure we're talking about the same instruction, you, I thought, at the beginning of this, you may have mentioned you were looking at Instruction 16.

THE COURT: No. You're right, it was 15(b). I caught that as we were talking. There is an Instruction 16 coming up, which is basically along those same lines.

MR. MOODHE: Right. And by the way, I misspoke, it's Count II of the complaint.

THE COURT: Count II, right. Okay, you said V.

MS. ROSENBLATT: Okay. Number 16 is specifically verbatim -- not verbatim, I say, "as modified," so I must have put in something about concealment -- miscellaneous Instruction 8(b).

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Then I go on to the greater weight of the evidence, which is actually E and F of that.

I think the sentence "Material fact" -- which was from the Minnesota instructions, "Material fact is one that is of such importance that a reasonable person would consider same significant in their decision-making process."

And I believe that is the one change in that instruction. Other than that, it's verbatim.

Now, is there a similar instruction that the defense has that we can compare? Which one is that?

MR. MOODHE: Well, to the extent that we deal with materiality, which is something we do deal with, it is set forth in our Instruction No. 13. But the balance of the instruction, absent the greater weight, because we didn't continually repeat that.

The first paragraph of this instruction, Your Honor, as you'll note by looking at the standard jury instructions, it's derived from paragraph b, sub b, and that is specifically headed as a reliance instruction.

Since we are not trying reliance as an issue in this phase of the trial, it's inappropriate to be instructing the jury.

Secondly the insertion of "misleading nature" or "misleading statement" is an addition to the

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standard Florida jury instruction which, as we've argued now exhaustively, ought not to be given to the jury because of this notion incorrectly that somehow Florida expands the doctrine of fraud to include things other than affirmative false representations.

And finally, as plaintiffs' counsel has noted, they have rewritten the definition of material fact from the standard jury instruction.

MS. ROSENBLATT: Material fact is D in the standard instruction.

THE COURT: I'm reading it now.

MR. MOODHE: In our instruction, we have maintained that standard jury instruction, although we have elaborated on it.

THE COURT: All right. So the language would be "consider same significant," rather than "transaction," "entered into the transaction" or "acted." That's the difference in the language.

All right.

MS. ROSENBLATT: It also refers to a particular claimant, so we refer to a "reasonable person," to use it in the generic sense. We felt it made more sense in this case. I believe that was used and I could verify that, in Minnesota. That's where they used that language, instead.

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MR. SCHNEIDER: Your Honor, just as an additional objection, this indicates that a plaintiff may rely on a false statement even though they could have made an investigation, pointed out that reliance is not an issue. We shouldn't have that charge.

But I also wanted to point out that the case of Doe versus Cutter Biological, 813 F. Sup 1574, under Florida law, Middle District of Florida, observed that plaintiffs are on notice of knowledge held by the medical community. Another reason for rejecting this charge.

THE COURT: What case did you just --

MR. SCHNEIDER: Doe versus Cutter Biological.

THE COURT: 813 F Sup something.

MR. SCHNEIDER: 1547.

MS. ROSENBLATT: As we argued previously, in connection with the verdict form, there is testimony through plaintiffs' witnesses, Drs. Blum, Siegel, Cummings and others, that others were deceived by misrepresentations made by the industry. I believe that was through Dr. Richmond's testimony as well, but certainly through Blum, Siegel, Cummings.

And so we feel reliance is, and the defendants, you know, don't -- want to have it just their way where they can get into common knowledge and

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what people knew, but not what they also relied upon in terms of their representations.

They want to have one side of that coin, and I think it's appropriate in the generic issues, as to whether the public did rely on, and there's been a lot of testimony as to that. And then that can be parceled out with individual claimants.

But I think it's appropriate here to close these causes of action, and I think reliance is an issue.

MR. MOODHE: Your Honor, the trial plan specifically says, as it must, that reliance is an individual issue in Phase II and III. It's bad enough that we're talking about trying generic causation as a matter of law, but now plaintiffs want to try generic reliance. There's no such thing as generic reliance.

MS. ROSENBLATT: They're talking about generic knowledge. We didn't have Mr. Amodeo or any of our class representatives, or thousands of class members, talking about whether they read these obscure journals and so forth. They basically are talking in the abstract, that people had knowledge, without letting those people speak. And we can certainly say that the public relied, the public was deceived. I think it's the same type of argument. And I think it

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has been tried and it's part of this case.

The Engle opinion basically carved out an exception of damages. Reliability would basically be determined in the common issue trial.

MR. HEIM: Your Honor, that is just wrong. I mean, everything we've talked about, from day one in the trial plan, has been that reliance is an individual issue. And, in fact, the trial plan specifically says reliance is an individual issue.

And the difference, of course, is that consumer expectations about the product is part of the product defect test under Florida law, so that's part of the test for whether or not there is a product defect when it is unreasonably dangerous. And Your Honor has recognized that in the past.

MR. MOODHE: Just to complete the thought, Your Honor, the reason why you can do that is because consumer expectations is an objective test, whereas reliance is a subjective test. And that's why reliance is an individual issue.

MS. ROSENBLATT: Okay. We have, for No. 17, a special instruction, which follows the two cases we had cited previously. We would add to that the Nicholson case. When a manufacturer of a product makes representations to consumers in the nature of half

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truths, the failure of the manufacturer to make a full and fair disclosure of the truth may be a false representation. That follows the holdings in those cases. And it's very -- it's comparable to an instruction given in Minnesota, as well, about half truths.

MR. MOODHE: Your Honor, I think we've spoken enough about this subject. You know what our position is. I would also just add that this language is not something taken from these cases.

MS. ROSENBLATT: Now, 17 -- should I proceed to the next one? 17(a) is taken verbatim from Florida Statute 817.41 and there are a series of Florida cases holding that this particular statute does not have to be pled in the complaint to have it presented to the jury.

And it's specifically: Misleading advertising prohibited. And it really addresses some of the issues here. And even if you don't sue pursuant to the statute -- and I'll present, and I'll bring in the case, I probably have it here and I'll find it -- even if you do not sue pursuant to the statute, which permits treble damages, that you still may address this as a violation.

And it specifically provides that, "It shall

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be unlawful for any person to make or disseminate or cause to be made or disseminated before the general public of the state, or any portion thereof, any misleading advertisements. Such making or dissemination of misleading advertising shall constitute and is hereby declared to be fraudulent and unlawful, designed and intended for obtaining money under false pretenses."

Then it goes on to define the term "misleading advertising" or "disseminated, in oral, written or printed form or otherwise, to or before the public, or any portion thereof, which are known, or through the execise of reasonable care or investigation, could or might have been ascertained to be untrue or misleading."

And this certainly is applicable in terms of the low tar, low nicotine, the health assurances. We've had testimony about it, and this is applicable to the issues in this case.

MR. MOODHE: Your Honor, this is a statute that was not pled, and certainly was not even mentioned as a basis of liability at any time in this trial until we received these jury instructions.

The fact of the matter is that in the Vance case, which I think plaintiffs are relying on the

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proposition that they may be able to plead, or allege the claim absent having pled it in the complaint. In that case, the fact that they were relying on the statute was made clear through discovery and other proceedings prior to trial. So it was no surprise.

And, even then, the Court, in Vance, said: Well, we're not going to require it. It's the better practice to require it here.

Your Honor, we didn't learn about any invocation of this statute until, as we say, the jury instructions were received.

In any event, they would have had to have pled the elements of the claim. And they have not pled the elements of the statutory claim.

This is a late attempt again to amend the complaint and add a new theory of liability. Theory of liability, based on this statute, should have been pled as a separate count. And for them to come in at the 11th hour and offer a new statutory basis for this proceeding I think is prejudicial to the defendants, as well as being enormously -- an enormous surprise to us in being able to address these allegations.

In addition, I think, to highlight the prejudice, plaintiffs, and I don't know that this is correct or not, but they asserted, I thought they

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asserted that they could have treble damages based on the violation of this statute.

Well, treble damages aren't pled anywhere in the complaint. Now not only do we have a new theory of liability, we have a new theory of damages. I think, while being criminal in nature, they cannot be inserted it into this action at the last minute.

Moreover, the statutes weren't even mentioned or offered into evidence, and there can be no basis for a claim absent some sort of prejudice. So at this point in the proceedings, Your Honor, I think it would be unfair to import this whole new theory of statute of liability.

MR. SCHNEIDER: One supplement before plaintiffs respond. The statute is also very overbroad and touches on the preemption issue. Obviously, by talking about misleading advertising, that's an issue that goes to the core of neutralization and those issues we've talked about.

MS. ROSENBLATT: I prefaced my remarks by saying we were not traveling under the statute, we were not seeking the treble damages pursuant to the statute, just as an ordinance or a statute is admissible as evidence of negligence or evidence of misconduct in an ordinary case, this is no different.

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I believe it is the Vance case -- and I'll get it for the Court -- where that very issue came up where it wasn't pled and it wasn't necessary to be pled. It's simply evidence -- it's tantamount to an instruction that this is recognized under Florida law, this is just a fact, it's something that a jury can consider, and it's comparable to the kinds of instructions that are used in negligence cases and other types of cases where it is evidence -- it's a jury instruction that can be provided to a jury, and the case specifically holds we didn't have to travel under it.

However, we have pled the elements in our complaint in terms of everything that's here in connection with misleading advertising. I mean, that's throughout our complaint. And in addition, it specifically, it's specifically as to low tar.

There have been many allegations about that throughout the complaint. So to suggest that this is something that is just new and they -- I'm sure they were very well aware of the statute, but the statute parallels many of the allegations that are within our complaint.

MR. MOODHE: Your Honor, just to facilitate the resolution of this issue, I will hand you up a copy

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of the Vance versus Hammock case that plaintiffs are, I believe, relying on for the proposition that you do not need to plead.

Again, it is highlighted, and it is, unfortunately, my only copy. But you will see in that case, while they do so hold that you do not need to plead, that the specific reliance on the statute was disclosed during pretrial conference that the Court conducted prior to trial.

So that there was no surprise or prejudice to the defendants in that case because, even though it had not been pled, it had been disclosed during the pretrial proceedings that the plaintiffs were going to be relying on it.

THE COURT: All right. Vance versus Indian Hammock Hunting and Riding Club, indicated at 403 So.2d 1367.

Make a copy. Make two copies.

MR. MOODHE: Your Honor, it's also been pointed out that I've been negligent in not directing you to the appropriate place in our binder.

THE COURT: I'm with you on those. I'm looking. If you have any particular instruction that you would rather have or prefer on your side of the case, maybe you can guide me on that.

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MR. MOODHE: Of course, we have no instruction on the statute. And, moreover, I believe just reading the statute to the jury is singularly unhealthy.

THE COURT: It has been known to be done.

MS. ROSENBLATT: I'll proceed to No. 18. This was an instruction given in Minnesota. And there are a lot of cases that support this instruction. And I think it's an important one here. "The First Amendment to the Constitution protects freedom of speech. However, false, misleading or deceitful statements are not protected under the First Amendment."

That's the law. The First Amendment does not permit anyone to lie, manufacturers to lie. And I think it's important because the defense is going to be arguing: We had the right to say this, we had the right to say that.

And I believe their position is we had the right to lie. At least that's what I gleaned from some of the arguments of Mr. Martinez. We can lie to Congress, we're allowed to, that's the law.

That's not the law. Each of these cases discuss no protection for false, misleading or deceitful speech. It was given in Minnesota. It's a

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significant, important instruction in terms of putting this in its appropriate perspective.

Opinions are one thing; lies, misleading statements are another.

MR. MOODHE: Your Honor, the only reason to give this instruction is because of the issue raised by the Noerr-Pennington doctrine. That doctrine, as well as Florida law, recognizes a privilege that is derived from the right to petition the government for redress. And it allows, basically, people to speak to their government and their representatives without fear of being hauled into a court and tried for making some sort of false statement or other type of claim based on whatever content of the communications to their legislatures are.

What that doctrine stands for is the proposition that, if a false statement is made to Congress, it is Congress that has the power to redress that. And they will do that through a contempt proceeding.

But a court of law ought not to be involved in allowing third parties to come in and question and hold those people from making those statements and subjecting them to a civil trial on the basis of statements made to Congress. That's the underpinning

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of the doctrine.

And the only reason to give an instruction on the First Amendment would be to recognize the Noerr-Pennington doctrine and its limitations, not to suggest that the First Amendment does not somehow apply in this case. And that is the import of plaintiffs' instruction.

And we do have a Noerr-Pennington instruction in our set of instructions, which I believe is --

MS. ROSENBLATT: It's No. 7.

MR. MOODHE: -- 7. And that we think is an appropriate statement of the law.

Moreover, Your Honor, even plaintiffs' very simple instruction is not an appropriate instruction, because if you look at the citations of authority, all they are citing to are statements that are based on commercial speech cases. And those cases basically hold that in certain commercial activity, a lesser standard of First Amendment scrutiny may apply. Not all of the statements, indeed many of statements that plaintiffs have pointed out here as being potentially misleading or fraudulent are statements made outside of the commercial speech context, as part of our right to participate in discussion of scientific and regulatory issues.

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So that suggesting implicitly, by citing these cases, that some lower standard applies to that speech, I think is inappropriate. The fact of the matter is that we are not arguing outside of the Noerr-Pennington doctrine that we cannot be held liable for fraudulent misrepresentations proven by plaintiffs simply because of the First Amendment.

We've not made that claim except in the limited instance of the Noerr-Pennington doctrine and the corollary Florida case law.

So that would be the appropriate thing to focus on, not the instruction which the plaintiffs have proposed here, which confuses the issue or presents a nonissue to the jury.

MS. ROSENBLATT: I don't agree with that. And I won't get into as much detail. I mean, basically that's -- what counsel is saying is we can lie to Congress and it's protected. That's the bottom line of what he's saying.

And when you look at their proposed No. 7, it goes beyond that, it basically says we can do what we want with advertising.

The last paragraph, "Defendants also have the right to advertise their product. Such advertising is commercial speech that is protected by the First

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Amendment to the United States Constitution."

And you know our response is the First Amendment doesn't protect falsehoods, misleading or deceitful statements.

We are not -- you know, what counsel is saying, it's their interpretation of the law, and it's simply not accurate. I mean, it's just not accurate. You cannot mislead or lie. It doesn't matter what forum you're in, you can't do it.

Now we're on No. 19: Civil conspiracy. And there is no standard jury instruction, so as to -- well, I think there was a mistake here, it should say -- that's correct.

Source, as to paragraphs 1 and 2, are the three cases I listed, which was Greenberg versus Mount Sinai, 629 So.2d 252, and then Union Oil and Florida Fern Growers. And as to the third paragraph, I cited four cases.

And it's a very simple civil conspiracy instruction following the case law: A civil conspiracy is a combination or an agreement of two or more persons or entities, having the common purpose to accomplish an unlawful act or accomplish a lawful act by unlawful means.

I indicate that: The claim here is that two

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or more defendants agreed to commit wrongful acts.

And then the third paragraph is the exception, that's carved out under Florida law, where you can have a conspiracy without an underlying tort. And that's a conspiracy where, because of either the numbers of individuals or their economic influence, if they act with a malicious motive, there can be a civil conspiracy. So it reads: A civil conspiracy may comprise an independent tort where two or more persons or entities combine, with a malicious motive, and there is a peculiar power of coercion possessed by the conspirators through their numbers or economic influence.

And we have alleged that in our complaint in terms of the amount of money that is expended on marketing, on targeting minors and so forth. And there is certainly an issue of a peculiar power of coercion by these defendants in this case.

So we would ask that the general rule and the limited carved-out exception be given under the case law that has been cited.

We also have, which we took from the Minnesota jury instructions, since there is no standard one which followed, and we might want to do 19 and 20 at the same time, the instruction that was given in

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Minnesota.

And it goes through the fact that you can find a conspiracy without direct proof and circumstantial evidence, which, of course, applies in Florida as well. And it goes through in a little more detail.

So it might be a combination of the two of them, because the Florida cases don't go into as much detail as the other instruction. That was from Minnesota transcript 1647-50.

I don't know if the defense, which number is that --

MR. MOODHE: Our comparable instruction is No. 15.

THE COURT: That's the fraud and conspiracy.

MS. ROSENBLATT: Let me just look at that for a moment.

It doesn't have to be -- I object, it doesn't have to be an unlawful act. It can be a lawful act by unlawful means. So it really doesn't follow the Florida law, the proposed instruction.

And then it starts talking about public debate again, I guess that First Amendment argument that they make. And there are Third District cases, quite a few of them, which we have relied on and

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Florida Supreme Court cases, almost entirely, I mean, everything we're relying on are Third District or Florida Supreme Court, with the exception of one Fifth Circuit, Fifth District case.

But the two cases relied upon are F.Supp., U.S. Supreme Court, I guess that's that Noerr-Pennington doctrine, again, they're talking about, First Amendment right, which they say "First Amendment right to lie," and also a Fourth District Court case. So we would really say our instructions are really based on the Florida law.

MR. MOODHE: Where to begin?

I guess No. 19 we should take first. Our objections are set forth on Page 30, tab D.

This, of course, is not standard Florida jury instruction. We have a comparable instruction to the first sentence of this instruction in our 15. But beyond that, this instruction goes on, as Mrs. Rosenblatt noted, charge on the theory of an independent tort conspiracy.

In the first place, that independent tort of conspiracy, while recognized under the law, in very narrow circumstances is not pled, nor are the elements pled in this complaint. And if it were to be pled as an independent theory, it would have had to have been

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set in a separate count.

What is pled in the complaint is conspiracy to make fraudulent statements. That is the conspiracy that is alleged in this complaint. But more to the point, the cases that are cited in support of that proposition have nothing to do with the type of allegations in this complaint. In those cases, they basically were cases that focused on a combination of people who had economic influence, and used that economic influence coercively to engage in anti-competitive practices.

For example, the Jai Alai case was a situation where several frontons got together and decided to boycott players who were trying to unionize. They used their influence, their economic influence, to drive or to deprive those players of their livelihood.

Similarly, there was a case involving a group of anesthesiologists at a hospital, who controlled another anesthesiologist outside of the group to be able to practice. They used their economic influence to deprive that individual of his livelihood.

That is not the type of claim that is being argued here. There is no economic coercion being brought about in any member of the class.

When Mrs. Rosenblatt talked about somehow our

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economic influence over young people in terms of convincing them to smoke, there's no economic influence that is being used coercively to force those people to smoke. Just isn't an allegation here. So the independent theory or the independent tort conspiracy has no place in this case.

In addition, a jury is simply not permitted or a party is not permitted to be charged or have a charge based on a theory that's not been pled. There is no proof of that economic influence or coerciveness through that economic influence.

We also object to their instruction on the grounds that it again incorporates the not cognizable notion that you can have a fraud based on concealment or suppression.

Let me turn, if Your Honor wants me to address No. 20 now, as well. Number 20 is a very argumentative, in my point of view, instruction, taken from the Minnesota set of instructions, as to what may or may not constitute evidence of a conspiracy.

And it is interesting to note that there is no Florida authority cited for any of the propositions about which this instruction is directed to.

For example, as we pointed out on Page 31, there is no Florida authority for the proposition that

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a conspiracy does not have to be established by direct proof, that there's no agreement necessary, that simply the agreement may be unspoken, and you can infer merely from the actions of people as to the nature or the existence of an agreement.

In addition, they dilute the "in furtherance" requirement of conspiracy by suggesting that mere statements can constitute an act in furtherance. Mere statements, mere discussions among defendants about something they may do is not an act in furtherance of carrying out the agreement. It may be a reflection of the agreement, but it is not an act in furtherance. Nor is simply acting to promote the common good the standard.

What is required is an act that is in furtherance of the common goals of the conspiracy. Just because somebody did something that benefitted a corporation if it is not tied to the unlawful conspiracy, it is irrelevant. And therefore, the plaintiffs' instruction is woefully overbroad.

In addition, on the Noerr-Pennington issues, we believe, in terms of the instruction we have provided, that it is appropriate to instruct that -- to instruct the jury about how the line that is drawn between agreements to commit fraudulent

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misrepresentations and discussions or common course of action in execution of our rights and privileges to petition for redress under the First Amendment and for that power, if there was some notion that something had wrongfully been done in front of Congress, is reserved on its separation of powers doctrine, reserved for Congress, not for a third party in a civil liability suit to seek redress on.

MS. ROSENBLATT: Just addressing the economic coercion, counsel said we didn't plead it in our conspiracy count, paragraph 110. There has been a conspiracy to spend billions -- with a B -- billions of dollars each year to entice new smokers targeting youngsters, women and minorities to make up for the smokers who are dying, or who have finally been able to quit, following serious debilitating illnesses caused by tobacco.

That specifically alleges economic coercion through spending billions of dollars to target -- I mean, it's right there in the count of civil conspiracy. So, to say that our allegations don't cover it is simply not accurate.

The Minnesota instruction is a fair recitation. I have not, in all candor, I have not gone into a lot of detail in researching all of the

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conspiracy cases. I'll start to look at more conspiracy cases in Florida; but circumstantial evidence, you can, I believe, I'm not a maven on criminal law. But I believe, through circumstantial evidence, can you put someone in prison for a long time, circumstantial can prove -- it doesn't have to be direct, I mean, that goes across the board, that's an evidentiary matter.

What the defendants are going to try to mislead the jury with is where is that written agreement, where everything says: We hereby enter into a conspiracy to do A, B, C. Well, that's not required.

If there are falsehoods through the Tobacco Institute, through publications through CTR, that is sufficient circumstantial proof. Not everybody leaves a paper trail.

Fine, these are arguments to make, but the jury should be told what the law requires, what it does not require.

I would have used the standard instruction, but they just don't exist in Florida on conspiracy, so that's why we had to create them. But I feel that our instructions are neutral, follow the case law and the instructions by the defense.

Again, this concept of we're allowed to lie,

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that's part of this doctrine, First Amendment rights, and I don't think that should be followed at all.

MR. KIRBY: Your Honor, may I make one brief comment with respect to what Mrs. Rosenblatt just said? She likes to repeat over and over and over again that we're arguing that the Noerr-Pennington doctrine quote gives us the right to lie.

The reason she likes to make that representation is she knows that you don't agree that that's what the doctrine does, so she repeats it over and over and over. It would be a great argument if it was responsive to what our position is.

It's not our contention that the Noerr-Pennington doctrine gives us the right to lie. What we are saying is that the Noerr-Pennington doctrine precludes a private party from suing someone, whoever it is, arising out of statements they made, that person made to Congress in the exercise of their First Amendment rights. That's all we're saying. We are not advocating the position that she keeps repeating.

MR. MOODHE: Just to address quickly the last points, first of all, we are also not saying that you need a formal written agreement to prove a conspiracy. We are saying you do need evidence, some evidence of an

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express agreement. And that evidence is lacking in this record.

But that is the requirement, evidence of an express agreement. And this instruction dilutes that concept.

Secondly, on the economic influence, coercive power cases, I urge Your Honor to look at those, because they all deal with using that influence, coerceively, in an anti-competitive setting.

It is the only narrow, independent tort of civil conspiracy recognized under Florida law. And it is plain, there is no anti-competitive practice going on vis-a-vis the tobacco companies on one hand and smokers on the other. It's not an anti-competition issue. It's a fraud issue here. And that's what they pled and that's what we ought to be dealing with.

MS. ROSENBLATT: When this issue came up, and I'm sure Your Honor will recall, the issue being, if somebody said something that's false to a congressional body, is that protected?

And Mr. Martinez had repeatedly said: It doesn't matter. We can lie. It's protected.

And I think that's basically what Mr. Kirby said, as I understand it, irrespective of the truth or falsity, it's not actionable. That's the same thing as

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saying the First Amendment protects lies in that context.

So I'm not twisting things around, I'm just getting to a bottom line, and we have a definite disagreement, which is why we requested that instruction, because I think the case law doesn't agree with the defense position here.

THE COURT: Okay. We'll break for lunch at this point. 2:00. Give you an hour and a half. How about quart to 2:00? 1:45.

(A lunch recess was taken at 12:25 p.m.)

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

GENERAL JURISDICTION DIVISION

HOWARD A. ENGLE, M.D., ROBERT W. ANGELL, RAYMOND LACEY, FROSENE D. STEEVENS, FRANK AMODEO, MARY FARNAN, LOREN E. LOWERY, ANGIE DELLA VECCHIA and MICHAEL MATYI, on behalf of themselves and all others similarly situated,

Plaintiffs,

vs.

R.J. REYNOLDS TOBACCO COMPANY, PHILIP MORRIS INCORPORATED, ("PHILIP MORRIS U.S.A."), LORILLARD TOBACCO COMPANY, LORILLARD, INC., THE AMERICAN TOBACCO COMPANY, BROWN & WILLIAMSON TOBACCO CORP., LIGGETT GROUP, INC., BROOKE GROUP LTD., INC., DOSAL TOBACCO CORP., COUNCIL FOR TOBACCO RESEARCH-U.S.A., INC., and TOBACCO INSTITUTE, INC.,

Defendants.

CASE NO. 94-08273 CA22

TRIAL
Volume 341

TRANSCRIPT OF PROCEEDINGS

in the above-styled cause before the Honorable Robert Paul Kaye, Circuit Judge, at the Dade County Courthouse, 73 West Flagler Street, Miami, Florida, on Monday, June 21, 1999, at 1:30 p.m.

13 years he has researched and studied and written about tobacco industry behavior, the main focus of this trial, tobacco industry behavior.

What was he looking at? Were they honest? Were they honest with the public? And his answer was a resounding no, they were never honest with the public; they constantly lied to the public to increase their bottom line.

And he studied for years child psychiatry as it relates to smoking. He is the author of a book on marketing and public health.

So we go to this issue. We go to this issue and I just -- I grit my teeth. I grit my teeth. And I say to myself: Can anyone buy this --

MR. REID: Objection, Your Honor. Counsel's opinion.

THE COURT: Overruled.

MR. ROSENBLATT: Can anyone believe this when this incredibly rich industry that spends billion, billion, $5 billion a year on advertising and promotion, they come in and they dance in here and smile and tell their little: Yeah, but we're not after new smokers. We don't want new smokers. No, we don't want to replace the dying and the quitters; we just want switchers. We just want -- so I asked Dr. Siegel,

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an expert, Line 14: Dr. Siegel, in the course of your career, have you had an occasion to do research on and actually write articles which were published in peer-reviewed journals about the advertising effect or impact of tobacco advertisements on youth?

Answer: Yes.

And what is your opinion on that subject, the impact or lack of impact of tobacco advertising on youth?

Next page. So he starts his answer at the top of this page: My opinion is that it's clear from the research literature that cigarette advertising does have an impact on youth and specifically cigarette -- here's the bottom line. Here's the bottom line which just blows away the nonsense: Specifically, cigarette advertising causes kids to start smoking. I think the best estimate from the literature is that approximately one out of every three kids who starts, the scientific literature, well researched, well documented in peer-reviewed literature, going to Line 16, indicates that approximately one out of every three children who start smoking start because of cigarette advertising.

Do a lot of kids start to smoke simply because their buddies smoke, simply because they think it will make them more popular with the opposite sex?

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Of course. Of course. We don't say that 100 percent of new smokers do it because of advertising.

Dr. Siegel says about a third. And they say zero, which is an insult to your intelligence, just an insult to your intelligence. Zero.

Dr. Siegel goes on in Line 18: In other words, if you were to eliminate cigarette advertising, if there was no cigarette advertising, then we'd only have two-thirds of the smokers that we have now.

Question on Line 22: So the research reveals, as to the other two-thirds, what causes most kids to begin smoking?

Answer: Well, there's a variety of factors, including influences of parents and peers, social influences, but the point I'm trying to make -- but the point I'm trying to make is that cigarette advertising is a big chunk of the cause for kids to start smoking.

Then my question on Line 13: Based on your research, the tobacco advertising and its impact on nonsmokers, do you have an opinion on the subject of whether tobacco advertising is only used to get present smokers to switch from one brand to another?

Answer: I think it's very clear that cigarette advertising is not merely intended to get people to switch brands. It's clear that cigarette

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advertising is intended to recruit new smokers, specifically among kids.

Now, ladies and gentlemen, that's got to be consistent with your common sense and it's got to have a ring of truth to it. And you know -- and if it doesn't, there's nothing -- there's nothing that I can say. But it truly must.

You're getting good at this.

Line 17 on this page: Dr. Siegel, based on your reading of the scientific literature, based on all your research, what was it that the tobacco industry did not turn over to the public health community in the areas of disease, causation and nicotine addiction?

And he answers the question, starting on Line 24: Basically, the tobacco industry failed to turn over all of the information that they had, starting at the top, that they had about the health risks of cigarettes and about tobacco addiction.

And going to Line 5 -- and this is a researcher and a writer on this very subject, who says, beginning on Line 5, Dr. Siegel says: They knew in the early 1950s nicotine was the specific agent that addicted. They knew in 1962 the mechanism by which nicotine works, specifically on the hypothalamus and pituitary in the brain. They knew of the mechanism of

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nicotine addiction that specifically nicotine changes the receptors.

Then he continues with his answer on Line 16: The companies knew specifically the mechanism by which nicotine was addictive and acknowledged this and explained it in the early 1960s, specifically that nicotine changes the receptors in the brain so that the body cannot respond to stress. And without nicotine in the body, the body cannot have a normal reaction to stress. It creates an unconscious desire among the individual to have to take more nicotine into the body in order to be able to appease those receptors, to satisfy the receptors in the brain.

Looking at Line 2, talking about the tobacco companies: They knew in 1966 that by controlling the pH, by controlling the acidity of the cigarette, they could increase its amount of nicotine that was present in that free form in order to enhance the nicotine delivery to the smoker.

Then the next paragraph he's talking about how they knew how to add ammonia to enhance the amount of nicotine in the free form and enhance the addictive nature of the cigarette.

And continuing on Line 14: The companies also knew back in 1953, 1953, that cigarettes were

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carcinogenic; that they caused cancer. They clearly knew this in 1953. That information was never disclosed to the public. They also knew that cigarette smokers compensate for the loss of nicotine in a cigarette by inhaling more or less.

So they knew everything.

So Dr. Siegel is asked on cross examination this question -- getting back to the concept, well, everybody is entitled to their opinion, that's right. I suppose within certain boundaries, everybody is entitled to their opinion, but intelligent people who are studying an issue are entitled to make a judgment that this person doesn't know what he's talking about. This person just doesn't know what he's talking about, compared to that person. I mean, that person has the qualifications and the background to speak about something.

If somebody says -- somebody is entitled to the opinion that Mark McGwire is not a good home run hitter, but no one who knows anything about baseball is going to spend five seconds talking to that person, because that person obviously doesn't know what they're talking about. They're entitled to an opinion, they shouldn't go to jail for expressing an opinion, but obviously they don't know anything about baseball or

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TRIAL
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in the above-styled cause before the Honorable Robert Paul Kaye, Circuit Judge, at the Dade County Courthouse, 73 West Flagler Street, Miami, Florida, on Tuesday, June 22, 1999, at 1:20 p.m.

talking; it's them talking. It's them talking.

To think 2 million adult smokers quit, 600,000 teenagers don't start, and this guy is crying in his beer, what terrible news, what terrible news for Philip Morris.

This goes on and on with destroying documents.

Plaintiffs' Exhibit 1245.

If company testing began to show adverse results pertaining to a particular additive, the company control would enable the company to terminate the research, remove the additive, and destroy the data.

That's why they terminated the rat research that Dr. Mele testified about, and that's why they sent research to INBIFO in Cologne, Germany. Anything adverse to their financial interest, their tendency and their first instinct is: Get rid of it. Don't let the American people know about it.

Plaintiffs' Exhibit 213, a Philip Morris document dated April 20th, 1976, from Judy McCall, and the subject is: Merit interviews.

And look at this whole group of people that got this document, including James Morgan, who was not then -- not in 1976, the CEO, but he had gone to work

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And even with respect to Europe, they are underhanded and they don't deal directly with the laboratory in Germany, but they use the laboratory or the facility in Switzerland and a go-between to get the information to Germany.

Plaintiffs' Exhibit 1608, a document to Dr. Robert Hockett, who is the director of the Council for Tobacco Research. This is in handwriting. It's authored by Dr. Helmut Wakeham, and basically it says: You know, after you get this, throw the paper away. Throw it away. Destroy it.

Plaintiffs' Exhibit 3277, dated -- this is a 1958 document which says: The guilt complex is a simple matter. We tend to suffer from the externally repressed fear that our opponents are right and we are wrong on the health question, and that we are thus devoting our business lives to the propagation of lung cancer.

The man is saying this in 1958. And then he says: Benzopyrene must go. This compound must be removed from Marlboro and Parliament, or sharply reduced.

Benzopyrene, nitrosamines, phenols, polycyclic hydrocarbons, 1999, are still in all these products. Still in all these products. And the

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average smoker has no idea. Carbon monoxide and nicotine, that's what the average smoker knows.

Plaintiffs' Exhibit 3383. This is a document dated 1978. Notes on group research and development conference, which says: There has been no change in the scientific basis for the case against smoking. Additional evidence of smoke dose-related incidence of some diseases associated with smoking has been published, but generally this has long ceased to be an area for scientific controversy.

1978. You heard witness after witness after witness: There's no controversy. No controversy. Cigarette smoking causes this whole host of diseases.

Plaintiffs' Exhibit 5676. This is a 1967 exhibit of Brown & Williamson, enunciating the company position on cigarettes and health. And this document says: In view of the concern by many regarding the health of cigarette smokers, Brown & Williamson is constantly on the alert for new knowledge from our laboratories and elsewhere about anything that might be harmful in cigarettes. We have found no connection between cigarettes and any sickness, nor has anyone else.

Now, here is someone that's aware of the 1962 Report of the Royal College of Physicians. It's been

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Esty Advertising in 1958: The Study of Attitudes Toward Cigarette Smoking Among High School Students.

And ladies and gentlemen, the only thing that's changed in recent years, as the tobacco industry has become more sophisticated and more slick and more politically correct, is they realize they can't admit to the American people that they are targeting kids, that they are going after kids.

And they use every torturous device to try to avoid that.

Give me a minute.

Believe me, I know this is not fascinating. But if it serves that when you're -- we have no idea how long you're going to take to deliberate. And if this assists you, if this assists you that when you're having a discussion in the jury room and someone refers to a document or someone refers to their notes, and you can go to one of the exhibit numbers that you've written down, hopefully -- hopefully that will be valuable. And I'm going to be stopping in a half hour or so.

Now, the next group of tobacco documents I will address have to do with addiction issues, and this includes the manipulation of nicotine levels by increasing nicotine in cigarettes through adjustments

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of pH, or the addition of ammonia; and it also includes research on nicotine establishing its addictiveness.

Now, during the 1970s and 1980s, Lorillard conducted an extensive research program wherein nicotine was manipulated through adjustments in pH and the addition of ammonia.

And I'm not going to go through each of these lengthy reports, but I will give you the exhibit numbers and the title of each report.

262: Nicotine Augmentation Project, which simply means how to increase nicotine;

Exhibit 3213: Application of Free Nicotine to Cigarette Tobacco and the Delivery of That Nicotine in the Cigarette Smoke;

Exhibit 3000: PH of Smoke: A Review;

264: Final Report, Intermediate Stage, Nicotine Augmentation Project;

3062: Nicotine Manipulation, Migration and Reaction Mechanisms;

3092: Vapor Phase Removal and Nicotine Augmentation with All Air Dilution Cigarettes.

And just the titles alone and the testimony from some of the scientists you've heard show you the incredible level of sophistication at which the tobacco companies operate; and how easy it is for them to

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manipulate nicotine to get the desired result, to get that free nicotine to the brain quickly and to have an impact, the basic goal and purpose being to keep the smoker smoking. It's no more complicated than that.

There are a large number of Brown & Williamson tobacco documents that reveal the ammonia technology at Brown & Williamson that increases the smoke pH, and thereby the free nicotine.

And this, in turn, increases the impact of nicotine on the brain on the smoker. It enables lower nicotine tobacco blends to have the impact of a much higher nicotine level, because even though the nicotine number is lower, if the percentage of free nicotine is greater, it has a greater -- it has a greater impact on the brain.

And a few of the many documents that address these issues of manipulating levels of nicotine through ammonia and pH from Brown & Williamson would include 3076, 1677, 3189, which is a handbook of ammonia technology. That's how sophisticated they are: ammonia technology.

One of the ways that Brown & Williamson has manipulated nicotine levels so as to alter the normal tar-to-nicotine ratio is through the genetically altered Y-1 tobacco that yields higher nicotine with

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lower tar and was grown in Brazil.

And some of the Brown & Williamson documents that address the Y-1 tobacco included: 3492, 3481, 3537, 3466, and 3195, which is a presentation by Brown & Williamson on Y-1 tobacco.

After all the lawyers get done talking, what happens next in this eight-month marathon is that Judge Kaye will read to you the instructions on the law. He will tell you what the law is.

But, you know, it's an interesting division and a lot of people are confused. A lot of intelligent people are confused. What is the role of the judge and what's the role of the jury? You would be amazed how many intelligent people are confused about that.

Obviously, you've learned in the last eight months you are the judges of the facts. The Judge doesn't decide, but you decide: Do I believe Witness A, or do I believe Witness B, or do I disbelieve both of them? That's the jury's decision. That's the jury's decision.

You've learned in the last eight months, however, the Judge decides what you hear and what you see. Because if the Judge decides that a piece of evidence -- he decides not to admit it, it doesn't get in and you never see it. If the Judge sustains an

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37156

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

GENERAL JURISDICTION DIVISION

HOWARD A. ENGLE, M.D., ROBERT W. ANGELL, RAYMOND LACEY, FROSENE D. STEEVENS, FRANK AMODEO, MARY FARNAN, LOREN E. LOWERY, ANGIE DELLA VECCHIA and MICHAEL MATYI, on behalf of themselves and all others similarly situated,

Plaintiffs,

vs.

R.J. REYNOLDS TOBACCO COMPANY, PHILIP MORRIS INCORPORATED, ("PHILIP MORRIS U.S.A."), LORILLARD TOBACCO COMPANY, LORILLARD, INC., THE AMERICAN TOBACCO COMPANY, BROWN & WILLIAMSON TOBACCO CORP., LIGGETT GROUP, INC., BROOKE GROUP LTD., INC., DOSAL TOBACCO CORP., COUNCIL FOR TOBACCO RESEARCH-U.S.A., INC., and TOBACCO INSTITUTE, INC.,

Defendants.

COPY

CASE NO. 94-08273 CA22

TRIAL
Volume 348

TRANSCRIPT OF PROCEEDINGS

in the above-styled cause before the Honorable Robert Paul Kaye, Circuit Judge, at the Dade County Courthouse, 73 West Flagler Street, Miami, Florida, on Thursday, June 24, 1999, at 2:00 p.m.

(Whereupon, the following proceedings were had:)

THE COURT: All right. Have a seat, folks. Who's next?

MR. SCHNEIDER: I am, Your Honor.

THE COURT: Okay. I guess we need a jury.

THE BAILIFF: Bringing in the jury. Jurors entering the courtroom.

(The jurors entered the courtroom.)

THE COURT: All right. Everybody is here and accounted for.

And the next speaker?

MR. HEIM: Mr. Schneider now.

MR. SCHNEIDER: Good afternoon, ladies and gentlemen. Good afternoon, Your Honor. May it please the Court.

Ladies and gentlemen, it's my honor to introduce myself to you directly for the first time. I'm Richard Schneider from King & Spalding in Atlanta. And I, along with Ed Moss, have represented Brown & Williamson and the American Tobacco Company in this case. It's been my privilege to appear before you.

Now, if you can remember, it's a long time ago, October 20th, 1998, Mr. Moss made the two opening statements in this case on behalf of the defendants. He's been kind enough to give me the opportunity to

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make our closing argument to you here today.

Before I begin, I want to add my thanks to you, ladies and gentlemen, as your service as jurors coming here 8 months straight, listening to the evidence. You've impressed us all. I thank you for that, and I thank you for listening to all of us in this case and to me during closing arguments.

Now, all of the evidence you've heard thus far really falls into two categories the defendants have summarized. I want to show you that on this board, if I can make it work. And I might fall victim to -- 797. There it is.

These two points. Point one: The companies did all that could be done in their response to the health risks associated with smoking. The defendants acted reasonably and responsibly by funding scientific research and doing everything possible to make a less hazardous cigarette.

And point two: The risks of smoking are known. Florida smokers at all times have been fully aware of the risks of smoking, as has the public health community.

And all of the evidence that I'm going to discuss here today will fall under those two points. And those two points demonstrate that the legal claims

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the plaintiffs have made in this case should be rejected.

I want to give you a brief preview of point one and point two, and I'll go into them in detail.

What the plaintiffs claim in this case is that they took up smoking and its attendant risks, and they were injured and they seek money. In their quest of money, they accuse the defendants of doing nothing to address the risks of smoking; they accuse the companies of negligence.

You heard they attack everything. They attack lower-tar cigarettes and claim that smokers, by compensating, offset and defeat the purpose of low-tar cigarettes.

And they claim that defendants used ammonia and other techniques to manipulate nicotine to hook smokers.

I'm going to address those topics: compensation and ammonia and manipulation, and I hope that I'm going to remind you how the evidence went so very much against the plaintiffs on each of those issues.

I'm going to discuss how smokers get a lower delivery when they switch to a lower tar product. I'm going to discuss how nicotine levels went down, not up.

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not manipulated up, went down. And I'm going to discuss how plaintiffs' ammonia theory that they heralded so much in their opening statement and mentioned in closing was rejected even by their own witness. And I'm going to show you the testimony on that.

And I'm going to add to Ben Reid's remarks when he talked about the efforts of the companies, and I'm going to focus specifically on what Brown & Williamson has done and what American Tobacco Company has done to respond to the smoking and health issue. The plaintiffs are wrong in their claims, ladies and gentlemen, because the evidence shows that the companies did all that could be done.

Now, let me preview point two for you: The risks of smoking are known. Beyond their claims of negligence, strict liability, the claims make the inherently incredible claim that they did not know the risks of smoking; that the risks were hidden; they were fooled. And that's the claim: The defendants committed fraud, concealed unknown facts and conspired to keep smokers from knowing the risks. They claim the defendants somehow hid from smokers that it would be somehow difficult to quit. Of course, it's the smoker that's smoking; the smoker that's finding it difficult

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to quit, but somehow that was hidden from the smoker. And really, that's the essence of their case: They didn't know the risks.

Now, ladies and gentlemen, one of the greatest assets you have in deciding this case is your own common sense. And by common sense we mean your good, old-fashioned ability to tell what makes sense and what doesn't, what's logical and what's not, what people really do and what they don't do.

And ask yourselves, ladies and gentlemen, ask yourselves, in light of your experience and common knowledge, in light of your own experience and common sense, and in light of the evidence, wasn't there widespread common knowledge of the risks of smoking before any of us walked into this courtroom? And doesn't that in and of itself prove that the risks were not hidden? Of course it does.

And how did the risks become known? Because the companies funded research, because the governments researched this issue extensively, and because the risks were continuously, constantly, widely publicized.

So the defendants didn't hide the risks. They couldn't. It would be impossible. You can't hide what's already known.

So the fundamental premise of their claim

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that they didn't know the risks makes no sense. It's defied by the overwhelming evidence, and I submit it's defied by your own common sense.

Now, realizing that they could never convince you that the risks of smoking were not known, what the plaintiffs' claim in this case is that there was some particular facts they didn't know, which was somehow concealed or hidden from the public health community, which plaintiffs claim would have made a difference to them.

They assert that we hid the health effects of smoking, and we hid the effects of nicotine, and we hid the very claim that nicotine might be classified as addictive.

And even though you heard in this case that there were articles in the public literature for decades and decades and decades, they suggest they never heard of the idea of addiction until 1994.

Now, these claims all come under the banner of fraud and concealment and conspiracy, and I'm going to address them under point two.

Contrary to the plaintiffs' allegations, the evidence shows, and I'm going to show this to you very directly, that each of the things that they say were hidden was not; it was known to the public health

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community, and often as a result of research funded by the defendants or information given by the defendants to the public health community and the government.

And the question you're going to be asked on your verdict form, one of the questions you'll be asked is: Did the defendants conceal material information, quote, not otherwise known or available concerning or related to the health effects of nicotine, or this issue of addiction?

Hopefully, my discussion here today will show you and the evidence in this case will show you that there is no material piece of information that was not otherwise known and available to the public health community throughout all relevant times in this case.

And I'm going to come back to this, but I want to tell you one of the most striking pieces of evidence. You've seen me hold up this battered book. I don't -- it's not me that did all the reading in there, but this is a book entitled Tobacco Experimental and Clinical Studies. You're going to have an excerpt from this book in the jury room with you. It's Defendants' Exhibit 14713.

And this book was published in 1961 with tobacco industry funding, and it covers an unbelieveable range of topics concerning smoking and

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health and nicotine and claims of addiction, every sort of issue on tobacco and health.

And if you want to know about the significance of this document, this book, the Larson text -- remember that the 1964 Surgeon General cited this text and said -- remember 1964 they said everything from '59 back had been covered in this text and this is what they relied on. And the Surgeon General relied on this information, published with industry research funds, and on the basis of that information reached his own personal judgment that smoking causes lung cancer in men.

That in itself ought to put an end to the allegation that the health effects were hidden, that information about nicotine wasn't known. I'll come back to that in a little bit more detail.

I'm going to take another turn at this device, and show you just briefly, that is the table of contents of that text in 1961, Tobacco Experimental and Clinical Studies, published in '61 and supplemented in '68, '71 and '75.

It would be difficult for you to see those headings, but you'll have a copy of that exhibit, Defendants' Exhibit 14713, and you can look at the range of things that were discussed in that text:

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epidemiology, pH, free nicotine, claims of addiction, calling nicotine an addictive drug; the epidemiological studies in the '50s, all covered in that text.

So the scientific facts weren't hidden. And the plaintiffs would have you believe that the defendants controlled all the knowledge there was about smoking and health. But how can they overlook the widespread public knowledge, the mountains of public research, the work by public health scientists, tens of thousands of articles. There were a tremendous number of sources of information. This is the most studied product in history.

And most tellingly, in plaintiffs' closing argument over two days, they didn't identify for you a single new or unknown fact that would have changed the science with respect to smoking and health or had any effect on smokers' awareness. What was the fact? What was the fact that you were told was the unknown, undisclosed fact suddenly discovered? Can't be done. And hopefully, my discussion today will show you just how much information was out there.

What's unique in this case is that the plaintiffs called witnesses and they made the charge that specific facts, specific information was not known. And while it may be difficult for you ladies

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and gentlemen, and it's difficult for me because we've lived very closely to this case, all of us, to remember cross examination of witnesses, showing them the documents, disproving their claim that it wasn't known. Remarkable. I'm going to go through some of that.

Now, in addition to their claim that we hid information, they claim that our statements of our opinion on scientific issues caused smokers to be unaware of the risks, but there's no evidence, a lot of argument -- argument is not evidence -- there's no evidence that smokers were kept from being aware of the risks.

But I'm going to address our opinions on causation and I'm going to talk about Dr. Sharon Boyse, who you might remember. She was an English scientist. She's Brown & Williamson's director of scientific communications, sort of a small English woman, spoke with a British accent.

I'm going to talk about her testimony, what she said about causation, and I'm going to talk about her testimony on whether smokers overestimate the risks. What she indicated is that smokers are so aware of the risks, that they overestimate. They overestimate.

Now, I hope that all the evidence that I'll

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discuss with you under these two points that have gone away from me -- I'll get them back -- will help you in answering the questions on the verdict form. That's what this process is designed to do.

Now, the plaintiffs have the burden of proof. They have the burden of proving what they said in this case, proving what they said in opening statement, and to do that they need evidence, not argument. They need evidence.

And evidence is not argument from plaintiffs' counsel, it's not making faces, it's not yelling at witnesses, it's not asking loaded questions. None of that is evidence.

And you'll recall that Mr. Moss at the beginning of this case asked you to listen to the opening statements and then test, during the course of the case, whether the statements that were made in opening were in fact borne out by evidence.

And what I'm going to discuss with you here today is that the plaintiffs called witnesses who didn't have evidence, whose claims were not backed up by the real facts, and whose claims fell apart on cross examination. And that adds up to plaintiffs not meeting their burden of proof and that's what we ask you to find here today: They have not proven their

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claims.

Now, with that preview, let me walk to, back to point number one, 671. This is the point: Companies did all that could be done. Mr. Reid has already summarized for you all of the efforts of the companies and all of the technology that they pursued to try to reduce risk, taking all the government suggestions.

And you heard plaintiffs' counsel in closing attack and belittle the defendants' efforts and criticize specifically the pursuit of low-tar cigarettes. I think he called them a con and clever. Was that attack fair? Is that what public health scientists were saying about those products?

You'll recall that we discussed that topic with plaintiffs' witnesses in this case and showed them what was being said in the public health literature. And I want to start with just a couple of those statements.

And the first one comes from Dr. M.A.H. Russell in a 1974 article. Dr. Russell is a renowned medical doctor and a psychiatrist from the addiction research unit at Mobley Hopps Hospital in London.

And what did he say? He said this, 1974, in his article: It is unlikely that any single measure

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has saved more lives or done more to reduce smoking-related disease than the switch from plain to filter tip cigarettes. That's in 1974.

And in 1979, what did Dr. Russell write in an article? 1979. Here's what he wrote: At the risk of being hounded out of the conference, I'm going to suggest that over the past 20 years, the tobacco industry may have achieved more in reducing smoking-related disease than we have. "We" refers to public health community. And this is because they have focused their efforts on making cigarettes safer.

That's just two of the many examples of public health statements encouraging the public health efforts. That's an extraordinary statement: At the risk of being hounded out of the conference, I'm going to suggest that over the past 20 years, the tobacco industry may have achieved more in reducing smoking-related disease than we have. This is because they have focused their efforts on making cigarettes safer.

I don't think that's a record that would justify calling low-tar cigarettes a con or clever. The companies responded to the public health suggestions, and the public health community viewed their work as legitimate and a persistent quest to find

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a potentially less hazardous cigarette.

And think about the plaintiffs' allegation or their implication that we did not want a safer cigarette. If we could find a cigarette that we could call safe, it would be good for customers, it would be good for business. And naturally, the companies pursued that topic.

Now, I want to spend just a few minutes talking about Brown & Williamson and American and their efforts over the years, their innovations over the years, to respond and address this problem.

You heard from a variety of witnesses from Brown & Williamson and American, and I don't know how many witnesses you heard in this case, but I think it's in excess of 60 probably -- and so it's got to be difficult for you to remember any of them, any particular one. And that's one of the benefits of making this closing argument, to remind you of key evidence.

But you'll recall Dr. Boyse, who I mentioned, and Dr. Michael Dixon from BATCO. I don't know if you might remember Dr. Dixon. He's the gentleman that came from England. He was raised in Nottingham, Robin Hood country.

And you might remember that Mr. Rosenblatt

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and Dr. Dixon had a little fun, and Mr. Rosenblatt was asking Dr. Dixon: Who was the most famous actor to play Robin Hood? And Dr. Dixon said, much to Mr. Rosenblatt's surprise, Kevin Costner. Not Errol Flynn, Kevin Costner. And hopefully that will bring Dr. Dixon back to mind for you.

Contrary to the plaintiffs' allegations that you didn't have any evidence from the CEOs, you heard Mr. Sandefur's deposition. He was the CEO at the time the case was filed. He since died. You have our current president, CEO, Mr. Brookes, who you saw by video. And you saw Mr. Johnson from the American Tobacco Company. There were way more than enough witnesses in this case, ladies and gentlemen.

Now, both Brown & Williamson and American made two types of responses to smoking and health issues. First of all, they funded external research, and second of all, they did internal research to try to modify their products.

And you heard Mr. Reid talk about that generally. I'm going to give you a few specifics about Brown & Williamson. I'm going to talk about some of the research they funded and how those companies did what they said they would do in The Frank Statement.

But let's cover product development first.

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Dr. Boyse was on the stand for a couple of days and explained at length the efforts that Brown & Williamson and American pursued to modify their products and invent new designs and new alternative technologies.

They used the state of the art techniques that Mr. Reid summarized for you, and as a result of them, what happened? One more time. 376. Tar and nicotine levels dropped like a rock. And the reductions began in 1952 with Brown & Williamson's introduction of the first cellulose acetate filter. That's still the filter that's being used today, introduced in 1952.

And American also was a leader in innovation with ventilation technology, and they came out with Carlton. You may remember I showed you the Carlton packs.

Carlton came out in 1964. At that time the average tar and nicotine delivery, tar was 24 milligrams. And Carlton came out 1964, 7 milligrams.

Well, as you probably remember, Carlton today, regular Carlton, is one milligram. And I don't know if you'll recall Carlton Ultra, which has a delivery that is the lowest tar and nicotine delivery on the market. And it is lower, lower than any public health official has suggested a cigarette be made at.

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You may recall B&W's Capri product, very slim cigarette, slimest cigarette on the market. By being slim, it uses less tobacco; therefore, it delivers less smoke.

And over time, Brown & Williamson has made an entire range of products. I'd like to get you to 361. You may remember this board showing the various types of products: full flavor, lights, ultras. And notice they cover an entire tar spectrum from .01, which is Carlton Ultra, to 24, Lucky Strike, still way lower than what it was in the 1950s. An entire range of nicotine.

And here's a very significant point. When these cigarettes are advertised, their tar and nicotine figures are set forth in the advertisements.

And so it's known and has been known for more than 30 years that the companies offer products with different tar and nicotine deliveries. The suggestion in this case has been: That's been a surprise, a secret, who knew that? It's advertised. And we offer a range of products for smokers to select and choose.

Now, in addition to lowering tar and nicotine, and contrary to the plaintiffs' allegations in the case, Brown & Williamson funded an entire range of bioassay research, biological testing, taking the

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latest tests of the day, mouse skin painting, Ames testing, inhalation; and testing various designs: filter, no filter, Burley tobacco versus Bright tobacco. See what the smoke generated from those tests does in the various biological tests, see if there's changes that could be made. And what was the bottom line? You'd get conflicting results. And external scientists did the same tests and got the same results. And what was the bottom line recommendation? You heard: Should I try it one more time? No.

438. Bottom line recommendation was the Tobacco Working Group, and pretty much every other regulatory authority that looked at this, specifically concluded that the best way to carry forward was on the general reduction strategy, that is, to continue to reduce tar deliveries in one form or another.

And Dr. Boyse told you about B&W's biological research in the United States, how she was not aware of any agreement that prevented B&W from conducting that research, or American.

And she also testified, Dr. Appleton did as well, about the company's work with respect to additives, reviewing that and making sure that the additives used by the company don't increase the hazards of smoking.

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Now, in addition to this sort of additional approach to lowering tar, offering a range of products, you heard in this case about alternative technologies. Is there a product we can make that could be an alternative to the traditional, conventional cigarette?

And Brown & Williamson funded, and its affiliate in England, BATCO, is one of the leaders in thinking about this kind of technology. And if you look in the documents that you'll have with you, you look at Defendants' Exhibit 37124. It worked. That's a patent for an idea called Aerial.

And what was Aerial? It was going to be a product that heated rather than burned tobacco. Well, it was ahead of its time. It was in the 1960s. Ultimately, RJ Reynolds, Philip Morris were able to come up with technology to heat tobacco rather than burn, and created Premier, created Accord.

Brown & Williamson itself has pursued a product idea, an experiment called Airbus, but it's all been part of this effort to try to explore alternative technologies and do whatever can be done.

And this technology wasn't hidden. It's very interesting. This is a patent -- and you can take a look at it in the jury room -- that says: It's been alleged that tar is the problem. We're trying to come

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up with some ways to address that. Here's an idea. Maybe we'll create less tar by heating tobacco.

And they put it in a patent for everybody to read. Not hidden.

Now, that short summary, you could go into more detail, and you may remember that Dr. Boyse was here for hours discussing Brown & Williamson and American's work in terms of products over the years.

But that little summary, that provides a fair historical context for you to judge whether this company was doing all that can be done, whether it was pursuing the state of the art techniques of the day, trying to be inventive, trying to be creative, trying to make products that may potentially be less hazardous. And that's context.

Now, by contrast, the plaintiffs have tried to take isolated documents to portray the companies unfairly, and indeed often to portray the documents themselves unfairly.

And during closing argument, I'm sure you saw a number of documents that you never heard of in the case before. But there was one document that you had heard of before and was discussed with Dr. Dixon. That's Plaintiffs' Exhibit 3276.

You may recall that was a document with a

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line in it about bags of money. You remember Mr. Rosenblatt said he wasn't going to tell you where that document came from or what person wrote it; and there's a reason for that, and that's because that document wasn't written by Brown & Williamson or American or even seen by those companies. It was written by an employee at BATCO, British American Tobacco Company, which is not even a defendant in this case.

But you might recall Dr. Dixon is an employee from BATCO, and we had him over here to testify based on his expertise in compensation. And Mr. Rosenblatt had a chance to ask him about that document.

And go ahead and look at it and see if you remember this. That document contains in it the word "rubbish." And Mr. Rosenblatt asked Dr. Dixon: Dr. Dixon, does the word "rubbish" in England mean the same thing that the word "rubbish" means in America?

And he said: Oh, yes, it does. Rubbish means rubbish.

And what he said, after looking at that document and being asked questions about it, was that that document was rubbish. And he went down and spoke to the author of that document, Mr. Greene, and told him that he didn't know what he was talking about; that

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he was proposing an idea that nobody accepted, that nobody acted on. And that's a document that's offered to you as context to judge the companies.

Now, ladies and gentlemen, Brown & Williamson and American have been in business for more than 100 years, and you've heard this from each defendant. We've got thousands upon thousands of employees writing documents. The companies aren't perfect and their documents aren't perfect.

And by 1995, for example, Brown & Williamson -- and Dr. Boyse testified about this -- had millions, millions of pages of documents. You know, you heard these allegations about documents that say in them: Throw this out, destroy, discard. It's ironic that they're reading the document. They have it in their hand when they're reading it to you, and millions of pages of documents were retained by our clients and by the other defendants in this case, and those documents have been gone through, and in any of those millions of pages has anybody found a new fact that would have changed public discussion on smoking and health?

Did any of those documents constitute a public statement by Brown & Williamson or American that the plaintiffs proved was false and proved that the

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person who wrote it believed it was false? No.

Have they found in those documents any new idea about how to make cigarettes that's not been publicly discussed? No.

Have they found any truly new science? No.

Have any unknown risks been uncovered? Absolutely not.

So what is it with these documents? What is it? It is an effort to try to create something out of nothing. It's an effort to suggest that new information has been discovered, when it hasn't. And it is an effort to ignore what these companies have done.

And you can look at the documents, ladies and gentlemen, and some of them are great, some of them are great documents. Some of them are good documents, and some of them are rubbish. But they don't provide the context for you, ladies and gentlemen, to judge these companies.

The context for judging these companies is their 40-year history of action that you have heard from the various witnesses in this trial, in the trial of this case.

Now, I'm going to turn now to the more technical portion of my presentation and talk about

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some of the issues that the plaintiffs claim were concealed or claim constituted manipulation.

I'm going to talk about those issues and I'll begin with the FTC method. The plaintiffs' attack on low-tar cigarettes really fell into two categories: They don't like the FTC method because they don't think it predicts what a smoker gets, which it doesn't, and it was never intended to do; and they don't like low-tar cigarettes because of the issue of compensation.

Now, you remember compensation was when somebody was smoking a higher tar cigarette and switched down to a lower tar cigarette, they might take bigger puffs or adjust their smoking pattern. That's compensation.

And the plaintiffs say all of the information on that was hidden by the tobacco companies, unknown to the public health community.

Now, a lot of witnesses addressed these issues, but the chief accuser was Dr. Michael Siegel from Boston. He was a witness with a lot of opinions and no information to back them up. He testified on November 5 and November 6th.

Now, plaintiffs presented Dr. Siegel to you as a key witness who would allegedly tell you what the

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tobacco companies knew that the public health community didn't know. And Dr. Siegel made a whole string of allegations of what the public health community supposedly didn't know.

So you're going to hear me mention him and his testimony a good bit in my presentation today, because the plaintiffs tried to have him carry a whole lot of water on their claims of fraud and concealment.

And as the evidence showed time and time again, there were a lot of holes in his water bucket.

Now, Dr. Siegel graduated from medical school in 1990. He doesn't maintain a license to practice medicine. He's basically an antismoking activist. He spent a lot of time in college and since as an activist on smoking issues. He's a board member of the Americans for Nonsmokers Rights. And he couldn't bring himself to admit to us that that was an antismoking group. I had to remind him that he had admitted that at his deposition.

But now, he's an earnest fellow. He is entitled to campaign against smoking. He is a bright fellow, a dedicated public health advocate, and he's entitled to campaign against smoking. But what he's not entitled to do is come into the courtroom and make claims against these companies that aren't true.

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Now, Dr. Siegel told you that the public health community didn't realize that the FTC machine was not intended to guarantee precisely what a smoker would get, didn't know anything about compensation until the '80s.

But he was wrong. Let me turn to the FTC test first. You recall the FTC test method. It was a machine; took certain puffs on a cigarette to generate tar and nicotine figure.

And what the test was designed to do was to rank cigarettes. If you had two cigarettes, one that was 10 milligrams of tar, one 9 milligrams, you smoked them through a machine in the same way, you'd get 10 milligrams in the first cigarette, 9 in the other. Helps you to rank the cigarettes.

That's valuable information because it tells you that between two cigarettes that you might buy, a 15-milligram cigarette and a 5-milligram cigarette, if you smoke them both in the same way, the 5-milligram cigarette is going to have less delivery than the 15. That's what the FTC tells you.

Does that mean it tells you precisely how much tar and nicotine that a smoker will receive? No. A smoker may smoke a 15-milligram tar cigarette and receive less than 15 milligrams; may receive more, may

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receive the same.

It was like EPA gas mileage ratings, to give you something to compare. And the FTC required it and we're obligated to the FTC to put it on our advertisements. You've seen it. 478. And then -- excuse me, 699. And here's an example of a figure in an advertisement: 16 milligrams tar, 1.2 milligrams nicotine, average per cigarette by FTC method. That's what's in the advertisements.

Now, the plaintiffs say that it was hidden from the public health community that the machine method might get a different delivery than a smoker. And is that true? Well, I asked Dr. Siegel about that. First let me show you what's in evidence as Defendants' Exhibit 23558.

372, please.

That is a letter from American Tobacco Company, Brown & Williamson, Liggett and Myers, Philip Morris, RJ Reynolds to the FTC in 1966.

And if you give me 686, please.

That's a blow-up of it, and look what it says there: Whatever procedures are adopted by the commission, the results will apply only to that particular set of test conditions and will not necessarily indicate relative smoke yields to any

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particular smoker, in view of the wide variety of smoking patterns followed by individual smokers.

That's in a letter from the industry, from these companies, to the FTC. So was it hidden information? No.

And when the FTC adopted the method, they issued a press release.

If you could go to 687.

And what did that press release say? It says: In determining the testing method, the commission has not attempted to gauge the test to the amount of smoke or tar and nicotine which the average smokers would draw from any particular cigarette. No two human smokers smoke in the same way, no individual smoker always smokes in the same fashion, et cetera.

In other words, precisely recognizing that this was a test to rank cigarettes and not to guarantee what particular smokers would get.

And that's what was announced to the public. So from the very beginning, the FTC understood that it was a way of ranking cigarettes; that smokers smoked differently. And it wasn't hidden; it was known and it was set forth.

So Dr. Siegel was wrong about that allegation, that the public health community didn't

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know anything about that. And why was he wrong? Because he just hadn't checked what the public health community knew on this topic before he came here to testify.

Now, let's turn to compensation. I just explained to you, I reminded you again of what compensation is: Some smokers switch, and when they first switch, adjusting their smoking behavior. The plaintiffs' claim that because of compensation, it totally offsets the benefit of switching to a lower tar cigarette.

First of all, there are many smokers who start with a low-tar cigarette, so this whole issue of compensation doesn't even apply to them.

But second, the evidence shows that switchers from high tar to low tar do, in fact, get a lower delivery, because compensation is only partial. And Dr. Dixon came and testified to you about that.

370.

And you may remember this board. And here's a comparison of a 15-milligram cigarette and a 5-milligram cigarette; a switcher going from 15 to 5. Here's the smoker smoking 15 milligrams, and this is the actual human intake. When that smoker switches to a 5-milligram cigarette, would you expect a decrease of

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10 milligrams? If he smoked the cigarette precisely the same, that's what you would get.

But some smokers, when they switch, take bigger puffs. They adjust their smoking and they get something in the middle for some period of time, and that's called partial compensation.

And why does that happen? Why is it that when a smoker switches from a high-tar cigarette to a low-tar cigarette they take bigger puffs? And the plaintiffs would have you believe that smokers are nicotine-driven robots with things happening in the deep recesses of their brain driving them to do this.

But Dr. Dixon came and explained it, and basically what it has to do with is mouthfeel and aroma and a sense of smoke in the mouth. And higher tar cigarettes, Dr. Dixon explained, have a certain flavor, mouthfeel, different than lower tar cigarettes.

Now, milk and cigarettes are not alike; I'm not saying that they are. But to get a hold of this concept, remember the issue with respect to switching from whole milk to skim milk? Used to drinking whole milk, switch down to skim milk. Doesn't taste like milk at all, has a whole different feel, feels like water. But eventually you get used to it. Now you can't go back to the whole milk.

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Well, the same thing with respect to high-tar and low-tar cigarettes. When you first switch down to low-tar cigarettes, it's an adjustment, change in mouthfeel, and the smoker takes a bigger puff. But after a while, they adjust to it; they get used to it.

And so this allegation of compensation just doesn't stand up, because what happens is that smokers only partially compensate in the first place, 40 percent, the evidence shows, but as they get 60 percent of the reduction. And after a while, they adjust and switch to their normal smoking pattern.

But, ladies and gentlemen, there's another aspect of compensation that I want to discuss with you, and that is Dr. Siegel's allegation that this whole topic that I've just discussed with you was hidden from the public health community by the tobacco companies. You remember Dr. Siegel's allegation. He said the public health community didn't know anything about it until the 1980s, because it was hidden by the tobacco companies.

Let me address that issue. First of all, we showed Dr. Siegel an article in 1968. And each one of these, if your memory is great, you'll remember this was like on November 5 and 6 of 1998. And 439, 1968 article. This was published by Dr. Armitage in the

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Journal of Nature in 1968, and it says: It's worth noting that someone smoking a cigarette has fingertip control of how much nicotine he takes into his mouth. Fingertip control. That was 1968. Had Dr. Siegel seen it? Nope.

Let me take a look now at 440. This is an article, 1970, written by Dr. Heather Ashton. Again, what's interesting and unique was these articles were funded by the industry. What does this one say? Comparing smokers that switch: The results are compatible with the possibility that smokers automatically adjust the nicotine dose obtained from a cigarette to some optimum level which may vary with different activities.

Talking about adjustment. Well, had Dr. Siegel seen that? No.

How about Defendants' Exhibit 15567? And you'll have an excerpt from this in the jury room, but it really just takes the cake, ladies and gentlemen. Here's this book called Smoking Behavior, published in 1978. You'll have an excerpt; you can look at it. Defendants' Exhibit 15567. And this has articles in it, chapters in it written by people from the tobacco industry talking about this very subject of compensation that I just discussed with you.

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And in fact, take a look at 441. And this is a quote from this text in 1978 published by the industry: It's often assumed by smokers and implied by others that it's preferable to change to a brand which offers lower deliveries of tar and nicotine, and to an increasing extent such advice is becoming more explicit.

And it goes on. Next paragraph: However, there is a considerable body of evidence that shows that smokers alter their smoking patterns when they change to a brand of cigarettes with different delivery characteristics.

And remember the allegation, the theory -- I'll come back to it in a minute -- was that the reason people were compensating was that they were used to a higher level of nicotine, and they wanted to smoke their lower tar cigarette to get their level of nicotine they were used to.

That was the theory. Dr. Siegel said it was a hidden theory; the tobacco company hid it.

It was published in this book: If a smoker of relatively high delivery cigarette changes to a brand with substantially lower deliveries, he may actually increase his intake of tar and carbon monoxide in his attempts to compensate for the reduced delivery

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of nicotine.

Had Dr. Siegel seen this before he came here and told you the public health community didn't know anything until the '80s, because tobacco companies, tobacco scientists, never told them? No, he hadn't seen it. He just hadn't seen it.

Now, he also wasn't familiar with a 1983 document from the Third Report of the Independent Scientific Committee on Smoking and Health. I think this is the crowning touch. Let me ask you to take a look at 442. 442.

This is the Third Report of the Independent Scientific Committee. And I've underlined that first line: The industry has told us, however, that the level of nicotine in some cigarettes has already reached a point where consumers are trying to maintain their nicotine intake by methods of compensation. These include increases in puffing, depth of inhalation, cigarette compensation and changing brands.

The industry has told us. This is the Independent Scientific Committee on Smoking and Health, which is akin in England to the Office of Smoking and Health here in the United States.

So compensation is partial. It doesn't last, short term. But do you have to only take Dr. Dixon's

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word on that issue that people adjust and get used to it? The plaintiffs' star witness in the case, Dr. Neal Benowitz, what did he have to say about this issue?

Show me 443.

This is Dr. Benowitz in a 1994 article. I showed this to Dr. Siegel. Dr. Siegel had said: Compensation, terrible; totally offsets the benefits of low tar.

I said: Dr. Siegel, have you ever seen this article by Dr. Benowitz? Look what it says. Over-compensation, i.e., inhaling more smoke from low-nicotine cigarettes than from higher tar brands, appears, however, to persist only for days or weeks. In long-term studies of carbon monoxide exposure, after subject switched to low-yield cigarettes, compensatory over-smoking appears not to persist. Dr. Benowitz.

Had Dr. Siegel seen that document? No. Again, he had not.

And what about the theory -- what about the theory that it was nicotine that's driving compensation? Well, Dr. Dixon came and talked to you about that and told you that that was tested. What they did was they took cigarettes, kept the nicotine level the same, and lowered the tar levels and had the high-tar smoker switch. What happened?

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When the nicotine levels were kept the same and the tar was lowered, the smoker still engaged in additional puffs, bigger puffs, indicating that it's something about the tar, not the nicotine, that's causing the bigger puff. That's exactly what Dr. Dixon told us. It's a taste mouthfeel. You get used to the high-tar cigarette, switch down, you adjust. And that's all there is to compensation.

Now, obviously, nicotine plays a role. Remember Dr. Dixon told us that the nonnicotine components of smoke add flavor, mouthfeel, and the nicotine is instrumental in giving the catch in the back of the throat. Talked about a balance.

He gave us an analogy. He said it's like Coca-Cola. If you drink Coca-Cola that's flat, it just doesn't taste like Coca-Cola; it needs the bubbles and the sensation to feel like Coca-Cola. Same thing with tar and nicotine. Got to be in balance. That's what Dr. Dixon told us.

So these allegations about FTC and compensation just didn't stand up, nor did the plaintiffs' allegations about low-tar ads. The companies print the FTC numbers in their ads pursuant to their obligation to the FTC; and not a single witness came in here and told you that the numbers that

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we have printed are not correct numbers, that weren't the results.

And nothing in the ads say that these cigarettes are guaranteed to be safer. In fact, they all bear the same warning: These cigarettes cause cancer.

Now, the public health community has recognized that lower tar was potentially less hazardous. Public health scientists have been saying for decades that less tar is better, and it makes sense and agreed, and we pursued that alternative. It made a whole bunch of products available. We properly produced them and we properly advertised them.

Now, let me turn to the allegation that the companies manipulated nicotine. Various witnesses, and again Dr. Siegel is chief among them, chief accuser, said that the companies manipulated nicotine to addict smokers so they couldn't quit.

And the implication of that allegation is that nicotine was increased. It was increased. That allegation fell flat on its face. You all know so much about nicotine now that it hardly bears to remind you, of course, nicotine occurs naturally in tobacco. And since the 1950s -- and you have that board over there against the wall. You see that tar and nicotine levels

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on average went down; they didn't go up. They weren't manipulated up. They went down. There was no spiking.

You heard Mr. Heim talk to you about Dr. Uydess and his statements on spiking. There's no evidence of any such activity in commercial products. And the companies can and do offer products at a variety of nicotine levels, but that's not manipulation to addict people. Offering and advertising a range of products for smokers to choose doesn't fit this sinister allegation of manipulation.

As I said before, the varying nicotine levels are not secret; they're advertised. And the companies, they test their products and they blend them to be sure that they meet whatever FTC number is put on the package.

But, again, that's not manipulation to addict people. Plaintiffs would have you believe that all smokers smoke one brand of cigarettes, one nicotine level, and they're hopelessly hooked and they can't change.

But the facts are, there are hundreds of types of brands. Smokers smoke light, full, ultra. In fact, there's a denicotinized brand that you heard talked about, the Next cigarette.

When you peel away the plaintiffs'

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allegations of manipulation, you'll find that they were way overplayed in this case and fundamentally unfair.

We talk about manipulation meaning increase, but then we asked Dr. Benowitz: What does manipulation mean to you? Could it mean lowering?

He said: Yes, it means lowering.

Well, lowering nicotine, lowering delivery, is a good thing. How can that fit the plaintiffs' label of manipulation?

What you find is, what the plaintiffs pointed to to support their claims, consists of documents in the companies exploring ways not to addict people, but to the contrary, to find a less hazardous cigarette.

You heard Mr. Ross talk a little bit about the concept of a low-tar, medium-nicotine cigarette. And I'm going to show you a couple of excerpts from the 1981 Surgeon General Report on that topic.

But before I do, I just want to remind you that the theory was that tar was the culprit, get people to lower their tar. Well, some people who are smoking higher tar cigarettes were not switching to low tar. And the theory was: Well, if you kept nicotine, didn't lower it as much, maybe you can get more people to switch over to lower tar cigarettes. That was thetheory of less hazardous cigarette.

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How do you do that? The companies experimented with lowering nicotine, then adding back some or trying to use high-nicotine tobaccos. But the evidence shows that these were experiments that never got beyond the test phase, the test stage, because what you created were cigarettes that were out of balance. You didn't have the proper balance between tar and nicotine. The tar and nicotine ratio wasn't in balance.

And are these just ideas that came from the tobacco companies? No. Take a look with me at the 1981 Surgeon General's Report. I want to let you look at two things. First of all, look at 668. You'll have this excerpt with you in the jury room as well.

Let me show you two things about this document. This first is a commentary on lower yield products. Most of these persons have changed to lower yield cigarettes. This is the Surgeon General in 1964, in the expectation that this will somehow reduce the hazards of their smoking: It's in the interest of these persons and in the public interest to know to what extent these expectations are justified. In this 1981 report, 1981, the Public Health Service has reviewed the questions again and in far greater depth than before. Overall, our judgment is unchanged from

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that of 1966 and 1979. Smokers who are unwilling or as yet unable to quit are well advised to switch to cigarettes yielding less tar and nicotine, provided they do not increase their smoking or change their smoking in other ways.

And did this report in 1981 talk about this issue of a low-tar, medium-nicotine cigarette? It did.

Go to 669.

Look at this. And remember, they're pointing you to documents where the tobacco companies are evaluating whether you can lower tar, not lower nicotine as much, experimenting with that. And the plaintiffs are calling that manipulation. This is the Surgeon General. This is the 1981 Surgeon General. Dr. Julius Richmond was the Surgeon General.

Here's what's said: It is necessary to evaluate cigarettes with lower tar-to-nicotine ratios than are currently found in the marketplace. Compensation by smokers of lower tar and nicotine cigarettes appears to be based on nicotine delivery. The tar-to-nicotine ratio might limit the delivery of smoke constituents to the smoker; a low ratio might be a desirable strategy for lower risk cigarettes.

Next paragraph: By smoking more to compensate for lower nicotine intake, lower tar and

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nicotine cigarette smokers can inadvertently increase their exposure to tar and carbon monoxide beyond what might be expected from a less intensively-smoked tar and nicotine cigarette.

Look at this next sentence: Because less hazardous cigarettes may require the delivery of moderate levels of nicotine while delivering lower levels of tar and carbon monoxide, russell -- remember Dr. Russell who we started with -- Russell has proposed that lower tar-to-nicotine ratios should be used to indicate less hazardous cigarettes.

That is the Dr. Russell who I read to you from the beginning that said he was going to be run out of a conference because he was going to suggest that for the last 20 years the industry has done more than the public health community because it's tried to make cigarettes safer.

This was such a technique that was explored and they couldn't do it. You heard Mr. Ross tell you about the Lorillard program. Couldn't be done.

Now, ladies and gentlemen, even Dr. Siegel admitted that efforts by the companies to pursue these types of goals could not be called manipulation. And when you look at the documents, that's what they're all connected to this type of effort, to make lower tar

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cigarettes more attractive.

There's no evidence that nicotine was manipulated to make smokers unable to quit. Smokers are able to quit. 50 million Americans have quit smoking. Now, in a world where nicotine levels are dropping, smokers are quitting in droves. It is truly unfair to be accused of manipulating nicotine, jacking the nicotine up and making people unable to quit.

And one of the unfairest allegations in this case concerns a tobacco called Y-1. And again, calling upon your powers of memory reserve, back on October 19th, 1998, when this journey we were on was in its infancy -- we hardly knew it would last to be 8 months old -- on October the 19th, when Mr. Rosenblatt made his opening, he called Y-1 a super-duper secret tobacco, and he suggested that it was used improperly and secretly.

And they didn't call you one witness, not one, not one witness to testify about it. B&W called Dr. Boyse and she delivered the facts. And when you hear the facts, you can't believe the allegation has been made. Y-1 was not a secret tobacco. It was invented by the government, by the United States Department of Agriculture.

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They took a high-nicotine tobacco that had poor taste, they cross-bred it with a low-nicotine tobacco that had a better taste, trying to make a good tasting high-nicotine tobacco. Why? So they could do this: So that they could try to make a less hazardous, low-tar, medium-nicotine product. And that's what Y-1 was.

The government eventually gave seeds to Brown & Williamson. Brown & Williamson tried to make the tobacco commercially useful, agriculturally useful.

And in fact, Brown & Williamson -- and you'll have these documents. 471. You'll have these documents with you. This is Defendants' Exhibit 15045 and 15046.

And what is it? It's a patent filed in 1991. They might lead you to believe that Y-1 was an issue around forever and ever. 1991, B&W is trying to patent their improvements to Y-1. And in these documents -- and take a look at them; they're publicly filed -- they call the tobacco high-nicotine tobacco.

B&W made an attempt to use Y-1 to make a low-tar, medium-nicotine cigarette, just like Lorillard, just like RJR. It failed; couldn't make it work. It was out of balance. It wasn't acceptable.

So that's it on Y-1. It wasn't secret. The

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government invented it. The government gave the seeds to Brown & Williamson to try to make a less hazardous product. And that's the accusation that's made in this case.

That's an unfair allegation, and it's got no substance. And that's why the plaintiffs didn't call you one witness on the topic and didn't put on any proof that any smoker in Florida was ever affected by Y-1 in any way.

Now, Your Honor --

THE COURT: Yes, sir.

MR. SCHNEIDER: -- we've been going about an hour.

THE COURT: It's up to you.

MR. SCHNEIDER: I'm fine. If you're fine, we'll continue on.

THE COURT: You're entitled to a 15-minute break in the afternoon. If you want to do it now, that's fine.

MR. HEIM: Go for another 15 minutes.

THE COURT: We've been voted down, folks. Unless you all want a break.

MR. MOSS: What does the jury want?

MR. SCHNEIDER: Continue.

THE COURT: All right. Let's proceed.

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MR. SCHNEIDER: Let's turn to ammonia, because this is another empty allegation. You might remember in opening statement there was the theory, and Mr. Rosenblatt repeated yesterday, and when you hear what I'm going to say about it, ask yourself: How could this be repeated again?

But here's the theory: Ammonia is used to increase pH, is used to increase free nicotine, so that free nicotine can reach the brain faster. And that's called the bioavailability theory or the absorption theory.

And I'm going to talk about those concepts of ammonia and pH and free nicotine in a little bit more detail, but that's the allegation: Ammonia used to increase pH, increases free nicotine, reaches the brain faster. That's the allegation.

Well, eight days into the case, eight days into the case, a star witness is on the stand, Dr. Benowitz. We asked him, and here is the testimony, Exhibit 445: Now, the theory -- this is Dr. Benowitz being cross examined by me, I believe: Now, the theory that changes in pH level could affect bioavailability, that's something that you discussed here today, correct?

Yes.

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And is it correct, based upon your knowledge, that that theory has not been scientifically proven? Correct?

Answer: Well, we need to talk specifically about what's meant by bioavailability. If you mean affecting the absorption rate.

Because that's the allegation, of course, what do I say? That's what I mean.

Answer: That's correct.

Now, Dr. Siegel came to the courtroom and he said ammonia is used to increase pH, to increase free nicotine, to increase the speed to the brain.

And I said: Well, Dr. Siegel, who has more knowledge on that topic, Dr. Benowitz or you?

And he said: Dr. Benowitz.

And here's what Dr. Benowitz had to say about that theory. (Indicating)

So the theory was rejected by their very own witness. But they kept repeating it. They repeated it yesterday. Or I guess on Monday and Tuesday.

So we called witnesses to address it head on. You remember Dr. Townsend and Dr. Dixon and Mr. Burley -- Burnley, excuse me. Burley is a type of tobacco. Burnley was a witness.

But we called them as witnesses. What did

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the evidence show? First of all, what was the plaintiffs' evidence? What did they tell you on Monday and Tuesday? You want to know about ammonia and pH? They gave you a list of document numbers, a list of document numbers. Go and look at it, because all the testimony is against them. They say look at these documents. All the testimony goes against their theory.

Their own witness went against their theory. Ammonia is found in very small amounts in tobacco. And ammonia compounds have been used to help make reconstituted tobacco. It helps bind tobacco parts together. And it turns out that when ammonia compounds are present, they release sugars and add a flavor note.

And you know what's intriguing? It's got a name. It's called a maliard reaction. It occurs in breads and cookies. And what else did Dr. Burnley tell us about it? Bread, cookies. There was one other. I can't remember.

But when ammonia, teeny, teeny amounts, mixes with and releases sugar, it gives a roasty-toasty flavor.

What the companies found in the 1970s is Marlboro had this great taste, this great flavor note. And they analyzed it and found out that Marlboro was

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using ammoniated reconstituted tobacco in small amounts in their cigarettes.

And they tried to mimic that, tried to figure that out. And you look in the documents, the ammonia documents that he cited, and you will see that there's discussion of the effect of ammonia on flavor. And the other thing it did was reduce harshness, made the smoke less harsh.

Now, there's another aspect to ammonia, and I'm only going to touch on this briefly, and that relates to pH. And what is pH? PH is a scale; tells you whether something is acid, like orange juice, or a base, like ammonia.

And as it turns out, well, how does that relate to tobacco? Well, tobacco smoke has a pH. And what significance is that? Well, it's long been known and published in the Larson text and elsewhere that nicotine, the form of nicotine, is dependent upon the pH of the smoke that it's in.

There's two forms of nicotine that are pertinent: One is bound, bound hydrogen; and one is free. And when pH is very acidic, there's very little free nicotine; and when it's basic, there's more free nicotine. And all that is known and was published.

And from all of that science, a theory arose

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that, as the plaintiffs were alleging, that you might be able to use ammonia to affect pH, to effect free nicotine, but not to increase it to the brain, but to try to get sensations in the mouth, in the throat, impact. The term "impact" was used. And all the witnesses testified that meant the catch you feel in the back of the throat when you inhale the cigarette.

Now, what's interesting is Dr. Siegel said all these concepts were unknown, never heard of them. Of course, they're in the Larson text, they're in the 1979 Surgeon General's Report.

Show 468, please.

This is a chart that shows pH versus protonated versus free nicotine in the '79 Surgeon General Report. Discussing this pH and free nicotine.

And in connection with trying to develop less hazardous cigarettes in the public health community, a theory arose that you might be able to use less nicotine, and maybe by adjusting pH, get the same impact, get the same balance. And that was a theory that was discussed in the Journal of the National Cancer Institute in 1972.

Let me ask you to take a look at 446. This is Dr. Siegel again. Dr. Siegel said this would never have been heard of, never been in the press, never been

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in the public health literature, nobody knew anything about it.

I asked him: And the theory is that if you add an alkaline substance, you might be able to raise the pH and have an effect on nicotine, correct?

That's exactly the theory, and he goes on.

And is it a theory discussed in this article in the Journal of the National Cancer Institute in 1972 as a method of pursuing a safer cigarette or less hazardous cigarette? Correct?

Answer: That's correct.

So that's not an article you reviewed before you came here today and gave your opinions, correct?

Answer: I had not seen this article, but, again, he says, it is right.

It happened again. He hadn't seen an article about an issue in the public health community that he came to tell you about.

Now, Dr. Benowitz also had written and made statements at conferences about this issue. Let me ask you to take a look at 367.

This is Dr. Benowitz reading from an article, a statement he made at a conference: The higher the pH, the more nicotine impact there would be on the throat. Throat. One would experience more irritation,

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more of a nicotine-type sensation. I don't think that differences in pH would make much of a difference in bioavailability, although it would impact on how strong the cigarette tasted.

Do you see that, Doctor? I asked Dr. Siegel.

Yes, I see it.

Have you reviewed that prior to coming into court today?

No. No. I just came to accuse the companies of knowing information that was not known by the public health community, of having a theory with respect to ammonia that increased the speed, but I had not looked at what had been said in the public health literature.

So that was a theory, but what happened in actual practice? What happened in actual practice is that the amount of ammonia technology, the ammonia compound, is so tiny that it has no effect on actual pH.

And the witnesses in this case testified to that: Dr. Townsend, Dr. Appleton, Dr. Dixon, Mr. Burnley, and so did Dr. Benowitz. They made this great allegation, so Dr. Benowitz was asked: Have you seen any evidence of that?

Let me take you to 447.

This is Mr. Heim asking Dr. Benowitz. And I

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want to just go to the third sentence there -- well, let me read you the whole question: I'm going to come to that part of what you talked about yesterday. But I want to stay with what we know in terms of evidence and facts that support charges and theory. And my question to you doctor is, simply, you have not seen any imperical evidence, any fact factual data that shows that the ammonia used by Philip Morris in making its commercial cigarettes has any effect on the pH of smoke?

Answer: Dr. Benowitz, that's correct.

So you had a theory and in practical application, ammonia did not increase pH. And in addition, all the witnesses agree that spoke about it, had knowledge, Dr. Benowitz, Dr. Dixon that free nicotine that gets absorbed in the throat, doesn't get to the brain faster; it gets there slower. Bound nicotine goes into the lungs, gets into the brain faster. That's why Dr. Benowitz said bioavailability, absorption rate wasn't increased.

And finally, ladies and gentlemen, there is no evidence that there's any correlation between ammonia and sales. If that was the case, all products would use ammonia. They don't.

You heard Dr. Dixon say that BATCO's products

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don't use it, Kool cigarettes, 1960s, '70s, never used any ammonia. No correlation between pH and sales.

And you may recall this chart that you saw with Dr. Towsend, 798, in which shows the pH varying over time as the blends vary up and down between 6 and 6.3; which, by the way, now that we're all pH experts, is acid, 0 to 7 is acid, 7 is water, above 7 is base. And the acid range, remember what I said, acid, acidic, very low free nicotine. Sales going down, pH of the blend moving up and down. No correlation.

So in the end, as Shakespeare said: A lot of sound and fury signifying nothing.

Now, ladies and gentlemen, plaintiffs' allegation about cigarette design, about manipulation, fell apart in this case. The evidence shows that the companies responded to smoking and health issues. They pursued every possible technique to lower tar. They pursued novel devices, and they did exactly what you would expect a company to do with a product with known risks: They tried to find ways to lower the risks and give consumers a choice.

You heard the plaintiffs suggest in this case that companies didn't live up to their responsibilities, but we did. What are our responsibilities? The plaintiffs argued that because

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some smokers develop disease, it's our responsibility to get out of business; we need to shut down. But that's wrong.

Our government has decided that people are aware of the risks, are warned of the risks, and have the right to smoke. But what is the responsibility of the company? The responsibility of the company is to fund research, to make potentially less hazardous cigarettes available, to put the government warnings on the package, and to continue research, and to try to find the key, try to find the mechanism that one day is going to enable you to make a cigarette that everybody can say is safe. Pursue that every day. That's our responsibility. And that's what we have done.

Now, I'm going to turn to my second point. But I think I'll give us all a short break, if you don't mind.

THE COURT: All right. We'll take our break now.

(The jurors exited the courtroom.)

THE COURT: All right. We'll be in recess.

(A 15-minute recess was taken.)

THE COURT: All right. Let's get the jury out, please.

THE BAILIFF: Bringing in the jury. Jurors

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entering the courtroom.

(The jurors entered the courtroom.)

THE COURT: All right, all present and accounted for. Have your seats. You may proceed, sir.

MR. SCHNEIDER: All right.

THE COURT: Before you do, we may be working a little later tonight. 5:30ish, if that doesn't bother anybody.

JUROR: I have a class.

THE COURT: When?

JUROR: 6:00.

THE COURT: All right. One juror has class at 6:00. See what we can do about it. Thank you, ma'am.

MR. SCHNEIDER: Ladies and gentlemen, now I'm going to move to point two, the risks, that the risks were known. Florida smokers at all times have been fully aware of the risks of smoking, and that screen is supposed to say, but it doesn't, as has the public health community.

Now, I told you at the outset, the plaintiffs' claim that they didn't know the risks of smoking, and in addition to that claim, the plaintiffs and the witnesses alleged that the defendants monopolized, hid the whole concept of addiction.

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They claim that we hid this information and did nothing to assist the public health community in compiling it, and nothing could be further from the truth.

First of all, you heard Mr. Moodhe yesterday talk to you about research that CTR funded, an enormous volume of published literature. And that's what was done to live up to what was said in The Frank Statement.

But that's only the tip of the iceberg in terms of what is out there, and the huge volume of information publicly available.

The government and public health scientists in the United States and across the world have continuously researched cigarettes and health effects for more than 50 years.

And you heard about the Tobacco Working Group program, a 10-year program studying cigarettes. You recall that Dr. Boyse testified that cigarettes are the most studied consumer product in history. There were 6,000 articles in 1964, and 30,000 in 1979, and 57,000 in 1989.

But the funding of research predated 1964. You recall that Dr. Boyse talked to you about the Medical College of Virginia. And specifically you'll

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have with you in the jury room -- 374, please -- a set of exhibits, they run from 14573 through 14580. And they're a set of reports, recent biological research reports funded by the American Tobacco Company from 1950 to 1971.

You'll have this in the jury room with you, and hopefully you can see some of these things on the table of contents from one of these reports. But this is a document published by American, made available in 1950, '51, '52, all the way through 1970s.

Look at the titles: Cigarette Smoke Irritation; Toxicology of Nicotine; Fate of Nicotine in the Body; Cardiovascular Effects of Nicotine; Factors Controlling Membrane Penetrability of Nicotine; Role of Nicotine in the Cigarette Habit, and so on.

Hidden concepts? Hidden information? Hidden issues? You can look at those pamphlets when you're back in the jury room.

And I showed you earlier, and I believe Mr. Heim spoke about this yesterday. 675. This is again the Larson text. Ladies and gentlemen, you'll have the excerpt from it, and I spoke to you about it before and how the Surgeon General relied upon it. With this text, you can look down the table of contents. It has information about the effects of

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nicotine on the brain, the medulla; talks about chemicals in tobacco smoke; the epidemiology; fate of nicotine in the body. Got an entire chapter, Chapter 15, on the tobacco habit.

And I'm going to show you some of the pages from that. This text covers every conceivable issue concerning smoking and health from 1961. It summarizes 6,000 articles published by scientists, funded by the industry.

And you know, you heard yesterday that the concept that nicotine could be classified as a drug was a big secret. You had to get these documents from the tobacco companies to find this out. You had to have this case in 1994 to find that out.

Well, here is this text: Tobacco Experimental and Clinical Studies, Larson, Haag and Silvette. You open the book, Page 1. There they are. Professor of pharmacology, P.S. Larson; Haag, professor of pharmacology; Silvette, visiting professor of pharmacology.

And what is pharmacology? Pharmacology deals with the study of drugs on the body, study of effects of substances on the body. And this is a text being published. That wasn't a hidden concept.

Now, you heard Mr. Rosenblatt during cross

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examination belittle the text, saying nobody reads it, just scientists. Well, first of all, he's wrong. The Surgeon General read it and relied on it, as I talked to you about.

And how can they claim that information was hidden? How can they claim this information was hidden when you put it between the covers of a book and it's relied upon by the Surgeon General, the very Surgeon General who concludes in his opinion smoking causes lung cancer in 1964?

But Dr. Siegel said that we hid the health effects. And you would have thought that before you come to Miami, and you make the allegation that the information is hidden and the public health community doesn't know it and the tobacco companies had the information and didn't provide it, what would you have done? A side-by-side comparison: Here is what the tobacco companies knew, here is what the public health community knew, and you'd be able to show me. Show me the document that has in it the hidden information, the unknown information.

And did Dr. Siegel do that? No. And you remember, I asked him. I said: Dr. Siegel, you said that we hid the health effects. I've shown you this avalanche of material. Tell me, what is the document?

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Where is the document that has in it hidden, unknown information.

And he said he wasn't able to identify a single one.

Now, when you're making serious charges against a company like that, against these companies, against any companies, against any people, you ought to be able to support your claims.

But he could not. And it's startling. He came to tell us what the public health community knew and didn't know, and he hadn't even seen this book. He hadn't seen it, and in the first couple of pages in the '64 Surgeon General Report referenced as a key reference source.

Now, you have the task of judging credibility. But when you have a witness who comes to tell you about what the public health community knows, and was as unfamiliar with what was in the public health literature as this witness, you make a judgment of credibility.

I've shown you the screen -- and by the way, I messed up because I was calling out these little numbers on the page, but the actual exhibit number is what is on the top of the page. So if I put these up here, look at the exhibit number. This is DX 14713.

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But when a witness comes into this courtroom, you would expect him to be able to back up his charge, and this witness could not. In light of the overwhelming mass of information, you can't claim that the tobacco companies hid the health effects. And suffice it to say, they weren't able to point out to you a single, unknown, the new fact, the missing science.

Now, I want to turn to another area of supposedly hidden unknown information. And this relates to the effects of nicotine and the issue of addiction.

Now, when you came to this courtroom and heard evidence for the first time here about nicotine and addiction, the plaintiffs were suggesting that this whole issue was like a giant surprise. It popped up out of nowhere in 1994.

But nicotine was first identified in the 1800s, discussed in that book. It occurs naturally in tobacco and has long been believed to be one of the reasons people smoke, one of the factors. And as a result of that, as you would expect, people have studied it up, down, sideways and backwards.

And the literature has included articles studying how nicotine reacts with the body, how it's

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metabolized. Hundreds of articles on that.

A chapter on absorption and fate of nicotine in the body. You heard Mr. Rosenblatt say yesterday: Well, nicotine has an effect on the receptors.

That was discovered in 1905, 1905 and published in the public literature. And you may remember Dr. Larry Carr from the University of Louisville. Take a look at Defendants' Exhibit 15723. It's a very nice summary of the history of nicotine research, published nicotine research. Hidden information? Hidden facts? I don't think so.

Now, ladies and gentlemen, in addition to the Larson text, there's many, many, many other things that have been published. I'll show you a few examples. All of this argument and all of the points I'm discussing here today address this whole allegation of concealment. Question 4B on the verdict form. Mr. Reid talked to you about 4A. It can't be fraud to state your opinion. It can't be fraud to use the same words public health scientists are using. It can't be fraud for the defendants to use the words that Dr. Whelan, the plaintiffs' witness, use from the stand.

And I'm dealing with 4B. You can't say it's hidden when it's not. That's the bottom line. That is

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the bottom line.

Now, let me show you this, 665. I'm not going to use this anymore.

This is a book called Smoking Behavior, Motives and Incentives, 1973. Defendants' Exhibit 3286.

Take a look at 663. This is written by William Dunn from Philip Morris. It's a book put together by him and published in 1973. And this is just an arrangement of the cover page and some of the table of contents. And look at some of these table of contents titles.

Show me 664.

1973, 26 years before Dr. Siegel came to the courtroom: Neuropsychopharmacology of nicotine and tobacco smoking; further observations on nicotine as the reinforcing agent in smoking; nicotine related neurochemical changes; additional characteristic EEG differences between smokers and nonsmokers.

Remember all of that that Dr. Gullotta from PM studied EEG. Big secret was claimed. Published in this text. Effects of pH on nicotine absorption from the mouth.

The effects of nicotine were not hidden; the topic of nicotine was not hidden. The public health

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authorities knew all about it, based on information from their own research, their own excellent research, their own excellent scientists and from information provided to them by scientists funded by industry.

So what about this issue of addiction, smoking behavior; was that a hidden fact? That smokers would keep to their habit over time? That some would find it difficult to quit? That they'd smoke repeatedly? Was that hidden? Anybody observing a smoker could see that throughout history.

And what would you expect? You would expect some people to say: You know, when I observe smoking behavior, looks to me like it's a habit. People are enjoying it; that's why they're doing it. They do it habitually, and like any habit you enjoy, it's difficult to give up for some.

Others, other scientists may say: No. You know, it's an addiction. We should call that an addiction. Well, was that concept, was that debate hidden, only known to the tobacco industry?

Ladies and gentlemen, again, the Larson text. I'm going to show you a few things from it. This is published in 1961, available before the Surgeon General published his results in 1964. And remember what the Surgeon General said in '64. He said, it's difficult

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for some people to quit smoking. Make no mistake about it, I'm not saying the habit should be easily broken, but I don't think it should be called an addiction, because it's not like hard drugs. That's what the Surgeon General said in 1964.

In making that decision, he had all of what I'm about to show you available to him in this book published with industry funding. Again, this is Defendants' Exhibit 14713. 472. This is page 526 of the text. I've highlighted the portions.

Let me take you to 693. And this shows you the blow-up of this. In this book, Tobacco Habituation, the terms "habituation" and "addiction," were still used more or less indiscriminately by many writers.

So in 1961 or the '60s, if someone was using the word "addiction" or "habit," they were using it interchangeably; didn't mean anything in particular at the time.

Look at also on Page 526, 691. This is in this text. In this text. I can find it for you, Page 526: That smoking produces a craving far more when an attempt is made to give it up is undoubted, wrote H. Raulerson in 1926, 1926. But it can seldom be accurately described as overpowering. And to regard

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tobacco as a drug of addiction may all be very well in a humorous sense, but it's hardly accurate.

Next sentence: J.D. Rolleston, 1937, was inclined to regard smoking as an addiction. He disagrees.

Let's take a look at 692.

Remember yesterday you heard the concept of drug addiction, that tobacco could be a drug addiction. Unheard of, never before passed the lips of man until the documents were produced in this case. 1961, comparing the tobacco habit to drug addiction. In this text, Page 526.

Take a look at Page 527 of this text, and it's in your excerpt that you'll have, 695.

It is important to recognize these fundamental differences between addiction, morphine and habit. Tobacco, if the nature and meaning of drug addiction are to be correctly understood. L.M. Johnson maintains the directly contrary view that tobacco smoking was not a habit, but a drug addiction. Hidden concept? Published in this book, provided to the Surgeon General, and said here. You reach your decision based on what's out there. Based on these concepts.

Take a look at 694. Same book. Smoking has

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been termed a disease, L.M. Johnson, who considered that any drug addiction was a disease.

So, ladies and gentlemen, the evidence is simply beyond dispute that the effects of nicotine, the concept of addiction, was all out in the public literature in the 1960s through information funded by the industry.

Let me take you to Exhibit, actually Dr. Seevers' 1962 article, 464. In this, Dr. Seevers ultimately writes the Surgeon General Report in 1964 on addiction.

And look what he says in this article, published in 1962, published in the Journal of the American Medical Association: Experts in the field of drug abuse have attempted to preserve the so-called scientific meaning of the terms "habituation" and "addiction" by redefining them and enlarging their scope, in the hope they could serve the needs, not only of science and medicine, but also of law and sociology.

As a long-time student of this problem who must assume his share of responsibility for contributing to the present confusion, it becomes increasingly apparent to me that these terms are beyond salvage with the scientific description of drug effects and should be abandoned.

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The words are being used interchangeably. You don't know in this time period if someone is using the word "addiction," do they really mean "habit"; if they use "habit," do they really mean "addiction."

The situation in regard to the use of tobacco contributing further to the confusion. The term, quote, "cigarette addict," is common among layman, 1962, cigarette addict common among layman, and the term "addiction" is applied to the abuses of tobacco, alcohol, narcotics, without discrimination by many in the medical profession, especially since cigarette smoking has become a cause celeb in certain medical groups.

Now, in 1964, when Dr. Seevers wrote the Surgeon General's Report, he looked at the known facts: Smoking is reinforcing properties, smokers smoke repeatedly, smokers have difficulty quitting, smokers find that they stick to their habit.

And he looked at those facts and he compared them to morphine and hard drugs and said, addiction, scientifically, the word "addiction" ought to be applied to the hard drugs, things that are intoxicating, that have severe withdrawal effects; and smoking, to distinguish it from those substances, we should call it a habit. That's what he decided.

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Based on information known and available, not hidden information in any way, shape or form. And the Surgeon General in 1964 didn't say it's a habit, because he thought people could quit.

465.

This is from the 1964 Surgeon General Report: Thus correctly designating the chronic use of tobacco as habituation rather than addiction carries with it no implication that the habit may be easily broken, or be broken easily.

So Dr. Siegel comes to court and he says all this was hidden, never heard of the concept of addiction, drug addiction, new concept, new revelation. And each of these documents that I showed him he had not looked at before. He had seen the Surgeon General Report of ours, but the Seevers article he had not seen and these pages from the Larson text he had not seen when he made those charges.

But even Dr. Siegel had to admit, after showing him this, that there were various articles claiming that nicotine and smoking was addictive.

If you look at 466:

And you are aware, are you not, from reading the literature in the '50s and '60s, that there were various medical articles claiming that nicotine and

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smoking was addictive, and others saying it was a habituation. That was published in the literature in the '50s and '60s. You know that, correct?

Correct.

And it's been known for decades and decades that some people find it difficult to quit; isn't that correct?

That's correct.

So this is one of the prime examples, and you may remember the exchange with Dr. Siegel. I said: Dr. Siegel, don't you think that a reasonable person could say that cigarettes are not like heroin and cocaine? Don't you think a reasonable person walking around in society could say that?

And he said: Yes. I think they could say that, because the tobacco companies have influenced them and caused them to think that nicotine is like chocolate and caffeine. That's the only reason they would say that.

I would submit to you that in 1964, the Surgeon General made a very reasonable decision. You can't compare cigarettes to hard drugs. Dr. Siegel's suggestion that nobody could contend otherwise is as valid as all of his claims that the public health community didn't know what he said they didn't know.

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Totally invalid.

Now, yesterday, the plaintiffs showed you a memorandum, Exhibit 796, written by Addison Yeaman. You may remember it. He told you: Read that document. Mr. Yeaman was a brilliant lawyer. That's what he told you.

Now, the first thing I need to tell you about that document, as written in 1963, is that Mr. Rosenblatt made a major mistake when he read you that document. I think he just misread it, but you may recall he was talking about this document. He was talking about Mr. Yeaman, and what he said was -- he was talking about Yeaman, quote -- this is from Mr. Rosenblatt's closing, and then he goes on to say: Well, you know, cigarettes have certain unattractive side effects. They cause or predispose to lung cancer. And he's saying this in 1963. That's what Mr. Rosenblatt read to you.

Well, he made a mistake, because he was reading this paragraph, this paragraph numbered 1 of Exhibit 796, but it's preceded by a sentence with a colon. And here's what it actually says: But cigarettes, dash, we will assume the Surgeon General's committee to say, dash, we will assume the Surgeon General's committee to say, despite the beneficient

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effect of nicotine, have certain side effects. Wasn't Mr. Yeaman saying this: He was hypothesizing what the Surgeon General would say.

That's a mistake in reading. But Mr. Rosenblatt did read to you some portions of the document accurately, particularly he read the portions where Mr. Yeaman uses the phrase, nicotine an addictive drug.

1963.

First of all, we've seen 1961, 1962 text and articles using that terminology, saying it's used loosely, saying that layman commonly call cigarettes addictive. But the plaintiffs say, because Mr. Yeaman used that word in 1963 in that document, that proves nicotine is addictive, and we knew it in '63.

But is there any new science about nicotine addiction in this document? Is there any new science not disclosed in the '61 Larson text?

What the plaintiffs didn't do is they didn't provide you with any context for this memorandum. But Dr. Boyse did, and I'm going to remind you of it. The document is entitled Implications of Battelle Hippo I and II.

What is Battelle Hippo? Maybe you remember, but Hippo refers to the hypothalamus, part of the brain

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that controls body function and hormones. And Sir Charles Ellis of the British American Tobacco Company was convinced that nicotine was beneficial to mankind.

And he wanted to do some research to prove the benefits of nicotine, and he was going to then trumpet that. He commissioned an organization called Battelle Institute in Geneva, Switzerland to do some research. And they did it and he thought it showed the benefits of nicotine.

Now, he subsequently provided it to two scientists in England to review before he could trumpet it to see if it was good research, prove the benefits of nicotine. That's in evidence, 15456.

15456, take a look at it. It says that this research is poorly performed and unpublishable. It was not novel. Dr. Boyse, Dr. Dixon talked about it. It doesn't have anything in it about the intoxicating effects or severe withdrawal effects or anything like that. It just talks about the role of nicotine in stress reduction and appetite.

And you can go back in the table of contents and those topics are discussed in the Larson text.

But how was it then that Mr. Yeaman was using the term "addictive drug" in this memorandum? Well, he had received -- and you can look at this in evidence.

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It's Exhibit 3383. This is a letter from Sir Charles Ellis that describes the Battelle Hippo research.

And 732. I want to blow up that paragraph.

Here is what Sir Charles Ellis writes to Addison Yeaman, that Addison Yeaman has before him when he wrote this memo. Here comes the hidden research: For people who oppose smoking do so on the grounds that it is an important contributory cause of lung cancer, and that it is just a habit with nothing to be said for it other than that it is pleasureable. Once given up, it would soon be forgotten.

It is my opinion -- and he's writing this in 1963 -- it is my opinion that the results I have described show this view to be untenable. Nicotine is a wonderfully beneficient drug which does not, like morphine, sleeping pills or even Dexedrin, lead to a cumulative addiction, people keep to their smoking habits over years. If nicotine were not known, its discovery would be claimed as one of the great medical advances of the day.

This is what Sir Charles Ellis was writing about. He believed he could prove nicotine had great benefits to mankind. This is the research that Mr. Yeaman is discussing in this memorandum.

This is hidden, hidden science that reflects

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badly on the industry?

And look at this. He uses the term, in the same sentence, or the same two sentences: Nicotine is a wonderfully beneficent drug that does not lead to cumulative addiction. People keep to their smoking habit over years.

Habit and addiction within 10 words of each other.

Now, ladies and gentlemen, after hearing that, after knowing that it doesn't say anything about intoxication and withdrawal, doesn't relate to the '64 Surgeon General's Report at all, you may reach the conclusion that this wouldn't have had any effect on the Surgeon General's opinion whatsoever.

In fact, you'll find that there's a letter in evidence where citations were sent to the Surgeon General with some of the same topics covered by Hippo.

But based upon that information that I've just provided to you, you may conclude that has got nothing at all to do with what the Surgeon General was saying in 1964.

That wouldn't have changed his view. He wasn't saying it's intoxicating, he wasn't saying it's associated with intoxicating effects. He says it's a wonderfully beneficient drug.

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Well, if you made that conclusion, you wouldn't be alone. You wouldn't be alone, because Dr. Benowitz was asked whether he had reviewed the internal company literature, the internal company memoranda, and to identify any that he thought would have affected the Surgeon General's Report in 1964.

And he said he wasn't aware of any. He had reviewed the Yeaman memo, he had reviewed the Hippo research, and he is the nicotine expert. And he said he did not identify this as changing, would have any impact at all.

Now, ladies and gentlemen, Mr. Yeaman has this document before him. He uses the word "addiction," and the plaintiffs say: That's it. That means it's proven. New science. You used the word "addiction."

That just will not withstand analysis. There is nothing in that document, nothing that the plaintiffs have shown you to say that Mr. Yeaman was saying anything other than that smoking was a pleasureable habit that people keep to over the years; or using the word "addiction" loosely, he wasn't saying it's like cocaine and heroin, and he wasn't saying people can't quit. And he wasn't saying anything that hadn't already been said in the public literature.

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So on question 4B, concealed facts, no way. No way. You heard the mountain of awareness. Well, this is the mountain of information. It was out there. It was published. It was discussed. It was funded by the industry, and the witness they called to tell you that it wasn't did not have his facts straight.

Now, let me turn to a different question, the question of opinions on causation. Plaintiffs said that the defendants' statements fooled and prevented smokers from knowing the risks; our statements over time fooled the smokers.

Yet, the testimony shows that the risks of smoking are common knowledge and have been for decades. And you heard Dr. Ford's testimony that the tobacco industry wasn't listened to in its views in expressing its opinions.

But the plaintiffs say they were fooled. They argued: We were fooled. We didn't know the risk.

But that's his argument; it's not evidence. They didn't introduce a single survey where smokers were asked, "Are you aware of the risk of smoking?" where they said no.

And the Gallup Polls and all of the other testimony from Dr. Ford, that Mr. Heim will go over with you, showed that the proof of awareness was

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conclusive, 95 percent awareness.

Now, like anybody faced with a risk, anybody faced with a risk, each smoker is going to hope it won't happen to him or her, and they may believe it won't happen to them, but that doesn't mean they're not aware of the risk.

Plaintiffs say smokers rationalize, but again, you have to be aware of the risks to rationalize about them. And that's the point. The smokers were aware.

Now, you've heard the plaintiffs say: Well, we didn't know about the 4,000 chemicals and we didn't know about phenols and we didn't know about nitrosamines, and that was hidden.

Well, it wasn't hidden. The government was well aware of that information. The public health authorities were well aware of that information. And they said: We're not going to put out a label that says: Watch out for phenols and nitrosamines. We're going to put out a label that says: Smoking causes cancer, smoking causes heart disease. Keep the message simple.

Can any smoker seriously argue that their awareness would have been materially changed, it would have affected their decision-making process? They've

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been told smoking causes cancer. If we say to them: By the way, there's nitrosamines in smoke, try to lower them to the extent we can, still some in there, does that change anything? The government certainly decided it did not. And the warnings that it provided are adequate as a matter of law.

When smokers know the risk of serious disease and premature death, they can't argue that scientific facts that are known by scientists would have made a difference to them, because it would not, and there's no evidence it would.

Now, not only are smokers aware of the risk, but Dr. Boyse testified that they're so aware of them, they overestimate them. And let me show you her testimony on April 30th, 1999. That's when Dr. Boyse began her testimony. If you look at 448.

But I think the most important thing here -- this is Dr. Boyse -- is that we know perfectly well that smokers overestimate risks anyway, of their risk of developing diseases like lung cancer.

And we also know from studies of risk analysis that if people are confronted with opposing views or conflicting evidence, on any issue, whether it be smoke or anything else, they tend to take the worst case scenario.

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So we have the following combination: You have huge information available, you have the smokers aware of the risks. There's not anything more that we can tell them, and yet they overestimate the risks. They overestimate the risks.

And that ends the attack on defendants' statements. Defendants' statements can't be said to be material, have affected anybody's decision-making, because smokers are aware of the risks and indeed overestimate the risks.

Now, Dr. Boyse testified in this case on causation, and you remember yesterday, I guess it was Tuesday, that Mr. Rosenblatt referred to her testimony as an explosion. Well, what he heard exploding was his mistaken view that there's a party line; that all company scientists are required to say exactly the same thing and they can't have a different view; the companies would never tolerate anyone who made a judgment that smoking causes lung cancer, for example.

The companies believe that causation is a question of reasonable judgment. There's room for stating different opinions. Science is not based on a show of hands. And every scientist is not required to say the same thing.

And in fact, while Mr. Rosenblatt was talking

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to you about the party line, he read you Dr. Boyse's testimony, which I'm going to read you in a moment. He referred to Dr. McAllister's statement, which Dr. McAllister said: I would agree that smoking is one of the contributing factors in a significant percentage of cancer deaths.

Dr. McAllister said what he believed, not words that were given to him. No party line.

And you heard all of the witnesses from the plaintiffs come in here. They gave various opinions. They were consistent. Was that a party line? No. They told us that's what they believed, that was their scientific opinion. We're not going to sue them for fraud. Now, it cannot be fraud to state your opinions, to express your opinions.

Now, Dr. Boyse, ladies and gentlemen, you remember Mr. Rosenblatt didn't bring Dr. Boyse here; Brown & Williamson and American did. And Mr. Rosenblatt read you her views yesterday.

Let me put up the part of the quote that he read, 789. Question, from Mr. Rosenblatt: You agree that the evidence, the scientific evidence, is sufficient to conclude that cigarette smoking causes lung cancer?

Answer: I believe it does. I believe it

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does.

She couldn't have expressed her opinion any clearer. Was she told what to say?

Give me 450.

While you've been at BATCO, 1986 to 1994, and while you've been at B&W from 1996 forward, have you at all times been free to express your opinion and your belief about what you believe on the issue about whether it's been established that smoking causes lung cancer?

Yes, totally free.

Have you been free to exercise your opinions and beliefs even though other scientists at the company, at the company itself, may at times disagree?

Yes. Absolutely.

And what did she say about party line? 451.

When I joined BATCO in 1986, I was never given a party line, I was never given a company position statement, and I never have been, in the 13 years that I've been working in this area. What I was asked is what my opinion was, and what I believe the scientific evidence was, and my colleagues, too.

And she came here and she gave her opinion in that witness chair; and what came through in her testimony is that the issue of whether one is prepared

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to say that it's been established that smoking causes lung cancer is a question of judgment, a question of opinion where the evidence has evolved over time.

And scientists are free to disagree.

And in Dr. Boyse's opinion it does. It's totally different from what the plaintiffs alleged, that the defendants were required to renounce all opinions and pledge allegiance to one view, plaintiffs' view.

Now, the bottom line on this issue of causation, ladies and gentlemen, is that the companies were not waiting for the outcome of this causation issue to take action. As you heard Mr. Reid for RJR, Brown & Williamson, American, the working hypothesis was that smoking causes disease and that we should do things to try to lower the risk, try to make lower delivery products.

The plaintiffs have set up this false dichotomy, saying we remained in business based on the belief that smoking does not cause disease. Totally to the contrary. The government has said smoking does cause disease. The packages are labeled and the companies have assumed it causes disease, and tried everything it can to lower the risk.

The companies have stayed in business, not

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because they don't believe smoking causes disease, but because millions of people find smoking pleasurable. They know of the risk, and our responsibility is to try to provide them with a product and try to make less hazardous products available, and work on that every day. And that is what is being done.

Now, the second thing about causation is this. You know, we rarely agreed on anything in this case, but we agree on one thing, and the plaintiffs have said the mechanism by which anything in smoke causes disease is unknown. But he says that's not the critical thing.

Well, it's very critical to the tobacco company, very critical to Brown & Williamson and American, and the reason why -- PM and RJR and all the other defendants -- and the reason why is if we can find the mechanism, number one, we can prevent disease; number two, we can cure disease; and number three, ultimately we may be able to make a cigarette that we can say is safe, which we can't say and haven't said, and the government will say is safe.

And that's precisely why CTR and the companies have been conducting research to find a mechanism. That's why. We haven't been waiting to change our products, waiting on the mechanism. We've

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been searching for it so we can make further changes.

You heard Mr. Rosenblatt refer to Brown & Williamson's CEO, Mr. Brookes, and he said Mr. Brookes said he would stay in the cigarette business even if it was shown how smoking causes cancer.

But what he left out was Mr. Brookes said, if you would show how smoking causes cancer, if you could show what Dr. Carchman called the "what," then we could make a cigarette that's safer, then we can cure and prevent disease, then we would know how to change our product. Yes, we would stay in business. We'd be selling a safer product.

In the meantime, every American has the right to smoke. That's what our government policy is, that is what has been decided, and the risks are known.

And Dr. Boyse made it very clear that smokers are aware of the risk when she gave this answer in response to Mr. Rosenblatt's question.

460.

I think people choose to smoke for whatever reason they may give you, and they give as many reasons as there are smokers: They enjoy it, it helps them relax, whatever it may be. The reasons why people continue to smoke, they do so in full awareness of the risk. In fact, the studies show that they

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overestimate the risk, and yet they continue to choose to do it.

Now, you may not understand that, and I may not understand that, and I might not choose to take that risk and you may not choose to take that risk, but people do so.

Now, ladies and gentlemen, let me see if in the next 5 or 10 minutes or so I can bring my remarks to a close. I really do appreciate you listening to me for this long, at this point in the case. I think it's imperative to address what this case is not about and what you're not being asked to decide.

I think we all know that the case is not about Abraham Lincoln and John F. Kennedy and Robert F. Kennedy, and you're not being asked to decide whether people should be allowed to smoke, or whether the sale of cigarettes should be legal, or whether they should be banned. Those are political issues.

You heard Mr. Rosenblatt say that the companies must stop selling cigarettes because some smokers develop lung cancer, and he argues we must get out of business. He wants to make that decision for everybody. But that's not his decision to make. The government has made a different decision.

And on the topic of a business generally, you

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heard plaintiffs' counsel accuse the defendants of being interested only in business, only in profits, and only in money.

Well, ladies and gentlemen, first of all, it's the plaintiffs in this case who are seeking money.

MR. ROSENBLATT: Your Honor, this case was filed --

THE COURT: Sustain the objection.

MR. SCHNEIDER: Well, it is telling, ladies and gentlemen, that after two days of argument, when the plaintiffs told you what they thought the important question was, they pointed, they pointed to the punitive damage question at the end of the verdict form.

Now, ladies and gentlemen, the plaintiffs say the interest of the companies and the interest of our customers are diametrically opposed, but that's wrong. Our customers have an interest in finding less hazardous products, and we have that same interest.

If we can find a cigarette that is, in fact, safe, it's good for business, it's good for consumers. If you can find an acceptable safer alternative -- and nobody has suggested one. Nobody has suggested a single idea, other than what we have pursued. Nobody in the company or out of the company, nobody in the

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witness chair, or out of the witness chair. We have tried everything.

Now, the plaintiffs in this case yesterday -- Monday, referred to Dr. Cummings' testimony and said that it costs 5 cents to make a pack of cigarettes, and suggested that the tobacco companies make huge amounts of money on every package of cigarettes. That's hogwash. It's totally unsupported in the record.

But what is in the record, you can look at Plaintiffs' Exhibit 227, 87 percent of the price of cigarettes in 1974, for example, was made up of taxes.

MR. ROSENBLATT: Objection, Your Honor.

MR. SCHNEIDER: This is in the record, Your Honor.

THE COURT: I think we went through that once before. I'll sustain the objection.

MR. SCHNEIDER: Yesterday or Monday, Mr. Rosenblatt stood before you and argued that the government was fooled; we fooled the government into allowing smoking; we fooled governments into lifting the ban.

But the truth is, ladies and gentlemen, the government allowed smokers to have the right to smoke, required warning labels, taxes the product very heavily, and lets each American decide whether to smoke

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or not.

And again, you're not being asked to decide whether the manufacturing of cigarettes should continue as a legal business. That's already been determined by our government.

And in short, ladies and gentlemen, this is not a case about political correctness, it's not a case about government policy, not about whether you like or don't like cigarette companies. The case is about whether or not the plaintiffs have proven the elements of their legal claims set forth on the verdict form.

806.

Mr. Rosenblatt showed you the verdict form yesterday, and I wanted to just speak about it briefly. There are 10 questions on the verdict form. They really break down into two separate groups. Keep this in mind.

The first group consists of the first two questions. It asks you about causation of disease, and the second question asks you about addiction. And all the rest of the questions on the form, the other eight questions, are the second group. They're entirely separate and they address whether plaintiffs have proven their actual legal claims against the defendants.

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And these two groups of questions are separate questions. And it's not the case, as plaintiffs may argue to you, that you should answer Questions 1 and 2 yes, and if you do, that determines how you should answer all the other questions, because that's wrong.

Take Question Number 1. It asks you whether smoking causes various diseases. Now, there are diseases on this form like cervical cancer, and on the next page you see kidney cancer and other diseases, where there is insufficient evidence in the record to support a finding that that disease is caused by smoking.

But there are other diseases on the verdict form. Go to the next page. Lung cancer. You see there's various types. Squamous cell carcinoma, you have heard a large amount of evidence on that disease in this case.

And we acknowledge that people have reasonable differences of opinions, and reasonable people can come to the conclusion that smoking causes squamous cell lung cancer. That's what their opinion is.

If you reach that opinion, then you'll check that disease yes.

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But that doesn't decide the legal claims against the defendants. That's covered in the last 8 questions on the verdict form.

The same holds true with respect to Question Number 2. It asks you about addiction. The Court is not going to define the term "addiction" for you. We believe that the 1964 Surgeon General's scientific definition is a reasonable one, and that smoking cannot reasonably be compared to heroin and cocaine.

But we recognize that many people adopt a broader, more common usage of the term "addiction." And if you adopt such a definition, then you'll check that question yes.

But then again, that does not decide the legal questions, the elements of the legal claims, that are on the last 8 questions on the form. And those questions, the last 8 questions, they don't turn on whether smoking causes disease or is addictive. Instead, they turn on smokers' awareness of the risks; they turn on whether anything defendants did ever prevented any smokers from being aware of the risks; they turn on the efforts of these companies over time to pursue a less hazardous cigarette. And it's these claims that form the basis of plaintiffs' actual legal claims for money damages in this case.

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It's the decision of those claims, the last 8 questions on the form, that determines whether plaintiffs have proven their claims in this phase and whether this case ends now.

Now, the questions on the verdict form will have various instructions for you to follow. You've heard references to the instructions, and one of the instructions that you receive, I want to give you a portion of an instruction.

It's 773.

This is a portion of the Court's negligence charge: There is no duty on the part of a manufacturer to warn of a risk or danger that should be obvious to or generally known by foreseeable product users, or danger of which the plaintiffs are already aware. When a risk is obvious or generally known, the consumer will or should know of its existence. A manufacturer in deciding whether to warn can reasonably take into account whether ordinary consumers are already aware of the risks.

Ladies and gentlemen, the evidence in this case show smokers are aware, shows that the defendants did all that could be done; and that's why, on the last 8 questions on the form, the only permissible outcome is to say no on each of those questions.

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And I want to, before closing, just talk about two other particular claims on the form. I'll be done in about five minutes. The first one is this claim of intentional infliction of emotional distress.

You're going to have a charge on that question, being asked whether the defendants have engaged in extreme and outrageous conduct, intending, intending to inflict emotional distress on smokers.

It goes beyond all -- the standard that the Judge will instruct you on is the conduct has to go beyond all possible bounds of decency and is regarded as shocking, atrocious and utterly intolerable in a civilized community.

This is a heavy, heavy, heavy standard of proof that the plaintiffs didn't satisfy in this case. In fact, I would submit to you, ladies and gentlemen, that the claim is preposterous. It is preposterous to claim that manufacturing cigarettes goes beyond all possible bounds of decency and is regarded as shocking, atrocious and utterly intolerable in a civilized community.

Our civilized community is fully aware of the risks of smoking, and has nonetheless determined that cigarettes should be a legal product. Our civilized community gives every person the right to smoke. Our

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civilized community here in Florida taxes each and every package of cigarettes. Our civilized community has passed laws for more than 30 years dictating what the warning labels on cigarettes should say. It is common knolwedge in our civilized community that smoking has health risks, and it can be difficult to quit. And in light of all that, cigarettes are a legal product and smokers have the right to smoke or not smoke.

And can a plaintiff in 1999 seriously come into this courtroom and suggest that manufacturing a legal product is beyond all bounds of decency, atrocious and utterly intolerable?

We've been trying to provide a product that millions of people find pleasureable, that have risks, that we are trying to get rid of, that we work at every day.

I don't think that meets the burden at all. Doesn't even come close.

Same is true for the punitive damage claim. Just as they can't prove that heavy standard of extreme and outrageous conduct, they can't prove the defendants' conduct in this case, any defendant, justifies finding an entitlement to punitive damages.

It would be unjust to award punitive damages

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against Brown & Williamson and American and the other defendants with respect to a legal product, one that they're trying to make safer products. They're responding to the public health authorities.

It would be unjust to find for punitive damages, find an entitlement on the theory that information was hidden, that witnesses came here and said information was hidden when it wasn't.

It would be unjust to assert punitive damages on veiled claims of marketing to youth when Brown & Williamson, for example, has a policy and has had a policy for decades of marketing to 21 and older, even though the legal age is way lower than that. It would simply be unjust. It would simply be unjust.

There really are three things that matter in this case after all of this evidence. Three things: Smoking is pleasureable, but risky, and smokers have known that; smoking can be difficult to quit, and that's common knowledge as well; and number three, if there's a way to make the cigarette risk free, we're at work every day trying to find it. We want to find it. Those are the three most important things.

If you keep those facts in mind when you're dealing with the actual legal claims against the defendants, I submit to you, ladies and gentlemen, you

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must answer no. This case has to end now.

Now, there's no doubt, ladies and gentlemen, that throughout yesterday's long closing arguments the plaintiffs made available and not so available efforts to try to make you hate these defendants, try to make us into monsters. Maybe if you hate us enough, you'll ignore the evidence.

And there have been references in this case to slavery and segregation and civil rights heros. You can ask yourself, what are those rights?

MR. ROSENBLATT: You objected during every one of those references. Every --

THE COURT: Counsel, please. You know that's improper. Please, if you have an objection --

MR. ROSENBLATT: That's my objection.

THE COURT: I know.

MR. SCHNEIDER: Ladies and gentlemen --

THE COURT: Overrule the objection.

MR. SCHNEIDER: -- I'm confident that you're not going to ignore the evidence in this case. I'm confident that you're not going to characterize thousands of employees at B&W and American, PM, RJR, Lorillard and Liggett as monsters because they work at making a controversial product that has known risk, and everyone is aware of; and every research person in

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these companies is at work every day as we speak, is trying to find the safe cigarette that people will accept.

Now, each one of you gets to define justice. It's your turn after so long. It's going to be your job, not the media, not politicians, not talking heads on television. It's going to be your job. And each one of you, when you deliberate, will have to state your views. You have to listen to your fellow jurors.

And you all will also have to have the courage to stand up for your own convictions of what you believe based on the evidence. Have the claims in this case been proved against these defendants? They have not.

The fundamental premise of our American judicial system is that jurors who use their common sense will listen to the evidence and will reach the right result. And I have every confidence that you're going to reach the right result in this case and return a verdict on plaintiffs' legal claims in defendants' favor.

I want to thank you again for your patience, your endurance, your sense of humor, and most of all, thank you on behalf of Brown & Williamson and American and Mr. Moss for listening to me here today. Thank

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you.

THE COURT: All right. Mr. Heim, it's quarter of 5:00.

MR. MOSS: Could we come sidebar?

MR. HEIM: In view of the fact that there's a time issue here, I thought we could talk scheduling.

MR. ROSENBLATT: Scheduling doesn't have to be on the record.

THE COURT: We'll be off the record. We'll put it on the record later.

(Discussion off the record.)

THE COURT: Okay, folks. We've been trying to work out scheduling. We would like to begin tomorrow at 8:30 in the morning. Does anybody have a problem with that? Great. Okay.

Depending, of course, on traffic, and I understand there may be some traffic problems, but I'd like you folks to be here, say, 8:15, 8:20. We'd like to get under way about 8:30, give or take a few minutes.

But we want to make up that hour, so let's shoot for that, if you don't mind.

Same rules apply, don't watch T.V., don't read the papers, don't make up your mind about anything.

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(The jurors exited the courtroom.)

THE COURT: All right. Folks, have a seat, please.

Now, Mr. Heim, you mentioned something the other day about the definition of class. What you said was accurate, or however you put it; I'm not really sure. And I assume that you were talking about on Page 1 of the instruction. I think that's about the only place that it's really mentioned.

MR. HEIM: That's correct, Judge, the second paragraph.

THE COURT: I looked at the definition that was used in the amended complaint as to their definition of the class. And it's just about right. I mean, there's one word or two out of place, but other than that. So what is the problem?

MR. HEIM: I think the definition of the class that was approved by the Third DCA has in it, it says diseases -- I'm not going to have it literally correct -- diseases or medical conditions caused by their addiction, or caused by their addiction to cigarettes that contain nicotine. The addiction concept is in the class definition.

THE COURT: It's not in the complaint definition.

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MR. ROSS: It's in the order of certification of the class.

THE COURT: That's where you're getting that from?

MR. HEIM: From the order of certification of the class.

MR. MOSS: Which is the class definition.

THE COURT: Let me take a look at it.

MR. ROSS: It was in the notice.

THE COURT: I know that, but what's in the notice is a little bit different than what's in the complaint. And we're here to prove the complaint.

MR. HEIM: If I may, this is the definition.

THE COURT: Okay. So basically "caused by." The definition that's in the complaint is: Caused by smoking cigarettes that contain nicotine.

What they have here is: Caused by their addiction to cigarettes that contain nicotine.

So you're talking about "by their addiction." Want to address that?

MR. ROSENBLATT: I know, Judge, that Susan has been working on this anticipating, so she'll have something to say in the morning. I know what our bottom line is, that we prefer the definition of the class as contained in the complaint.

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MR. MOSS: Can't be.

MS. LUTHER: Can't be.

MR. ROSENBLATT: Can be if the Judge says that.

MS. LUTHER: Isn't the point that we've sent that definition in the notice, so if we had a different definition for the jury to determine, the notice is completely invalid?

THE COURT: I'm going to have to look at the Court order, which I don't have a copy in front of me. If somebody would be kind enough to dig it up quickly for me in the morning.

All right. We'll see if we can address that issue in the morning.

MR. HEIM: Your Honor, tomorrow morning --

THE COURT: I don't want to waste a lot of time on it. So we'll get here at 8:15.

MR. MOSS: We're here at 8:15, Your Honor.

THE COURT: I'll try at 8:15 so we can discuss these things.

(Court was adjourned at 5:00 p.m.)

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IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT IN AND FOR DADE COUNTY, FLORIDA

GENERAL JURISDICTION DIVISION
CASE NO. 94-08273 CA-22

HOWARD A. ENGLE, M.D., et. al.,
Plaintiffs,

v.

RJ REYNOLDS TOBACCO COMPANY, et. al.,
Defendants
_____/

JURY INSTRUCTIONS FOR PHASE I

This case is unlike most other lawsuits that come to trial and before instructing you on the law, I want to discuss with you your role as jurors in this case. In a typical lawsuit, the jury hears testimony from the litigants, including the Plaintiffs, the parties bringing the lawsuit. Ordinarily the Plaintiffs would testify about their claims and describe their medical conditions and damages. However, this case is not typical because it is not brought on behalf of one or two individuals, but rather on behalf of a group or class of individuals.

The Florida Class is a statewide class consisting of all Florida citizens and residents and their survivors, who have diseases or medical conditions or who have died from diseases or medical conditions that are claimed to be caused from smoking cigarettes.

Because of the size of the Florida Class and the complexity of the issues, the Court determined that all common liability issues would be tried before a jury in a single trial. This common issue trial has addressed the conduct of the tobacco industry. This trial did not address issues as to the conduct or damages of individual members of the Florida Class. Those issues are not relevant during this trial.

The Court has determined that the conduct of class members is not relevant to the issues presented in this common liability trial. Therefore, you did not hear testimony from any members of the Florida Class who are Plaintiffs bringing this action. You should not hold it against any of the class representatives or class members that they did not testify before you or provide you with their medical records or other information, because that was the decision of this Court. You will not determine any issues regarding the conduct of individual members of the Florida Class, including any issues as to compensatory damages for individual class members. You will, however, consider the issue of entitlement to punitive damages, since punitive damages address only the conduct of the Defendants.

Members of the Jury, I shall now instruct you on the law that you must follow in reaching your verdicts. It is your duty as jurors to decide the issues, and only those issues, that I submit for determination by your verdict. In reaching your verdict, you should consider and weigh the evidence, decide the disputed issues of fact, and apply the law on which I shall instruct you, to the facts as you find them from the evidence.

The evidence in this case consists of the sworn testimony of the witnesses, all exhibits received in evidence, and all facts that may be admitted or agreed to by the parties.

In determining the facts, you may draw reasonable inferences from the evidence. You may make deductions and reach conclusions which reason and common sense lead you to draw from the facts shown by the evidence in this case. But you should not speculate on any matters outside the evidence.

a. General considerations:

In determining the believability of any witness and the weight to be given the testimony of any witness, you may properly consider the demeanor of the witness while testifying; the frankness or lack of frankness of the witness; the intelligence of the witness; any interest the witness may have in the outcome of the case; the means and opportunity the witness had to know the facts about which the witness testified; the ability of the witness to remember the matters about which the witness testified; and the reasonableness of the testimony of the witness, considered in the light of all the evidence in the case and in the light of your own experience and common sense.

b. Expert witnesses:

You have heard opinion testimony on certain technical subjects from persons referred to as expert witnesses. Some of the testimony before you is in the form of opinions about certain technical subjects.

You may accept such opinion testimony, reject it, or give it the weight you think it deserves, considering the knowledge, skill, experience, training, or education of the witness, the reasons given by the witness for the opinion expressed, and all the other evidence in the case.

In your deliberations, you are to consider several distinct claims. There are individual claims for strict liability, fraud and misrepresentation, conspiracy, implied warranty, express warranty, negligence, and intentional infliction of emotional distress. Although these claims have been tried together, each is separate from the other[s], and each party is entitled to have you separately consider each claim as it affects that party. Therefore, in your deliberations, you should consider the evidence as it relates to each claim separately, as you would had each claim been tried before you separately.

The first issue for your consideration is whether cigarette smoking causes lung cancer and other diseases or medical conditions in some smokers (and former smokers). The second issue for your consideration is whether cigarettes that contain nicotine are addictive.

Additional issues for your consideration on the claims of the plaintiffs are as follows:

On the claim of strict liability, the issues are whether one or more of the defendants designed, manufactured and marketed cigarettes which were defective and unreasonably dangerous to smokers.

On the claim of fraud and misrepresentation, the issues are whether one or more of the defendants made numerous fradulent misrepresentations of material facts regarding their cigarette products and engaged in a public relations campaign that was designed to manipulate public opinion and create a false controversy so that smokers would have doubt about the adverse health effects of smoking and would continue to smoke. The Plaintiff Class members also allege that, each of the Defendant Tobacco Companies previously concealed from the public, the internal tobacco documents proving that nicotine is addictive, and have kept the levels of nicotine at sufficiently elevated levels to keep smokers dependent upon cigarettes and smoking. The Plaintiff Class members claim these misrepresentations and concealments were made by all of the Defendants Tobacco Companies. The Tobacco Industry Research Council, that later became the Council for Tobacco Research and the Tobacco Institute, were acting on behalf of and at the direction of the member Defendant Tobacco Companies.

On the claim of civil conspiracy to commit fraud and misrepresentation, the issues are whether the Defendants agreed together, with and through the Tobacco Institute and the Council for Tobacco Research, and its predecessor the Tobacco Institute Research Committee, to create a false controversy regarding cigarettes and disease and to create doubt in the minds of smokers as to whether smoking is hazardous to health and whether smoking is addictive. Plaintiff Class members further allege that there has been a

conspiracy to entice new smokers, consisting of underage smokers, women and minorities to make up for the smokers who are dying or who have been able to quit.

On the claim of negligence, the issues are whether one or more of the Defendants were negligent in manufacturing, designing, marketing, selling and distributing cigarettes which Defendants knew or should have known (1) would cause serious and fatal diseases, including lung cancer; or dependence producing substances; (3) in negligently not testing tobacco and comercial cigarettes to confirm that smoking causes human disease; (4) in failing to design and produce a reasonably safe cigarette with lower nicotine levels; (5) in negligently measuring and understating nicotine and tar levels in low tar cigarettes; (6) and in failing to warn smokers of the dangers of smoking and the addictiveness or dependence producing effects of cigarettes prior to July 1, 1969.

On the claim for intentional infliction of emotional distress, the issues are whether one or more of the Defendants engaged in extreme and outrageous conduct with the intent to cause severe emotional distress to smokers or with reckless disregard of the high probability of causing severe emotional distress to smokers.

On the claim for breach of express and implied warranties, the issues are whether one or more of the Defendants, with the exception of Liggett, expressly and voluntarily undertook certain responsibilities and duties pursuant to the Frank Statement to Cigarette Smokers that was published throughout the United States in 1954. Another issue for your consideration is whether cigarettes manufactured or supplied by Defendants do not conform to representations of fact made by the Defendant Tobacco Company orally or in writing, and whether cigarettes are not reasonably fit for the uses intended or reasonably foreseeable by the Defendant Tobacco Companies.

The final issue is whether the Plaintiffs class is entitled to punitive damages.

This Court has determined that this class action will be tried in phases. During this phase of the case, any alleged fault or negligence on the part of class members and their decedents is not relevant and therefore not an issue in this case. You should not consider whether any smoker or smokers are or were at fault, nor should you compare any alleged fault of any smoker/class member to the alleged fault of one or more Defendants.

The comparative fault or negligence, if any, of individual class members will be determined at subsequent individual trials of class members, therefore the comparative fault or negligence of class members is not at issue and is irrelevant during this Phase I trial.

The Court has determined and now instructs you, as a matter of law, that:

Defendants are responsible for any negligence or other conduct of their officers, agents and employees while said individuals are performing services they were employed to perform or while the individual is acting at least in part because of a desire to serve his employer and is doing something that is reasonably incidental to his employment or is doing something the doing of which was reasonably foreseeable and reasonably to be expected of persons similarly employed. The Defendants are not responsible for the actions of an independent contractor. The Defendants are corporations and can act only through their officers, agents and employees. The conduct of an officer, agent or employee acting within the scope of their authority or employment is the conduct of the corporation.

You are instructed that the American Tobacco Company has merged with the Defendant Brown & Williamson Tobacco Corporation and that, as a result of the merger, Brown & Williamson Tobacco Corporation has succeeded to the liabilities of the American Tobacco Company, as successor to the American Tobacco Company.

You have heard evidence regarding the destruction of certain documents. If you find that Plaintiffs have shown that a Defendant or Defendants destroyed documents and have failed to provide a satisfactory explanation for doing so, you are permitted to infer that the evidence, if produced, would have been unfavorable to that party.

In determining whether a party's explanation regarding the destruction of evidence is satisfactory, you may consider all of the facts and circumstances, including whether the documents were destroyed in bad faith. "Bad faith" includes both deliberate destruction or concealment, as well as destruction or concealment with reckless disregard for the relevance of the evidence. Bad faith is not required, however; it is sufficient if the party knew or should have known of the importance of preserving the evidence.

During the trial you have heard references to defendants' appearances before Congress and various regulatory agencies. Under the law, the defendants have the right to petition, provide information, and express their views to their governments on issues of policy and legislation concerning smoking and health. These, and similar communications with the government, advocacy efforts, and government submissions, are protected under the First Amendment to the United States Constitution, as well as Florida law. However, false, misleading, or deceitful statements and representations are not protected under the First Amendment.

During the trial you have been given the option of taking notes of the testimony and evidence presented by the parties as an aid to your memory. Your notes are not evidence. In the event that your recollection of the testimony or evidence differs from what is recorded in your notes or the notes of another juror, you should rely on your own recollection. The fact that some jurors may have taken more notes than others in no way gives those jurors more authority over jurors who have taken fewer or no notes.

Throughout the trial, you have occasionally heard the Court or the lawyers mention the word "preemption". "Preemption" is a doctrine of federal law that limits the claims that plaintiffs can make in this case. You need to understand this limitation in order to perform your duties as jurors.

The doctrine of preemption arises from the federal law enacted by the United States Congress on July 1, 1969, in which Congress mandated that every pack of cigarettes bear a specific warning label written by Congress itself. Later, Congress required that those same warnings appear in each cigarette brand advertisement.

Therefore, pursuant to federal law, you may not base any finding of liability on a determination that after July 1, 1969 one or more of these Defendants should have included additional or more clearly stated warnings on their cigarette packages or in advertisements. However, federal law does not limit the liability of any Defendant against claims based on negligence, strict liability, express warranty, fraud, misrepresentation, or conspiracy. Finally, the federal law does not limit the liability of any Defendant against claims of failure to warn prior to July 1, 1969.

On the claim of strict liability of the Florida Class against the Defendant Tobacco Companies, the issue for your consideration is whether cigarettes sold by these Tobacco Companies were defective when they left the possession of the companies.

A product is defective if it is in a condition unreasonably dangerous to the user and the product is expected to and does reach the user without substantial change affecting that condition.

A product is defective if by reason of its design the product is in a condition unreasonably dangerous to the user and the product is expected to and does reach the user without substantial change affecting that condition. A product isunreasonably dangerous because of its design if the product fails to perform as safely as an ordinary consumer would expect when used as intended or in a manner reasonably foreseeable by the manufacturer or the risk of danger in the design outweights the benefits. If you find against one or more of the Defendants, you are also to consider whether the Defendants conduct occurred before or after July 1, 1974.

On the Florida Class claim for fraud and misrepresentation, the issues for your determination are:

(1), whether one or more of the Defendants made a false statement concerning a material fact;

(2), whether one or more of the Defendants knew the statement was false when it was made, or made the statement knowing that said Defendants were without knowledge of its truth or falsity;

(3), whether in making the false statement, or in concealing material facts, one or more of the Defendants intended that another rely on the false statement or misrepresentation;

If you find against one or more of the Defendants, you are also to consider whether Defendant's conduct occurred before or after May 5, 1982.

On the Plaintiffs claim for fraud by concealment, the issues for your determination are:

(1), whether one or more of the Defendants omitted or concealed material facts that would be necessary to make statements by said Defendants not misleading;

(2), whether one or more of the Defendants knew the statement was false when it was made or made the statement knowing that said Defendants was without knowledge of its truth or falsity, or knew of the existence of material facts that were not disclosed;

(3), whether in making the false statement, or in concealing material facts, one or more of the Defendants intended that another rely on the omission or concealment.

Intentional concealment exists where a party knows of defects in a product and intentionally conceals them, or, while under no duty to speak, nevertheless voluntarily does so, but does not speak honestly or makes misleading statements or suppresses facts.

If you find against the Defendant, you are also to consider whether Defendant's conduct occurred before or after May 5, 1982.

A material fact is one that is of such importance that a reasonable person would consider same significant in their decision making process.

A civil conspiracy is a combination or an agreement of two or more persons or entities, having the common purpose to accomplish an unlawful act or accomplish a lawful act, by unlawful means.

The claim here is that two or more Defendants agreed to commit wrongful acts, namely, a fraudulent statement, misrepresentation, concealment, or omission of material information regarding the health effects of cigarette smoking.

Plaintiffs must establish that a conspiracy existed and that Defendants knowingly became members of the conspiracy with the intent to advance or further some object or purpose of the conspiracy. "Knowingly" means voluntarily and intentionally, and not because of a mistake or accident or other innocent reasons.

A conspiracy does not have to be established by direct proof, and no formal or written agreement is necessary. The agreement itself may have been entirely unspoken. Its existence may be proved by circumstantial evidence. You may infer the existence of an agreement, or mutual understanding, from what you find the alleged members actually did. Mere similarity of conduct among various persons, however, or the fact that they may have associated with one another and may have never assembled together and discussed common aims and interests, does not necessarily establish the existence of a conspiracy. If they acted similarly but independently of one another without any agreement or mutual understanding among them, then there would be no conspiracy.

A conspiracy may be formed without all parties coming to the agreement at the same time. The unlawful agreement may be shown if the proof establishes that the parties knowingly worked together to accomplish a common purpose. It is not essential that all persons acted exactly alike. A person who knowingly joins an existing conspiracy or who participates only in part of a conspiracy, with knowledge of the overall conspiracy, is just as responsible as if it had been one of those performed or began the conspiracy and pariticipated in every part of it. A party may become a member of a conspiracy without full knowledge of all the details of the conspiracy, the identity of all its members, or the parts they played. Knowledge of the essential nature of the plan is enough.

On the other hand, a person who has no knowledge of a conspiracy, but happened to act in a way which furthers some object or purpose of the conspiracy, does not, thereby become a conspirator. Once a conspiracy has been established, the acts, statements and conduct of each of the conspirators in execution of furtherance of the common purpose may be considered as evidence against the others, regardless of their presence or absence. The "in furtherance" requirement is broadly construed and is satisfied if the acts, statements, or conduct promote the common good of the conspirators. For example, statements describing past events are in furtherance of the conspiracy if they are made to plan future activiities or to keep conspirators abreast of current developments and problems facing the group.

The issues for your determination on the claim of the Plaintiffs against the Defendant Tobacco Companies under express and implied warranties are whether cigarettes sold or supplied by the Tobacco Companies were defective when they left the possession of one or more of the Defendants and, if so, whether such defect was a legal cause of loss, injury or damage sustained by class members.

A product is defective if it does not conform to representations of fact made by one or more of these Defendants, orally or in writing, in connection with the sale or transaction, or if it is not reasonably fit for the uses intended or reasonably foreseeable by the Tobacco Companies or if it is not reasonably fit for the specific purpose for which the Tobacco Companies knowingly sold a product.

If you find against the Defendants on the issue of express warranty, you are also to consider whether Defendant's conduct occurred before or after July 1, 1974. If you find against the Defendants on the issue of implied warranty, you are also to consider whether the Defendants conduct occurred before or after July 1, 1969, and before or after July 1, 1974.

The issues for your determination on the claim of the Plaintiffs against all of the Defendants for the intentional infliction of severe emotional distress are:

(a) whether one or more of the Defendants engaged in extreme and outrageous conduct;

(b) whether one or more Defendants acted with the intent to cause severe emotional distress or with reckless disregard of the high probability of causing severe emotional distress;

Extreme and outrageous conduct is behavior which, under the circumstances, goes beyond all possible bounds of decency and is regarded as shocking, atrocious and utterly intolerable in a civilized community.

Emotional distress is severe when it is of such intensity or duration that no ordinary person should be expected to endure it.

The issues for your determination on the negligence claims of the Plaintiffs against each of the Defendant Tobacco Companies is whether one or more of the Tobacco Companies were negligent in designing, manufacturing, testing, marketing. If you find Defendants were negligent, you are also to consider whether one or more of the Defendant Tobacco Companies were negligent in failing to warn smokers before or after July 1, 1974 of the health risks of smoking or the addictiveness of smoking.

Negligence is the failure to use reasonable care. Reasonable care is that degree of care which a reasonably careful person would use under like circumstances. Negligence may consist either in doing something that a reasonably careful person would not do under like circumstances, or in failing to do something that a reasonably careful person would do under like circumstances.

A manufacturer's conduct is unreasonable if it fails to warn of a danger which a reasonably prudent manufacturer would have known and warned about under the circumstances. There is no duty on the part of a manufacturer to warn of a risk or danger that should be obvious to, or generally known by, foreseeable product users, or a danger of which the plaintiffs are already aware. When a risk is obvious or generally known, the consumer will or should know of its existence. A manufacturer, in deciding whether to warn, can reasonably take into account whether ordinary consumers are already aware of a risk.

If the greater weight of the evidence does not support the claims of the Florida Class against one or more of the Defendant tobacco companies, then your verdict on that claim should be for one or more of the Defendants.

However, if the greater weight of the evidence does support the claims of the Florida Class against one or more of the Defendants, then your verdict should be in favor of the Florida Class and against one or more of the Defendants.

"Greater weight of the evidence" means the more persuasive and convincing force and effect of the entire evidence in the case.

If you find for the Plaintiffs, and against one or more of the Defendants, you should consider whether punitive damages are warranted in the circumstances of this case as punishment and as a deterrent to others.

You will decide whether the conduct of any and all of the Defendants is such that punitive damages are warranted.

Punitive damages are warranted if you find by the greater weight of the evidence that:

(1) the conduct causing loss, injury, or damage to Plaintiff was so gross and flagrant as to show a reckless disregard of human life or of the safety of persons exposed to the effects of such conduct; or

(2) the conduct showed such an entire lack of care that the Defendant must have been consciously indifferent to the consequences; or

(3) the conduct showed such an entire lack of care that the Defendant must have wantonly or recklessly disregarded the safety and welfare of the public; or

(4) the conduct showed such reckless indifference to the rights of others as to be equivalent to an intentional violation of those rights.

You may determine that punitive damages are warranted against one defendant and not the others, or against more than one defendant.

Your verdicts must be based on the evidence that has been received and the law in which I have instructed you. In reaching your verdicts, you are not to be swayed from the performance of your duty by prejudice, sympathy or any other sentiment for or against any party.

When you retire to the jury room, you should select one of your number to act as Foreperson to preside over your deliberations and sign your verdicts. Your verdicts must be unanimous, that is your verdicts must be agreed to by each of you.

You will be given blank forms of verdict, which I shall now read to you:

When you have agreed on your verdicts, the Foreperson, acting for the jury, should date and sign the appropriate forms of verdict. You may now retire to consider your verdicts.

IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT IN AND FOR DADE COUNTY, FLORIDA

GENERAL JURISDICTION DIVISION
CASE NO 94-08273 CA-22

HOWARD A ENGLE, M.D., et. al.,
Plaintiffs,

v

RJ REYNOLDS TOBACCO COMPANY,
et al,
Defendants
_____/

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VERDICT FORM FOR PHASE I

We, the Jury, return the following Verdict:

Question No 1

[Generic Causation]

Does smoking cigarettes cause one or more of the following diseases or medical conditions ?

Aortic Aneurysm	Yes ✓	No ___
Asthmatic Bronchitis, as related to COPD	Yes ___	No ✓
Bladder Cancer	Yes ✓	No ___
Cerebrovascular Disease (including Stroke)	Yes ✓	No ___
Cervical Cancer	Yes ✓	No ___
Chronic Obstructive Pulmonary Disease-COPD (including Emphysema)	Yes ✓	No ___
Coronary Heart Disease (including cardiovascular disease, hardening of the arteries, atherosclerosis, coronary artery disease and arteriosclerosis, angina, abnormal blood clotting, blood vessel damage, myocardial infarction (heart attack))	Yes ✓	No ___
Esophageal (Throat) Cancer	Yes ✓	No ___
Infertility	Yes ___	No ✓

Kidney Cancer	Yes ✓	No ____
Laryngeal (Throat or Voice Box) Cancer	Yes ✓	No ____
Lung Cancer	Yes ✓	No ____
Adenocarcinoma	Yes ✓	No ____
Bronchioloalveolar carcinoma	Yes ____	No ✓
Large cell carcinoma	Yes ✓	No ____
Small cell carcinoma	Yes ✓	No ____
Squamous cell carcinoma	Yes ✓	No ____
Complications of Pregnancy (miscarriage)	Yes ✓	No ____
Oral Cavity/Tongue Cancer	Yes ✓	No ____
Pancreatic Cancer	Yes ✓	No ____
Peripheral Vascular Disease (including Buerger's Disease)	Yes ✓	No ____
Pharyngeal Cancer	Yes ✓	No ____
Stomach Cancer	Yes ✓	No ____

If your answer to all of the diseases, above, is "no", your verdict is for the Defendants, and you should not proceed further except to date and sign this verdict form. If you answered "yes" to **any** of the above questions, please answer the following questions

Question No 2

[Addiction/Dependence]

Are cigarettes that contain nicotine addictive or dependence producing ?

Yes ✓ No ____

Question No 3.

[Strict Liability]

Did one or more of the Defendant Tobacco Companies place cigarettes on the market that were defective and unreasonably dangerous ?

Please answer "Yes" or "No" as to each Defendant, below. If you answer "yes" to **any** Defendants, please answer whether the conduct occurred during **one** of the following time periods:

Philip Morris, Incorporated	Yes ✓	No ____
Before July 1, 1974	Yes ____	No ____
After July 1, 1974	Yes ____	No ____

Both before and after July 1, 1974	Yes ✓	No ____
RJ Reynolds Tobacco Company	Yes ✓	No ____
Before July 1, 1974	Yes ____	No ____
After July 1, 1974	Yes ____	No ____
Both before and after July 1, 1974	Yes ✓	No ____
Brown & Williamson Tobacco Corporation	Yes ✓	No ____
Before July 1, 1974	Yes ____	No ____
After July 1, 1974	Yes ____	No ____
Both before and after July 1, 1974	Yes ✓	No ____
Brown & Williamson Tobacco Corporation, as successor to American Tobacco Company	Yes ✓	No ____
Before July 1, 1974	Yes ____	No ____
After July 1, 1974	Yes ____	No ____
Both before and after July 1, 1974	Yes ✓	No ____
Lorillard Tobacco Company/Lorillard, Inc	Yes ✓	No ____
Before July 1, 1974	Yes ____	No ____
After July 1, 1974	Yes ____	No ____
Both before and after July 1, 1974	Yes ✓	No ____
Liggett Group, Inc	Yes ✓	No ____
Before July 1, 1974	Yes ____	No ____
After July 1, 1974	Yes ____	No ____
Both before and after July 1, 1974	Yes ✓	No ____
Brooke Group, Ltd., Inc.	Yes ✓	No ____
Before July 1, 1974	Yes ____	No ____
After July 1, 1974	Yes ✓	No ____
Both before and after July 1, 1974	Yes ____	No ____

Question No 4

[Fraud and Misrepresentation]

Did one or more of the Defendants make a false statement of a material fact, either knowing the statement was false or misleading, or being without knowledge as to its truth or falsity, with the intention of misleading smokers ?

Please answer "Yes" or "No" as to each Defendant, below. If you answer "yes" to any Defendants, please answer whether the conduct occurred during one of the following time periods

Philip Morris, Incorporated	Yes ✓	No ____
Before May 5, 1982	Yes ____	No ____
After May 5, 1982	Yes ____	No ____
Both before and after May 5, 1982	Yes ✓	No ____
RJ Reynolds Tobacco Company	Yes ✓	No ____
Before May 5, 1982	Yes ____	No ____
After May 5, 1982	Yes ____	No ____
Both before and after May 5, 1982	Yes ✓	No ____
Brown & Williamson Tobacco Corporation	Yes ✓	No ____
Before May 5, 1982	Yes ____	No ____
After May 5, 1982	Yes ____	No ____
Both before and after May 5, 1982	Yes ✓	No ____
Brown & Williamson Tobacco Corporation, as successor to American Tobacco Company	Yes ✓	No ____
Before May 5, 1982	Yes ____	No ____
After May 5, 1982	Yes ____	No ____
Both before and after May 5, 1982	Yes ✓	No ____
Lorillard Tobacco Company/Lorillard, Inc.	Yes ✓	No ____
Before May 5, 1982	Yes ____	No ____
After May 5, 1982	Yes ____	No ____
Both before and after May 5, 1982	Yes ✓	No ____
Liggett Group, Inc.	Yes ✓	No ____
Before May 5, 1982	Yes ____	No ____
After May 5, 1982	Yes ____	No ____

Both before and after May 5, 1982	Yes ✓	No ____
Brooke Group, Ltd , Inc	Yes ✓	No ____
Before May 5, 1982	Yes ____	No ____
After May 5, 1982	Yes ✓	No ____
Both before and after May 5, 1982	Yes ____	No ____
Council for Tobacco Research-U.S.A	Yes ✓	No ____
Before May 5, 1982	Yes ____	No ____
After May 5, 1982	Yes ____	No ____
Both before and after May 5, 1982	Yes ✓	No ____
Tobacco Institute	Yes ✓	No ____
Before May 5, 1982	Yes ____	No ____
After May 5, 1982	Yes ____	No ____
Both before and after May 5, 1982	Yes ✓	No ____

Question No 4a

[Fraud by Concealment]

Did one or more of the Defendants conceal or omit material information, not otherwise known or available, knowing the material was false and misleading, or failed to disclose a material fact concerning or proving the health effects and/or addictive nature of smoking cigarettes ?

Please answer "Yes" or "No" as to each Defendant, below. If you answer "yes" to any Defendants, please answer whether the conduct occurred during one of the following time periods:

Philip Morris, Incorporated	Yes ✓	No ____
Before May 5, 1982	Yes ____	No ____
After May 5, 1982	Yes ____	No ____
Both before and after May 5, 1982	Yes ✓	No ____
RJ Reynolds Tobacco Company	Yes ✓	No ____
Before May 5, 1982	Yes ____	No ____
After May 5, 1982	Yes ____	No ____
Both before and after May 5, 1982	Yes ✓	No ____
Brown & Williamson Tobacco Corporation	Yes ✓	No ____

Before May 5, 1982	Yes ____	No ____
After May 5, 1982	Yes ____	No ____
Both before and after May 5, 1982	Yes ✓	No ____
Brown & Williamson Tobacco Corporation, as successor to American Tobacco Company	Yes ✓	No ____
Before May 5, 1982	Yes ____	No ____
After May 5, 1982	Yes ____	No ____
Both before and after May 5, 1982	Yes ✓	No ____
Lorillard Tobacco Company/Lorillard, Inc	Yes ✓	No ____
Before May 5, 1982	Yes ____	No ____
After May 5, 1982	Yes ____	No ____
Both before and after May 5, 1982	Yes ✓	No ____
Liggett Group, Inc	Yes ✓	No ____
Before May 5, 1982	Yes ____	No ____
After May 5, 1982	Yes ____	No ____
Both before and after May 5, 1982	Yes ✓	No ____
Brooke Group, Ltd , Inc.	Yes ✓	No ____
Before May 5, 1982	Yes ____	No ✓
After May 5, 1982	Yes ✓	No ____
Both before and after May 5, 1982	Yes ____	No ____
Council for Tobacco Research-U.S.A.	Yes ✓	No ____
Before May 5, 1982	Yes ____	No ____
After May 5, 1982	Yes ____	No ____
Both before and after May 5, 1982	Yes ✓	No ____
Tobacco Institute	Yes ✓	No ____
Before May 5, 1982	Yes ____	No ____
After May 5, 1982	Yes ____	No ____
Both before and after May 5, 1982	Yes ✓	No ____

Question No 5

[Civil Conspiracy-Misrepresentation]

Did two or more of the Defendants enter into an agreement to misrepresent information relating to the health effects of cigarette smoking, or the addictive nature of smoking cigarettes, with the intention that smokers and members of the public rely to their detriment ?

Please answer "Yes" or "No" as to each Defendant, below:

Philip Morris, Incorporated	Yes ✓	No ____
RJ Reynolds Tobacco Company	Yes ✓	No ____
Brown & Williamson Tobacco Corporation	Yes ✓	No ____
Brown & Williamson Tobacco Corporation as successor to American Tobacco Company	Yes ✓	No ____
Lorillard Tobacco Company/Lorillard, Inc.	Yes ✓	No ____
Liggett Group, Inc.	Yes ✓	No ____
Brooke Group, Ltd., Inc	Yes ✓	No ____
Council for Tobacco Research-U.S A	Yes ✓	No ____
Tobacco Institute	Yes ✓	No ____

Question No 5a

[Civil Conspiracy-Concealment]

Did two or more of the Defendants enter into an agreement to conceal or omit information regarding the health effects of cigarette smoking, or the addictive nature of smoking cigarettes, with the intention that smokers and members of the public rely to their detriment ?

Please answer "Yes" or "No" as to each Defendant, below:

Philip Morris, Incorporated	Yes ✓	No ____
RJ Reynolds Tobacco Company	Yes ✓	No ____
Brown & Williamson Tobacco Corporation	Yes ✓	No ____
Brown & Williamson Tobacco Corporation as successor to American Tobacco Company	Yes ✓	No ____
Lorillard Tobacco Company/Lorillard, Inc.	Yes ✓	No ____
Liggett Group, Inc.	Yes ✓	No ____
Brooke Group, Ltd., Inc.	Yes ✓	No ____

Council for Tobacco Research-U S A	Yes ✓	No ____
Tobacco Institute	Yes ✓	No ____

Question No 6.

[Breach of Implied Warranty]

Did one or more of the Defendant Tobacco Companies sell or supply cigarettes that were defective in that they were not reasonably fit for the uses intended ?

Please answer "Yes" or "No" as to each Defendant, below. If you answer "yes" to **any** Defendants, please answer whether the conduct occurred during **any** of the following time periods

Philip Morris, Incorporated	Yes ✓	No ____
Before July 1, 1969	Yes ✓	No ____
July 1, 1969 thru July 1, 1974	Yes ✓	No ____
After July 1, 1974	Yes ✓	No ____
RJ Reynolds Tobacco Company	Yes ✓	No ____
Before July 1, 1969	Yes ✓	No ____
July 1, 1969 thru July 1, 1974	Yes ✓	No ____
After July 1, 1974	Yes ✓	No ____
Brown & Williamson Tobacco Corporation	Yes ✓	No ____
Before July 1, 1969	Yes ✓	No ____
July 1, 1969 thru July 1, 1974	Yes ✓	No ____
After July 1, 1974	Yes ✓	No ____
Brown & Williamson Tobacco Corporation, as successor to American Tobacco Company	Yes ✓	No ____
Before July 1, 1969	Yes ✓	No ____
July 1, 1969 thru July 1, 1974	Yes ✓	No ____
After July 1, 1974	Yes ✓	No ____
Lorillard Tobacco Company/Lorillard, Inc.	Yes ✓	No ____
Before July 1, 1969	Yes ✓	No ____
July 1, 1969 thru July 1, 1974	Yes ✓	No ____
After July 1, 1974	Yes ✓	No ____
Liggett Group, Inc.	Yes ✓	No ____
Before July 1, 1969	Yes ✓	No ____

July 1, 1969 thru July 1, 1974	Yes ✓	No ____
After July 1, 1974	Yes ✓	No ____
Brooke Group, Ltd , Inc	Yes ✓	No ____
Before July 1, 1969	Yes ____	No ✓
July 1, 1969 thru July 1, 1974	Yes ____	No ✓
After July 1, 1974	Yes ✓	No ____

Question No 7.

[Breach of Express Warranty]

Did one or more of the Defendant Tobacco Companies sell or supply cigarettes that, at the time of sale or supply, did not conform to representations of fact made by said Defendant(s), either orally or in writing ?

Please answer "Yes" or "No" as to each Defendant, below. If you answer "yes" to any Defendants, please answer whether the conduct occurred during one of the following time periods

Philip Morris, Incorporated	Yes ✓	No ____
Before July 1, 1974	Yes ____	No ____
After July 1, 1974	Yes ____	No ____
Both before and after July 1, 1974	Yes ✓	No ____
RJ Reynolds Tobacco Company	Yes ✓	No ____
Before July 1, 1974	Yes ____	No ____
After July 1, 1974	Yes ____	No ____
Both before and after July 1, 1974	Yes ✓	No ____
Brown & Williamson Tobacco Corporation	Yes ✓	No ____
Before July 1, 1974	Yes ____	No ____
After July 1, 1974	Yes ____	No ____
Both before and after July 1, 1974	Yes ✓	No ____
Brown & Williamson Tobacco Corporation, as successor to American Tobacco Company	Yes ✓	No ____
Before July 1, 1974	Yes ____	No ____
After July 1, 1974	Yes ____	No ____
Both before and after July 1, 1974	Yes ✓	No ____
Lorillard Tobacco Company/Lorillard, Inc.	Yes ✓	No ____

Before July 1, 1974	Yes ____	No ____
After July 1, 1974	Yes ____	No ____
Both before and after July 1, 1974	Yes ✓	No ____
Liggett Group, Inc	Yes ✓	No ____
Before July 1, 1974	Yes ____	No ____
After July 1, 1974	Yes ____	No ____
Both before and after July 1, 1974	Yes ✓	No ____
Brooke Group, Ltd , Inc	Yes ✓	No ____
Before July 1, 1974	Yes ____	No ✓
After July 1, 1974	Yes ✓	No ____
Both before and after July 1, 1974	Yes ____	No ____

Question No 8

[Negligence]

Have Plaintiffs proven that one or more of the Defendant Tobacco Companies failed to exercise the degree of care which a reasonable cigarette manufacturer would exercise under like circumstances ?

Please answer "Yes" or "No" as to each Defendant, below If you answer "yes" to any Defendants, please answer whether the conduct occurred during one of the following time periods:

Philip Morris, Incorporated	Yes ✓	No ____
Before July 1, 1969	Yes ____	No ____
After July 1, 1969	Yes ____	No ____
Both before and after July 1, 1969	Yes ✓	No ____
RJ Reynolds Tobacco Company	Yes ✓	No ____
Before July 1, 1969	Yes ____	No ____
After July 1, 1969	Yes ____	No ____
Both before and after July 1, 1969	Yes ✓	No ____
Brown & Williamson Tobacco Corporation	Yes ✓	No ____
Before July 1, 1969	Yes ____	No ____
After July 1, 1969	Yes ____	No ____
Both before and after July 1, 1969	Yes ✓	No ____

Brown & Williamson Tobacco Corporation, as

successor to American Tobacco Company	Yes ✓	No ____
Before July 1, 1969	Yes ____	No ____
After July 1, 1969	Yes ____	No ____
Both before and after July 1, 1969	Yes ✓	No ____
Lorillard Tobacco Company/Lorillard, Inc	Yes ✓	No ____
Before July 1, 1969	Yes ____	No ____
After July 1, 1969	Yes ____	No ____
Both before and after July 1, 1969	Yes ✓	No ____
Liggett Group, Inc	Yes ✓	No ____
Before July 1, 1969	Yes ____	No ____
After July 1, 1969	Yes ____	No ____
Both before and after July 1, 1969	Yes ✓	No ____
Brooke Group, Ltd , Inc	Yes ✓	No ____
Before July 1, 1969	Yes ____	No ____
After July 1, 1969	Yes ✓	No ____
Both before and after July 1, 1969	Yes ____	No ____

Question No 9.

[Intentional Infliction of Emotional Distress]

Have Plaintiffs proven that one or more of the Defendant Tobacco Companies engaged in extreme and outrageous conduct or with reckless disregard relating to cigarettes sold or supplied to Florida smokers with the intent to inflict severe emotional distress ?

Please answer "Yes" or "No" as to each Defendant, below:

Philip Morris, Incorporated	Yes ✓	No ____
RJ Reynolds Tobacco Company	Yes ✓	No ____
Brown & Williamson Tobacco Corporation	Yes ✓	No ____
Brown & Williamson Tobacco Corporation as successor to American Tobacco Company	Yes ✓	No ____
Lorillard Tobacco Company/Lorillard, Inc.	Yes ✓	No ____
Liggett Group, Inc.	Yes ✓	No ____
Brooke Group, Ltd., Inc.	Yes ✓	No ____

Question No 10

[Entitlement to Punitive Damages]

Under the circumstances of this case, state below whether the conduct of any Defendant rose to a level that would permit a potential award or entitlement to punitive damages.

Please answer "Yes" or "No" as to each Defendant, below

Philip Morris, Incorporated	Yes ✓	No ____
RJ Reynolds Tobacco Company	Yes ✓	No ____
Brown & Williamson Tobacco Corporation	Yes ✓	No ____
Brown & Williamson Tobacco Corporation as successor to American Tobacco Company	Yes ✓	No ____
Lorillard Tobacco Company/Lorillard, Inc	Yes ✓	No ____
Liggett Group, Inc.	Yes ✓	No ____
Brooke Group, Ltd., Inc.	Yes ✓	No ____
Council for Tobacco Research-U.S.A	Yes ✓	No ____
Tobacco Institute	Yes ✓	No ____

SO SAY WE ALL, this 7th day of July, 1999

Keighton Anthony Finegan
FOREPERSON
KEIGHTON ANTHONY FINEGAN

RECEIVED, 9/20/2017 4:34 PM, Jon S. Wheeler, First District Court of Appeal

Case No. 1D17-2104
L.T. Case No. 2007-CA-11551-DXXXX

IN THE DISTRICT COURT OF APPEAL, FIRST DISTRICT
STATE OF FLORIDA

LINDA PRENTICE, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF JOHN C. PRICE
Plaintiff-Appellee/Cross-Appellant,

v.

R.J. REYNOLDS TOBACCO COMPANY,
Defendant-Appellant/Cross-Appellee.

On Appeal from a Final Order rendered by the Fourth Judicial Circuit Court,
in and for Duval County, Florida
Hon. Tyrie Boyer, Circuit Judge

APPELLANT R.J. REYNOLDS TOBACCO COMPANY'S INITIAL BRIEF

Charles R.A. Morse
Florida Bar No. 91561
Jason T. Burnette
Florida Bar No. 125200
JONES DAY
250 Vesey St.
New York, NY 10281-1047
Telephone: (212) 326-3939
Facsimile: (212) 755-7306
cramorse@jonesday.com

Robert B. Parrish
Florida Bar No. 268739
David C. Reeves
Florida Bar No. 0072303
Jeffrey A. Yarbrough
Florida Bar No. 14892
MOSELEY, PRICHARD, PARRISH, KNIGHT & JONES
501 West Bay Street
Jacksonville, Florida 32202
Telephone: (904) 356-1306
Facsimile: (904) 354-0194
bparrish@mppkj.com

Counsel for Appellant/Cross-Appellee R.J. Reynolds Tobacco Company

September 20, 2017

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STATEMENT OF THE CASE AND FACTS

In this *Engle*-progeny wrongful-death case, the jury returned a verdict for Plaintiff Linda Prentice for $6.4 million. On appeal, Reynolds challenges the exclusion of its expert witness and of key deposition testimony of the decedent, John Price, the admission of speculative testimony from Plaintiff's expert witness, the trial court's erroneous conspiracy instruction, and the trial court's refusal to apportion the judgment by Mr. Price's share of comparative fault.

1. Plaintiff alleged that Mr. Price, her mother's husband, died from chronic obstructive pulmonary disease ("COPD"), or emphysema, caused by a smoking addiction. *See* R.3:4552. Medical records included a pulmonary function test in 1996 showing that Mr. Price had by that time already lost 75% of his lung function. Reynolds asserted a statute-of-limitations defense, alleging that Mr. Price's COPD manifested by May 5, 1990. *See R.J. Reynolds Tobacco Co. v. Jewett*, 106 So. 3d 465, 467–68 (Fla. 1st DCA 2012). In support of that defense, Reynolds sought to introduce the testimony of Dr. Harold Jackson, a board-certified pulmonologist who has treated nearly 30,000 COPD patients during his two decades of experience practicing and researching in the field. *See* R.2:1099.

Dr. Jackson offered to testify that Mr. Price's COPD manifested by May 5, 1990, that Severe or Very Severe COPD is always symptomatic, and that COPD progresses very gradually. R.2:1106–07; R.2:2488. In coming to these opinions,

Dr. Jackson relied on his own training, skill, and experience and on scientific literature on the progression of COPD; application of the Knudson Formula, which is the formula generally accepted by pulmonologists to assess predicted values of lung function; and the rate of lung function decline explained in a peer reviewed meta-analysis of multiple studies and trials. R.2:1098–1107; R.3:1705–06.

The trial court barred Dr. Jackson from offering his manifestation opinion on the grounds that it was supported by "insufficient facts or data"; he did not rely on "scientific, technical, or other peer-reviewed studies"; and he had not "undertaken to do any study" that would support his opinion. R.2:1698–99. The trial court excluded Dr. Jackson's opinion on the gradual progression of symptomatic COPD on the ground that no witness or medical record corroborated Dr. Jackson's testimony. *See* R.3:1955–56; R.3:1958; R.3:1962. In excluding this evidence, the trial court recognized that it had foreclosed Reynolds from presenting its limitations defense to the jury. R.3:1962–65.

2. Reynolds sought to introduce a portion of Mr. Price's deposition testimony in which he attributed his father's death in 1986 to emphysema caused by cigarette smoking. Specifically, Mr. Price testified that, at that time, he and the rest of his family "knew to no end" that his father's emphysema was caused by cigarette smok-

ing because all he did was "smoke, smoke, smoke." R.2:1957–58. Although Reynolds offered this testimony to show Mr. Price's state of mind, the trial court excluded it as hearsay. R.3:446–49.

3. The only damages Plaintiff sought at trial were noneconomic compensatory damages on behalf of her mother, Ann Price, as the surviving spouse of Mr. Price. Mrs. Price did not testify at trial, however. Nor did Plaintiff call any other fact witness to testify about Mrs. Price's experiences with her husband's physical condition toward the end of his life. Instead, over Reynolds's objection, the trial court permitted Plaintiff's expert witness, Dr. David Burns, to describe the experiences of a hypothetical spouse of a hypothetical patient with end-stage COPD. R.3:3356–59. Dr. Burns testified that a hypothetical spouse would "see someone who is struggling to breathe … all the time" and who "can't walk across … a regular room in the house to go to the bathroom" or to go to "the kitchen to have dinner." *Id.* Dr. Burns further testified that "somebody[ ]" would need "to be with [the patient] carrying the oxygen tank because [the patient] can't do anything for themselves at that moment in time." *Id.* According to Dr. Burns, the spouse would "then move [out of] the bathroom … and then … to the kitchen [to] fix dinner," before "bring[ing] the dinner to the [patient] because" the patient cannot "move into the kitchen." *Id.* Dr. Burns made clear that those difficulties would affect "all of the activities." *Id.*

Dr. Burns also testified about the spouse's sense of helplessness. The spouse "can't fix the fact that [the patient] can't get air in and out" and would have "to watch" the spouse's struggle to breath. *Id.* He added that "it doesn't get better," but instead "goes on month after month, year after year, slowly getting a little bit worse … until the person can't breathe enough" and "quite slowly suffocates to death." R.3:3359. According to Dr. Burns, this would happen with the patient's "spouse sitting there watching unable to do anything about it." *Id.* Dr. Burns so testified despite the fact that Mrs. Price was not present at Mr. Price's passing. *See* R.3:4452.

4. Reynolds requested instructions to make clear that the reliance element of Plaintiff's concealment and conspiracy claims required the jury to determine "whether Mr. Price reasonably relied to his detriment on a *statement* . . . concerning the health risks or addictive nature of cigarette smoking." R.1:7522–23 (emphasis added). The trial court rejected that instruction, instead telling the jury that it must determine "whether the *concealment or omission* of material information concerning the health risks or addictive nature of cigarette smoking … was relied upon by John Price to his detriment." R.3:5233–34.

5. From voir dire through closing argument, Plaintiff repeatedly conceded to the jury that Mr. Price bore some of the fault for his illness. During voir dire, her counsel told potential jurors that she was "accept[ing] some responsibility for" Mr.

Price, R.3:1381; R.3:1405; R.3:1568. Plaintiff emphasized that theme during opening statement, *see* R.3:2159–60; R.3:2176, and closing argument, admitting that Mr. Price shared fault but insisting that Reynolds bore most of the fault because of its intentional conduct in "[c]reating doubt" about the health risks of smoking. R.3:5272; R.3:5466. Plaintiff refused to take up the trial court's suggestion that she explain to the jury that comparative fault would not apply to her intentional tort claims. R.3:862–63.

6. The jury found for Plaintiff on her claims strict liability, negligence, and conspiracy (but not concealment). R.2:5114–15. The jury awarded Plaintiff $6.4 million in noneconomic compensatory damages and allocated 40% of the fault to Reynolds and 60% to Mr. Price. *Id.* In a separate phase, the jury declined to award punitive damages against Reynolds. R.2:5130. The trial court denied Reynolds's post-trial motions, R.2:8470–71, 8473–76, and entered a final judgment for the full amount of the $6.4 million verdict. R.2:8477–79.

SUMMARY OF ARGUMENT

I. The trial court abused its discretion in excluding the testimony of Dr. Jackson. Dr. Jackson's testimony should have been admitted under any conceivable standard for admission of expert testimony, and its exclusion robbed Reynolds of any opportunity to present its statute-of-limitations defense to the jury.

II. The trial court committed reversible error in excluding as hearsay portions of Mr. Price's deposition which provided compelling evidence in support of, among other things, Reynolds's statute-of-limitations defense. Reynolds offered that testimony—which showed that Mr. Price knew or should have known that his COPD was caused by smoking—for a non-hearsay purpose and, in any event, the testimony fell into the party-opponent statement exception to the bar on hearsay.

III. The jury's Phase I verdict is fatally infected by Dr. Burns's speculative, highly detailed, and emotional testimony concerning the experiences of a hypothetical spouse of a patient with end-stage COPD.

IV. The jury was not asked to determine whether Mr. Price had reasonably relied on any misleading *statement* made by one of the companies involved in the purported conspiracy. Instead, the instructions permitted imposition of liability if Mr. Price relied on a *concealment or omission*. Florida law, the procedural history of *Engle*, and principles of express preemption all make clear that Reynolds cannot be held liable on a theory of pure concealment.

V. The trial court erred in failing to apply the comparative-fault statute, Section 768.81, to reduce Plaintiff's compensatory damages award. In addition, Plaintiff waived any application of that statute by repeatedly telling the jury that Mr. Price was at fault, urging it to compare Mr. Price's assertedly slight degree of negligence with Reynolds's intentional conduct.

VI. Reynolds preserves two arguments: (1) federal law preempts Plaintiff's strict-liability and negligence claims, which rest on the *Engle* defect and negligence findings; and (2) use of the *Engle* findings violated due process.

ARGUMENT

I. THE TRIAL COURT ERRED IN EXCLUDING THE TESTIMONY OF REYNOLDS'S EXPERT WITNESS, DR. HAROLD JACKSON.

The trial court excluded all evidence offered by Reynolds in support of its statute-of-limitations defense, effectively directing a verdict on that issue. An *Engle*-progeny plaintiff's lawsuit is "barred by the applicable four-year statutes of limitations" if by May 5, 1990, the smoker knew, or in the exercise of reasonable care should have known, both that she was injured and "that there was a reasonable possibility that her [illness] was caused by cigarette smoking." *Jewett*, 106 So. 3d at 468, 470. To prevail on that defense, Reynolds had to prove that, by May 5, 1990, (1) Mr. Price's COPD had manifested, and (2) Mr. Price knew, or in the exercise of reasonable care should have known, that there was a reasonable possibility that his COPD was caused by cigarette smoking. *Id.* at 467–68. To prove its defense, Reynolds offered the testimony of Dr. Harold Jackson.

A. Dr. Jackson's Opinions and Methods.

Dr. Jackson is a board-certified pulmonologist who has treated tens of thousands of COPD patients over his more than twenty years of practice. R.2:1098. Drawing on his education, his training, his research, and his "continuous review of

the … scientific literature," *id.*, Dr. Jackson offered two sets of opinions on the development and progression of COPD through its four stages (Mild, Moderate, Severe, and Very Severe): one set specifically based on Mr. Price, and the second based on a hypothetical patient matching Mr. Price's characteristics.

1. Dr. Jackson offered to testify that Mr. Price's COPD manifested by May 5, 1990. R.2:1106–07. In reaching this opinion, he reviewed Mr. Price's deposition testimony concerning his symptoms in 1992 and 1993 and all of Mr. Price's medical records, including a 1993 record discussing Mr. Price's respiratory symptoms and Mr. Price's pulmonary function tests from 1996 through 2009. R.2:1100–02; R.2:2483–84, 2505, 2513, 2533–34, 2538. Dr. Jackson then applied three different methodologies to the facts revealed by those records, each of which independently led Dr. Jackson to determine that the only "physiologically plausible" conclusion was that Mr. Price must have had symptomatic COPD—indeed, must have had Severe COPD—by May 5, 1990. R.2:1102; R.2:2500, 2578.

First, Dr. Jackson applied the Knudson Formula, which is the generally accepted formula used by pulmonologists to assess normal values of lung function, including for assessment of impairment of lung function. *See* R.2:2509, 2520. As Dr. Jackson explained, the four stages of COPD are defined by the ratio of the patient's lung function to the predicted lung function of a healthy individual with the same characteristics. R.2:2506, 2519–21. Dr. Jackson began by using the Knudson

formula to determine that Mr. Price would have enjoyed a respiratory capacity of 2,960 ccs in 1996 had he been healthy, and compared that value with the results of his 1996 pulmonary function test, which demonstrated an actual respiratory capacity of just 740 ccs. *See* R.2:1102; R.2:2488, 2511. Because Mr. Price retained only 25% of his healthy lung function, Dr. Jackson concluded that Mr. Price was suffering from Very Severe COPD in 1996. *See* R.2:2488, 2511.

Dr. Jackson then applied the Knudson Formula to determine that, in 1990, Mr. Price would have had to have a respiratory capacity of more than 1,560 ccs to have anything less than Severe COPD at that time. *See* R.2:1102. Given his 1996 results of 740 ccs, this meant that to have had anything less than Severe COPD in 1990, Mr. Price would "have had to have lost at least 830 ccs [of lung function] in a five year, ten month period (or approximately 136 ccs a year)." R.2:1102. As Dr. Jackson explained, "it is not scientifically plausible that" Mr. Price experienced such a profound loss of lung function in such a short period of time. The only scientifically plausible conclusion was that Mr. Price had Severe or Very Severe, and thus symptomatic, COPD by May 5, 1990. R.2:1102; R.2:2520–26.

Second, Dr. Jackson applied another independent method, which led him to the same conclusion that Mr. Price had, at a minimum, Severe and symptomatic COPD by May 5, 1990. Dr. Jackson relied on a peer reviewed article from the

International Journal of Chronic Obstructive Pulmonary Disease. That article analyzed a number of studies of the rate of loss of lung function in COPD sufferers. R.2:1103; R.2:2502–03, 2527. Adopting a conservative rate from that study, Dr. Jackson calculated how long it would take for someone to progress from Moderate COPD to the Very Severe COPD that Mr. Price had in 1996. The result of that straightforward calculation was that it would take a minimum of ten years, leading Dr. Jackson to again conclude that "it [was] not plausible for Mr. Price" to have anything less than Severe COPD by May 5, 1990. R.2:1104; 2:2502–03, 2506–08.

Third, as yet another independent method, Dr. Jackson applied his education and extensive clinical and research experience and knowledge to the facts of this case. R.2:1099; R.2:2549. Specifically, based on Mr. Price's pulmonary function tests, his 1993 medical record, and his deposition testimony concerning his respiratory symptoms in 1992 and 1993, Dr. Jackson concluded that Mr. Price was suffering from Very Severe COPD in 1996 and was already suffering from Severe or Very Severe—and thus symptomatic—COPD during the period from 1992 to 1993. R.2:1102; R.2:2488. Then, working back from both 1996 and 1992–1993, Dr. Jackson determined that, in light of the gradual nature of COPD progression, the only "physiologically plausible" conclusion was that Mr. Price must have had noticeably symptomatic COPD by May 5, 1990. R.2:1101–02; 2:2500, 2578.

2. Dr. Jackson also offered to testify that Severe or Very Severe COPD is

always symptomatic and that COPD progresses very slowly—but without testifying about the specific state of Mr. Price's COPD at any given point in time. *See* R.2:2510. In developing this more generic opinion, Dr. Jackson relied not only on his own experience, education, and training, but also the relevant literature—including the same peer-reviewed study compiling and analyzing the results of other studies on the rate of lung function loss among those with COPD. R.2:1100; R.2:2571–72.

The trial court excluded both sets of opinions. R.2:1698–99; R.3:1951–63.

B. The Trial Court Erred By Excluding Dr. Jackson's Testimony Under The *Daubert* Standard.

Although at present there is uncertainty about which standard (*Daubert* or *Frye*) governs the admissibility of expert testimony in Florida, the trial court abused its discretion when it excluded Dr. Jackson's testimony, no matter the standard.[1]

[1] Citing constitutional concerns, the Supreme Court recently declined to adopt, "to the extent they are procedural," the 2013 amendments to the Florida Evidence Code replacing the *Frye* standard with the *Daubert* standard, but left for another day the determination whether the *Daubert* amendments are unconstitutional. *In re Amendments To Florida Evidence Code*, 210 So. 3d 1231, 1237, 1239 (Fla. Feb. 16, 2017) (quotation marks and citation omitted). This Court need not decide which standard applies because, under any conceivable standard, the trial court committed reversible error in excluding Dr. Jackson's testimony. But, if the Court has doubt on this point, it should hold this case pending the Florida Supreme Court's decision in *Delisle v. Crane Co.*, No. AC16-2182, which presents the question of which standard governs admission of expert testimony.

For starters, both the trial court and Plaintiff acknowledged that Dr. Jackson is qualified to deliver his proffered opinions as an expert. R.3:84, 86. They could not reasonably have done otherwise in light of Dr. Jackson's more than two decades of treating COPD patients, researching in the field, and reviewing the scientific literature concerning the "development and progression of COPD." R.2:1099. Moreover, an expert's specialized knowledge would have assisted the jury in determining the complicated medical facts relevant to Reynolds's statute-of-limitations defense—and, in particular, the fact of when Mr. Price's COPD manifested. The only question, then, is whether Dr. Jackson's proffered opinions met the standard for admissibility. They clearly did.

Under the *Daubert* standard, which the trial court applied here, the "exclusion of expert testimony is reviewed for an abuse of discretion." *Maines v. Fox*, 190 So. 3d 1135, 1140 (Fla. 1st DCA 2016). The trial court's "discretion, however, is limited by the evidence code and the applicable case law, and its interpretation of those authorities is subject to de novo review." *Panama City-Bay Cty. Airport & Indus. Dist. v. Kellogg Brown & Root Servs., Inc.*, 140 So. 3d 1112, 1115 (Fla. 1st DCA 2014) (quotation marks and citation omitted). Under the relevant rule of evidence, a qualified expert like Dr. Jackson may testify if: "(1) [t]he testimony is based upon sufficient facts or data; (2) [t]he testimony is the product of reliable principles and methods; and (3) [t]he witness has applied the principles and methods reliably to

the facts of the case." § 90.702, Fla. Stat.

Thus, the testimony of a qualified expert should be admitted if the testimony is (1) based on sufficient facts or data and (2) the product of "'reliable principles and methods' … applied 'reliably to the facts of the case.'" *Baan v. Columbia Cty.*, 180 So. 3d 1127, 1134 (Fla. 1st DCA 2015) (quoting § 90.702, Fla. Stat.). This *Daubert* standard is "flexible." *Booker v. Sumter Cty. Sheriff's Office/N. Am. Risk Servs.*, 166 So. 3d 189, 194 (Fla. 1st DCA 2015). Moreover, while the trial court must act as a "gatekeeper" to keep out "science that is junky," *L.L. v. State*, 189 So. 3d 252, 256 (Fla. 3d DCA 2016), the court must "not … supplant the adversary system or the role of the jury: vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence." *Baan*, 180 So. 3d at 1134 (quotation marks and citation omitted).

1. Dr. Jackson's expert opinions on manifestation were "based upon sufficient facts or data." § 90.702, Fla. Stat. "[T]he sufficiency of the facts required to form an opinion must normally be decided by the expert himself" and, "unless the omissions are glaring," alleged deficiencies go "to the weight rather than the admissibility of the expert's testimony." *Centex-Rooney Constr. Co. v. Martin Cty.*, 706 So. 2d 20, 27 (Fla. 4th DCA 1997) (quotation omitted). Nothing in the amendments

adopting *Daubert* calls into question this pro-admissibility approach to the sufficiency of the facts or data on which an expert relies.

In any event, Dr. Jackson clearly based his opinions on sufficient facts and data. Dr. Jackson based his opinion on Mr. Price's smoking history and all of the medical records in this case, including: (1) the report from Mr. Price's 1993 visit to a doctor on account of lung problems, R.2:1100, and (2) all of Mr. Price's pulmonary function tests from 1996 through 2009, R.2:1100–01; 2:2505, 2513. Moreover, Dr. Jackson evaluated the non-medical evidence, including Mr. Price's deposition testimony concerning his respiratory symptoms in 1993. R.2:1101–02. Dr. Jackson thus easily satisfied the first prong of the *Daubert* standard. *See, e.g.*, *Baan*, 180 So. 3d at 1133 (expert relied on sufficient facts or data where he "reviewed the [decedent's] medical records, the autopsy report, EMS records, and statements from witnesses who observed [the child's] medical condition"); *Booker*, 166 So. 3d at 194 (same where expert examined the injured person and medical records).

2. Dr. Jackson's opinion that Mr. Price's COPD manifested by May 5, 1990, was also the product of "'reliable principles and methods' … applied 'reliably to the facts.'" *Baan*, 180 So. 3d at 1134. Indeed, Dr. Jackson's proposed testimony was based on his reliable application of *several* reliable methods.

First, Dr. Jackson applied the Knudson formula, which is the "generally accepted" formula used by pulmonologists to assess normal values of lung function,

including for assessment of impairment of lung function. *See* R.2:1102; R.2:2509, 2520. That the Knudson Formula is generally accepted by pulmonologists suffices to demonstrate its reliability. *See, e.g.*, *Crane Co. v. DeLisle*, 206 So. 3d 94, 108 (Fla. 4th DCA 2016). And the Knudson Formula's reliability is confirmed by the fact that it has long been approved by the Department of Labor for the assessment of lung function. *See, e.g.*, *Simco Peabody Coal Co. v. Director, Office of Worker's Compensation Programs*, 630 F. App'x 447, 454 n.5, 460 (6th Cir. 2015).

Dr. Jackson reliably applied the Knudson formula to the facts of this case. Dr. Jackson accounted for Mr. Price's age, height, and race to apply the Knudson Formula at two points in time (1990 and 1996), identifying the lung function Mr. Price would have had in 1996 had he been healthy and the lung function he needed to have had in 1990 to have been potentially asymptomatic. Comparing these to Mr. Price's actual lung function results, Dr. Jackson concluded that Mr. Price had Very Severe COPD in 1996 and could not possibly have been asymptomatic in 1990. *See* R.2:1102. That is precisely how the Knudson Formula works. *See* R.2:2520–22. So, Dr. Jackson, a qualified expert, took a reliable method and applied it by the book to the facts of the case before him. *Daubert* does not demand anything more.

Second, in an alternative assessment that independently led to his opinion that Mr. Price's COPD manifested by May 5, 1990, Dr. Jackson applied scientific

data concerning the rate of decline in lung function among those with COPD compiled and analyzed in a peer reviewed article published in the *International Journal of Chronic Obstructive Pulmonary Disease*. R.2:1103; R.2:2502–03, 2527. Thus, the trial court was simply wrong when it asserted that Dr. Jackson relied on "no scientific, technical, or other peer reviewed studies." R.2:1698–99. Nor is it relevant that Dr. Jackson did not himself conduct the study on which his opinion is based; nothing in § 90.702, *Daubert*, or the decisions applying them limits experts to reliance only on data or methods they have themselves developed. *See Booker*, 166 So. 3d at 194; *Daubert v. Merrell Dow Pharm., Inc.*, 43 F.3d 1311, 1317–18 (9th Cir. 1995).

Moreover, Dr. Jackson reliably applied the peer-reviewed scientific data to the facts of this case. He took a conservative, Plaintiff-friendly approach, choosing the peer-reviewed study's highest average rate of lung function loss associated with Moderate COPD and, using that rate, calculating "the minimum plausible length of time" it would take for a patient to advance from Moderate COPD to the level of lung function exhibited by Mr. Price during his 1996 pulmonary function test. R.2:1103–04; R.2:2527. As those calculations revealed, that process would take a minimum of ten years—*i.e.*, it would have begun no later than 1986—meaning that "it [was] not plausible for Mr. Price" to have suffered anything less than Severe COPD by May 5, 1990. R.2:1104; R.2:2502–03, 2506–08. Mr. Price must have

been symptomatic well before that date because Severe COPD is invariably symptomatic—as confirmed by well-accepted sources like those published by the World Health Organization and even the study relied upon by Plaintiff in this case. *See* R.2:1104–05; R.2:2500–01.[2] In sum, Dr. Jackson reliably applied the results of "published medical studies … to the facts of this case"—a quintessentially reliable method. *Booker*, 166 So. 3d at 195.

Third, Dr. Jackson independently reached his opinion that Mr. Price's COPD manifested by May 5, 1990, by applying his education and extensive clinical and research experience and knowledge to the facts of this case. R.2:1099; R.2:2549. Under *Daubert*, an expert's testimony is inadmissible if it is based solely on her own "*ipse dixit*," but testimony based on her experience is admissible so long as she "explain[s] how that experience leads to the opinion, why the experience is a sufficient basis for the opinion and how that experience is reliably applied to the facts." *Baan*, 180 So. 3d at 1133. Dr. Jackson offered just such an explanation.

Dr. Jackson's experience studying and treating COPD is undoubtedly extensive. *See* R.2:2501, 2549 ("30 plus years of experience in pulmonary medicine,"

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[2] *See* Isa Cerveri, et al., The Rapid FEV1 Decline in Chronic Obstructive Pulmonary Disease Is Associated With Predominant Emphysema: A Longitudinal Study, 10 J. CHRONIC OBSTRUCTIVE PULMONARY DISEASE 55, 57 (2013).

including treatment of thousands of COPD patients and review of scientific literature). Dr. Jackson explained in detail the several steps he took in applying his experience to this case. He began by reviewing all of Mr. Price's available medical records, R.2:2505, including the 1996 pulmonary function test that indisputably revealed Very Severe COPD. R.2:1100; R.2:2488. Dr. Jackson examined the report from Mr. Price's 1993 doctor's visit, which noted "diminished breath sounds" in both of Mr. Price's lungs, which would only be possible if Mr. Price had "more advanced COPD (Severe or Very Severe)." R.2:1100; R.2:2557–58. And Dr. Jackson confirmed that conclusion by considering Mr. Price's self-described respiratory symptoms in 1992–1993, which "were consistent with advanced COPD." R.2:1101–02; R.2:2500, 2533–34.

Dr. Jackson next explained the slow progression of COPD. COPD progresses "over decades," R.2:2509–10, because "[t]he patient loses lung function gradually as the disease slowly destroys the alveolae where the gas exchange takes place." R.2:1101. Indeed, Dr. Jackson observed that he had "never treated" and was not "aware of, a single patient with COPD caused solely by smoking (as opposed to alpha-1 antitrypsin deficiency) whose COPD progressed from Moderate to Very Severe in fewer than six years." R.2:1099. As a result, Dr. Jackson's extensive experience led him to conclude that the symptoms Mr. Price described having in 1993 would have been "preceded by significant shortness of breath for many years,"

R.2:1101; R.2:2500, 2517–18, 2535–36, such "that Mr. Price had to have been symptomatic as of May 5, 1990," R.2:1102.

Despite Dr. Jackson's reliance on these three independent (and independently reliable) methodologies, the trial court excluded Dr. Jackson's testimony, seemingly due to a belief that it was improper for Dr. Jackson to "extrapolate back" in time—from either Mr. Price's 1996 pulmonary function test or from Mr. Price's symptoms in 1992 and 1993—to determine the severity of Mr. Price's COPD as of and before May 5, 1990. R.2:1698–99; R.3:1951–52. But neither § 90.702 nor *Daubert* somehow bars or disfavors expert testimony concerning the past. In fact, courts in *Engle*-progeny cases regularly allow plaintiffs' experts to "extrapolate back" in time to testify about the symptoms suffered by plaintiffs in the past, as when those experts opine that a plaintiff suffered symptoms before the cut-off date for membership in the *Engle* class. *See, e.g.*, *R.J. Reynolds Tobacco Co. v. Ciccone*, 190 So. 3d 1028, 1033–34 (Fla. 2016) (plaintiff's expert opined in hindsight that disease manifested before 1996 based on symptoms in 1999 and expert's belief that such symptoms "take[ ] 'at least more than five years' to develop").

The trial court's exclusion of Dr. Jackson's testimony cannot be justified by its unadorned assertions that Dr. Jackson "relie[d] on no scientific, technical, or other peer-reviewed studies … for the purpose of extrapolating" and "never un-

dert[ook] … any study to be able to extrapolate." R.2:1698–99. As already explained, § 90.702 and the *Daubert* line of cases require only that an expert reliably apply reliable principles and methods, *Baan*, 180 So. 3d at 1134; they do not require that an expert rely on a study—much less that an expert personally conduct a study, *see id.*; *Maiz v. Virani*, 253 F.3d 641, 669 (11th Cir. 2001). Moreover, as noted, Dr. Jackson *did* rely on a peer-reviewed study of the rate of decline in lung function among those with COPD. R.2:1103–04; R.2:2571–79. To the extent the trial court faulted Dr. Jackson's reliance on that study because it discussed COPD patients' prospective loss of lung function, the trial court's conclusion reflects a fundamental misunderstanding of how rates of change operate: The article discussed rates of change in lung function over time, and a rate of change over time necessarily can be applied forward into the future or backward into the past. After all, if someone knows that the rate of return on an investment is 10% per year, she can determine *not only* that a $10 investment today will be worth $11 one year in the future, *but also* that the $10 investment was worth $9.09 one year in the past. Things are no different here. Thus, even on the trial court's own, erroneously wooden view of the "flexible" *Daubert* standard, *Booker*, 166 So. 3d at 194, the trial court abused its discretion.

3. The trial court rejected Dr. Jackson's second set of opinions—on the gradual progression of COPD in a typical patient matching Mr. Price's characteristics—

based on its understanding of the Third District's decision in *Frazier v. Philip Morris USA, Inc.*, 89 So. 3d 937 (2012), coupled with the fact that Mr. Price testified that he did not have symptoms until 1992 or 1993 and that no other witness or potential witness stated that Mr. Price manifested symptoms of COPD before 1993. *See* R.3:1955–62.

To begin, *Frazier* is inapposite. In that case, before the statute of limitations cut-off date the plaintiff sought and received medical treatment for a variety of symptoms, including "a cough and pain in her ribs," a "bad cold," and a "temperature." *Frazier*, 89 So. 3d at 940. And, on each occasion, the plaintiff's treating physician diagnosed her with and treated her for some other, non-smoking-related condition, such as bronchitis or pneumonia, but never COPD. *Id.* at 939–41. When the plaintiff filed suit after eventually being diagnosed with COPD within the limitations period, the defendant raised the limitations defense and offered an expert pulmonologist's testimony that the plaintiff developed COPD outside the limitations period. *Id.* at 939, 941–42. On those facts, the Third District held that it would be "unworkable and unfair" to permit introduction of expert testimony that would have allowed the jury to hold the plaintiff—who diligently sought treatment—to a higher standard of medical acumen than her own treating physicians. *Id.* at 945–46; *see also id.* at 943 ("Nor did [the expert] testify that [the plaintiff] herself, a

hairdresser with no medical training whatsoever, should have surmised that the doctor treating her … was missing the 'manifestation' of a condition more sinister than pneumonia or bronchitis.").

The situation here is wholly different. There is no evidence at all that Mr. Price sought and received medical treatment prior to May 5, 1990 and was misled about the nature of his illness by the doctors with whom he spoke. Thus, allowing the jury to consider Dr. Jackson's expert testimony that Mr. Price had symptomatic COPD before 1990 would hardly have been "unworkable and unfair." *Frazier*, 89 So. 3d at 946.

Moreover, § 90.702 requires only that an expert's testimony be based on "sufficient facts or data"—which Dr. Jackson's testimony clearly was. The statute does *not* require that the expert base his testimony on a specific *type* of evidence, or that his testimony be *corroborated* by another witness or by the records of a treating physician. Nor, for that matter, does § 90.702 bar an expert from testifying if his opinion is contrary to certain items of evidence or the testimony of another witness, including a plaintiff or decedent. *See Baan*, 180 So. 3d at 1131, 1134 (reversing trial court's exclusion of expert testimony that contradicted report of EMS operator concerning decedent's symptoms). And that makes sense: A contrary rule would leave a defendant unable to challenge the testimony of the plaintiff—who of course could be misremembering the circumstances of his illness or shading the truth.

In short, there is no legal basis for a rule that an expert may not testify unless his opinion is consistent with other evidence of record. Such a rule would be flatly inconsistent with the text of Section 90.702, with the "flexible" *Daubert* standard more generally, and with the longstanding recognition that the courts' gatekeeping function under *Daubert* is not to supplant the adversary system and the role of the jury. *Baan*, 180 So. 3d at 1134. Indeed, to permit an expert to testify only when his opinion is consistent with that of a plaintiff or decedent or has been corroborated by other evidence would be to allow expert testimony only where it is unnecessary and unhelpful—a self-evidently nonsensical position.

C. Dr. Jackson's Opinions Would Be Admissible Under *Frye*.

If the Florida Supreme Court abandons the *Daubert* standard, this Court should apply whatever standard takes its place. *See, e.g.*, *Zambos v. Meier*, 875 So. 2d 5, 6 (Fla. 5th DCA 2004) (decisions changing a rule of law apply to cases then pending on direct appeal). The most likely replacement is the *Frye* regime, which applied prior to the legislature's 2013 amendments and for which appellate review is de novo. *See Marsh v. Valyou*, 977 So. 2d 543, 547 (Fla. 2007).

Under that regime, the testimony of a qualified expert—like Dr. Jackson—is admissible if one of two standards is met. In "the vast majority" of cases, the expert may freely offer her "pure opinion." *Marsh*, 977 So. 2d at 547–48 (quotation marks and citation omitted); *see also Baan*, 180 So. 3d at 1132 ("Under *Frye*[,] … expert

testimony is admissible if the expert is qualified and the opinion falls within the witness's expertise."). That opinion might be based on her "personal experience and training," or it might be based on principles, techniques, or methodologies that are neither new nor novel. *Marsh*, 977 So. 2d at 548 (quotation marks and citation omitted). Either way, the testimony is admissible. *Id.*

"[W]hen"—and only when—"an expert attempts to render an opinion that is based upon *new or novel scientific techniques*," the *Frye* standard applies. *Marsh*, 977 So. 2d at 547 (quotation marks and citation omitted). Under that standard, the proponent of the evidence must establish by a preponderance of the evidence that the underlying scientific principles or methodology are generally accepted in the relevant field. *See id.* Only the methodology or principles used by the expert must satisfy that test; the expert's conclusions and opinions need not be generally accepted. *See id.* (collecting cases).

The trial court's exclusion of Dr. Jackson's testimony was reversible error when measured under these pre-*Daubert* standards. For starters, Dr. Jackson could have offered his testimony in the form of "pure opinion … based … on [his] personal experience and training" alone. *Marsh*, 977 So. 2d at 547–48 (quotation marks and citation omitted). Dr. Jackson's testimony is not based on novel scientific techniques. *See id.* at 547 ("By definition, the *Frye* standard *only applies* when an expert attempts to render an opinion that is based upon *new or novel scientific*

techniques." (quotation marks and citation omitted)). Indeed, far from relying on new or novel techniques, Dr. Jackson based his opinion on generally accepted techniques and principles. For example, the Knudson Formula applied by Dr. Jackson is generally accepted. R.2:1102; R.2:2509, 2520. So, too, is the principle that those with COPD lose lung function at a gradual rate. R.2:1101; R.2:2509–10. The published and peer-reviewed average rate of lung function applied by Dr. Jackson is generally accepted as well. *See Marsh*, 977 So. 2d at 550 ("[P]ublished articles and studies" suffice to render a principle generally accepted under *Frye*.). And, to top it all off, it is generally accepted among pulmonologists that everyone with Severe or Very Severe COPD is symptomatic. R.2:1104. In sum, Dr. Jackson's testimony was based on non-novel and generally accepted principles at every step. Thus, under the pre-*Daubert* standards, his testimony would be admissible.

D. The Exclusion of Dr. Jackson's Testimony Was Not Harmless.

Plaintiff cannot carry her heavy burden of proving "that there is no reasonable possibility that the" erroneous exclusion of Dr. Jackson's testimony "contributed to the verdict." *Special v. W. Boca Raton Med. Ctr.*, 160 So. 3d 1251, 1256 (Fla. 2014). Dr. Jackson's testimony provided the essential elements of Reynolds's statute-of-limitations defense, and that evidence would have been especially powerful when coupled with Mr. Price's own deposition testimony—which, as next explained, the trial court also erroneously excluded—that he believed in 1986 that his father died

from emphysema caused by smoking. On its own, Dr. Jackson's testimony would have allowed the jury to draw a reasonable inference that Mr. Price knew, or should have known, that he had a smoking-related illness before the cut-off date for the statute of limitations. *See Carter v. Brown & Williamson Tobacco Corp.*, 778 So. 2d 932, 937–38 (Fla. 2000) ("[T]he question of when the statute of limitations begins to run in this type of case is generally treated as a fact question for a jury to resolve, and therefore inappropriate for resolution on a summary judgment or directed verdict." (quotation and alterations omitted)). The trial court's rulings deprived the jury of any opportunity to resolve that factual issue and foreclosed Reynolds from presenting its limitations defense altogether. R.3:1962–65. A new trial is therefore required. *See Jewett*, 106 So. 3d at 472.

II. THE TRIAL COURT ERRED IN EXCLUDING MR. PRICE'S TESTIMONY ABOUT HIS OWN KNOWLEDGE AS HEARSAY.

"A trial court's ruling on the admissibility of evidence is reviewed for an abuse of discretion, but legal questions of whether evidence falls within the statutory definition of hearsay, or is admissible in evidence under an exception to the hearsay rule are reviewed de novo." *Philip Morris USA, Inc. v. Pollari*, – So. 3d – , 2017 WL 3730347, at *2 (Fla. 4th DCA Aug. 30, 2017) (quotation marks and citations omitted). The trial court committed reversible error in excluding portions of Mr. Price's testimony as hearsay. In the excluded testimony, Mr. Price testified that immediately following his father's death, one of Mr. Price's sisters told Mr.

Price that his father died of emphysema, and that Mr. Price believed her. R.2:1955–57. Moreover, Mr. Price testified that he "knew to no end" that his father's emphysema was caused by cigarette smoking. R.2:1957–58. The erroneous exclusion of that testimony undoubtedly prejudiced Reynolds's ability to make out its statute-of-limitations defense.

A. The excluded portion of Mr. Price's deposition is not hearsay. "'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." § 90.801(1)(c). Thus, "[i]f the statement is offered for some purpose other than its truth, the statement is not hearsay" and may not be excluded on that basis. *Ward v. State*, 156 So. 3d 1004, 1017 (Fla. 2014) (quotation marks and citation omitted); *see* Charles W. Ehrhardt, 1 *Florida Practice*, *Evidence* § 801.4 (2017 ed.). Here, Mr. Price's deposition testimony was not offered for the truth of the matter asserted—*i.e.*, that Mr. Price's father in fact died from emphysema caused by smoking. Instead, the testimony was offered only to show that in 1986 Mr. Price believed his father died of emphysema caused by smoking. Under well-settled law, then, the deposition testimony was not hearsay. *See Jenkins v. State*, 189 So. 3d 866, 869 (Fla. 4th DCA 2015) ("When a statement is offered to prove what a person thought after the person heard the statement, it is being offered to prove the person's state of mind and is not hearsay.").

Moreover, Mr. Price's deposition testimony should have been admitted even if it had been offered to prove the truth of the matter asserted. Under Section 90.803(18) of the Florida Statutes, a hearsay statement is "not inadmissible" if it is "offered against a party and is … [t]he party's own statement." Under this hearsay exception for statements by a party-opponent, a party's statements are admissible against it even if the statement is not based on firsthand knowledge. *See Jones v. Alayon*, 162 So. 3d 360, 365 (Fla. 4th DCA 2015). Further, Florida law is clear that, for purposes of this rule, a decedent counts as a party-opponent in a wrongful death action, such that his statements are admissible against the wrongful-death claimants. *See id.*; *Ritter v. Brengle*, 185 So. 2d 7, 9–10 (Fla. 2d DCA 1966). As a result, the trial court erred in refusing to admit Mr. Price's testimony that he understood in 1986 that his father died of emphysema caused by smoking. *See* R.3:446–49, R.3:4559.

Finally, Mr. Price's deposition testimony qualifies for the then-existing state-of-mind exception to the hearsay rule because Mr. Price's "subjective beliefs were offered to prove his subsequent conduct and to explain his continued conduct of smoking." *Lorillard Tobacco Co. v. Alexander*, 123 So. 3d 67, 75 (Fla. 3d DCA 2013). "Similar statements have been admitted in other *Engle*-progeny cases" when offered by plaintiffs, *id.*, including by this Court in *Lorillard Tobacco Co. v. Mrozek*, 106 So. 3d 479, 480 (Fla. 1st DCA 2012) (no error in admitting "purported hearsay

evidence" showing the plaintiff's state of mind and attitude about smoking decades before her death). Thus, fairness—like the Florida Evidence Code—demanded the admission of Mr. Price's deposition testimony.

B. Plaintiff cannot "prove[ ] that there is no reasonable possibility that the" erroneous exclusion of Mr. Price's deposition testimony "contributed to the verdict." *Special*, 160 So. 3d at 1256. The exclusion of Mr. Price's deposition testimony deprived Reynolds of important evidence on the statute of limitations, comparative fault, and Mr. Price's alleged reliance. The excluded testimony tended to make it more likely that Mr. Price knew, or in the exercise of reasonable care should have known, that there was a reasonable possibility that cigarette smoking was the cause of his emphysema by May 5, 1990. Mr. Price—then a smoker for 38 years—testified that in 1986 he believed his own father had died of emphysema caused by smoking and, thus, understood that smoking can cause emphysema. Thus, the excluded testimony powerfully suggests that Mr. Price knew, based on his father's death, that his own smoking caused his illness. From that testimony and Dr. Jackson's erroneously excluded testimony, the jury easily could have concluded that Mr. Price knew that smoking caused his emphysema by the May 5, 1990, statute-of-limitations date. For the same reason, the evidence tended to show that he did not exercise reasonable care in failing to seek medical treatment for his lung problems, as relevant to comparative fault, and that he could not have relied on any alleged

conspiracy to conceal material information about the health risks of smoking, because he was already aware of them.

The trial court compounded the prejudice to Reynolds by allowing Dr. Burns to testify that Mr. Price did not know that smoking caused emphysema *until 1993*, the very same year in which he was diagnosed with emphysema. R.3:3355–56; R.3:3406; R.3:4631. Sure, the jury heard Mr. Price's testimony that at some point he "thought" his father died from "lung cancer," and that members of his family discussed that cigarettes caused the death. R.3:4557–60. But testimony suggesting that Mr. Price thought his father died of *lung cancer* caused by cigarette smoking does not speak to the relevant point for Reynolds's statute-of-limitations defense—that Mr. Price knew or reasonably should have known by May 5, 1990, that there was a reasonable possibility that *his emphysema* was caused by cigarette smoking.

III. THE TRIAL COURT ERRED IN ADMITTING DR. BURNS'S "HYPOTHETICAL PATIENT" TESTIMONY.

It is bad enough that the trial court *sustained* Plaintiff's objection to the testimony of Dr. Jackson on the general progression of COPD and the symptoms of typical COPD patients. But in addition, the exclusion of Dr. Jackson's generic opinions was unfair in this case because the trial court, over Reynolds's objections, permitted Plaintiff's expert witness, Dr. Burns, to describe to the jury in vivid detail the experiences of a hypothetical spouse of a hypothetical patient with end stage COPD. "[A] trial court's decision to admit evidence" is reviewed "under an abuse

of discretion standard." *Hudson v. State*, 992 So. 2d 96, 107 (Fla. 2008). The trial court's discretion, however, is limited by "the rules of evidence and case law." *Hunter v. Aurora Loan Servs., LLC*, 137 So. 3d 570, 572 (Fla. 1st DCA 2014).

Dr. Burns's hypothetical testimony substituted for the actual experiences of Mrs. Price, who did not testify at trial due to dementia. Over Reynolds's objections, Dr. Burns spun an elaborate story, testifying that the hypothetical spouse would assist the patient in "walking across … a regular room in the house to go to the bathroom," in "carrying the oxygen tank," and, indeed in "all of the patient's "activities." R.3:3358. He added that the spouse would help the patient out of the bathroom before cooking dinner and "bring[ing] the dinner to the [patient] because" the patient "cannot move into the kitchen." *Id.* And Dr. Burns conveyed the hypothetical spouse's sense of despair, explaining that she had "to watch" the patient struggling to breath for "month after month, year after year" as the patient "quite slowly suffocate[d] to death." R.3:3358–59. As for the moment of death, Dr. Burns testified that the hypothetical spouse would be "sitting right there watching unable to do anything about it." R.3:3359.

A. Dr. Burns's hypothetical-patient testimony was impermissibly speculative because it had no basis in the evidence in this case. Section 90.604 of the Florida Statutes generally prohibits a witness from "testify[ing] to a matter unless evidence is introduced which is sufficient to support a finding that the witness has personal

knowledge of the matter." Though couched in hypothetical terms, Dr. Burns's testimony amounted to no more than a thinly-veiled attempt to tell a sympathetic story about Mrs. Price's experiences during Mr. Price's final days. The trial court should have barred Plaintiff from eliciting that narrative because Dr. Burns had no personal knowledge of Mr. and Mrs. Price's home life during the end stage of Mr. Price's disease. Indeed, Dr. Burns admitted that his narrative was not even a *second*-hand account based on Mrs. Price's deposition testimony. *See* R.3:3364–66.

Mrs. Price's pain and suffering was the only matter in issue to which Dr. Burns's hypothetical-patient testimony could even conceivably have been relevant. But Dr. Burns's testimony had nothing to do with Mrs. Price and her experience with Mr. Price's illness. Both the Court and Dr. Burns acknowledged as much. *See* R.3:3359 ("THE COURT: He is not describing Mr. Price."); R.3:3366, (Dr. Burns agreeing that he was "not attempting in any way to recount Ann Price's experience about how Mr. Price's illness affected her."). Indeed, unlike Dr. Burns's hypothetical spouse, *Mrs. Price was not even present when Mr. Price passed away.* *See* R.3:4452. Because Dr. Burns had no personal knowledge of Mrs. Price's experiences, his testimony was wholly untethered from the facts of this case, and the trial court abused its discretion in admitting it.

Nor does Dr. Burns's status as an expert witness somehow condone his speculative testimony. *See Taylor v. Batemen*, 927 So. 2d 1024, 1025 (Fla. 4th DCA

2006) (holding that trial court properly excluded speculative testimony of expert witness). Dr. Burns in delivering this testimony strayed beyond the scope of his expertise, which concerns medicine, to provide a factual description of the day-to-day activities and emotions of his hypothetical Mrs. Price. *See, e.g.*, *Harrison v. Savers Fed. Sav. & Loan Ass'n*, 549 So. 2d 712, 714 (Fla. 1st DCA 1989) ("[F]undamental error was committed when an expert testified beyond his qualifications." (collecting cases)). In other words, Dr. Burns took on the role of a fact witness in delivering his hypothetical-patient testimony. Examination of Dr. Burns vivid testimony makes that much clear: Dr. Burns described a hypothetical spouse—his stand-in for Mrs. Price—"seeing [the patient] struggling to breathe," helping the patient in and out of the bathroom, and fixing dinner and bringing it to the patient, all the while helplessly "watching" for years as the patient struggles to breathe and eventually "quite slowly suffocates to death." R.3:3358–59. And, to drive the point home, Dr. Burns described his hypothetical Mrs. Price "sitting there watching unable to do anything" at the moment of death. R.3:3359. Dr. Burns had no personal knowledge of any of this. Not only did Dr. Burns stray beyond his own personal knowledge; he also strayed beyond the facts of the case—and, indeed, testified *contrary* to the record evidence, as when he placed his stand-in for Mrs. Price at the bedside of her dying husband. R.3:3359.

Dr. Burns's testimony as a de facto fact witness was not based on the record

evidence—much less on his personal knowledge. The trial court therefore abused its discretion in permitting Dr. Burns's speculative hypothetical-patient testimony. *See* § 90.604, Fla. Stat.; *Tolbert v. State*, 114 So. 3d 291, 294 (Fla. 4th DCA 2013) ("[A]n expert's testimony may not merely be used as a conduit for the introduction of otherwise inadmissible evidence." (quotation marks omitted)); *see also Dorbad v. State*, 12 So. 3d 255, 257–58 (Fla. 1st DCA 2009) (an "expert may state an opinion based on record facts through a hypothetical question, as long as those facts are supported by evidence that has been or will be introduced at trial").

B. The trial court's erroneous failure to exclude Dr. Burns's highly emotional testimony requires a new trial because Plaintiff cannot carry her burden of proving that there is no reasonable possibility that the error contributed to the verdict. *Special*, 160 So. 3d at 1256. Indeed, every indication is that the trial court's admittance of Dr. Burns's hypothetical-patient testimony *did* contribute to the verdict. Consider that the jury awarded $6.4 million in noneconomic compensatory damages in this wrongful death case, where the decedent passed at age 74 and the single beneficiary was his widow, Mrs. Price. That award bore no logical relationship to the evidence at trial. Plaintiff dropped her economic damages claim, so the only relevant damages issue was Mrs. Price's noneconomic damages. *See* R.3:7180. But Mrs. Price did not testify at trial, and she focused during her deposition on economic damages and made virtually no mention of her alleged pain and suffering. *See*

R.3:4681–83; R.3:4686–88.[3]

Moreover, Dr. Burns's improper testimony described in vivid detail his hypothetical Mrs. Price struggling to assist her husband with each and every life activity—all the while trying but failing to relieve his symptoms—before finally sitting by her husband's bedside to watch as he "quite slowly suffocate[d] to death." R.3:3358–59. Such testimony—which, again, neither concerns nor reflects the *actual* Mrs. Price's experiences—almost certainly "inflame[d] the jury" and "appeal[ed] improperly to the jury's emotions." *Reyes v. State*, 976 So. 2d 1169, 1170 (Fla. 1st DCA 2008) (quotation marks and citation omitted); *Kane Furniture Corp. v. Miranda*, 506 So. 2d 1061, 1067 (Fla. 2d DCA 1987) (reversing plaintiff's verdict where trial court allowed plaintiff to present "highly emotional testimony" about plaintiff's "family relationship" with decedent). Indeed, Dr. Burns's hypothetical patient testimony was almost guaranteed to mislead the jury: By drawing the jury's attention to Dr. Burns's hypothetical spouse, the testimony drew the jury's attention *away* from the relevant issue of *Mrs. Price's* pain and suffering. To make matters worse, Reynolds was not able to correct Dr. Burns' misdirection and the prejudice

[3] Although there have been higher awards, the $6.4 million noneconomic compensatory damages award in this case is much larger than noneconomic compensatory damages awards in many other, similar wrongful death cases. *See* R.2:5500-01 (noting awards in *Engle*-progeny cases affirmed on appeal ranging from $750,000 to $1.550 million).

it caused because Mrs. Price did not testify at trial and, thus, could not be cross-examined. A new trial is required.

IV. THE CONSPIRACY INSTRUCTION OMITTED THE REQUIREMENT THAT PLAINTIFF PROVE RELIANCE ON A STATEMENT.

A "trial court abuses its discretion when it fails to give a proposed instruction that is (1) an accurate statement of the law, (2) supported by the facts of the case, and (3) necessary for the jury to properly resolve the issues, so long as the subject of the proposed instruction is not covered in other instructions given to the jury and the failure to instruct is shown to be prejudicial." *Jewett*, 106 So. 3d at 467. It is also an abuse of discretion to give a jury instruction which "may have misled the jury." *Barrier v. Duncan*, 541 So. 2d 631, 634 (Fla. 1st DCA 1989). In both instances, "the proper test is not whether the jury was actually misled, but whether the jury might reasonably have been misled." *Jewett*, 106 So. 3d at 469 (citation omitted).

In this case, the trial court allowed Plaintiff to pursue her conspiracy (and concealment) claim based on mere silence, even in the absence of any false or misleading statement that Mr. Price heard and relied on. R.3:5233–34. Reynolds's proposed instructions would have asked the jury whether Mr. Price had "reasonably relied to his detriment *on a statement* that concealed or omitted material information" about the health risks of smoking. R.1.7523 (emphasis added). Here, the requirement of a misleading *statement* follows from general principles of Florida

law, from *Engle* itself, from the need to avoid problems of express preemption.

A. Under settled principles of Florida law, mere silence cannot constitute actionable fraud. Rather, fraud requires a *statement* that is either false in and of itself or rendered misleading by the concealment of other material information. As the Florida Supreme Court has explained, "concealment becomes a fraud"—and therefore an actionable tort—where "in addition to a party's silence there is *any statement, word or act* on his part which tends affirmatively to a suppression of the truth." *Joiner v. McCullers*, 28 So. 2d 823, 825 (Fla. 1947) (emphasis added). As a limited exception to this rule, a plaintiff may make out a fraud claim based solely on a defendant's failure to disclose information, but only if the defendant had a legal duty to make the disclosure. *See, e.g.*, *State v. Mark Marks, P.A.*, 698 So. 2d 533, 539 (Fla. 1997). And Florida courts have been "unwilling to expand the [duty to disclose] in the absence of any … fiduciary, special, or longstanding relationship." *Kovach v. McLellan*, 564 So. 2d 274, 277 (Fla. 5th DCA 1990).

Mr. Price had no fiduciary or other special relationship of trust with Reynolds or any other tobacco company, and "there is no confidential or fiduciary relationship arising from … sales between a manufacturer and a consumer." *Joy v. Brown & Williamson Tobacco Corp.*, No. 96-2645CIV-T24(B), 1998 WL 35229355, at *5 (M.D. Fla. May 8, 1998); *see Taylor Woodrow Homes Fla., Inc. v. 4/46-A Corp.*, 850 So. 2d 536, 541 (Fla. 5th DCA 2003) (no fiduciary duty "[w]hen the parties are

dealing at arm's length").

B. Phase I of *Engle* reflects these settled principles. In particular, the fraudulent-concealment claim partially adjudicated in *Engle* rested entirely on the theory that the defendants had made *statements* rendered misleading by omitted information. The *Engle* trial court denied the defendants' motion for directed verdict on the concealment and conspiracy claims because "a duty to disclose" arose as a result of "the defendants[']fail[ure] to reveal information they knew was contrary *to that which they disseminated*." *Engle v. RJ Reynolds Tobacco*, No. 94-08273 CA-22, 2000 WL 33534572, at *2 (Fla. Cir. Ct. Nov. 6, 2000); *see also id.* ("defendants intended that the public rely upon that which the defendants generated over extended periods"). The *Engle* trial court made clear as day that this reasoning "appl[ied] directly to the Fraud count and the Conspiracy count." *Id.* at *3.

On the class's concealment claim, the instructions to the *Engle* jury made it explicit that it must find "whether one or more of the defendants omitted or concealed material facts that would be necessary to make *statements* by said defendants not misleading." Appendix Tab A, at 17 (emphasis added).[4] The claim of conspiracy to commit fraud by concealment was grounded in the same theory. *See id.* at

[4] Reynolds requests that the Court take judicial notice of the proceedings in the original *Engle* trial. *See, e.g.*, § 90.202(6), Fla. Stat.

19. And that makes perfect sense: The *Engle* class claimed that the defendants committed the tort of fraudulent concealment and conspired to commit that tort, so the conspiracy-to-conceal claim was dependent on—and was governed by the same standards as—the underlying claim of fraudulent concealment. *See* Appendix Tab B, at 5, 7 (asking jury to determine whether the *Engle* Defendants "conceal[ed] or omit[ted] material information" about the health effects of smoking (fraud) and whether *Engle* Defendants "entered into an agreement" to do so (conspiracy)). As a result, the conspiracy claim survived only because the fraud-by-concealment claim survived on its own terms. *See, e.g.*, *Raimi v. Furlong*, 702 So. 2d 1273, 1284 (Fla. 3d DCA 1997) ("An actionable conspiracy requires an actionable underlying tort or wrong," and that underlying tort or wrong must "constitute a cause of action if the wrong were done by one person." (quotation marks and citation omitted)); *Am. United Life Ins. Co. v. Martinez*, 480 F.3d 1043, 1067–68 (11th Cir. 2007) (applying Florida law and holding that conspiracy claim failed where the underlying claim of wrong failed).

Moreover, the *Engle* class retreated to a statements-based theory of concealment precisely to avoid the dispositive legal objection that cigarette manufacturers have no duty to disclose information to the customers of their customers. During the charge conference in Phase I of *Engle*, after defense counsel argued that Florida

law does not recognize a duty to disclose absent a fiduciary or other special relationship, class counsel responded that their proposed instruction concerned "concealment in connection with representations or not telling the whole truth," as well as "misleading statements, half truths." *See* Appendix Tab C, at 36170, 36174. Having avoided a legal objection by limiting its concealment-based claims to a theory of "half truths," the class (including former class members) cannot now change course to proceed on a theory of pure concealment. And by resting her concealment and concealment-based-conspiracy claims entirely on the *Engle* jury findings, Plaintiff necessarily limited herself to "the same causes of action" pursued in *Engle* itself. *Philip Morris USA, Inc. v. Douglas*, 110 So. 3d 419, 432 (Fla. 2013). Plaintiff cannot mix-and-match by invoking a conduct finding keyed to misleading statements, but then pursuing a reliance theory keyed to pure silence.

Not surprisingly, many appellate decisions have recognized that *Engle*-progeny plaintiffs, to make out claims for concealment or conspiracy, must prove reliance on statements rendered misleading due to concealment. The Florida Supreme Court assumed as much in its recent statute-of-repose decisions, which quoted with no hint of disapproval jury instructions indistinguishable from the one sought here by Reynolds. *See Hess v. Philip Morris USA, Inc.*, 175 So. 3d 687, 691 (2015) (quoting instruction that jury "must determine whether [the smoker] relied to his

detriment on any *statements* made by [the defendant] that omitted material information" (emphasis added)); *Philip Morris USA, Inc. v. Russo*, 175 So. 3d 681, 684 (Fla. 2015) (quoting verdict-form question "whether Plaintiff relied to her detriment on a *statement* made in furtherance of [Defendant's] agreement with others to conceal or omit material information regarding the health effects and/or addictive nature of smoking cigarettes" (emphasis added)).

Other decisions recognize the point more explicitly. For instance, in *R.J. Reynolds Tobacco Co. v. Martin*, 53 So. 3d 1060 (2011), this Court quoted with approval an instruction that, to establish liability for concealment or conspiracy, an Engle-progeny plaintiff "must show that [the smoker] relied on *statements* by either [the defendant] or any of the other companies involved in the conspiracy that omitted material information." *Id.* at 1065 (emphasis added). The Court then held that a jury could infer such reliance from what it characterized as "pervasive misleading advertising campaigns." *See id.* at 1069. Such an inference would be unnecessary and nonsensical if the plaintiff could prove reliance on concealment unconnected to misleading statements.[5]

[5] In keeping with its decision in *Martin*, this Court in a *per curiam* opinion rejected an *Engle* plaintiff's argument that she need not prove she relied on a *statement* to recover for fraudulent concealment or conspiracy. *See Blundell v. Philip Morris USA Inc.*, 164 So. 3d 793 (Fla. 1st DCA 2015), *quashed on other grounds by* No. SC15-1206, 2016 WL 2986069 (Fla. May 24, 2016).

Other courts, too, have recognized that a mere omission does not suffice.[6] The Fourth District explained the point well: "A plaintiff still must prove detrimental reliance upon the defendant's *misinformation*." *R.J. Reynolds Co. v. Calloway*, 201 So. 3d 753, 766 (Fla. 4th DCA 2016) (emphasis added; quotation marks and citation omitted). True, the Fourth District went on to say that an *Engle*-progeny fraudulent-concealment instruction "need not include reliance on 'a statement' unless the facts of the case warrant it." *Id.* at 766. But the Fourth District offered no reasoning in support of its offhand comment that reliance on a statement is not always required, and it cited with approval decisions specifically recognizing the requirement of a statements-based theory of reliance and concealment. *See id.* at 766 (citing *R.J. Reynolds Tobacco Co. v. Buonomo*, 138 So. 3d 1049, 1051 (Fla. 4th DCA 2013), and *Martin*, 53 So.3d at 1065–66, 1068).

C. Limiting progeny fraud and conspiracy claims to ones keyed to misleading statements is also necessary to avoid problems of express preemption. In *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992), the Supreme Court held that a provision in the Federal Cigarette Labeling and Advertising Act, 15 U.S.C. § 1334(b), preempts claims based on a failure to warn of the health risks of smoking,

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[6] *See Alexander*, 123 So. 3d at 80 ("[T]o prevail on the fraudulent concealment and conspiracy claims, [plaintiff] was only required to show that [the smoker] relied on the deceptive statements made by [defendant] and the other members of the conspiracy").

but does not preempt claims for affirmative fraud. *See id.* at 524–29 (plurality op.). Applying *Cipollone*, the Second District in *Laschke v. Brown & Williamson Tobacco Corp.*, 766 So. 2d 1076 (2000), held that pure concealment claims fall on the failure-to-warn side of this line. Accordingly, it affirmed summary judgment for the defendants on a claim for "conspiracy to commit fraud through concealment." *Id.* at 1078. If plaintiffs' concealment and conspiracy claims were extended from misleading statements to theories of pure concealment, such claims would squarely implicate the express preemption prevision of the Labeling Act.[7]

D. Plaintiff cannot prove that there is no reasonable possibility that the jury might have been misled by the trial court's instructional error. *See Dockswell v. Bethesda Mem'l Hosp., Inc.*, 210 So. 3d 1201, 1213 (Fla. 2017). Absent an instruction asking the jury to determine whether Mr. Price reasonably relied on a misleading *statement* by a member of the alleged *Engle* conspiracy, the jury may well have imposed liability based on a theory of pure silence. Moreover, the prejudice is even more acute in light of significant evidence that Mr. Price had *not* in fact relied on

[7] The Florida Supreme Court's decision in *Carter v. Brown & Williamson Tobacco Corp.*, 778 So. 2d 932 (Fla. 2000), is not to the contrary. There, the Court concluded that the claims at issue were limited to pre-1969 smoking and involved channels of communication other than "advertising or promotion." *Id.* at 940-42. In contrast, *Engle*-progeny claims turn in significant part on smoking after 1969, and centrally target the impact of cigarette advertising. *See*, *e.g.*, *Martin*, 53 So. 3d at 1069 (concealment and conspiracy claims predicated on "pervasive misleading advertising").

any statements by any tobacco entity. Mr. Price himself testified that he chose to smoke because it was "[s]omething to do" and because "[e]verybody else was doing it," and that nothing "that the cigarette companies said or did … influence[d] [him] to start smoking." R.3:4576; *see also* R.3:4613–14 (Mr. Price testified that he had never heard, read or heard about any statements concerning smoking and health made by any cigarette manufacturer).

But, using the erroneous instruction, Plaintiff repeatedly blamed tobacco companies for their *silence*, faulting the tobacco companies for not "tell[ing] John Price, … don't suck it into your lungs because that's the stuff that's going to get you addicted and going to have you struggling and smoking like that every day." R.3:5254–55. Indeed, Plaintiff argued that omission itself "is essential to this case": "This is a case about concealment. They should have told him. And when they don't, they're held accountable and that's why we called you here." R.3:5255. In light of these arguments, Plaintiff cannot prove that there is no reasonable possibility that the instructional error affected the verdict. *See Robinson v. State*, 982 So. 2d 1260, 1263 (Fla. 1st DCA 2008) ("[e]mphasizing" error in closing argument "bespeaks a reasonable possibility that the error affected the verdict" (quotation omitted)).

V. THE JUDGMENT SHOULD BE REDUCED BY THE SHARE OF MR. PRICE'S COMPARATIVE FAULT.

A. The trial court erred in refusing to reduce the compensatory award to

reflect the 60% of fault attributed by the jury to Mr. Price. The trial court refused to offset the award for comparative fault because Plaintiff prevailed on her intentional-tort claim of conspiracy. However, the comparative-fault statute applies to all *Engle*-progeny cases, which involve a "products liability action" at their core, regardless of whether or not the plaintiff prevails on individual claims for concealment or conspiracy. *See* § 768.81(1)(d), Fla. Stat.; *R.J. Reynolds Tobacco Co. v. Schoeff*, 178 So. 3d 487, 495 (Fla. 4th DCA 2015), *review granted*, No. 15-2233, 2016 WL 3127698 (Fla. 2016). This Court, applying abuse-of-discretion review, came to a different conclusion in *R.J. Reynolds Tobacco Co. v. Sury*, 118 So. 3d 849 (Fla. 1st DCA 2013), but Reynolds preserves this issue for further review.

B. In any event, Plaintiff waived any right that she might otherwise have to avoid such a reduction. "[A] trial court's finding of waiver is reviewed for abuse of discretion." *R.J. Reynolds Tobacco Co. v. Hiott*, 129 So. 3d 473, 479 (Fla. 1st DCA 2014). In *Hiott*, this Court held that a plaintiff had waived any right to avoid comparative fault by "encourag[ing] the jury, from voir dire through closing argument, that she accepted that her deceased husband was partially at fault for his smoking-related illness and death," without "inform[ing] the jury that she intended to reserve her right to assert the inapplicability of comparative fault to any of her claims." 129 So. 3d at 480–81. As this Court recognized, a plaintiff who "use[s] the admission that [the smoker] was partly at fault as a tactic to secure an advantage

with the jury" cannot after the verdict "seek to have it both ways by avoiding comparative fault." *Id.* Other courts have followed suit. *See Philip Morris USA, Inc. v. Green*, 175 So. 3d 312, 314–15 (Fla. 5th DCA 2015) (reversing failure to apportion damages where plaintiff "repeatedly referenced [the smoker's] acceptance of his portion of responsibility," leaving the "impression than that [plaintiff] was accepting some measure of fault with respect to each of her claims"); *Schoeff*, 178 So. 3d at 493–95 (ordering apportionment where plaintiff "accepted partial responsibility" and "argued that the jury should consider this concession when coming up with its figure for comparative fault").

Plaintiff waived any right to resist apportionment here. From voir dire through closing arguments, Plaintiff "invit[ed]" the jury "to find shared responsibility," but never informed it that her admission of partial fault was confined to the strict-liability and negligence claims. *Green*, 175 So. 3d at 315. During voir dire, Plaintiff repeatedly told the potential jurors that she was "accept[ing] some responsibility for" Mr. Price. R.3:1381; R.3:1405; R.3:1568. And, during her opening statement, Plaintiff repeatedly told the jury that Mr. Price "certainly shares the responsibility" for the damage caused by his illness. R.3:2159; R.3:2160; R.3:2176. During her opening statement, though, Plaintiff added a refrain to this admission: She argued that Reynolds bore the "lion's share of the fault" because it and other members of the tobacco industry engaged in an *intentional* campaign of "deception

and deceit." R.3:2160; R.3:2176. In other words, Plaintiff asked the jury to compare Mr. Price's negligence to Reynolds's purported intentionally tortious conduct—and thereby invited the jury to believe that comparative fault would apply if Reynolds was found liable for an intentional tort.

In closing argument, Plaintiff reminded the jury several more times of her unqualified admission that Mr. Price was partially at fault. *See, e.g.*, R.3:5271 ("[O]f course he has some responsibility this. And he on his behalf, it has been taken. No one is saying it is all on them."); R.3:5271. And, yet again, Plaintiff asked the jury to compare Mr. Price's allegedly slight degree of negligence to Reynolds's allegedly intentional conduct: "And he takes responsibility for … his efforts in not trying. But they were doing it on purpose, and they addicted him on purpose. You can't split them up." R.3:7935. Not only that, but Plaintiff asked the jury to draw that comparison *specifically* in the context of presenting argument on the intentional tort claims. *See* R.3:5285–87 ("So, of course the conspiracy had an impact. Then we talk about comparing fault. … But, goodness, gracious, I ask you when you compare, let's not compare it as if it was apples and apples. His negligence is not the same orange that they were doing on purpose.").

Plaintiff so argued despite the trial court's specific advice to make clear to the jury that comparative fault would apply only to the claims of negligence and strict liability. R.3:5049; R.3:5052. As she later put it during a sidebar with the

trial court, Plaintiff had chosen to accept the comparative fault reduction "across the board." R.3:8689. Plaintiff later attempted to reverse position following the Phase II verdict. R.3:8746–47. As justification, Plaintiff pointed to objections made during trial, but Plaintiff was aware of those objections when she acknowledged the waiver. R.3:8689; R.3:8746–47. In any event, Plaintiff's purported reliance on the objections cannot explain away Plaintiff's conscious choice to suggest that comparative fault would apply to the intentional tort claims despite the trial court's explicit advice that she do the exact opposite.[8]

The trial court refused to apportion the award, citing Reynolds's statements during Phase II asking the jury to consider "whether there is a purpose … that will be served by an award over and above the $6.4 million" compensatory damages award, and that "the judge simply hasn't decided yet whether" the comparative-fault reduction would apply. R.3:8686–87. These statements have no bearing at all on the issue here. The trial court was simply wrong to conclude that Reynolds's

[8] Plaintiff's strategic admission of partial fault distinguishes this case from *Sury*, 118 So. 3d 849, and *R.J. Reynolds Tobacco Co. v. Allen*, No. ID15-1497 2017 WL 729817 (Fla. 1st DCA Feb. 24, 2017), where the Court found no waiver because the plaintiff "never argued to the jury or the court that the damages for his father's terminal illness should be reduced by his portion of fault," 118 So. 3d at 851, and where "the jurors … were repeatedly told that if they returned a verdict on the two fraud counts then damages could not be reduced by the percentage of fault attributed to the decedent." 2017 WL 729817 at *4 n.4. Here, the jury was never told any such thing, and Plaintiff repeatedly suggested to the jury that any damages awarded would be reduced by Mr. Price's fault.

statement somehow suggested that the jury was not misled in rendering its Phase I verdict. R.2:8483–84. After all, Reynolds's statements to the jury came *after* Phase I, so they could not have affected the jury's belief—pressed on it by Plaintiff—at the time of the Phase I verdict that its compensatory award would be reduced for comparative fault. Moreover, Reynolds's recognition that the trial court had not yet resolved the comparative-fault issue says nothing at all about whether the jury had been misled by Plaintiff's repeated suggestions that their compensatory award would be reduced for comparative fault. This Court rejected a similar argument in *Hiott*, where it held that application of comparative fault is not waived by statements made during the punitive damages phase unless the defendant "specifically assert[s] that the jury's finding on comparative fault would be disregarded." 129 So. 3d at 482. Reynolds made no such assertion here; indeed, it explicitly told the jury that the comparative fault issue remained "[un]decided." R.3:8687.

Finally, the trial court's purported "find[ing] that the jury was not misled" regarding application of comparative fault beggars belief. R.2:8483–84. Indeed, to suggest "that there was no reasonable possibility that [Plaintiff's] tactics may have resulted in the jury inflating the damages to account for reduction due to application of comparative fault insults the intelligence of jurors and flies in the face of the burden to prove harmless error under *Special*." *Green*, 175 So. 3d at 315. At a minimum, then, the judgment in this case must be reduced to account for the jury's

application of comparative fault.

VI. REYNOLDS PRESERVES OTHER ARGUMENTS.

A. Plaintiff's Strict-Liability and Negligence Claims Are Preempted.

Federal law preempts Plaintiff's strict-liability and negligence claims resting on the defect and negligence findings from *Engle*. Applying *de novo* review, the Florida Supreme Court rejected this argument in *R.J. Reynolds Tobacco Company v. Marotta*, 214 So. 3d 590, 595, 600 (Fla. 2017), but Reynolds wishes to preserve it.

B. Use of the *Engle* Findings Violated Due Process.

Plaintiff's use of the *Engle* findings in establishing the conduct elements of her claims violated federal due process. *See Fayerweather v. Ritch*, 195 U.S. 276 (1904). A trial court's decision regarding the application of preclusion is reviewed *de novo*. *Felder v. Dep't of Mgmt. Servs., Div. of Ret.*, 993 So. 2d 1031, 1034 (Fla. 1st DCA 2008). The Florida Supreme Court rejected this argument in *Douglas*, 110 So. 3d 419, but Reynolds preserves it for further review.

CONCLUSION

The Court should order a new trial or, in the alternative, reduce the judgment by Mr. Price's share of comparative fault.

Date: September 20, 2017

Respectfully submitted,

/s/ Jason T. Burnette

Robert B. Parrish
Florida Bar No. 268739

David C. Reeves
Florida Bar No. 0072303
Jeffrey A. Yarbrough
Florida Bar No. 14892
MOSELEY, PRICHARD, PARRISH, KNIGHT & JONES
501 West Bay Street
Jacksonville, Florida 32202
Telephone: (904) 356-1306
Facsimile: (904) 354-0194
bparrish@mppkj.com

Jason T. Burnette
Florida Bar No. 125200
JONES DAY
1421 Peachtree Street, N.E., Suite 800
Atlanta, Georgia 30309
Telephone: (404) 581-8724
Facsimile: (404) 581-8330
jtburnette@jonesday.com

Charles R.A. Morse
Florida Bar No. 91561
JONES DAY
250 Vesey Street
New York, New York 10281
Telephone: (212) 326-3939
Facsimile: (212) 755-7306
cramorse@jonesday.com

Counsel for Appellant/Cross-Appellee R.J. Reynolds Tobacco Company

CERTIFICATE OF SERVICE

I HEREBY certify that on September 20, 2017, a true and correct copy of the foregoing was served by E-Mail on below listed counsel.

Attorneys for Plaintiff:
Gregory D. Prysock, Esq.
Katherine Massa. Esq.
MORGAN & MORGAN, P.A.
76 South Laura Street, Suite 1100
Jacksonville, FL 32202
gprysock@forthepeople.com
kmassa@forthepeople.com

Keith R. Mitnik
MORGAN & MORGAN, P.A.
P.O. Box 7979
Orlando, 32808
tobacco@bhappeals.com

Celene Humphries, Esq.
Maegen Peek Luka
Thomas J. Seider
BRANNOCK & HUMPHRIES
1111 West Cass Street, Suite 200
Tampa, FL 33606
tobacco@bhappeals.com

/s/ Jason T. Burnette
Counsel for Appellant/Cross-Appellee
R.J. Reynolds Tobacco Company

CERTIFICATE OF COMPLIANCE

Pursuant to Florida Rule of Appellate Procedure 9.210(2), counsel for Reynolds hereby certifies that the foregoing brief complies with the applicable font requirements because it is written in 14-point Times New Roman font.

DATED: September 20, 2017

/s/ Jason T. Burnette
Counsel for Appellant/Cross-Appellee
R.J. Reynolds Tobacco Company

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IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT OF FLORIDA

R.J. REYNOLDS TOBACCO COMPANY,

Appellant,

v.

LINDA PRENTICE, as Personal Representative
Of the Estate of JOHN C. PRICE

Appellee.

Case No. 1D17-2104

L.T. Case No. 2007-CA-11551

ON APPEAL FROM THE CIRCUIT COURT OF THE FOURTH JUDICIAL CIRCUIT IN AND FOR DUVAL COUNTY, FLORIDA

ANSWER BRIEF/INITIAL BRIEF ON CROSS-APPEAL OF APPELLEE

GREGORY D. PRYSOCK
Florida Bar No. 0062420
gprysock@forthepeople.com
KATHERINE M. MASSA
kmassa@forthepeople.com
Florida Bar No. 0078316
MORGAN & MORGAN, P.A.
76 S. Laura Street, Suite 1100
Jacksonville, FL 33202
Tel: (904) 398-2722

KEITH R. MITNIK
Florida Bar No. 0436127
MORGAN & MORGAN, P.A.
P.O. Box 7979
Orlando, FL 32808

CELENE H. HUMPHRIES
Florida Bar No. 884881
MAEGEN PEEK LUKA
Florida Bar No. 549851
THOMAS J. SEIDER
Florida Bar No. 884881
BRANNOCK & HUMPHRIES
1111 W. Cass Street, Suite 200
Tampa, Florida 33606
Tel: (813) 223-4300
tobacco@bhappeals.com

Attorneys for Appellee

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STATEMENT OF THE CASE AND OF THE FACTS

Plaintiff, Linda Prentice, on behalf of her mother, Ann Price, brought a wrongful death claim against R.J. Reynolds Tobacco Company for the wrongful death of Mrs. Price's husband, John Price. For over 40 years, Mr. Price had smoked R.J. Reynolds' cigarettes, and his addiction led to his lung disease and death. After hearing two weeks of evidence, the jury found that R.J. Reynolds' conduct caused Mr. Price's death. The jury awarded compensatory damages, and it also found that Plaintiff was entitled to punitive damages. But after a short second phase of trial, the jury changed course and awarded no additional damages.

On appeal, R.J. Reynolds looks to undo the jury's compensatory verdict. The initial brief packs in six issues; all are challenges to the trial court's discretionary rulings (or are foreclosed by binding precedent). None have merit. The trial court did not abuse its discretion in excluding unreliable, unsupported expert testimony, and that testimony could not possibly have affected the jury's verdict anyhow. Nor did the trial court exceed its broad discretion in making minor evidentiary rulings, in giving a legally correct jury instruction on conspiracy, or in rejecting R.J. Reynolds' waiver argument on comparative fault.

Plaintiff's cross-appeal addresses phase-two errors that led to the jury's zero-dollar verdict. The cross-appeal, however, is a conditional one. If this Court affirms on the main appeal, Plaintiff will forego a new trial on punitive damages.

Plaintiff's *Engle*-progeny case.

This is an *Engle*-progeny case stemming from a class-action lawsuit filed against R.J. Reynolds and other major tobacco companies.[1] (R3:2120). The *Engle* class includes Florida residents who developed diseases caused by an addiction to defective cigarettes. (R3:2121). The *Engle* jury made factual findings that now have res judicata effect for class members filing individual suits. (R3:2121-22). These findings include that cigarettes are addictive and cause diseases; and that the tobacco companies were negligent, sold an unreasonably dangerous product, and engaged in fraud and conspiracy to hide both the addictive nature and the health risks of cigarettes. (R3:2121-22).

Mr. Price filed an individual *Engle* lawsuit before his death. When he passed, this became a wrongful death case, with Mrs. Prentice ultimately serving as personal representative due to her mother's declining mental health. (R1:229-36, 444-46, 1566-67). The lawsuit alleged that Mr. Price was a member of the *Engle* class, and it brought product claims for strict liability and negligence, as well as intentional-tort claims for fraudulent concealment and conspiracy. (R3:5225).

Mr. Price starts to smoke.

Mr. Price tried his first cigarette around 1948, when he was 12-years old. (R3:2353-54, 3353, 4562). By age 16, he was smoking a pack a day. (R3:3584,

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

3643, 4570). He started with Kool cigarettes, a R.J. Reynolds brand, unwittingly beginning a 44-year-long addiction to R.J. Reynolds' cigarettes. (R3:3199, 3353, 3598-99, 3646-47, 4569-70). Cigarette advertising was omnipresent at the time. As one of Plaintiff's experts explained, "It was like wallpaper: You couldn't escape it. It was virtually everywhere in every form of media." (R3:2841-42).

Mr. Price grew up in a rural farming community (R3:3642-43, 4554-55), but he could still recall specific cigarettes advertisements (R3:4533). These ads, he said, made smoking look "like the thing to do….You're in the in crowd. Everybody is doing it." (R3:4553-54). And indeed, most people were doing it; at the time, cigarettes were a normal part of American life. (R3: 2713-16, 2528). In fact, Mr. Price would have been atypical had he felt differently: 70 percent of the men in Mr. Price's age group smoked cigarettes. (R3:3678.)

The conspiracy begins.

By the early 1950s—when Mr. Price was becoming a regular smoker—the tobacco industry already knew that smoking caused cancer. (R3:2581-84, 2587-88, 3647-48). In 1953, the first (publicly available) scientific study on the topic emerged. (R3:2578-80). The study's effect on smokers was immediate: the tobacco industry experienced its first-ever dip in cigarette sales. (R3:2580).

The industry, worried at the prospect of losing money, responded with alacrity. (R3:2580-81). Executives from the top tobacco companies, including

R.J. Reynolds, held a secret meeting at the Plaza Hotel in New York City. (R3:2460-61, 2580-81, 2584-85). There, the conspiracy was born. The tobacco companies agreed to cooperate to conceal the health risks of smoking and to attack any research that connected smoking and disease. (R3:2588-94).

The conspirators also made a false promise (the first of many) to the American public. In 1954, just after the meeting at the Plaza Hotel, the conspirators took out a full-page ad in newspapers around the county. (R3:2596-98, 2600). That ad, titled "A Frank Statement to Cigarette Smokers," made several promises: that cigarettes were not "injurious to health," that there is no proof cigarettes cause cancer, and that the conspirators would always "cooperate closely" with public-health officials. (R3:2600-01). The conspirators also pledged to conduct their own research and to let the public know if any health risks were uncovered. (R3:2456-57; 2593-94). None of this was true. (R3:2587-88). The conspirators already knew, when they made these promises, that their cigarettes were deadly and addictive. (R3:2589-91, 2593-94, 3647).

The conspirators' plan worked: after the Frank Statement, the industry's sales began to climb again. (R3:2706). This was just the beginning of the conspiracy, which would endure for nearly a half century. Because R.J. Reynolds' has appealed the trial court's jury instruction on conspiracy, we will highlight some relevant facts about the conspirators' decades-long fraud.

Concealing the cancer link. Ever since scientists began to link smoking to cancer, the tobacco companies followed their work closely and confirmed it with their own research. (R3:2701-03, 2815-17). In the 1950s, every major tobacco company acknowledged, internally, that cigarettes cause lung cancer. (R3:2654-57, 3647-48). Publicly, the conspirators said the opposite: that there was no proven link between cigarettes and disease. (R3:2456-57, 2593-94). The conspirators promised, however, to keep researching the issue and to let the public know if any link was found. (R3:2456-57, 2593-94, 2659-61, 2663).

In 1964, the Surgeon General asked the conspirators to turn over their internal research. (R3:2810-11). The conspirators pretended to comply, turning over research as though representative of what they knew. (R3:2810-11, 2819). But the conspirators kept hidden the research showing they had already determined, conclusively, that cigarette smoke causes cancer. (R3:2811, 2824).

Filter fraud. The conspirators took steps to reassure the public that the conspirators were working to make cigarettes safer. (R3:3258-60). To that end, the conspirators created and marketed filtered cigarettes, which would supposedly remove harmful tar and nicotine from tobacco smoke. (R3:3257-60). The purpose of the filter campaign was to convince worried smokers that they did not have to quit—they just needed to switch to safer filtered cigarettes. (R3:2385-86, 2569-73). But filtered cigarettes are not safer: they deliver no less nicotine and tar than

unfiltered cigarettes. (R3:2385-86, 2817-18). The conspirators knew this from the start. (R3:2385-89, 2817-18, 3650-52). Still, the conspirators heavily marketed filtered cigarettes, recognizing that "the illusion of filtration" was enough to serve their goal of keeping their customers smoking. (R3:2385-86, 2569-73).

R.J. Reynolds pioneered filtered cigarettes with its Winston brand, which boasted a "modern filter" that would turn black as a customer smoked, giving the (false) impression that the filter was trapping harmful elements. (R3:2386-88, 2391-92, 2569-70, 2572-73, 2722-23, 3261, 3652-53). Not only was the filter a sham, but Winston cigarettes were actually ***more*** dangerous. (R3:2610). R.J. Reynolds' research department had discovered that Winstons delivered 250 percent more carcinogens than their unfiltered Camel-brand cigarettes. (R3:2610, 2650-51, 3649). Undeterred, R.J. Reynolds kept marketing the Winston filter, capitalizing on the "health scare" of the 1950s. (R3:2388-89).

The conspirators' marketing efforts were wildly successful; people switched to filtered cigarettes in droves. (R3:2385). Mr. Price was one of them: he started smoking Winston cigarettes soon after they were introduced. (R3:3255, 4571, 4667-68). The conspirators had everyone fooled. (R3:2385-88). Even the Surgeon General recommended that smokers switch to filtered cigarettes. (R3:3257-58). Today, virtually all cigarettes sold have filters, and most people still (incorrectly) believe that filters are safer. (R3:2385-88).

Concealing addiction. The conspirators have known since 1953—when Mr. Price was 17-years old—that nicotine is addictive. (R3:2449-52, 2463, 3647). In the following decades, the conspirators extensively (and secretly) researched nicotine and its addictive effects. (R3:2401, 2458, 2452, 2456, 2464-67, 2471-73, 2524, 2668-71, 2830-31, 3649-50 3682-83). The conspirators discovered that nicotine addiction is ***the*** reason why people smoke, and that without nicotine "the cigarette market would collapse…and we'd all lose our jobs." (R3:2525).

The conspirators concealed the truth about addiction and publicly trivialized the notion that cigarettes could be addictive, telling the public that smoking was simply a matter of choice. (R3:2454, 3264, 3269-70, 3278-79, 3283-89, 3669-71). This messaging was purposeful: the conspirators understood that concealing addiction was vital to their business model. *E.g.*, (R3:2441) ("We can't defend smoking as a free choice if the person was addicted."). The public-health community was decades behind the tobacco companies when it came to understanding addiction; indeed, the Surgeon General did not officially state that nicotine was addictive until 1988. (R3:3262-63, 3654-55, 3665-66).

Mr. Price was powerfully addicted to cigarettes.

For most of his adult life, Mr. Price smoked two to three packs of cigarettes a day. (R3:3177-79). He smoked compulsively, unable to go more than 15 minutes without lighting a new one. (R3:3178-79, 3193-94). It was the first thing

he did in the morning, and it was the last thing he did at night. (R3:3194, 3676). He smoked at home (even in bed), before and after meals, and, as a long-haul trucker, while he worked too. (R3:3751, 4433-35, 4584).

Mr. Price smoked for 40 years without any adverse health effects. (R3:3199). But in 1992, he started having shortness of breath. (R3:4587-89). In 1993, after he went to the doctor, Mr. Price learned that he had chronic obstructive pulmonary disease ("COPD," synonymous with emphysema); meaning that smoking had caused holes to develop in his lung tissue. (R3:3355-57, 4585-86).

Mr. Price still had enormous difficulty quitting smoking. (R3:3194-96, 3741-42, 4437-38, 4585-86). He was prescribed over-the-counter medications, went to a smoking-cessation clinic, chewed nicotine gum, received acupuncture injections in his eyes and face, and tried hypnosis. (R3:3194-97, 3205, 3603, 3741-43, 3745-46, 4437, 4470, 4592, 4594-96, 4604). But it was not until Mr. Price was prescribed a nicotine patch—a newly available product (R3:3680-81)—that he was able to quit for good. (R3:3195, 3198-99, 3678-79, 4586, 4597).

The conspirators create a false controversy to reassure smokers.

When Mr. Price learned that he had COPD, the conspiracy was still ongoing. The conspirators were directing their efforts at perpetuating the idea that a "controversy" existed in the scientific community over whether smoking was addictive and dangerous. (R3:2842-46, 2875-76). The conspirators knew full well

there was no controversy, but still they attacked accurate health warnings—like those coming from the Surgeon General—and told the public that there was, in fact, an "open debate" about whether cigarettes were addictive and cancer-causing. (R3:2595-96, 2658-67, 2824-28, 2842-49, 2865-70, 3289-3301).

The conspirators created this false controversy by pointing to supposedly objective research that was, in reality, coming from organizations that were (in the conspirators' own words) "set up to serve as an industry shield." (R3:2400-01, 2440-41, 2462, 2597-2603, 2764-65, 2846-62, 2852). The conspirators spent well over a billion dollars in funding the false research organizations. (R3:2591-92). These organizations solicited only friendly research, and they ventriloquized the conspirators' controversy message to the American public. (R3:2457, 2602-08, 2705-06, 2712-13, 2849-62). Meanwhile, in secret, the conspirators would share studies that confirmed there was no controversy at all. (R3:2458-59).

Addicted smokers were particularly vulnerable to this type of "controversy" counter-messaging, which provided a rationalization for the decision to keep smoking. (R3:3206-07, 3209, 3212-13, 3275-76, 3279). The conspirators knew this. (R3:3206-07); (R3:2847) ("[D]oubt is our product since it is the best means of competing with the 'body of fact' that exists in the mind of the general public.").

The conspiracy lasted into the late 1990s, with the conspirators going so far as to lie to the United States Congress on national television. (R3:2443, 2490-94).

In 1994, top tobacco executives, including R.J. Reynolds' CEO, were subpoenaed to testify before Congress. (R3:2443, 2490-92). Each executive swore to tell the truth, and then testified that it was still unknown whether nicotine was addictive and whether cigarettes caused cancer. (R3:2443, 2494). It was not until 2000 that R.J. Reynolds admitted what it had known for nearly half a century: that nicotine is addictive and that cigarettes cause cancer. (R3:2449-52, 2463, 2596-97, 3647).

Mrs. Price loses her husband to COPD.

Mrs. Ann Price lost her husband after 30 years of marriage. (R3:4421-22). She met Mr. Price in 1979, around the time he moved to Florida. (R3:4421-22). Soon after that, Mr. Price confided in his future stepdaughter, Mrs. Prentice, that he was falling in love with Ann. (R3:4422-23). Ann felt the same way: "She adored him...And she was kind of lonely before so she was very happy." (R3:4432). It was not long before the Prices were married. (R3:4422-23, 4681). Mr. Price was working as a truck driver at the time. Mrs. Price would miss him during longer hauls, so she would ride with him, sleeping behind the cab at night. (R3:4424-25). Mrs. Prentice said the Prices "were the perfect couple. The next chapter was wonderful." (R3:4423).

But then Mr. Price developed COPD, and everything changed. That is the basis for damages here: this is a wrongful-death case, brought on behalf of Mrs. Price for the death of her husband caused by COPD. (R1:229-36). R.J. Reynolds

claims that Plaintiff's damages case was proven ***exclusively*** through Dr. Burns' testimony about a hypothetical COPD patient (addressed below), and that Plaintiff did not "call any other fact witness to testify about Mrs. Price's experiences with her husband's physical condition toward the end of his life." (IBR, p.3).

This is just flat wrong. There were two witnesses—Mrs. Price and Mrs. Prentice—who testified extensively on this topic. Mrs. Price was unable to testify live, but portions of her discovery deposition testimony were read at trial. The jury heard Mrs. Price explain how her world had "been turned all around" since her husband's COPD diagnosis in 1993. (R3:4682-83, 4685-86). After his illness, Mr. Price was "unable to do anything." (R3:4682-83, 4685-88). He was limited by the length of the cord attached to his oxygen tank. (R3:4686-87). Even on oxygen, he would still "get[] completely out of breath" walking short distances. (R3:4686-87). He had an especially difficult time breathing in warm weather. (R3:4687). Just getting to the doctor's office was a huge undertaking. (R3:4447, 4687).

Even more compelling was the trial testimony of Mrs. Prentice, who observed her mother's pain and suffering firsthand. (R3:4448). Mrs. Prentice had this vantage point because the Prices, struggling on their own, had been forced to move in with her. (R3:4446, 4627). During closing arguments, R.J. Reynolds would acknowledge Mrs. Prentice's "moving testimony." (R3:5408).

Mrs. Prentice's testimony was moving. She told the jury how Mr. Price was

tethered to his oxygen tank 24 hours a day. (R3:4446-47). "[E]verywhere he went, he had a hose attached to him." (R3:4447). He lived like that for the last 12 years of his life. (R3:4446-47). And once Mr. Price went on oxygen, "there was really no life after that for him." (R3:4446). He could not leave the house, which meant that the Prices could no longer go out to dinner—"their favorite thing"—and that they missed out on family holidays. (R3:4447-48).

Mrs. Prentice said it was incredibly difficult for her mother to watch Mr. Price deteriorate. (R3:4448-49). Mrs. Price saw her husband slowly lose the ability to breathe, barely able "to go from one room to another." (R3:4448-49). Things only got worse over time. (R3:4448-49). Mr. Price could not breath in bed, so he had to sleep in a chair. (R3:4449). And Mr. Price grew very weak; on one occasion, he broke a vertebra in his back just by sneezing. (R3:4451). Mr. Price tried to hide this from his doctors because he did not like staying at the hospital. (R3:4451). He wanted to go home. (R3:4451).

Throughout all this, Mrs. Price was her husband's primary caregiver. (R3:4446). She "did everything for him." (R3:4446). There came a time when Mr. Price could not travel to the bathroom anymore. (R3:4450). So, he had to wear a diaper. (R3:4450). Mrs. Price would change it. (R3:4450). And she bathed him when he could no longer shower. (R3:4450).

Eventually, Mr. Price's condition worsened to the point where he had to be

put in hospice. (R3:4450-52). Once there, he told Mrs. Prentice, "I can't do this anymore," and asked that his breathing tube be removed. (R3:4452-53). He died shortly after. (R3:4451-52). No one suggested that Mrs. Price was present when he passed. In fact, Mrs. Prentice specifically stated that her mother was not there. (R3:4452). It had become too difficult for Mrs. Price to go to the hospice facility; seeing Mr. Price there "tore her up. She couldn't go anymore." (R3:4452).

Without her husband, Mrs. Price became a shell of her former self. (R3:4453). "She quit doing everything when he died. That was it for her." (R3:4453). Mrs. Prentice, when asked if her mother had dated since Mr. Price passed, answered, "Oh, Lord, no, no. He was the love of her life." (R3:4453).

Six months before trial, Mrs. Price was diagnosed with a type of rapidly progressing dementia (which is why she could not testify live at trial). (R3:4454-55). Even as her memory fails, Mrs. Price does not forget her husband. (R3:4455). She keeps a framed photo of Mr. Price on her dresser, with his wallet sitting next to it. (R3:4455). Every day she picks up his wallet to look at the photographs inside. (R3:4455). And every day she talks to Mrs. Prentice about the photos. (R3:4455). Mrs. Prentice said, "Funny, she doesn't remember [the photos]. She doesn't forget him, though, you know." (R3:4455).

Dr. Burns answers a single hypothetical question.

Dr. Burns is an expert on cigarette design and addiction. (R3:3166-67). He

is also a medical doctor. (R3:3152). Since graduating from Harvard Medical School, he has specialized in pulmonary medicine and treating different lung diseases, including COPD. (R3:3164-65). Dr. Burns testified for a day and a half, and his testimony spans hundreds of transcript pages. (R3:3152-3688).

On appeal, R.J. Reynolds focuses on a single answer, given to a hypothetical question about a spouse with late-stage COPD requiring 24-hour oxygen. (R3:3357). At trial, R.J. Reynolds objected to this question on the basis that it called for speculation. (R3:3357). The trial court overruled the objection, and Dr. Burns testified that an end-stage COPD patient would have constant shortness of breath, would have trouble walking short distances, and would slowly lose the ability to breathe. (R3:3358-59). Dr. Burns also stated that the patient's spouse would have to accommodate the patient's lack of mobility, and would have to sit and watch the COPD progress. (R3:3558-59).

R.J. Reynolds objected again, this time because R.J. Reynolds thought Dr. Burns' answer made it sound as though he had a case-specific basis for his testimony. (R3:3359). The trial court overruled the objection but instructed the jury that Dr. Burns was not describing Mrs. Price. (R3:3359). R.J. Reynolds made this point crystalline during cross-examination, asking several times for Dr. Burns to confirm that he was not testifying about Mrs. Price's experiences with Mr. Price. (R3:3364-66). Dr. Burns agreed: "I think we've made that abundantly clear. What

I was describing was the end stage of COPD as a clinical disease." (R3:3366).

The trial court excludes Mr. Price's hearsay statements, but the substance of the statements is conveyed through other testimony.

Plaintiff moved to exclude a portion of Mr. Price's deposition testimony where he relayed that one or more of his siblings had attributed their father's death to emphysema. (R3:445-46). Mr. Price was unsure if this was correct:

> Q. And at that time one of your sisters said he died of emphysema?
> A. I believe that, you know, at that time, you know.
>
> Q. And then later Joan told you she thought it was lung cancer?
> A. Yeah.
>
> …
>
> Q. And one of those people told you—one of your sisters or—your brother or one of your sisters told you he died of emphysema?
> A. Yeah, but that don't mean they was right.
>
> Q. Did y'all discus the fact that his emphysema was caused by cigarette smoking?
> A. Well, we all knew that's what it was.
>
> Q. Do what now?
> A. I said we knew to no end. That's all he done all his life was smoke, smoke, smoke.

(R2:1956-58). The trial court excluded this testimony as hearsay. (R3:445-49, 961-62). But the court noted that Mr. Price had, in one of his interrogatory answers, stated that his father had died from emphysema. (R3:446). That interrogatory answer ended up before the jury. Mr. Price's discovery deposition was played at trial, including a part where R.J. Reynolds' counsel asked, "Look at interrogatory 4. It says your father's cause of death was emphysema. Is that

correct?" Mr. Price answered, "I thought it was lung cancer." (R3:4459).

Regardless, it was very clear that Mr. Price knew his father (and mother) had died from a smoking-related lung disease. (R3:3243-44) (Plaintiff's expert confirms Mr. Price knew his parents' deaths were smoking-related); (R3:3862) (same); (R3:4557) (Mr. Price says he thought his father died of lung cancer); (R3:4557) (Mr. Price says his father's "lungs killed him"); (R3:4560) (Mr. Price confirms smoking killed his father—"It's the same as my mother").

R.J. Reynolds later made use of this testimony during closing arguments, reminding the jury that Mr. Price's "own father die[d] of a smoking-related lung disease," and asking, "What warning can a cigarette company possibly give Mr. Price to compete with what he learned in his own personal life?" (R3:5377-78.).

R.J. Reynolds pursues a counterfactual statute-of-limitations defense.

The statute-of-limitations cutoff date is May 5, 1990. It was undisputed that Mr. Price was not diagnosed with COPD until 1993. (R2:2557; R3:3355, 4623). And there is no record evidence that Mr. Price had any COPD-related symptoms in 1990. In his deposition, Mr. Price testified, under oath, that the earliest he experienced shortness of breath was 1992. (R3:2879-80, 4587-89). He developed a cough after that. (R3:4621, 4624; 4587-89, 4591). Mr. Price stayed firm on this timeline in the face of repeated questions by R.J. Reynolds. (R3:4619-24). In fact, Mr. Price said he had no significant health issues before 1992; he described

himself as "[t]he pillar of strength." (R3:4567-68, 4591, 4607, 4618).

Mrs. Prentice—who was with her stepfather "all the time" (R3:4423)—put Mr. Price's symptoms in the same time period (or even a little later). (R3:4444-45, 4465-66). Prior to 1993, "he was very healthy." (R3:4445). She described Mr. Price as "constantly on the go. He was driving the truck all the time. [The Prices] were going on weekends. He was great." (R3:4445).

There were no medical records reflecting any pre-1992 symptoms (as R.J. Reynolds' expert conceded). (R2:2534). And Mr. Price had been to the doctor consistently: his employers had required that he take a physical examination every two years. (R3:4621-23). Mr. Price kept working until 1995. (R3:4587).

The trial court bars some of Dr. Jackson's statute-of-limitations opinions.

Despite all this evidence to the contrary, R.J. Reynolds wanted to call Dr. Harold Jackson, as an expert pulmonologist, to provide testimony tailored to support a statute-of-limitations defense. Initially, R.J. Reynolds disclosed that Dr. Jackson would testify that Mr. Price, on May 5, 1990, should have reasonably known he had COPD (20 years before his death). (R3:505, 518).

Dr. Jackson based his opinion on the results of a ***1996*** pulmonary-function test that showed Mr. Price's lungs were functioning at 25% of what they should be. (R2:2500, 2552-54). Dr. Jackson extrapolated back from the 1996 test to the limitations date, concluding that Mr. Price, in May of 1990, could not have scored

above 49% on the same type of test. (R2:2505-06, 2509-12). And if Mr. Price's score was that low, then his COPD was "severe." (R2:2506; R3:505, 518). And if Mr. Price's COPD was severe, then he must have been symptomatic. (R2:2517-18; R3:505, 518). And if Mr. Price was symptomatic, then he should have realized he had smoking-caused COPD and gone to the doctor. (R2:2539-42; R3:505, 518).

During Dr. Jackson's deposition, Plaintiff asked about this first inferential leap: How had Dr. Jackson divined Mr. Price's lung function as it existed back in 1990? (R2:2502, 2505-06). Dr. Jackson explained that he had a single methodological basis: a table from the International Journal of COPD. (R2:2503-14). That table summarized studies that tracked the ***average*** rate of COPD-caused decline in lung function across a population. (R2:585-86, 2532-33, 2578-79). Using those average figures, Dr. Jackson opined that Mr. Price could not have progressed from 49% to 25% lung function in less than six years, because the table showed a lower average rate of yearly decline. (R2:2532-33).

Dr. Jackson had not read the studies summarized in the journal article. (R2:2578-79). Thus, he did not know the variability of the studies' data; that is, Dr. Jackson did not know how many of the studies' participants fell above the average, and how many fell below. (R2:2579). Nevertheless, Dr. Jackson stated, repeatedly, that the table was the ***sole*** basis for his conclusion about Mr. Price's rate of decline. (R2:2507, 2532-33, 2551).

Plaintiff moved to preclude Dr. Jackson's opinions under *Daubert*, arguing that the studies did not provide Dr. Jackson with an adequate foundation for his opinion about Mr. Price's lung function back in 1990, and that it would be improper for any expert to give an opinion on what Mr. Price would have known about his COPD at that time. (R2:533-51). Plaintiff's motion prompted R.J. Reynolds to file an affidavit, signed by Dr. Jackson, which laid out additional bases that supposedly supported his opinion. R.J. Reynolds' initial brief relies almost exclusively on this affidavit, which can be found at (R2:1098-1107).

The trial court, after hearing argument, ruled that Dr. Jackson could not opine on whether Mr. Price should have known he had COPD back in 1990. (R2:552-53). R.J. Reynolds would later concede that the court was correct to make this ruling under *Frazier v. Phillip Morris USA, Inc.*, 89 So. 3d 937 (Fla. 3d DCA 2012), which "says an expert cannot testify to what some smokers should have known." (R3:1956). The trial court also ruled that Dr. Jackson could not offer an opinion on whether Mr. Price was symptomatic in 1990, because Dr. Jackson did not reach this sort of conclusion in his normal practice of treating patients—as R.J. Reynolds had admitted (R3:538)—and because there were no reliable principles, methods, or studies supporting his conclusions. (R2:1698-99). But the trial court did not exclude Dr. Jackson's other opinions, and specifically allowed the opinion that severe COPD is always symptomatic. (R2:1698-99; R3:518-20, 551).

After the trial court's ruling, R.J. Reynolds asked if Dr. Jackson could testify as to how quickly COPD progresses generally. (R3:551). The trial court answered, "I probably would say yes," but wanted this testimony proffered first. (R3:552). Dr. Jackson's second proffered opinion was "that you simply cannot go from having no symptoms to being 75 percent lost lung function in less than six years." (R3:1953-54). R.J. Reynolds explained that it would ask the jury, based on this opinion, to infer that Mr. Price should have known in 1990 that he had COPD caused by cigarette smoking. (R3:1951-52).

The trial court found this argument would be improper. (R3:1951, 1961-62). The court noted that all the factual evidence established Mr. Price did not have symptoms before 1992, and that R.J. Reynolds' considerable efforts to find evidence to the contrary had been unsuccessful. (R3:1957-58, 1961-62). Thus, the trial court found that *Frazier* barred an opinion about "what somebody knew with no evidence to show that they knew it except for a hired person who has treated people but did not treat this person." (R2:1698-99; R3:1961-62).

The trial court again stated, however, that it would allow Dr. Jackson to testify about the severity of COPD symptoms. (R3:1962). And the trial court never precluded Dr. Jackson from offering general testimony about how COPD progresses. (R2:1698; R3:1962-63). But R.J. Reynolds, rather than have Dr. Jackson offer a general opinion, chose not to call him at all. (R2:1962-65). R.J.

Reynolds then withdrew its statute-of-limitations defense. (R2:1962-65).

The trial court gives a conspiracy instruction tracking binding case law.

The trial court gave fraudulent-concealment and conspiracy instructions that did not require reliance on a statement. (R3:5232-33). Instead, the jury was instructed to consider whether Mr. Price's death was caused by the concealment or omission of material information about the health risks or addictiveness of cigarettes. (R3:5232-33). As Plaintiff argued during the charge conference, this instruction accorded with a then-recent appellate decision, *R.J. Reynolds Tobacco Co. v. Calloway*, 201 So. 3d 753 (Fla. 4th DCA 2016), which found that R.J. Reynolds' reliance-on-a-statement language was not required. (R3:4968).

The jury found for Plaintiff on the conspiracy count but not on concealment. (R2:5115). The jury also found for Plaintiff on the negligence and strict liability counts, apportioned 60% percent of the fault to Mr. Price, and awarded $6.4 million in compensatory damages. (R2:5114-15). Lastly, the jury determined that R.J. Reynolds' conduct was reprehensible enough to warrant punitive damages. (R2:5115). So, the case proceeded to a second phase of trial.

The trial court allows evidence of settlement agreements and FDA regulation.

In phase two, the trial court allowed R.J. Reynolds to reference settlement agreements that it had entered into with Florida and 46 other states. Plaintiff argued, unsuccessfully, that the settlement agreements—arising out of cases filed

to recover Medicaid monies—did not address any relevant punitive-damages considerations, and that the agreements contained non-admissibility provisions that prohibited the agreements from being used in litigation. (R1:6279-83). Plaintiff also objected, again unsuccessfully, to evidence about current federal regulation of the tobacco industry. Plaintiff argued that compliance with mandatory regulations did not reduce or soften R.J. Reynolds' moral or social culpability. (R1:3560-67).

During phase two, R.J. Reynolds called as its company witness, Dr. Ryan Potts, a senior director in scientific and regulatory affairs. (R3:5856-57). Dr. Potts was disclosed to testify about the present-day "regulatory environment," which would include "the "FDA's regulatory oversight of the tobacco industry," and R.J. Reynolds' responsibilities under its settlement agreements. (R1:1217-18).

And while Dr. Potts was knowledgeable on direct examination about the FDA's supposedly "broad authority" over the tobacco industry (R3:5919-33), he could not answer Plaintiff's questions about the FDA's rulemaking process (R3:6110). Similarly, Dr. Potts knew that billions had been paid to various states under the settlement agreements (R3:5918), but was unaware that R.J. Reynolds had been fined for failing to comply with its payment obligations (R3:6052-54).

The settlement-agreement evidence made an impact. During deliberations, one of the jurors would ask, "The money that is paid to the states from RJR, what is done or the purpose of that money? 58 billion already to the states? 3 billion to

the State of Florida?" (R3:6260). (The trial court properly declined to answer.)

R.J. Reynolds repeatedly says it has accepted the jury's award of $6.4 million, and the jury returns a zero-dollar verdict on punitive damages.

R.J. Reynolds' counsel began phase two by telling the jury, "We respect your verdict." (R3:5757). In fact, counsel respected it so much that he had been carrying around a copy of the verdict in his pocket. (R3:5757). Counsel continued in this vein during phase two closings, telling the jury, "Already, before we even came into this phase, you have sent a very powerful, strong message to the people at R.J. Reynolds Tobacco Company." (R3:6215). And part of this received message was that the "total damages…were $6.4 million." (R3:6214-15).

All that was left now, said R.J. Reynolds, was to decide "whether or not an award of more money over and above the $6.4 million that you found would fully compensate the plaintiff; whether more money is necessary to punish and to deter." (R3:6217). According to R.J. Reynolds, this was the central question posed by phase two: "whether there is a purpose, a reason, something that will be served by an award over and above the $6.4 million you've already awarded." (R3:6218).

R.J. Reynolds went even further. Counsel argued that the jury should not expect its comparative-fault finding to apply, saying, "And you should know this: That although you wrote on the form that Mr. Price was 60 percent responsible for that $6.4 million, there has been no determination yet, the judge simply hasn't decided yet whether this amount will be reduced…" (R3:6218).

Plaintiff objected. Up to that point, the trial court had not allowed any commentary on the possibility of a comparative-fault reduction (or non-reduction). Plaintiff had tried to tell the jury, during voir dire and opening statements, that a comparative-fault finding would not apply to the intentional torts. But R.J. Reynolds successfully objected both times. (R3:1475-86, 2114-18). And at the charge conference, Plaintiff had asked for an instruction that there would be no reduction if the jury answered yes on the fraud or conspiracy questions. (R3:5042-51). The trial court refused because of an appellate-court split over whether the comparative-fault statute applied to intentional torts in *Engle* cases. (R3:5042-43). Rather than risk running afoul of a later-issued appellate decision, the trial court decided to stay silent on the issue of comparative fault. (R3:5042-52).

Thus, Plaintiff objected when R.J. Reynolds point-blank told the jury that it should not expect a comparative-fault reduction. Moreover, Plaintiff's counsel argued to the court that Plaintiff had already expressed—outside the presence of the jury—a willingness to accept a fault reduction "across the board," which made R.J. Reynolds' arguments particularly inappropriate. (R3:6220-21). The trial court did not sustain Plaintiff's objection; instead, the trial court told the jury that the court, and not the parties, would be entering the final judgment. (R3:6221-22).

Undeterred, R.J. Reynolds went back to its earlier refrain: "we are at a point right now already where you've awarded $6.4 million…You have to decide

whether more money over and above that can accomplish something[.]" (R3:6222-23). The trial court overruled Plaintiff's objection to this comment, too. (R3:6222). So, R.J. Reynolds kept going, making this same point several more times, and invoking the jury's award of $6.4 million each time. (R3:6224, 6227).

R.J. Reynolds asked the jury to award Plaintiff zero dollars, because "Reynolds has already been punished enough." (R3:6237). This argument was successful. In the end, the jury declined to award "more money" (R3:6227), and returned a phase-two verdict of zero dollars (R2:5130).

The trial court denies the parties' new-trial motions and enters final judgment on the jury's full compensatory verdict.

Both parties filed post-trial motions. R.J. Reynolds asked for a complete new trial. (R2:5458-5511). R.J. Reynolds also asked that the verdict be reduced by comparative fault because Plaintiff's counsel, during closing arguments, had made comments that supposedly waived Plaintiff's right to oppose apportionment. (R2:5247-5321, 5511). R.J. Reynolds had not, however, objected to these comments when they were made. *See* (R3:5272, 5285-87, 7935).

Plaintiff moved for a new punitive-damages trial based on the admission of the settlement agreements and FDA regulation, as well as on R.J. Reynolds' improper phase-two closing argument. (R2:5698-5712). Plaintiff also argued that the phase-two closing argument had, at the very least, resulted in R.J. Reynolds waiving application of comparative fault. (R3:6713-23).

The trial court denied both motions for new trial. (R3:8470-76). The trial court also entered an order finding that Plaintiff's closing-argument comments had not misled the jury on the issue of comparative fault, and that R.J. Reynolds' phase-two comments had implied to the jury that its full award "would or may be the amount in the judgment." (R2:8480-84). So, the trial court entered a final judgment for the full $6.4 million. (R2:8477-79). This timely appeal followed.

SUMMARY OF THE ARGUMENT

To prove its statute-of-limitations defense, R.J. Reynolds had to show that Mr. Price, by May 5, 1990, reasonably should have known that he had COPD and that he could file a non-frivolous lawsuit against R.J. Reynolds. The undisputed evidence here was that Mr. Price did not have ***any*** symptoms in 1990, let alone symptoms linkable to COPD or R.J. Reynolds. Yet Dr. Jackson—bending over backward to give favorable testimony—was still willing to opine that Mr. Price should have diagnosed himself with COPD in 1990. The trial court did not abuse its discretion in excluding this belated, arm-chair opinion, which lacked any factual support and was unreliable. And there was no harm here anyway. With or without Dr. Jackson, R.J. Reynolds' limitations defense was hopeless.

Mr. Price's excluded deposition testimony would not have helped either. In fact, this testimony was completely unnecessary because it merely corroborated what the jury already knew: that Mr. Price's father had died of a smoking-related

lung disease. And the trial court did not abuse its discretion in excluding this testimony—a single answer, really—because what Mr. Price's siblings said caused their father's death was hearsay, and the siblings' state of mind was not at issue.

The initial brief's challenge to Dr. Burns makes much out of very little. He gave a single, purely hypothetical answer that was not speculative. R.J. Reynolds would have this Court believe that Dr. Burns was the only one who spoke to Mrs. Price's pain and suffering. But, in truth, the jury heard firsthand testimony about how Mrs. Price acted as her husband's sole caregiver, even bathing him and changing his diaper, while he slowly suffocated before her eyes.

The conspiracy-instruction issue is an academic one. Even if R.J. Reynolds' instruction was legally accurate (and it was not), the jury's verdict would still stand because Plaintiff also prevailed on the negligence and strict-liability counts. On the merits, R.J. Reynolds fares no better. The existence of R.J. Reynolds' duty to disclose was established, conclusively, at the original *Engle* trial. Res judicata bars R.J. Reynolds from relitigating that duty now. Even so, Florida law does not require a specific statement to prove fraudulent concealment. That is why two appellate courts recently rejected the exact argument R.J. Reynolds makes here.

R.J. Reynolds waived its comparative-fault argument by failing to object to Plaintiff's supposedly improper comments. And R.J. Reynolds later perfected its waiver during phase two of trial by repeatedly arguing that $6.4 million was

punishment enough. R.J. Reynolds, having used the jury's full award as a shield, cannot now use the comparative-fault statute as a sword. And, waiver aside, there was nothing misleading or improper about Plaintiff's comments.

R.J. Reynolds' last issue on appeal comprises two preservation arguments that are, ironically, not preserved. They fail under binding precedent regardless.

Plaintiff's conditional cross-appeal addresses evidentiary and closing-argument errors from phase two of trial. But this Court need not reach the cross-appeal, because R.J. Reynolds' appeal is meritless. Taken as a whole, the six-issue initial brief is nothing more than R.J. Reynolds' attempt to throw everything it can against the wall. But nothing sticks. The trial court should be affirmed.

ARGUMENT

I. The trial court did not abuse its discretion in excluding Dr. Jackson's opinion, which lacked any kind of factual support, used an unreliable methodology, and could not possibly have affected the jury's verdict.

Standard of review. This Court will review the trial court's exclusion of Dr. Jackson's testimony for an abuse of discretion, *see Baan v. Columbia County,* 180 So. 3d 1127, 1131 (Fla. 1st DCA 2015), and will not reverse "absent a clear showing of error," *see Hall v. State*, 568 So. 2d 882, 884 (Fla. 1990).

Dr. Jackson's opinion had no factual foundation.

R.J. Reynolds wanted Dr. Jackson to offer the opinion that Mr. Price should have known, in 1990, that he had COPD caused by smoking cigarettes. This opinion did not satisfy *Daubert*, as discussed below. But this Court need not

consider *Daubert*, because Dr. Jackson did not "establish accurate essential foundation facts in support of [his] opinion." *State Dep't of Corr. v. Junod*, 217 So. 3d 200, 206 (Fla. 1st DCA 2017). "It is elementary that the conclusion or opinion of an expert witness based on facts or inferences not supported by the evidence in a cause has no evidential value." *Id.*; *Shartz v. Miulli*, 127 So. 3d 613, 620 (Fla. 2d DCA 2013) (an expert opinion does not "eliminate the necessity of proving the foundation facts necessary to support the opinion"); *Young-Chin v. City of Homestead,* 597 So. 2d 879, 882 (Fla. 3d DCA 1992) (same).

None of the facts in this case support Dr. Jackson's opinions. Rather the opposite. The evidence here showed that Mr. Price did not have ***any*** symptoms—let alone symptoms he could link to COPD or R.J. Reynolds—until well after 1990. Mr. Price swore to this under oath. So did Mrs. Prentice. And Mr. Price's medical records contained no hint of respiratory issues before 1992.

Against this uncontroverted evidence, R.J. Reynolds offered Dr. Jackson, who was willing to testify that Mr. Price must have known he had smoking-caused COPD in 1990. Dr. Jackson did not examine Mr. Price. Instead, Dr. Jackson's entire opinion hinged on a 1996 lung-function test, as well as a review of Mr. Price's symptoms from 1993. (IBR, p.14). Dr. Jackson relied on these facts—while ignoring all others—to reach his opinion. The trial court did not abuse its discretion in finding that this opinion was unsupported by the evidence and nothing

more than a "guess[] regarding Mr. Price's knowledge." (R3:1961-62).

In the initial brief, R.J. Reynolds uses this finding to construct a strawman: that the trial court believed "an expert may not testify unless his opinion is consistent with other evidence of record." (IBR, p.23). But the trial court never said anything of the sort. An expert may of course present an inconsistent opinion. But that opinion still must be tethered to reality. Here, Dr. Jackson's opinion was based on a fiction. *See id.*; *Schindler Elevator Corp. v. Carvalho*, 895 So. 2d 1103, 1107 (Fla. 4th DCA 2005) (opinion lacked factual support where expert assumed a "handrail malfunctioned when there was no evidence presented that it did").

R.J. Reynolds has lost on this exact expert-testimony issue before, in *Frazier v. Phillip Morris USA, Inc.*, 89 So. 3d 937 (Fla. 3d DCA 2012). The facts are the same: in *Frazier*, R.J. Reynolds wanted to prove its statute-of-limitations defense by calling an expert pulmonologist to use a 1991 pulmonary function test "to speculate as to what [the plaintiff's] lung function would have been four to six years earlier[.]" *Id.* at 941-42. Based on this test, as well as plaintiff's past respiratory issues, R.J. Reynolds' expert concluded the plaintiff "must have had COPD in the 1980s," and would have been noticeably symptomatic. *Id.* at 942.

This was improper. *Frazier* held that the trial court erred in allowing the opinion, because "a medical expert may not furnish a prognosis 'from an inference' lacking appropriate supporting physical evidence." *Id.* at 946.

Despite identical facts and on-point holding, R.J. Reynolds claims that *Frazier* is inapposite. To hear R.J. Reynolds tell it, the Third District was mostly worried about unfairly punishing the plaintiff, "who diligently sought treatment" from her doctors in the 1980s. (IBR, p.21). This is a blinkered reading of the case. True, *Frazier* found it "unworkable and unfair" for R.J. Reynolds to assert that the plaintiff's doctor, when treating the plaintiff's respiratory diseases in the 1980s, "should have investigated the creeping, as yet *un*-manifested disease." *Id.* at 946.

But this does not help R.J. Reynolds here. To the contrary, R.J. Reynolds had a ***stronger*** case in *Frazier*, and it still was not enough. The plaintiff in *Frazier*—unlike Mr. Price—had at least suffered from serious respiratory ailments (pneumonia and bronchitis) and seen a doctor for it before the cutoff date. Still, *Frazier* held these ailments—even when paired with a 1991 pulmonary-function test (ours was in 1996)—were insufficient to "allow a defense expert to engage in a belated armchair analysis" about what the plaintiff would have known. *Id.* at 946.

And that is what truly bothered the Third District: R.J. Reynolds' expert, by testifying as to what symptoms "would have been apparent to [plaintiff]," was speaking to the plaintiff's state of mind despite having "no competent evidence before him from which to hazard his own guesses regarding [plaintiff's] knowledge[.]" *Id.*; *see also Young-Chin*, 597 So. 2d at 882.

Likewise here. All Dr. Jackson had to work with was shortness of breath in

1993 and a pulmonary-function test in 1996. This was not "competent evidence" sufficient to allow Dr. Jackson to testify that Mr. Price must have been noticeably symptomatic. *See id.* It surely was not enough to justify Dr. Jackson's opinion that Mr. Price should have realized, in 1990, that he had COPD. Thus, the trial court did not abuse its discretion in excluding Dr. Jackson's belated armchair analysis—which contradicted all record evidence in the case—about what symptoms Mr. Price would have experienced in 1990. *See id.*

Dr. Jackson's relied-upon COPD studies do not pass muster.

Under Florida's *Daubert* standard, an expert's opinion must be based on sufficient facts or data, and an expert's methods must be reliable and reliably applied to the facts of the case. § 90.702, Fla. Stat. If an expert relies on a study or data, he must explain "how and why" he extrapolated his opinions from that data. *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 144 (1997). A trial court should exclude an expert opinion if "there is simply too great an analytical gap between the data and the opinion proffered." *Id.*

Here, there was a yawning analytical gap between Dr. Jackson's opinions and his supporting data. Dr. Jackson testified that his opinion was based on a medical-journal article that discussed the results of COPD studies. The studies in question gave an average rate of decline for individuals suffering from COPD.

Dr. Jackson had never read the studies. As a result, he did not know the

studies' variability; that is, he did not know how spread out the studies' data was. That was crucial information. For any average—no matter what the context—there will be data points falling above and below that average. The data's spread will directly affect how reliably the average can be applied to an individual person.

That is not to say there is anything wrong with the studies. It is just that they were never intended to serve as an accurate estimation of a single individual's lung function. That a study is valid for one purpose does not make it "valid[] for other, unrelated purposes." *See Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 591 (1993); *Joiner*, 522 U.S. at 146 ("Of course, whether animal studies can ever be a proper foundation for an expert's opinion was not the issue. The issue was whether *these* experts' opinions were sufficiently supported by the animal studies[.]") (emphasis in original); *see also Husky Industries, Inc. v. Black*, 434 So. 2d 988, 992-93 (Fla. 4th DCA 1983) (rejecting opinion based on dissimilar data).

The problem with Dr. Jackson's opinion is well expressed in R.J. Reynolds' misguided investment analogy. In the initial brief, R.J. Reynolds asks us to imagine a $10 investment that averages a ten-percent yearly return. According to R.J. Reynolds, we can use this information to work backward to a year ago, when the investment's value would have been $9.09. (IBR, p.20).

But investments (and creeping respiratory diseases) are not as orderly as that. By way of example, consider the stock market's well-established seven

percent return on investment. That average return, while perhaps correct as a long-term measurement, can hardly be used to accurately value the market on a year-to-year basis. Instead, some years boom; others bust. Those years average out, over time, to a seven percent annual return. But that average figure is worthless when it comes to calculating a value at any given point. After all, an investor with $10 in 2008 most assuredly did not have $9.09 the year before. *See* Michael M. Grynbaum, *Gloom Descends Over Wall Street Again*, The New York Times, June 27, 2008, http://www.nytimes.com/2008/06/27/business/27stox.html.

And therein lies the problem with averages: they do not tell you much of anything "without an accompanying measure of variability, or dispersion." Barbara Hazard Munro, *Statistical Methods for Health Care Research* 40 (5th ed. 2005). To illustrate this problem, take "the woman who had her head in an oven and her feet in a buck of ice water. When asked how she felt, the reply was, 'On the average, I feel fine.'" *Id.* Or consider the man "who drowns while fording a river that he calculates is, on average, three feet deep. If he were alive to tell the tale, he would expound on the 'flaw of averages,' which states, simply, that plans based on assumptions about average conditions usually go wrong." Sam Savage, *The Flaw of Averages*, The Harvard Business Review, Nov. 2002, https://hbr.org/2002/11/the-flaw-of-averages.

The trial court recognized this flaw in Dr. Jackson's methodology, which is

why the court asked, "Well, what were the averages based on? What was the high and the low?" (R3:546). R.J. Reynolds (and Dr. Jackson) did not know the answer. (R3:547). This was significant, because Dr. Jackson admitted that, when it comes to COPD, "[t]here is a lot of variance among individuals." (R2:2516).

Dr. Burns agreed that there was considerable individual variance. (R2:2423-37). That was why Dr. Burns, during his deposition, said he would not guess at Mr. Price's lung function based on population-based studies that tracked only an average rate of decline. (R2:2423-37). In fact, Dr. Burns—who, unlike Dr. Jackson, ***had*** read the studies—explained that the studies themselves recognized the existence of "substantial individual variability." (R2:2424). That meant there would be "no way to know what [Mr. Price's] actual response was because there's so much variability around the mean changes in the population data." (R2:2425); (R2:2429) ("And the fact that they have had an average decline over two years of 'X' doesn't mean that they had that evenly distributed across both years.").

Exactly so. Mr. Price could have been on the low end of the spectrum, while other individuals—who might differ from Mr. Price in terms of age, gender, or medical background—were on the higher end. The trial court was concerned with this scenario exactly, observing that "we don't know where [Mr. Price] falls…if the average is seven, we don't know if he falls in the eight [and] six or if he falls in the…13 and one." (R3:547). Thus, Dr. Jackson's opinion was not "the product of

reliable principles and methods" and the trial court properly excluded it. *See Giaimo v. Fla. Autospor*t, 154 So. 3d 385, 388 (Fla. 1st DCA 2014).

Dr. Jackson did not truly have any other bases for his opinions.

R.J. Reynolds, signaling the weakness of the above-discussed studies, argues that Dr. Jackson's opinion was also based on two other "methods"—his experience as a pulmonologist, and something called the Knudson Formula. R.J. Reynolds is wrong. During his deposition, Dr. Jackson testified that his opinion was based ***entirely*** on the studies mentioned in the journal article. (R2:2507, 2532-33, 2551).

To be sure, R.J. Reynolds has since tried to backpedal from that testimony. After Plaintiff moved to strike Dr. Jackson's studies-based opinions, R.J. Reynolds filed an affidavit that attempted to mine Dr. Jackson's deposition for something—***anything***—that could provide additional support for his limitations opinion. (R2:1098-1107). And on appeal, R.J. Reynolds relies on that affidavit to support all its arguments. In the end, though, Dr. Jackson did not leave R.J. Reynolds any wiggle room. He stated, repeatedly, that he did not rely on any other data, study, or literature in reaching this opinion. (R2:2507, 2532-33, 2551).

Still, the trial court did its best to understand the additional "methods" laid out in Dr. Jackson's affidavit and heard argument on the topic. (R3:532-40). But the trial court was unconvinced, particularly given Dr. Jackson's deposition statements about how he relied on the studies. (R2:529-31).

The trial court did not abuse its discretion in rejecting the additional methods that R.J. Reynolds created in its affidavit. In fact, the trial court could have disregarded the affidavit entirely. It is well-established that an expert may not "disavow prior sworn testimony with contradictory sworn affidavit testimony" just so a party can escape a motion for summary judgment. *Lesnik v. Duval Ford, LLC*, 185 So. 3d 577, 580 (Fla. 1st DCA 2016) (citing *Ellison v. Anderson*, 74 So. 2d 680, 681 (Fla. 1954); *Ondo v. F. Gary Gieseke, P.A.*, 697 So. 2d 921, 923 (Fla. 4th DCA 1997)). The same principle applies with equal force here: Dr. Jackson should not be allowed to disavow his earlier deposition testimony with a self-serving affidavit for the sole purpose of resuscitating R.J. Reynolds' limitations defense.

Even putting the affidavit aside, Dr. Jackson's other supposed methods do not hold water on their own. Start with his method of "applying his education and…experience and knowledge to the facts of this case." (IBR, p.17). Dr. Jackson's affidavit offers no explanation as to how his experience and education led him to reach his opinion here. The initial brief is similarly light on analysis: R.J. Reynolds states that Dr. Jackson concluded, based on Mr. Price's medical records and (estimated) lung function, that it was not "physiologically plausible" for Mr. Price to have been asymptomatic in 1990. (IBR, p.10).

But R.J. Reynolds never explains ***why*** this scenario is so implausible, and never provides any "insight into the principles and methods used to reach [Dr.

Jackson's] opinion." *See Giaimo,* 154 So. 3d at 388. Dr. Jackson's opinion therefore fails under *Daubert*, which requires a witness "relying solely or primarily on experience" to "explain *how* that experience leads to the conclusion reached, why that experience is a sufficient basis for the opinion, and how that experience is reliably applied to the facts. The trial court's gatekeeping function requires more than simply 'taking the expert's word for it.'" *United States v. Frazier*, 387 F.3d 1244, 1261 (11th Cir. 2004) (emphasis in original, citation omitted).

Here, R.J. Reynolds would like us to take Dr. Jackson's word for it. That is not allowed under *Daubert*, *see id.*, and would not have been enough before *Daubert* either, *see Frazier*, 89 So. 3d at 946.

More than that, R.J. Reynolds has already admitted we ***cannot*** take Dr. Jackson's word for it. At trial, R.J. Reynolds conceded that Dr. Jackson does not, in his day-to-day practice, reverse-extrapolate his patients' timeline of symptoms based on later-taken lung-function tests. (R3:538). R.J. Reynolds' education-and-experience argument fails for this reason, too. *See Hall*, 568 So. 2d at 884 (opinion held inadmissible where expert admitted he was not qualified to give it).

No more availing is R.J. Reynolds' invocation of the Knudson Formula. Contrary to what R.J. Reynolds claims, measuring the average rate at which a person's lung function regresses is not at all "how the Knudson Formula works." (IBR, p.15). Rather, the Knudson Formula is simply a way of predicting a

person's expected lung function based on age, height, and gender. (R2:2509). That predicted lung function can then be measured against the results of a person's pulmonary function test (if such a test exists). (R2:2509, 2520-21). It is not too difficult a formula to use; in fact, the CDC's website even has a do-it-yourself Knudson calculator. Center for Disease Control, *Reference Value Calculator*, cdc.gov/niosh/topics/spirometry/refcalculator.html (last visited Dec. 1, 2017).

Dr. Jackson used the Knudson Formula to score Mr. Price's 1996 lung-function test and to assess "the lung function [Mr. Price] needed to have in 1990 to have been potentially asymptomatic." (IBR, p.15). Significantly, though, the Knudson Formula does not explain ***why*** Mr. Price could not have been asymptomatic. That is the missing inferential leap here. Dr. Jackson must justify his conclusion that Mr. Price's lung function was at a symptomatic level in 1990. The above-discussed COPD studies, while inadequate, at least offered a supposed path to this conclusion. The Knudson Formula does not even do that. Instead, "the only connection between the conclusion and the existing data is the expert's own assertions[.]" *See Crane Co. v. DeLisle*, 206 So. 3d 94, 102 (Fla. 4th DCA 2016).

Finally, we address R.J. Reynolds' argument that Dr. Jackson was precluded from presenting lesser opinions. (IBR, p.20). As detailed in the statement of the facts, the trial court never precluded Dr. Jackson from offering more general opinions about the severity of COPD or how it usually progresses. (R2:1698-99;

R3:518-30, 551, 1961-62, 1968-69). R.J. Reynolds just chose not to offer these opinions. This choice is unsurprising. As we discuss below, none of Dr. Jackson's opinions—and certainly not his lesser ones—could have supported a statute-of-limitations defense.

R.J. Reynolds has waived its ability to seek refuge under *Frye*, which would not change the outcome here.

R.J. Reynolds would like to preserve, for future use, the argument that the older *Frye* standard renders Dr. Jackson's testimony admissible. This argument never gets off the ground, however, because R.J. Reynolds failed to preserve it. At trial, R.J. Reynolds never claimed, even alternatively, that *Daubert* did not apply or was unconstitutional. Nor did R.J. Reynolds make any *Frye*-based arguments. R.J. Reynolds may not raise *Frye* now. As this Court has previously held, if a party has not preserved an objection to the application of *Daubert*, "the *Daubert* standard [is] applicable to all expert testimony.'" *Baan*, 180 So. 3d at 1132 n.8.

This is as it should be. Long-established Florida law dictates that a party may not advance an argument on appeal unless it was made in the trial court. *See*, *e.g.*, *Kent v. State*, 755 So. 2d 805 (Fla. 1st DCA 2000). Here, Plaintiff might have made additional arguments at the trial court had Plaintiff known that R.J. Reynolds would later seek to apply *Frye*. Thus, it would be prejudicial, and improper, to allow R.J. Reynolds to assert a theory for the admission of Dr. Jackson's testimony that is different than the theory asserted at the trial court. *See id.*

Further, and as discussed above, Dr. Jackson's testimony fares no better under *Frye*. Indeed, *Frazier* predated *Daubert* and yet had no difficulty excluding this exact type of testimony as "not based on any generally accepted medical or scientific principles or methodologies." 89 So. 3d at 946. *Frazier* is not anomalous. "It has always been the rule that an expert opinion is inadmissible where it is apparent that the opinion is based on insufficient data," *Husky Indus.*, 434 So. 2d at 992, or where the opinion "is imprecise and unspecific" or based on a "factual basis…not adequately explained," *Dempsey*, 589, So. 2d at 380. *See also D'Avila, Inc. v. Mesa,* 381 So. 2d 1172, 1173 (Fla. 1st DCA 1980) (experts' opinion—that plaintiff's asthma was caused by unsafe air particles—lacked an adequate factual basis because there was no evidence of air contamination).

Dr. Jackson could not have saved R.J. Reynolds' limitations defense anyhow.

The trial court's exclusion of Dr. Jackson's testimony is harmless so long as there is no reasonable possibility that the testimony would have contributed to the jury's verdict. *See Special v. W. Boca Raton Med. Ctr.*, 160 So. 3d 1251, 1256 (Fla. 2014). R.J. Reynolds admits that Dr. Jackson was testifying for one reason: to set up a statute-of-limitations defense. This defense could not have contributed to the jury's verdict. Indeed, Dr. Jackson's testimony would not even have been enough for R.J. Reynolds to escape a directed verdict on its limitations defense.

The statute of limitations is designed to prevent unreasonable delay in the

enforcement of existing legal rights. *Kush v. Lloyd*, 616 So. 2d 415, 418 (Fla. 1992). For this reason, the limitations period will start running the moment that a ***cause of action*** accrues. *Id.* In a traditional injury suit—like, say, a negligent driving case—that moment of accrual (the car accident) is easy enough to figure. Not so when the injury is COPD, a "creeping disease" that slowly develops over a protracted period because of long-term exposure to tobacco smoke. *See Carter v. Brown & Williamson Tobacco Corp.*, 778 So. 2d 932, 936-37 (Fla. 2000).

The Florida Supreme Court has held that, when it comes to creeping lung diseases, a smoker's cause of action accrues when cigarette-caused symptoms manifest "in a way which supplies some evidence of a causal relationship to the manufactured product." *Id.* at 934. That means R.J. Reynolds, to prevail on its limitations defense, had to prove not only that the creeping disease of COPD existed before May 5, 1990, but also that Mr. Price reasonably should have known by then that he had COPD ***caused by R.J. Reynolds' product***. *See id.*

The initial brief neglects to mention that Mr. Price would have to link his disease to R.J. Reynolds. (IBR, p.7). But the rule could not be otherwise. Accrual requires a cause of action. And a cause of action necessarily requires a defendant. *See R.J. Reynolds Tobacco Co. v. Ciccone*, 190 So. 3d 1028, 1038 (Fla. 2016).

So, the issue here is whether Dr. Jackson's testimony would have been legally sufficient to show that Mr. Price, by May 5, 1990, reasonably should have

known "enough to permit [him] to commence a non-frivolous tort lawsuit against [R.J. Reynolds] based on physical, observable, patent symptoms and effects ('manifestations')[.]" *See Belanger v. R.J. Reynolds Tobacco Co.*, 140 So. 3d 598, 599-600 (Fla. 3d DCA 2014) (citing *Frazier*, 89 So. 3d at 946); *Damianakis v. Philip Morris USA Inc.*, 155 So. 3d 453, 464 (Fla. 2d DCA 2015) (same).

There is simply no evidence to support a finding that Mr. Price knew enough in 1990 to bring a non-frivolous lawsuit against R.J. Reynolds. Mr. Price was not diagnosed with COPD until 1993, and he did not have ***any*** symptoms until 1992. Dr. Jackson's opinion, even if admitted, would not have been enough to create a question of fact on whether Mr. Price was symptomatic in 1990. *See Loper v. Weather Shield Mfg., Inc.*, 203 So. 3d 898, 903 (Fla. 1st DCA 2015) (directed verdict appropriate when "no view of the evidence could support a verdict for the nonmoving party"). Surely there is no reasonable possibility that Dr. Jackson's unsupported, result-driven opinion could have affected the jury's verdict.

And even if the jury somehow accepted Dr. Jackson's opinion that Mr. Price would have been symptomatic in 1990, it still would not be enough. At best, this would establish that Mr. Price had a cough or shortness of breath in 1990. But these symptoms cannot, by themselves, create a legal basis for bringing a lawsuit against a tobacco company. *See Frazier*, 89 So. 3d at 945. Thus, Dr. Jackson's testimony about "these medically—and practically—ambiguous 'manifestations'"

would have been insufficient, as a matter of law, to "create an issue of fact for… the jury[.]" *See id.*; *see also Ciccone*, 190 So. 3d at 1038 (creeping diseases do not "manifest" at first sign of symptoms). Excluding the opinion was harmless.

II. The trial court correctly excluded hearsay statements made by Mr. Price's siblings about their father's death and, in any event, the jury already knew Mr. Price's father died of smoking-related lung disease.

Standard of review. This Court reviews the trial court's evidentiary rulings for an abuse of discretion. *See Coffey v. State*, 228 So. 3d 179, 183 (Fla. 1st DCA 2017). "Discretion is abused when the 'judicial action is arbitrary, fanciful, or unreasonable[.]'" *Id.* (citation omitted).

Mr. Price only relayed what his siblings thought about emphysema.

The trial court excluded a portion of Mr. Price's testimony where he relayed his siblings' belief that emphysema caused their father's death. Mr. Price made it plain, though, that just because his siblings said so did not "mean they w[ere] right." (R2:1957). Immediately after Mr. Price gave this answer, R.J. Reynolds asked him, "Did y'all discus the fact that his emphysema was caused by cigarette smoking?" (R2:1957-58). Mr. Price responded, "Well, we all knew that's what it was" because all their father had done "was smoke, smoke, smoke." (R2:1958).

R.J. Reynolds cites this answer to give the impression that Mr. Price was admitting emphysema caused his father's death. (IBR, p.27). This is misleading. Indeed, Mr. Price had ***just*** finished saying how he did not know if emphysema was

the cause. (R2:1957-58). And not long before that, Mr. Price had said one of his sisters attributed their father's death to lung cancer. (R2:1957). All Mr. Price was trying to say is that he thought smoking caused his father's cancer. He was not linking his father's cancer to emphysema specifically.

What Mr. Price's siblings said about emphysema was hearsay.

What Mr. Price's siblings said about their father's death was quintessential hearsay. The siblings made out-of-court statements that R.J. Reynolds wanted to present to the jury as true. *See* § 90.801(1)(c), Fla. Stat.

R.J. Reynolds seeks refuge under the party-admission exception to Florida's hearsay rule. § 90.803(18), Fla. Stat. But while Mr. Price's statements fall within this hearsay exception, his siblings' statements do not. That makes the siblings' statements hearsay within hearsay and inadmissible. *See Gosciminski v. State*, 994 So. 2d 1018, 1026 (Fla. 2008). R.J. Reynolds argues, however, that the hearsay-within-hearsay rule does not apply to party admissions. This argument, which is based on Fourth District case law, is wrong. (IBR, p.28) (citing *Jones v. Alayon*, 162 So. 3d 360 (Fla. 4th DCA 2015)).

The most straightforward reason why is that this Court has held directly to the contrary. *See Keyes v. Tallahassee Mem'l Reg'l Med. Ctr.*, 579 So. 2d 201, 204-05 (Fla. 1st DCA 1991) (excluding party testimony as hearsay within hearsay); *compare Benjamin v. Tandem Healthcare, Inc.*, 93 So. 3d 1076, 1086

(Fla. 4th DCA 2012) (declining to follow *Keyes* on hearsay-within-hearsay issue).

Even still, the excluded statements are not Mr. Price's admissions. He was not answering for himself; instead, R.J. Reynolds had specifically asked what his siblings thought. Had Mr. Price stated that ***he*** believed his father died from emphysema because of what his siblings said, then R.J. Reynolds' argument would have some force here. But all Mr. Price shared was his siblings' point of view.

The testimony here, then, does not fit under the rationale of *Alayon*, which reasoned that "it may be assumed" that a party passing along third-party statements would have "made an adequate investigation so that such statements possess, even if not based on firsthand observation, a substantial indicia of reliability." 162 So. 3d at 364-65. But that assumption cannot be made here; Mr. Price made it plain that he did not think his siblings' statements were necessarily reliable or accurate.

R.J. Reynolds also claims that Mr. Price's statements could have shown his then-existing state of mind under section 90.803, Florida Statutes. But again, these statements revealed only his siblings' state of mind about what caused their father's death. That does not get R.J. Reynolds anywhere: section 90.803(3) provides an exception for only the ***declarant's*** state of mind. *See Kelley v. State*, 543 So. 2d 286, 288 (Fla. 1st DCA 1989).

Here, the declarants in question would be Mr. Price's siblings. But their state of mind was not at issue, and their statements could not be used to prove what

Mr. Price was thinking. *See id.*; *Rigdon v. State*, 621 So. 2d 475, 479 (Fla. 4th DCA 1993) ("Since [declarant's] state of mind was not at issue and her statements could not be used to prove appellant's state of mind, [the] testimony was inadmissible."); *compare Lorillard Tobacco Co. v. Alexander*, 123 So. 3d 67 (Fla. 3d DCA 2013) (spouse of a deceased smoker relayed ***smoker's*** statements to prove ***smoker's*** state of mind). Thus, section 90.803(3) has no force here.

Finally, R.J. Reynolds asserts that the excluded testimony was non-hearsay because it "was offered only to show that in 1986 Mr. Price believed his father died of emphysema." (IBR, p.27). But, yet again, the excluded testimony shows that Mr. Price did not believe this. It is what his siblings believed.

More to the point, this testimony was hearsay because R.J. Reynolds wanted to use it for the truth of the matter asserted. R.J. Reynolds claims this is not the case, and that it did not matter whether "Mr. Price's father in fact died from emphysema." (IBR, p.27). But the initial brief's harmless-error discussion gives the lie to that argument. R.J. Reynolds argues that excluding the testimony was harmful because it was vital for the jury to hear that Mr. Price's father had emphysema—and not lung cancer—to show that Mr. Price should have known he was suffering from emphysema-specific symptoms in 1990. (IBR, p.30).

Of course, Mr. Price could not have matched his emphysema symptoms to his father's symptoms unless his father did, in fact, have emphysema. And that

was the point of introducing the excluded statements: to prove that Mr. Price's father had emphysema, and so Mr. Price should have realized he had it too. Put differently, the out-of-court statements were of no value to R.J. Reynolds unless they were true. The statements therefore were hearsay and properly excluded.

Any error was harmless because the jury already knew that Mr. Price's father had a smoking-related lung disease.

R.J. Reynolds' harmful-error argument is a struggle. And understandably so. The trial court's exclusion of Mr. Price's testimony did not deprive R.J. Reynolds of anything, let alone anything meaningful. R.J. Reynolds had plenty of evidence showing that Mr. Price's father had died of smoking-related lung disease. (R3:3243-44, 3862, 4557, 4459-60). During closings, R.J. Reynolds used this evidence to argue that nothing a tobacco company did could have affected Mr. Price because he did not quit even after his "own father die[d] of a smoking-related lung disease." (R3:5377-78). There was no harm here. *See Maines v. Fox*, 190 So. 3d 1135, 1137 (Fla. 1st DCA 2016) (excluded testimony harmless under *Special* because "substantial portions" of testimony still conveyed to jury).

R.J. Reynolds complains that Mr. Price's testimony—that his father smoked until "his lungs killed him" (R3:4557)—was too equivocal. According to R.J. Reynolds, it could not mount a statute-of-limitations defense unless Mr. Price said his father died of emphysema. (IBR, p.30). This argument fails for three reasons.

First, the jury heard that Mr. Price, when filling out his interrogatory

answers, had written that his father died of emphysema. (R3:4459). (And R.J. Reynolds could have published the interrogatory, as the trial court suggested. R3:446.) This removes any possible harm. *See Maines*, 190 So. 3d at 1137.

Second, and as explained in the next section, R.J. Reynolds' statute-of-limitations defense was hopeless. Decades-old, secondhand statements about emphysema would not have changed that.

Third, R.J. Reynolds' basic premise—that Mr. Price would have behaved differently depending on whether his father died of lung cancer instead of emphysema—is fundamentally flawed. It defies belief that Mr. Price would have linked his cough and shortness of breath to emphysema but not to lung cancer.[2]

III. The trial court did not abuse its discretion in allowing Dr. Burns to answer a single hypothetical question; even so, this testimony was harmless in light of the compelling pain-and-suffering testimony that was presented at trial.

Standard of review. The trial court's ruling on Dr. Burns' hypothetical-patient testimony is subject to an abuse-of-discretion standard. *See Melton v. State*, 824 So. 2d 948, 951 (Fla. 1st DCA 2002).

Dr. Burns' answer to Plaintiff's hypothetical question was entirely proper.

Plaintiff asked Dr. Burns a hypothetical question based on what he would expect to see in a typical late-stage COPD patient who was on oxygen full-time.

[2] In fact, these are also early symptoms of lung cancer. American Cancer Society, *Signs and Early Symptoms of Lung Cancer*, www.cancer.org/cancer/lung-cancer/prevention-and-early-detection/signs-and-symptoms.

There was nothing improper about this question; an expert "may state an opinion based on record facts through a hypothetical question, as long as those facts are supported by evidence that has been or will be introduced at trial." *See Dorbad v. State of Florida,* 12 So. 3d 255, 257-58 (Fla. 1st DCA 2009). The facts here supported the hypothetical question: Mr. Price did have late-stage COPD, and he was on oxygen 24 hours a day.

R.J. Reynolds objected because the question was too speculative. (R3:3357). But a hypothetical question becomes unduly speculative only when it would be impossible for an expert to answer the question based on the information provided. *See Silvers v. U-Haul Co. of Georgia*, 756 So. 2d 1082, 1083-84 (Fla. 5th DCA 2000); *Dandashi v. Fine*, 397 So. 2d 442, 444-45 (Fla. 3d DCA 1981); *Great Am. Ins. Co. v. Cornwell*, 191 So. 2d 435, 439 (Fla. 1st DCA 1966).

The hypothetical question here provided all the information that Dr. Burns needed. Dr. Burns, as a lung-disease specialist, knew what to expect from an end-stage COPD patient. The trial court did not abuse its discretion in allowing Dr. Burns to describe that patient. *See State v. Hickson*, 630 So. 2d 172, 176 (Fla. 1993) ("[E]xpert testimony on the syndrome and the characteristics of a battered spouse will give the jurors and the judge information beyond the understanding of the average layman."); *Melton*, 824 So. 2d at 951-52 (narcotics expert allowed to testify about habits of a typical cocaine seller).

In the initial brief, R.J. Reynolds complains it is unfair that Dr. Burns was allowed to answer this hypothetical question while Dr. Jackson was precluded from giving his limitations opinion. (IBR, p.30). But these are not the same thing at all. The trial court never barred Dr. Jackson from describing a hypothetical smoker. The impermissible part of Dr. Jackson's testimony—which was considerably more involved than Dr. Burns' single answer—was his unsupported assumption that Mr. Price had severe COPD in 1990. (IBR, p.30).

No more availing was R.J. Reynolds' second objection at trial: that Dr. Burns did not have any personal knowledge of Mrs. Price's experiences. (R3:3359). Hypothetical questions are, by their very nature, not based on personal knowledge. *See*, *e.g.*, *Cornwell*, 191 So. 2d at 439. And there was no danger of the jury here thinking otherwise; the trial court and R.J. Reynolds made it perfectly clear that Dr. Burns was not describing Mrs. Price. (R3:3359, 3364-66).

Also wrong is R.J. Reynolds' contention that Dr. Burns described a hypothetical spouse who was there "at the moment of death." (IBR, p.33). What Dr. Burns actually said was that a person with COPD "can't get enough oxygen in, can't get the carbon dioxide up, can't breathe enough. And the person literally but quite slowly suffocates to death with his spouse sitting there watching[.]" (R3:3359). This matched Mrs. Price's experience exactly: she watched her husband slowly suffocate for over a decade. In any event, the jury knew that Mrs.

Price was not physically present when Mr. Price passed. (R3:4452).

Lastly, we note that much of R.J. Reynolds' argument seems aimed at the notion that Dr. Burns' "sympathetic" and "highly emotional" testimony was unfairly prejudicial. But that is not what R.J. Reynolds argued at trial. Instead, R.J. Reynolds claimed the testimony was speculative and described case-specific evidence. (R3:3357-59). The trial court considered only these specific objections. (R3:3359) ("In ***that regard***, it's overruled. It should not be perceived…that [Dr. Burns] observed Mr. Price or has the ability to recreate.") (emphasis added). R.J. Reynolds may not raise a new objection on appeal. *See*, *e.g.*, *Kent*, 755 So. 2d 805.

Mrs. Price's and Mrs. Prentice's compelling testimony obviates any harm.

This was a multi-week trial, with a transcript that is thousands of pages long. Dr. Burns' objected-to answer is about a page of testimony. There is not a reasonable possibility that this brief testimony could have contributed to the jury's verdict. *See Rodriguez v. State*, 187 So. 3d 903, 906 (Fla. 3d DCA 2016) (expert's comment harmless in "context of a four-day trial"); *Boley Ctrs., Inc. v. Vines*, 179 So. 3d 464, 465 (Fla. 1st DCA 2015) (testimony harmless in context of entire record). That is particularly true here, because Dr. Burns' testimony was cumulative of other testimony. *See Tower Hill Preferred Ins. Co. v. Cabrera*, 219 So. 3d 862, 863 (Fla. 4th DCA 2017) (cumulative evidence harmless under *Special*); *see also Hunter v. State*, 174 So. 3d 1011, 1016 (Fla. 1st DCA 2015).

R.J. Reynolds, seemingly cognizant of the minor and cumulative nature of Dr. Burns' testimony, constructs a harmful-error argument built on a faulty foundation. Namely, that Dr. Burns' testimony was prejudicial because Plaintiff did not "call any other witnesses" to testify about Mrs. Price's pain and suffering. (IBR, p.3). Not so. There was considerable, compelling testimony about what Mrs. Price went through in losing Mr. Price to COPD. R.J. Reynolds even acknowledged this "moving" testimony during closing arguments. (R3:5408).

That testimony certainly supports the jury's award of $6.4 million, which is less than the "amounts of compensatory damages [that] have been entered against tobacco companies in cases with similar facts." *See Alexander*, 123 So. 3d at 78 (approving $10 million compensatory award).[3] The award here is also substantially less than the $10 million Plaintiff requested (T.3483), which belies the notion that this jury was infected by passion or prejudice. *See Mercury Ins. Co. of Florida v. Moreta*, 957 So. 2d 1242, 1253 (Fla. 2d DCA 2007).

Further, the verdict here was not "so inordinately large as obviously to exceed the maximum limit of a reasonable range within which the jury may

[3] *See also, e.g., Philip Morris USA, Inc. v. Ledoux*, 2017 WL 4654965, at *5 (Fla. 3d DCA Oct. 18, 2017) (approving $10 million in compensatory damages); *R.J. Reynolds Tobacco Co. v. Townsend*, 90 So. 3d 307, 307 (Fla. 1st DCA 2012) ($10.8 million); *Philip Morris USA Inc. v. Cohen*, 102 So. 3d 11, 19 (Fla. 4th DCA 2012) ($10 million); *R.J. Reynolds Tobacco Co. v. Gray*, 63 So. 3d 902 (Fla. 1st DCA 2011) (per curiam affirming $7-million-dollar compensatory verdict, which is in the record at R2:6523-25).

properly operate." *See Alexander*, 123 So. 3d at 79. The testimony at trial described, in heartbreaking detail, how Mrs. Price had to watch her husband's inexorable march towards death by suffocation. She saw him tethered, permanently, to an oxygen machine, and she saw him suffer greatly—where hot weather, or even walking across a room, left him gasping.

Mrs. Price did not just watch Mr. Price suffer. She also served as his primary caregiver. She did everything for him. When Mr. Price could no longer walk to the bathroom, Mrs. Price gave him sponge baths, and she changed his diaper. *See id.* at 78 ("[T]he jury compensated Mrs. Alexander for her mental pain and suffering as she nursed, cared for, and watched the love her life as he became incontinent and unable to move or breathe.").

And once Mr. Price—the love of her life—died, she fell to pieces. She never dated again. She barely left the house. Mrs. Price, although currently suffering from advanced dementia, continues to mourn Mr. Price. The jury heard how Mrs. Price, as part of a daily vigil, takes out his old wallet to look at photographs she no longer recognizes. She still remembers her husband, though.

In light of this testimony, R.J. Reynolds pushes too far in claiming that the jury's award "bears no logical relationship to the evidence at trial." (IBR, p.34). Especially because R.J. Reynolds never deigned to suggest a lower amount. R.J. Reynolds told the jury that Plaintiff did not deserve "***any*** award" because "Mr.

Price could have avoided the injuries that he sustained." (R3:5408) (emphasis added). Having declined "to assist the jury in establishing a range for a verdict," R.J. Reynolds should have to live with the result. *See Hawk v. Seaboard Sys. R.R., Inc.*, 547 So. 2d 669, 674 (Fla. 2d DCA 1989) (Altenbernd, J., concurring).

IV. The trial court did not abuse its discretion in declining to instruct the jury that conspiracy requires reliance on a specific statement.

Standard of review. This Court reviews the trial court's jury-instruction ruling for an abuse of discretion and will not reverse absent a "clear demonstration that prejudicial error occurred." *See R. J. Reynolds Tobacco Co. v. O'Hara*, 2017 WL 4526819, at *3 (Fla. 1st DCA Oct. 11, 2017). A trial court does not abuse its discretion in declining to give a proposed instruction unless that instruction is a correct statement of the law and supported by the facts of the case. *Id.* at *2.

R.J. Reynolds cannot earn a new trial.

R.J. Reynolds suggests, without ever stating it outright, that winning on this conspiracy-instruction issue would result in a complete new trial. But R.J. Reynolds is entitled to no such thing. Plaintiff prevailed on three counts: negligence, strict liability, and conspiracy. The jury's verdict on the negligence and strict-liability counts are not implicated at all by the conspiracy instruction. No matter what, then, these counts still stand. *See Marriott Int'l, Inc. v. Perez-Melendez*, 855 So. 2d 624, 627 (Fla. 5th DCA 2003) (error as to one theory of liability not a basis for reversal where one theory entitles plaintiff to recover "the

same measure of damages under other theories").

The jury's damages award would remain intact, too. *See id.* Here, Plaintiff sought damages for Mrs. Price's pain and suffering. Her pain and suffering is the same regardless of whether Mr. Price's death was caused by R.J. Reynolds' negligence or fraud (or both). *See id., see also Philip Morris USA, Inc. v. Douglas*, 110 So. 3d 419, 425-26, 436 (Fla. 2013) (affirming verdict on strict liability where jury found against plaintiff on fraud). That is why the verdict form provided a single line for damages (R2:5114), and it is why the jury was instructed to answer the damages question if it answered yes on ***any*** count (R3:5236).

Further, R.J. Reynolds has waived the right to seek a comparative-fault reduction of the damages here, as discussed in the next issue on appeal. Thus, R.J. Reynolds' jury-instruction argument, even if correct, is ultimately meaningless. Plaintiff would still be able to recover the full $6.4 million in damages.

Fraudulent concealment does not require a statement.

Here, R.J. Reynolds argues for a jury instruction that would have required Plaintiff to prove that Mr. Price relied on a specific misleading statement made by a conspirator. This is an incorrect statement of the law. Recently, both the Second and Fourth Districts held that an *Engle* concealment or conspiracy instruction need not include reliance "on a statement." *Philip Morris USA, Inc. v. Duignan*, 2017 WL 5471866, at *9-13 (Fla. 2d DCA Nov. 15, 2017) (rejecting argument "that an

Engle progeny plaintiff must show his reliance on a direct statement"); *Calloway*, 201 So. 3d 753 at 766 (finding that conspiracy instruction "need not include reliance on 'a statement' unless the facts of the case warrant it").

Duignan and *Calloway* reached the right result. Florida law does not require a misleading statement or a fiduciary relationship to support a concealment claim. *E.g.*, *Joiner v. McCullers*, 28 So. 2d 823, 824-25 (Fla. 1947); *Nessim v. DeLoache*, 384 So. 2d 1341, 1344 (Fla. 3d DCA 1980); *Ramel v. Chasebrook Construction Co.*, 135 So. 2d 876, 882 (Fla. 2d DCA 1961).

This is consistent with how Florida appellate courts, including this Court, have regarded the sufficiency of *Engle* plaintiffs' concealment evidence. Time and time again, "courts have refused to hold that an Engle progeny plaintiff must identify specific statements…relied upon in making a decision regarding cigarette smoking[.]" *Duignan*, 2017 WL 5471866, at *11; *e.g., Philip Morris USA Inc. v. Putney*, 199 So. 3d 465, 470 (Fla. 4th DCA 2016); *Evers v. R.J. Reynolds Co.*, 195 So. 3d 1139, 1141 (Fla. 2d DCA 2015); *Philip Morris USA Inc. v. Buchanan*, 155 So. 3d 1156, 1158 (Fla. 1st DCA 2014); *R.J. Reynolds Tobacco Co. v. Townsend*, 90 So. 3d 307, 310 (Fla. 1st DCA 2012); *Philip Morris USA, Inc. v. Naugle*, 103 So. 3d 944, 946 (Fla. 4th DCA 2012), *disapproved on other grounds*, *Philip Morris USA, Inc. v. Russo*, 175 So. 3d 681 (Fla. 2015); *R.J. Reynolds Tobacco Co. v. Martin*, 53 So. 3d 1060, 1069-70 (Fla. 1st DCA 2010).

The initial brief does not offer any authority to the contrary. The best R.J. Reynolds can do is reference trial court jury instructions that were quoted in *Hess v. Philip Morris USA Inc.*, 175 So. 3d 687 (Fla. 2015), and *Philip Morris USA, Inc. v. Russo*, 175 So. 3d 681 (Fla. 2015). But neither *Hess* nor *Russo* passed on the correctness of those instructions. These decisions instead addressed whether the statute of repose applies in *Engle* litigation (it does not). Nothing cited in the initial brief stands for the proposition that a defendant's fraudulent concealment must be accompanied by a specific statement.

In fact, R.J. Reynolds is forced to concede that a concealment claim ***can*** be predicated solely on a defendant's failure to disclose material facts. (IBR, p.37). The initial brief tries to brush past this inconvenient reality, however, by arguing that R.J. Reynolds—unless it made a statement—could not have owed any duty to disclose information to Mr. Price. There are a number of problems here.

To start with, this argument is barred by res judicata. The *Engle* jury's findings conclusively resolve whether R.J. Reynolds engaged in conduct sufficient to impose liability. R.J. Reynolds may not relitigate this issue now. Regardless, and *Engle* aside, R.J. Reynolds still had a duty to disclose here because R.J. Reynolds repeatedly, publicly, and falsely promised to disclose all material information to the public, and because R.J. Reynolds concealed material information by artifice and with the intent to deceive. These are all independent

reasons for why R.J. Reynolds' duty argument fails. We address them in turn.

Res judicata bars R.J. Reynolds from relitigating its duty to disclose.

R.J. Reynolds already lost this argument at the original *Engle* trial. The *Engle* jury found that R.J. Reynolds and other tobacco companies conspired to conceal or omit material information about cigarettes. *Engle*, 945 So. 2d at 1277. The jury's findings are now res judicata: "the Phase I verdict against the *Engle* defendants resolved all elements of the claims that had anything to do with the *Engle* defendants' cigarettes or their conduct." *Douglas*, 110 So. 3d at 430-36.

The existence of a duty is one of these already-decided elements. Indeed, as this Court has recognized, that R.J. Reynolds owed a duty to the *Engle* class was resolved against R.J. Reynolds at the *Engle* trial. *Martin*, 53 So. 3d at 1068-69; *see Engle v. R.J. Reynolds Tobacco*, 2000 WL 33534572, at *2 (Fla. 11th Cir. Ct. 2000) (*Engle* trial court notes in post-trial order that defendants owed a duty).

Now, the only concealment and conspiracy-specific issues to be decided in individual *Engle*-progeny actions are reliance, causation, and damages. *Engle*, 945 So. 2d at 1267-68, 1277; *Martin*, 53 So. 3d at 1068-69. But the existence of R.J. Reynolds' duty is written in stone. *See id.*; *Douglas*, 110 So. 3d at 431-32.

R.J. Reynolds does not explain how it can circumvent the preclusive effect of the *Engle* jury's findings. R.J. Reynolds does, however, try to twist a portion of the *Engle* phase one concealment instruction, arguing that this instruction required

identification of specific statements. (IBR, p.39). Even if correct, R.J. Reynolds still cannot escape *Engle*'s res-judicata effect, which applies to any matter that could have been litigated in that action. *See Douglas*, 110 So. 3d at 431-32. But R.J. Reynolds is not correct. The *Engle* phase one concealment instruction was not based entirely on misleading statements. The *Engle* jury was also asked to decide:

> (2), whether one or more of the Defendants . . .knew of the existence of material facts that were not disclosed;
>
> (3), whether . . . in concealing material facts, one or more of the Defendants intended that another rely on the omission or concealment.

(IBR Appendix Tab A, p.17). And, the *Engle* instructions stated that concealment exists when a party knows about product defects "and intentionally conceals them…or suppresses facts." *Id.* Thus, the *Engle* instructions did not require a specific statement.

R.J. Reynolds undertook a duty to disclose.

In any event, the facts here show that R.J. Reynolds had a duty to disclose material information. *See O'Hara*, 2017 WL 4526819, at *2 (proposed instruction must be "supported by the facts of the case"). The evidence at trial established that R.J. Reynolds and its co-conspirators repeatedly promised, beginning with the Frank Statement, to fully disclose truthful information about smoking and health.

This created a duty. "[O]ne who undertakes to disclose material information has a duty to disclose that information fully." *See Naugle*, 103 So. 3d at 946 (citing *ZC Ins. Co. v. Brooks*, 847 So. 2d 547, 551 (Fla. 4th DCA 2003)); *Marriott*

Int'l, Inc. v. Am. Bridge Bahamas, Ltd., 193 So. 3d 902, 908 (Fla. 3d DCA 2015) (duty to disclose "may arise where a party undertakes to disclose certain facts").

This is how the conspirators' duty was established at the original *Engle* trial. Indeed, this Court, when summarizing the foundation of the *Engle* jury's fraud findings, specifically identified the existence of "evidence [that] the defendants had taken on the duty to disclose by promising to share their research results with the public." *Martin*, 53 So. 3d at 1068. And the *Engle* jury was instructed that "[i]ntentional concealment exists where a party…while under no duty to speak, ***nevertheless voluntarily does so***." (IBR Appendix Tab A, p.17) (emphasis added).

Here, R.J. Reynolds and its co-conspirators repeatedly promised that they would disclose information about whether smoking was harmful. *E.g.*, (R3:2592-94, 2606-69, 2658-65, 2823). The conspirators therefore undertook a duty to disclose that information fully. *See Naugle*, 103 So. 3d at 946.

R.J. Reynolds had a duty because it concealed information, to which Mr. Price did not have access, with artifice and with the intent to deceive.

It does not matter that R.J. Reynolds lacked a "special relationship" with Mr. Price. (IBR, p.37). When a defendant suppresses the truth with the intent to deceive or to create a false impression, it will be liable for fraudulent concealment despite there being no independent duty to disclose. *De La Osa v. State*, 158 So. 3d 712, 730 (Fla. 4th DCA 2015); *Telesphere Int'l, Inc. v. Scolin*, 489 So. 2d 1152, 1153-54 (Fla. 3d DCA 1986). Here, there can be little question that the

conspirators concealed the truth with the intent to deceive. Indeed, deceiving the American public was the explicit purpose of the conspiracy. That the conspirators acted with an intent to deceive therefore creates a duty under Florida law. *See id.*

Also, as explained in *Ramel* and *McCullers*—two cases selectively cited in the initial brief—a defendant's "mere nondisclosure" of information is sufficient to create a duty (1) "where the other party does not have equal opportunity to become apprised of the fact," *Ramel*, 135 So. 2d at 882; *Scolin*, 489 So. 2d at 1153-54, or (2) "where a party…uses any artifice to throw the other party off his guard and lull him into a false sense of security," by any act that "tends affirmatively to a suppression of the truth," *McCullers*, 28 So. 2d at 284-25; *Nessim*, 384 So. 2d at 1344. The conspirators' conduct here checks both these boxes.

First, there was not an equal opportunity to learn of the information that the conspirators concealed. That is part of what made the conspiracy so effective. The conspirators were ***decades*** ahead of even the Surgeon General when it came to the dangerousness of cigarettes. The conspirators did everything they could to hide this information. The result was that Mr. Price, like the rest of the American public, had no idea of the breadth of information concealed. Mr. Price could not have known filtered cigarettes were more dangerous than unfiltered ones, or that nicotine was ***the*** reason why smokers kept smoking, or that the conspirators had created fake research organizations to manufacture a public-health controversy.

Second, the conspirators' concealment was certainly accompanied by trick or artifice intended to throw smokers of their guard and lull them into a false sense of security. Lulling smokers into a false sense of security was a foundational principle of the conspiracy. The conspirators' goal, by their own words, was "to reassure people so that they could continue smoking," and "to free millions of Americans from the guilty fear that is going to arise…every time they light a cigarette." (R3:2590-91, 3259); (R3:2847) ("[D]oubt is our product….").

There was also abundant evidence showing that the conspirators acted to affirmatively suppress the truth. They created false research organizations to suppress unfavorable research. They feigned cooperation when the Surgeon General asked for the tobacco companies to turn over research about smoking and health. They attacked public-health organizations for daring to tell the public what the conspirators had known for decades. And they created products, like filtered cigarettes, to give the false impression that their products were safe.

In short, the conspirators did not just fail to disclose information, they also took acts to suppress or disguise the truth and to "distract[]…attention from the real facts." *See McCullers*, 28 So. 2d at 825. Based on this evidence, the "line is overstepped and the concealment becomes a fraud." *See id.*

The conspiracy instruction does not implicate preemption.

Next, we address R.J. Reynolds' halfhearted preemption argument. R.J.

Reynolds has yet to prevail on preemption in an *Engle* case, although not for a lack of trying. *See*, *e.g.*, *R.J. Reynolds Tobacco Company v. Marotta*, 214 So. 3d 590 (Fla. 2017); *Graham v. R.J. Reynolds Tobacco Co.*, 857 F.3d 1169 (11th Cir. 2017); *Philip Morris USA, Inc. v. Lourie*, 198 So. 3d 975 (Fla. 2d DCA 2016).

Here, R.J. Reynolds suggests that the conspiracy instruction, by leaving out the word "statement," somehow triggered the Federal Cigarette Labeling and Advertising Act. But the United States Supreme Court has twice held that the Act does ***not*** preempt fraudulent concealment and conspiracy claims. *Altria Group, Inc. v. Good*, 555 U.S. 70, 82-84 (2008); *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 528-29 (1992). In fact, the claim at issue in *Altria* was very similar to Plaintiff's claim here. The plaintiffs in *Altria* claimed that the tobacco defendants defrauded smokers by concealing that "light" cigarettes were no less harmful than regular cigarettes. 555 U.S. at 73-74. *Altria* held that this claim was not preempted. *See id.* at 91. The same is true here.

Nothing in *Laschke v. Brown & Williamson Tobacco Corp.*, 766 So. 2d 1076 (Fla. 2d DCA 2000), is to the contrary. *Laschke* stated that preemption extends only to claims based on a duty of disclosure "beyond that imposed by the Labeling Act." *Id.* at 1078. But as *Altria* held, a duty of disclosure is different from a duty not to deceive, and claims based on the latter, like Plaintiff's here, are not preempted. 555 U.S. at 87, 91; *see also Engle*, 945 So. 2d at 1273 (only failure-to-

warn claims preempted). R.J. Reynolds' preemption argument fails accordingly.

The jury instruction was harmless.

Any error was harmless. There is not "a reasonable possibility that the jury could have been misled by the failure to give" R.J. Reynolds' instruction. *See Golian v. Wollschlager*, 893 So. 2d 666, 667 (Fla. 1st DCA 2005). The evidence here showed that the conspirators concealed what they knew about nicotine addiction and cancer until 2000. Every single public statement on these subjects failed to include what the conspirators had known since the 1950s.

The jury found that Mr. Price's reliance on this concealment was a legal cause of his COPD and death. It is inconceivable that the jury would have found reliance on "pure silence" to be a legal cause of Mr. Price's death but would have reached a different conclusion when considering the conspirators' public statements that failed to disclose what conspirators obviously knew—that their products were addictive and caused cancer.

There is no reasonable possibility that the omission of the word "statement" could have affected the jury's verdict. *See O'Hara*, 2017 WL 4526819 at *3.

V. The trial court did not abuse its discretion in entering judgment on the jury's full compensatory verdict because R.J. Reynolds waived its right to seek a comparative-fault reduction and because Plaintiff's arguments did not mislead the jury.

Standard of review. The trial court's comparative-fault finding is reviewed for an abuse of discretion. *See R.J. Reynolds Tobacco Co. v. Hiott*, 129 So. 3d

473, 479 (Fla. 1st DCA 2014). And contrary to what R.J. Reynolds says in the initial brief (IBR, p.49), the harmless-error test does not apply to Plaintiff's closing arguments. *See R.J. Reynolds Tobacco Co. v. Robinson*, 216 So. 3d 674, 683 (Fla. 1st DCA 2017) ("Error, in the context of harmless-error analysis, is an improper ruling by the trial court, not an improper comment by counsel or a witness.").

R.J. Reynolds waived its waiver argument.

R.J. Reynolds asserts that Plaintiff's counsel made closing-argument comments that waived Plaintiff's right to seek a comparative-fault reduction. But R.J. Reynolds failed to object to these comments (R3:5272, 5285-87, 7935), and so they are not preserved for appeal. *See*, *e.g.*, *Townsend*, 90 So. 3d at 310.

R.J. Reynolds can hardly claim it was unprepared to object. The argument it makes here—that Plaintiff waived the right to resist apportionment—is one R.J. Reynolds makes ***constantly*** in *Engle* cases. And R.J. Reynolds would have been especially attuned to this issue here because—as R.J. Reynolds reminds us (IBR, p.47)—the trial court had told Plaintiff to avoid telling the jury that comparative fault would apply to the intentional torts. (R3:5050-52). Plaintiff followed this directive. If R.J. Reynolds felt differently, it should have objected at the time.

Instead, R.J. Reynolds waited until after trial. That was too late. Objections are not cards to be played at a litigant's leisure. "[B]asic fairness" requires a timely objection to "put the trial judge on notice that an error may have occurred

and thus provides the opportunity to correct the error at an early stage of the proceedings." *City of Orlando v. Birmingham*, 539 So. 2d 1133, 1134 (Fla. 1989).

And if there was any remaining question as to waiver, R.J. Reynolds' conduct during phase two removes all doubt. To quote the initial brief, a party that says it accepts responsibility "to secure an advantage with the jury cannot after the verdict seek to have it both ways." (IBR, p.46) (quoting *Hiott*, 129 So. 3d at 479). Put another way: "It is a general rule that parties will be held to the theories upon which they secure action by the court, and in pursuance of the rule that a party may not take inconsistent positions in a litigation." *Federated Mut. Implement & Hardware Ins. Co. v. Griffin,* 237 So. 2d 38, 41 (Fla. 1st DCA 1970).

This is exactly right. And here it was R.J. Reynolds that took inconsistent positions. There was never any doubt that R.J. Reynolds would ask for a comparative-fault reduction to any damages awarded. Sure enough, R.J. Reynolds took this position after trial, claiming that the jury's finding of fault should be applied to the verdict; meaning R.J. Reynolds believed it should have to pay only $2.5 million of the $6.4 million awarded by the jury.

The jury would have been surprised to hear this. After all, R.J. Reynolds' counsel had told the jury that "we respect your verdict." (R3:6215). So much so that R.J. Reynolds' counsel felt compelled to carry the verdict around in his jacket

pocket. (R3:6215). In particular, R.J. Reynolds said it respected the jury's award of $6.4 million in damages—"a very powerful, strong message." (R3:6215-16).

Thus, R.J. Reynolds started the jury at the assumption that R.J. Reynolds would be paying the full $6.4 million. R.J. Reynolds reinforced this idea during phase two closings, telling the jury that it had "already awarded" $6.4 million, and that making R.J. Reynolds pay money "over and above" that amount would not serve the goals of punishment and deterrence. (R3:6217). Leaving nothing to chance, R.J. Reynolds' counsel repeated this point numerous times:

- "[W]e are at a point right now already where you've awarded $6.4 million, and you've got to decide whether…more money over and above that can accomplish something[.]" (R3:6222-23).

- Counsel says phase two is about "whether there is a purpose, a reason, something that will be served by an award over and above the $6.4 million you've already awarded." (R3:6218).

- "[I]f you're concerned that the company is somehow not being held accountable for things that happened in the past, you heard about that evidence too. Over and above the $6.4 million you already came to…" (R3:6224).

- "[Y]ou came to a compensatory damage award of $6.4 million. Now in this phase of the trial you have to consider whether more money should be awarded." (R3:6227).

Even worse, R.J. Reynolds' counsel outright told the jury that its verdict might not be reduced even though "you wrote on the form that Mr. Price was 60 percent responsible." (R3:6218). The trial court would later conclude, in a written

order, that the "implication" of counsel's arguments was that the jury's full award "would or may be the amount in the judgment." (R2:8480).

R.J. Reynolds' conduct here, then, is very similar to its conduct in *Philip Morris USA Inc. v. Marchese*, 2017 WL 5632420 (Fla. 4th DCA Nov. 22, 2017). There, during phase two, "counsel for Reynolds suggested the jury had already fully compensated [appellee] with [an] award of $1 million[,] and implied she would receive all of it by stating that [the jury] sent a loud and clear message with that reward." *Id.* at *2. The trial court, following *R.J. Reynolds Tobacco Co. v. Schoeff*, 178 So. 3d 487 (Fla. 4th DCA 2015), reduced the jury's verdict to reflect the apportionment of fault. But *Marchese* reversed, finding that R.J. Reynolds and its co-defendant had waived the right to seek a comparative-fault reduction:

> [Defendants] always intended to seek a reduction based on comparative fault. But as we have previously stated, they cannot have it both ways. [Defendants'] repeated suggestions to the jury that there would be no reduction of the compensatory damages award were made in hopes of minimizing the amount of punitive damages awarded. At no point did [defendants'] counsel inform the jury of their intent to seek a reduction of the compensatory damages award based on comparative fault, nor did they remain silent on the issue. Instead, [defendants] affirmatively represented that [plaintiff] would be fully compensated as a "shield" against the potential imposition of a large punitive damages award, all the while intending to use the comparative fault statute as a "sword" to reduce the amount awarded.

Id. at *4 (internal citations omitted). So too here. R.J. Reynolds, knowing it would seek a post-trial reduction of comparative fault, nevertheless used the jury's ***full*** compensatory award to shield against the jury awarding more in punitive damages.

Plus, R.J. Reynolds did not need to reference a specific number; counsel's we've-been-punished-enough argument could have been made without mentioning $6.4 million. But counsel chose to use the full weight of that number to persuade the jury that R.J. Reynolds had been punished enough. This strategy worked: the jury, despite having found that R.J. Reynolds' conduct was so reprehensible to justify a second phase of trial, nevertheless awarded nothing in punitive damages.

But R.J. Reynolds "cannot have it both ways." *Id.* at *4. Counsel made an intentional choice to convince this jury that Plaintiff was going to receive every penny of $6.4 million. R.J. Reynolds may not take an inconsistent position now. "Whether it be in politics or trial strategy, 'elections have consequences.'" *Id.*

The jury was not misled (by Plaintiff).

As this Court has held, a plaintiff does not waive entitlement to full compensatory damages unless the jury is ***misled*** into believing that damages will be reduced. *Buchanan*, 155 So. 3d at 1158. This is what happened in *Hiott*: the jury was misled when plaintiff's counsel stated that any damages would be reduced to reflect the plaintiff's comparative fault. *Hiott*, 129 So. 3d at 481. But not here. Plaintiff never told the jury that damages would be reduced.

And the trial court expressly found that the jury would not have been left with this impression. The court stated that "Plaintiff's arguments did not mislead the jury regarding the reduction of damages awarded if an intentional tort was

found." (R2:8483-84). The trial court, having sat through the entire trial and having witnessed the allegedly misleading arguments, is in the best position "to judge the impact thereof on the jury." *See, e.g., Johns-Manville Sales Corp. v. Janssens*, 463 So. 2d 242, 257-58 (Fla. 1st DCA 1984).

Further, R.J. Reynolds has mischaracterized why Plaintiff accepted partial responsibility. It was not to mislead the jury on the issue of damages. Rather, Plaintiff discussed Mr. Price's partial responsibility in the context of causation. To establish class membership, Plaintiff had to show that Mr. Price's addiction to nicotine in cigarettes caused his COPD. And to prevail on the intentional torts, Plaintiff had to prove that concealment or conspiracy was the cause.

R.J. Reynolds' theory of the case—drilled into the jury—was that Mr. Price's COPD was caused by his choice to smoke and nothing else. (R3:2237-38, 2244, 2252, 2256, 2258-62, 2267-73, 2287-88, 5355-59, 5386-89); (R3:5357) ("No one put a gun to John Price's head and made him smoke[.]"). According to R.J. Reynolds, Mr. Price could have stopped smoking whenever he wanted, but he chose not to because he loved it (R3:2239-42, 2244, 2256, 2258, 2287, 5356-57, 5359, 5415), or because it gave him something to do while bored at work (R3:3886, 5356), or because it relieved stress (R3:3886). Therefore, Mr. Price was entirely to blame for his COPD. (R3:2241-44, 2258-60, 2267-73, 2287, 5415).

Plaintiff, rather than disclaiming any fault, acknowledged Mr Price was partially responsible—and therefore was a partial cause—of his own COPD. (R3:5461-63, 5465). It was in this context that Plaintiff discussed partial fault. Not to suggest that damages would be reduced, but to show that causation was not an all-or-nothing proposition. Florida law allows for liability even where there are concurring causes; thus, Plaintiff needed to prove only that the conspirators' fraudulent conduct was "a substantial factor in causing the injury." *See Whitney v. R.J. Reynolds Tobacco Co.*, 157 So. 3d 309, 312 (Fla. 1st DCA 2014).

It was for this purpose—proving that R.J. Reynolds' conduct was ***a*** cause of the injury here—that Plaintiff presented Mr. Price's partial responsibility to the jury. For example, Plaintiff argued that Mr. Price's failure to quit smoking as an adult did not mean "we should forget all the heavy smoking" earlier in his life when the conspirators "were intentionally doing everything in their power to say, 'You don't need to try to quit.'" (R3:5465-66). This was a vital part of Plaintiff's causation argument: explaining that the conspirators' fraudulent conduct, while perhaps not the sole cause of Mr. Price's COPD, was at least ***a*** substantial cause.

A plaintiff has the right to decide "the theory under which his case is tried" and may, as part of that theory, admit the plaintiff is "partly to blame." *Philip Morris USA, Inc. v. Arnitz*, 933 So. 2d 693, 697-98 (Fla. 2d DCA 2006). R.J. Reynolds should not, under the guise of waiver, "be able to control [P]laintiff's

theory of [the] case" and to punish Plaintiff for accepting some fault. *See id.*

***Sury* bars R.J. Reynolds' statutory argument.**

R.J. Reynolds concedes its statutory argument—that comparative fault categorically applies to all *Engle* verdicts—must fail under this Court's decision in *R.J. Reynolds Tobacco Co. v. Sury,* 118 So. 3d 849 (Fla. 1st DCA 2013). As other appellate courts have since recognized, *Sury* had the right of it: "the 'core' of *Engle* progeny actions is intentional misconduct." *Philip Morris USA Inc. v. Boatright*, 217 So. 3d 166, 172 (Fla. 2d DCA 2017) (following *Sury*); *Philip Morris USA, Inc. v. Ledoux*, 2017 WL 4654965, at *7 (Fla. 3d DCA Oct. 18, 2017) (same). Indeed, *Engle* cases are at their heart about the conspirators' "frightfully inhumane, vile, and unconscionable" actions in defrauding the American public. *Berger v. Philip Morris USA, Inc.*, 2015 WL 1865757, at *8 (M.D. Fla. 2015). The comparative-fault statute excludes precisely this type of conduct. *See* § 768.81(4), Fla. Stat.

VI. R.J. Reynolds has not preserved its due-process or implied-preemption arguments, which are foreclosed by binding precedent.

R.J. Reynolds tries to preserve due-process and implied-preemption issues for further review. But R.J. Reynolds makes "only conclusory argument" in support of these issues, which are therefore "insufficiently presented for review and are waived." *See Hammond v. State*, 34 So. 3d 58, 59 (Fla. 4th DCA 2010). Regardless, these issues fail under binding precedent. *See Marotta*, 214 So. 3d 590 (preemption); *Douglas*, 110 So. 3d 419 (due process).

INITIAL BRIEF ON CONDITIONAL CROSS-APPEAL

The trial court abused its discretion in allowing R.J. Reynolds to argue that it had been sufficiently punished by the jury's award of $6.4 million in compensatory damages. This argument misled the jury in two ways. First, R.J. Reynolds suggested it was accepting that the jury's full compensatory award would go to Plaintiff. But that was not true: once trial was over, R.J. Reynolds tried to reduce the jury's damages. Second, R.J. Reynolds led the jury to believe that the phase-one award had a punitive element. Compensatory damages, however, cannot punish a defendant. R.J. Reynolds' argument to the contrary was improper.

The trial court also committed evidentiary errors during phase two. R.J. Reynolds introduced evidence about agreements it had entered into with states to settle claims for smoking-caused healthcare costs, and it also introduced evidence about federal regulation of the tobacco industry. This evidence was irrelevant; neither the settlements nor the regulation has anything to do with deterring or punishing R.J. Reynolds. Still, R.J. Reynolds claimed this evidence provided a basis for the jury to return a zero-dollar verdict. The jury then did precisely that. There is thus at least a reasonable possibility that this evidence affected the verdict.

The trial court's three errors—either individually or cumulatively—warrant a new punitive-damages trial. But this Court need not consider the errors. If this

Court affirms the full $6.4-million final judgment, Plaintiff agrees to forego the conditional cross-appeal and the right to seek a new trial on punitive damages.

I. The trial court erred in allowing R.J. Reynolds to argue that the $6.4 million compensatory award was punishment enough.

Standard of review. This Court will review the trial court's denial of Plaintiff's new-trial motion for an abuse of discretion. *Engle*, 945 So. 2d at 1271.

R.J. Reynolds cannot seek a comparative-fault reduction *and* avoid a new trial on punitive damages.

As discussed in the answer brief, our position is that R.J. Reynolds waived the right to seek an application of comparative fault. But, if this Court disagrees (and also rejects our other arguments) and does apply comparative fault to the jury's verdict, then Plaintiff should be given a new punitive-damages trial. During phase-two closing arguments, R.J. Reynolds leveraged the jury's $6.4-million compensatory award into a zero-dollar punitive-damages verdict. The trial court allowed the punitive verdict to stand, but made sure that Plaintiff did, in fact, recover the full $6.4-million compensatory verdict. Now, R.J. Reynolds reaches for more: a reduced compensatory verdict ***and*** a zero-dollar punitive verdict. But R.J. Reynolds "cannot have it both ways," *see Marchese*, 2017 WL 5632420, at *4, and should be forced to face some consequences for its closing argument.

Thus, if this Court reduces Plaintiff's verdict by comparative fault, it should also grant Plaintiff a new trial on punitive damages.

R.J. Reynolds' phase-two arguments improperly suggested that the jury's compensatory verdict had a punitive element to it.

R.J. Reynolds argued—repeatedly, and over Plaintiff's objections—that it had been punished enough by the jury's compensatory-damages award. (R3:5757, 6214-15, 6217-18, 6221-24, 6237). This was improper. A compensatory award, by definition, cannot punish a defendant. Indeed, these two types of damages serve two entirely different purposes. "The purpose of punitive damages is to punish for outrageous conduct done in reckless disregard of another's rights to deter similar conduct….Compensatory damages, on the other hand, are intended only to make a plaintiff whole." *R.J. Reynolds Tobacco Co. v. Gafney*, 188 So. 3d 53, 57-58 (Fla. 4th DCA 2016) (internal citations omitted). As a result, punitive damages should "be measured by the enormity of the offense, entirely aside from the measure of compensation for the injured plaintiff." *Arab Termite & Pest Control of Fla., Inc. v. Jenkins*, 409 So. 2d 1039, 1042-43 (Fla. 1982).

The difference between compensatory and punitive damages has been a major issue in the *Engle* litigation, with R.J. Reynolds claiming that it is improper for a plaintiff to argue, during phase one of trial, that a jury can "send a message" with a high compensatory-damages award. *See, e.g., Gafney*, 188 So. 3d at 57-58. R.J. Reynolds has prevailed on this issue by characterizing plaintiff's send-a-message comments as "an obvious and direct plea to include a punitive element in the jury's compensatory damages award." *See id.* at 58. Thus, R.J. Reynolds has

accepted and advanced the position that a jury cannot be asked to punish a defendant with a compensatory award.

Here, R.J. Reynolds told the jury the opposite: that the compensatory verdict had already punished R.J. Reynolds. In fact, R.J. Reynolds' counsel admitted as much at a bench conference following one of Plaintiff's objections. Counsel explained why he kept referencing the jury's full compensatory verdict: "I'm arguing that, when a company is hit with $6 million in compensatory damages, ***that alone sends a message***." (R3:6225) (emphasis added). But as R.J. Reynolds has recognized—when it suits R.J. Reynolds to do so—a compensatory award cannot "send a message" at all. *See*, *e.g.*, *id.*; *Calloway*, 201 So. 3d at 768-69.

For R.J. Reynolds to suggest that the jury's compensatory award had a punitive element was improper as a matter of law, *see id.*, and it was also improper because R.J. Reynolds has taken a contrary position in other litigation. *Cf. Aery v. Wallace Lincoln-Mercury, LLC*, 118 So. 3d 904, 914 (Fla. 4th DCA 2013) (judicial estoppel precludes parties from "achieving success on one position, then arguing the opposing to suit an exigency of the moment"). The trial court thus abused its discretion in denying Plaintiff a new trial on punitive damages.

II. The trial court erred in admitting the settlement agreements.

Standard of review. The trial court's evidentiary rulings are reviewed for an abuse of discretion. *Coffey*, 228 So. 3d at 183.

Here, the trial court abused its discretion in allowing R.J. Reynolds to feature two settlement agreements at trial. As we will show, those agreements were inadmissible, irrelevant, and harmful. First, though, we provide some background on these agreements.

The FSA and MSA.

In 1995, the state of Florida sued R.J. Reynolds and other tobacco companies. Florida's lawsuit looked to recover the "significant Medicaid costs and other healthcare expenditures the State had incurred in the past and would incur in the future due to tobacco-related illnesses from its citizens' consumption of [the defendants'] cigarettes." (R2:6603). The case settled in 1997, with the parties entering into the Florida Settlement Agreement (the "FSA"). (R2:5714, 6604). Under the FSA, the defendants "agreed to pay the State up-front 'initial payments,'" and to later pay several hundred million dollars per year. (R2:6605).

At the same time, 46 other states had collectively sued the tobacco companies on the same grounds. *Liggett Group Inc. v. Engle*, 853 So. 2d 434, 467 (Fla. 3d DCA 2003). That case settled, too. The states and the tobacco companies entered into a Master Settlement Agreement (the "MSA"), which called for more than $200 billion to be paid in an initial 25-year period, and for more payments to made in perpetuity after that. *Id.*

That is a lot of money. Even still, the defendants got off cheap. From an economic perspective, the societal impact of smoking is staggering, and it far exceeds the amounts agreed to in the settlements. The Surgeon General estimates that cigarettes cost the United States, annually, "between $289-332.5 billion, including $132.5-175.9 billion for direct medical care of adults[.]" U.S. Department of Health and Human Services, *The Health Consequences of Smoking—50 Years of Progress: A Report of the Surgeon General* 12, www.surgeongeneral.gov/library/reports/50-years-of-progress/full-report.pdf.

The settlement agreements should not have been admitted.

There are two reasons why the settlement agreements should not have found their way into evidence. The first comes from the agreements themselves. As a condition to settlement, both the FSA and MSA state that neither the agreements nor evidence of their negotiations may be admitted in ***any*** future actions or proceedings. The provisions are really quite clear. The FSA provides:

> C. **Non-Admissibility**. These settlement negotiations have been undertaken by the parties in good faith and for settlement purposes only, and neither this Settlement Agreement nor any evidence of negotiations hereunder, shall be offered or received in evidence in this Action, or any other action or proceeding, for any purpose other than in an action or proceeding arising under this Settlement Agreement.

(R2:5728). The MSA similarly provides:

> (f) **Non-Admissibility**. The settlement negotiations resulting in this Agreement have been undertaken by the Settling States and the Participating Manufacturers in good faith and for settlement purposes

> only, and no evidence of negotiations or discussions underlying this Agreement shall be offered or received in evidence in any action or proceeding for any purpose. Neither this Agreement nor any public discussions, public statements or public comments with respect to this Agreement by any Settling State or Participating Manufacturer or its agents shall be offered or received in evidence in any action or proceeding for any purpose other than in an action or proceeding arising under or relating to this Agreement.

(R2:5732). R.J. Reynolds agreed to these non-admissibility conditions when it signed the settlement agreements.

And make no mistake: the states meant to hold R.J. Reynolds to these provisions. The states did not bargain just for money when they settled their lawsuits against the tobacco companies. The FSA and MSA also required the companies to take affirmative steps, like making their internal documents available to the public, or changing their internal policies on youth marketing. *See United States v. Philip Morris USA, Inc.*, 449 F. Supp. 2d 1, 843-44 (D. D.C. 2006). The settlement agreements' non-admissibility provisions are no different. The states agreed to settle their lawsuits ***if*** R.J. Reynolds agreed not to use the settlements in future litigation. The trial court should have held R.J. Reynolds to its word.

What is more, the FSA and MSA were not relevant to any issue at trial. Their only arguable relevance would be to show that R.J. Reynolds has already been punished or deterred. But, the FSA and MSA partially compensated the states for healthcare costs; they did not include any punitive element.

Admitting the settlement agreements was not harmless.

The settlement agreements were not harmless, because R.J. Reynolds used the FSA and MSA to convince the jury to change its mind on punitive damages, arguing that the settlement agreements had already punished and deterred R.J. Reynolds. *See Barkley v. State*, 750 So. 2d 755, 756 (Fla. 2d DCA 2000) (improper evidence harmful where emphasized during closing arguments). Here, R.J. Reynolds' counsel asked the jury to "[c]onsider the $3 million [sic] the companies have already paid under the [FSA] to the state of Florida and the $58 million more that Reynolds has already paid to the other states and it will continue to pay on an ongoing basis." (R3:8696). Counsel told the jury it was empowered to decide "$3 billion is enough. $58 billion that's being paid to the states and will continue in perpetuity…is enough." (R3:8709).

Counsel's argument influenced the jury. Of this we can be sure. During deliberations, the jury asked, "The money that is paid to the states from RJR, what is done or the purpose of that money?" (R3:8729). The trial court told the jury to rely on its memory of the evidence, which prompted a juror to stand up and say, "Can I ask? I do not recall…that being…said." (R3:8730).

The reason the juror could not remember that evidence is because R.J. Reynolds called a witness, Dr. Potts, who knew next to nothing about the settlement agreements beyond how much money was (supposed to be) paid under

them. R.J. Reynolds disclosed Dr. Potts as knowledgeable about the "[MSA] and individual settlement agreements with states, including Florida." (R1:1217-18). But Dr. Potts' knowledge went in only one direction. For instance, Plaintiff asked Dr. Potts, outside the presence of the jury, about violations of the FSA and MSA. (R3:8521-23). But he claimed to not know about any violations. (R3:8521-23).

Dr. Potts managed to miss a lot. Indeed, R.J. Reynolds has violated the MSA ***repeatedly*** over the years, forcing states to sue R.J. Reynolds into compliance. *See*, *e.g.*, *State v. R.J. Reynolds Tobacco Co.*, 151 Wash. App. 775 (2009) (violating MSA provision on youth marketing); *United States v. Philip Morris USA, Inc.*, 449 F. Supp. 2d at 844-46 (summarizing MSA violations); *State ex rel. Petro v. R.J. Reynolds Tobacco Co.*, 820 N.E.2d 910, 914 (2004) (violating provision on branded merchandise); *People ex rel. Lockyer v. R.J. Reynolds Tobacco Co.*, 11 Cal. Rptr. 3d 317, 323, 327-28 (2004) (failing to change youth-magazine placement policies); *State ex rel. Goddard v. R.J. Reynolds Tobacco Co.*, 206 Ariz. 117, 121 (Ct. App. 2003) (advertising cigarettes at racetracks); *People ex rel. Lockyer v. R.J. Reynolds Tobacco Co.*, 132 Cal. Rptr. 2d 151 (2003) (same). As one federal judge concluded, "Defendants' assertions that, as a result of the MSA, they are now new companies headed by changed management are simply not accurate." *United States v. Philip Morris USA, Inc.*, 449 F. Supp. 2d at 848.

R.J. Reynolds' track record is not any better in Florida. Recently, the Florida Attorney General sued R.J. Reynolds for failing to make required payments under the FSA. (R2:6600-22). As of January 2017, R.J. Reynolds was over $45 million in arrears. (R2:6600-01). R.J. Reynolds, as a company, was aware of this. Before this trial began, the Florida Attorney General wrote two letters to R.J. Reynolds' Deputy General Counsel, detailing R.J. Reynolds' delinquent payments and a "clear lack of effort to meaningfully resolve" those payments. (R2:6629-31). And yet Dr. Potts, as Senior Director of Regulatory Affairs (R1:1216), was somehow not in the loop. *Cf. Nordyne, Inc. v. Florida Mobile Home Supply, Inc.*, 625 So. 2d 1283, 1288 (Fla. 1st DCA 1993) (ordering new punitive-damages trial where defendant failed to disclose evidence). Thus, Dr. Potts' one-sided testimony exacerbated the settlement agreements' harm. *See Special*, 160 So. 3d at 1256.

III. The trial court erred in allowing evidence of FDA regulation.

Standard of review. The trial court's evidentiary rulings are reviewed for an abuse of discretion. *Coffey*, 228 So. 3d at 183.

Federal regulation is irrelevant to punitive damages.

R.J. Reynolds also focused on the FDA's "broad oversight" over the tobacco industry. (R3:5919-33). During closings, R.J. Reynolds argued that the FDA's onerous regulations had a deterrent effect, because "[i]t simply would be impossible in today's regulatory environment for anyone, even if they wanted to,

to repeat any of the conduct that you saw in the first phase [of trial]." (R3:6235).

But this regulation evidence was irrelevant. That R.J. Reynolds is regulated by the FDA does not implicate punitive damages. According to this Court, these are the factors that should be considered in deciding punitive damages:

> (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.

Johns-Manville, 463 So. 2d at 248. FDA regulation does not speak to any of these nine factors. Nor would it. Punitive damages are meant to punish and to deter. *E.g.*, *St. Regis Paper Co. v. Watson*, 428 So. 2d 243, 247 (Fla. 1983).

FDA regulation is irrelevant to punishment. Regulations are necessarily prospective; as such, they cannot impose a punishment on tobacco companies for past misconduct. Regulations are also irrelevant to deterrence—they do not "mitigate" what R.J. Reynolds has done "by reducing or softening the moral or social culpability." *See Humana Health Ins. Co. of Fla., Inc. v. Chipps*, 802 So. 2d 492, 496 (Fla. 4th DCA 2001). An example of proper mitigating evidence is where a defendant shows it has taken responsibility for its actions, or has apologized for

its past conduct. *R.J. Reynolds Tobacco Co. v. Odom*, 210 So. 3d 696, 701-03 (Fla. 4th DCA 2016). Here, however, R.J. Reynolds merely proved that it is subject to mandatory federal regulations. That is not mitigating evidence.

The regulation evidence was harmful.

R.J. Reynolds' counsel highlighted the FDA-regulation evidence during closings. (R3:6234-35, 6238). There is thus a reasonable possibility that the FDA evidence affected the jury's verdict. *See Barkley*, 750 So. 2d at 756.

Further, Plaintiff was not able to tell the whole story when it came to the FDA. As with the FSA and MSA, R.J. Reynolds presented the jury with a one-sided, sterilized version of the facts. When Plaintiff went to cross-examine Dr. Potts about the glacial speed of FDA regulations, Dr. Potts again knew nothing. (R3:8575-79). As a result, Plaintiff was unable to cross-examine Dr. Potts about the difficulty of imposing regulations. The bottom line is that the ***potential*** power of the federal government to regulate R.J. Reynolds means nothing if the process has not been implemented. The jury should have heard this. And R.J. Reynolds cannot show, as it must, that there is no reasonable possibility the lopsided FDA-regulation evidence affected the jury's verdict. *See Special*, 160 So. 3d at 1256.

CONCLUSION

Plaintiff asks this Court to affirm the trial court's final judgment entered on the jury's full compensatory verdict.

GREGORY D. PRYSOCK
Florida Bar No. 0062420
gprysock@forthepeople.com
KATHERINE M. MASSA
kmassa@forthepeople.com
Florida Bar No. 0078316
MORGAN & MORGAN, P.A.
76 S. Laura Street, Suite 1100
Jacksonville, FL 33202
Tel: (904) 398-2722

KEITH R. MITNIK
Florida Bar No. 0436127
MORGAN & MORGAN, P.A.
P.O. Box 7979
Orlando, FL 32808

/s/Thomas J. Seider
CELENE H. HUMPHRIES
Florida Bar No. 884881
MAEGEN PEEK LUKA
Florida Bar No. 549851
THOMAS J. SEIDER
Florida Bar No. 884881
BRANNOCK & HUMPHRIES
1111 W. Cass Street, Suite 200
Tampa, Florida 33606
Tel: (813) 223-4300
tobacco@bhappeals.com

Attorneys for Appellee

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was sent by email to Robert B. Parrish (rb@mppkj.com), J.W. Prichard, Jr. (jwprichard@mppkj.com), and David Reeves (dcreeves@mppkj.com), Mosley, Prichard, Parrish, Knight & Jones, 501 W. Bay Street, Jacksonville, FL 32202; Stephanie E. Parker, John F. Yarber, John M. Walker, Emily Baker (ecbaker@jonesday.com) and Ed Carter (emcarter@jonesday.com), Jones Day, 1420 Peachtree St., N.E., Suite 800, Atlanta, GA 30309; Katrina L.S. Caseldine (klcaseldine@jonesday.com), Jones Day, 901 Lakeside Avenue, Cleveland, OH

44114; Dana G. Bradford, II (dbradford@sgrlaw.com), Smith, Gambrell & Russell, LLP, Bank of America Tower, 50 N. Laura Street, Suite 2600, Jacksonville, FL 32202; David Thorne (dthorne@shb.com), Bonnie Daboll (bdaboll@shb.com), Dale Johnson (dmjohnson@shb.com), and Adriana Paris (aparis@shb.com, shbpmatty@shb.com), Shook, Hardy & Bacon, LLP, 100 N. Tampa Street, Suite 2900, Tampa, FL 33602; John A. Devault and Patrick P. Coll, Bedell Dittmar, et al., The Bedell Building, 101 E. Adams Street, Jacksonville, FL 32202; Stacey Koch Lieberman (Lieberman@hugheshubbard.com), Hughes, Hubbard & Reed, LLP, 201 South Biscayne Blvd., Suite 2500, Miami, FL 33131; and George A. Tsougarakis (tsougagara@hugheshubbard.com), Hughes, Hubbard & Reed, LLP, One Battery Park Plaza, New York, NY 10004, this 13th day of December 2017.

/s/Thomas J. Seider
THOMAS J. SEIDER
Florida Bar No. 86238

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief complies with the font requirements of Florida Rules of Appellate Procedure 9.210(a)(2).

/s/Thomas J. Seider
THOMAS J. SEIDER
Florida Bar No. 86238

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Case No. 1D17-2104
L.T. Case No. 2007-CA-11551-D11551

IN THE DISTRICT COURT OF APPEAL, FIRST DISTRICT
STATE OF FLORIDA

LINDA PRENTICE, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF JOHN C. PRICE,

Plaintiff-Appellee/Cross-Appellant,

v.

R.J. REYNOLDS TOBACCO COMPANY,

Defendant-Appellant/Cross-Appellee.

On Appeal from a Final Order rendered by the Fourth Judicial Circuit Court,
in and for Duval County, Florida
Hon. Tyrie Boyer, Circuit Judge

APPELLANT R.J. REYNOLDS TOBACCO COMPANY'S REPLY BRIEF AND ANSWER BRIEF ON CROSS APPEAL

Charles R.A. Morse
Florida Bar No. 91561
Jason T. Burnette
Florida Bar No. 125200
JONES DAY
250 Vesey Street
New York, NY 10281-1047
Telephone: (212) 326-3939
Fax: (212) 755-7306
cramorse@jonesday.com

Robert B. Parrish
Florida Bar No. 268739
David C. Reeves
Florida Bar No. 0072303
Jeffrey A. Yarbrough
Florida Bar No. 14892
MOSELEY, PRICHARD, PARRISH, KNIGHT & JONES
501 West Bay Street
Jacksonville, Florida 32202
Telephone: (904) 356-1306
Facsimile: (904) 354-0194
bparrish@mppkj.com

Counsel for Appellant/Cross-Appellee R.J. Reynolds Tobacco Company

February 27, 2018

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REPLY BRIEF ON DIRECT APPEAL

I. THE ERRONEOUS EXCLUSION OF DR. JACKSON'S TESTIMONY REQUIRES A NEW TRIAL.

The trial court's erroneous exclusion of Dr. Jackson's testimony effectively eliminated Reynolds's defense that Mr. Price developed COPD outside the limitations period. *See* Initial Brief ("IB") 7–26. In defending the trial court's ruling, Plaintiff distorts the standards governing admissibility of expert testimony.

First, Plaintiff asserts an argument of breathtaking implications. She contends that Dr. Jackson's opinions were not admissible because they contradicted the testimony of Mr. Price and Plaintiff's witnesses that he did not have symptoms in 1990, as well as medical records that did not affirmatively state that Mr. Price had symptoms at that time. *See* Appellee's Br. ("AB") 29–32. That is no less than an argument that expert testimony is inadmissible unless it corroborates—and does not contradict—other evidence in the record. *Daubert* imposes no such bar. Rather, *Daubert* requires only that an expert base his opinions on "sufficient facts or data." § 90.702, Fla. Stat. It certainly does not require *agreement* with the other side's evidence, especially when the jury could reject the credibility of Plaintiff's witnesses, *see* R.3:7711, and the medical records do not definitively state one way or the other whether Mr. Price was symptomatic in 1990. In fact, the earliest available medical record was from 1993. Because he based his opinion on all of Mr. Price's available medical records in the case, Mr. Price's smoking history, Mr.

Price's deposition testimony, and independent medical studies on the rates of declining lung function, Dr. Jackson undoubtedly had "sufficient facts or data" on which to base his opinion. *See* IB 13–14, 22–23.

Second, Plaintiff argues that Dr. Jackson's application of an average rate of lung-function decline reported in a peer-reviewed article does not pass muster under *Daubert* because an individual's rate of decline might vary from the average. *See* AB 32–36. Dr. Jackson acknowledged the possibility of individual variation and therefore used "the highest average rate of loss" reported in the study to account for the fact that Mr. Price could have lost lung function at an above-average rate —even though that rate of loss "corresponds" to Moderate COPD, and not the Very Severe COPD exhibited by Mr. Price during his 1996 pulmonary function test. *See* R.2:1103–04; R.2:2526–29. Dr. Jackson took a conservative, Plaintiff-friendly approach to account for the fact that Mr. Price could have lost lung function at an above-average rate.

In any event, Plaintiff's assault on averages misapprehends *Daubert*. That standard asks only whether the qualified expert has reliably applied a reliable method, so as to avoid "supplant[ing] the adversary system or the role of the jury." *Baan v. Columbia Cnty.*, 180 So. 3d 1127, 1134 (Fla. 1st DCA 2015). Plaintiff could have addressed her concerns about "the problem with averages," AB 33, through "vigorous cross-examination" and "presentation of contrary evidence"—but those

concerns provide no basis for excluding Dr. Jackson's opinion. *Baan*, 180 So. 3d at 1134. Dr. Jackson's testimony applying the average rate of lung-function decline reported in a peer-reviewed journal is precisely the type of evidence other courts have held to be admissible when an expert applies the average rate of a biological process (here, lung-function decline in those with COPD) to extrapolate from a known value (here, Mr. Price's lung function in 1996) to an earlier point in time. *See, e.g.*, *Berger v. Philip Morris USA Inc.*, No. 3:09-cv-14157, 2014 WL 10715266, at *1 (M.D. Fla. Aug. 29, 2014) (*Daubert* satisfied where expert applied "population studies" to "predict[ ] the presence of COPD in 1996 … from the level detected in 1998"); *United States v. Tsosie*, 791 F. Supp. 2d 1099, 1115–16 (D.N.M. 2011) (same, where expert took defendant's blood alcohol content on the morning after a crash and applied average rate of alcohol elimination to extrapolate to defendant's blood alcohol content at the time of crash).

Third, Plaintiff incorrectly discounts the other, independently sufficient bases for Dr. Jackson's opinion. Contrary to Plaintiff's assertion, Dr. Jackson relied on his experience and application of the Knudson Formula before he submitted his affidavit. *See* R.2:2501, 2520–24, 2549, 2572. But even if Dr. Jackson had first mentioned these other bases for his opinion in his affidavit, that is no reason for disregarding them because they provide additional support for, and do not contradict, Dr. Jackson's opinion, and because Plaintiff never moved to strike Dr. Jackson's

affidavit, which the trial court considered, *see* R.3:534–45, 551. *See, e.g.*, *O'Quinn v. Seibels, Bruce & Co.*, 447 So. 2d 369, 370 n.2 (Fla. 1st DCA 1984) (failure to move to strike or otherwise timely object to an affidavit waives the issue); *Cleveland v. Crown Financial, LLC*, 183 So. 3d 1206, 1210–11 (Fla. 1st DCA 2016) (tipsy coachman rule does not apply where trial court did not make findings necessary to support purported alternative ground for affirmance). Dr. Jackson applied the Knudson formula by the book to calculate the degree of Mr. Price's lung function impairment in 1996 and the lung function he would have needed to have been potentially asymptomatic in 1990. IB 15. The fact that the gap between these values was so large, coupled with his "30 plus years of experience" treating "many thousands of patients with COPD," supported Dr. Jackson's conclusion that Mr. Price could not possibly have been asymptomatic in 1990. *See id.*

Fourth, Plaintiff falls back on the Third District's decision in *Frazier v. Philip Morris USA, Inc.*, 89 So. 3d 937 (Fla. 3d DCA 2012), *see* AB 31–38, but she fails to come to grips with the distinctions between *Frazier* and this case. *See* IB 21–22. The expert in *Frazier* "admitted . . . that [his] opinion was based on his own experience rather than any scientific research or medical literature." *Frazier*, 89 So. 3d at 941–42. Dr. Jackson relied on both his extensive experience and independent medical studies and diagnostic tools to reach his opinions about Mr. Price. Moreover, in *Frazier*, the court held that the expert's testimony was not

competent evidence to prove "what Ms. Frazier and her doctors knew and when they knew it vis-à-vis COPD/emphysema." *Id.* at 946. As explained, that holding rests on the distinct facts of *Frazier*, where Ms. Frazier had actually sought medical treatment and been diagnosed with ailments other than COPD. *See* IB 21.

But even putting those facts to one side, Dr. Jackson was excluded from testifying about much more than Mr. Price's knowledge and when he knew it. The trial court also excluded Dr. Jackson's opinions on the progression of symptomatic COPD in a typical patient—*i.e.*, "that you simply cannot go from having no symptoms to being 75 percent lost lung function in less than six years," R.3:1953–54—which would have allowed Reynolds to argue that the jury could infer that Mr. Price should have known in 1990 that he had COPD. The trial court based that ruling on the lack of medical records or other evidence to corroborate Dr. Jackson's testimony. *See* R.3:1951, 1961–62. *Frazier* says nothing to support that rationale: the medical evidence in *Frazier contradicted* the expert's testimony in that case, because Ms. Frazier did have symptoms, but her doctors attributed them to other medical conditions. The trial court's ruling here goes much further than the holding in *Frazier* by permitting expert testimony only if there is independent evidence to corroborate it. That is a misapplication of the standards for expert testimony.

Finally, Plaintiff has not come close to proving "that there is no reasonable possibility" that the exclusion of Dr. Jackson's opinion "contributed to the verdict."

Special v. W. Boca Med. Center, 160 So. 3d 1251, 1256 (Fla. 2014). Dr. Jackson opined that Mr. Price suffered from Severe or Very Severe COPD before the statute-of-limitations cut off and—in a portion of his opinion confirmed by Plaintiff's own sources and unchallenged by Plaintiff—that Mr. Price therefore had "significant" and "apparent" symptoms of COPD before that date. *See* R.2:1101–02, 1104–05. It was for the jury to consider and weigh that testimony, which would have allowed the jury to draw the reasonable inference that Mr. Price—a longtime smoker—knew or should have known before the cut-off date that he was suffering from an illness with "a causal relationship to the cigarettes" he smoked. *Carter v. Brown & Williamson Tobacco Corp.*, 778 So. 2d 932, 938 (Fla. 2000). That is all the more true in light of Mr. Price's knowledge that his father died of a smoking-related lung disease. *See* AB 16, 48; R.3:4557–58. Indeed, because "Mr. Price … smoked … Reynolds' cigarettes" for "over 40 years," AB 1–3, the jury reasonably could have concluded that Mr. Price knew or should have known that his disease was linked *to Reynolds*—though that conclusion is unnecessary to Reynolds's statute-of-limitations defense despite Plaintiff's assertion to the contrary, AB 42–43.[1]

[1] Contrary to Plaintiff's assertion, AB 40–41, Reynolds explicitly preserved its arguments under both the *Daubert* and *Frye* standards. *See* R.2:5461. And even if Reynolds had not done so, it clearly objected to the exclusion of Dr. Jackson's testimony, and this Court must follow the currently applicable standard for reviewing that exclusion. *See Miles v. State*, 694 So. 2d 151, 152 (Fla. 4th DCA 1997). For the moment the standard is *Daubert*, but Reynolds reserves its right to

II. MR. PRICE'S EXCLUDED TESTIMONY WAS NOT HEARSAY.

Mr. Price's testimony that his siblings believed his father died from emphysema caused by smoking, which was excluded by the trial court as hearsay, was not offered for the truth of the matter asserted, but rather as notice to Mr. Price that, at least by 1986, smoking could cause emphysema. For Reynolds's statute-of-limitations defense, the ultimate question is not what Mr. Price actually knew, but what he "should have known" before May 5, 1990. *R.J. Reynolds Tobacco Co. v. Jewett*, 106 So. 3d 465, 472 (Fla. 1st DCA 2012). Plaintiff's argument that Mr. Price's statements reflect his siblings' belief, not his own, is beside the point. And fairly read, the deposition testimony in fact demonstrates Mr. Price's belief that "we all knew" smoking was the cause of his father's emphysema. R.2:1956–58.

Even if the statement was hearsay, it was admissible as an admission. Plaintiff claims the rule in *Jones v. Alayon* does not permit the admission of the siblings' statement because there is no evidence that Mr. Price believed those statements carried "indicia of reliability." AB 46 (quoting 162 So. 3d 360, 364–65 (Fla. 4th DCA 2015)). But Mr. Price's deposition testimony shows that he understood and shared his siblings' view of the matter. Plaintiff claims there is no harm from the erroneous exclusion, because Reynolds did not seek to introduce Mr. Price's

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ask a court to apply *Frye* if the Florida Supreme Court rejects the legislative adoption of *Daubert* in *DeLisle*.

interrogatory response from 2008. The issue is what Mr. Price knew or should have known before May 5, 1990, which is uniquely revealed by Mr. Price's discussions with his family about the death of their father in 1986. Plaintiff claims that Mr. Price's knowledge that smoking causes lung cancer can substitute for the evidence of emphysema. That could be true in some circumstances, but not where Plaintiff's expert witness Dr. Burns testified that Mr. Price did *not* know the risk of developing emphysema from smoking until 1993, *see* IB 30, a point Plaintiff fails to address.

III. THE "HYPOTHETICAL PATIENT" TESTIMONY WAS IMPROPER.

Plaintiff does not dispute that witnesses—including expert witnesses—may not offer speculative testimony in response to a hypothetical question. Instead, she claims the hypothetical question asked of Dr. Burns "provided all the information [he] needed." AB 50. But the only information provided by the question was that Mr. Price had "end stage" COPD and was on "24-hour oxygen." R.3:3357. Dr. Burns took this as license to conjure up numerous unsupported details, such as a spouse "carrying the oxygen tank because [the patient] can't do anything for themselves at that moment in time," "bring[ing] the dinner to the [patient] because" the patient cannot "move into the kitchen," and a spouse's sense of helplessness while "sitting there watching unable to do anything about it." R.3:3357–59.

Plaintiff denies that the testimony, "the person literally but quite slowly suffocates to death *with his spouse sitting there watching*," R.3:3359 (emphasis

added), describes a hypothetical spouse who was present at the moment of death. Not only is the testimony clear itself, but immediately before it, Dr. Burns testified, "ultimately their lungs *give up the ghost*" because "they can't breathe enough." *Id.* (emphasis added). Clearly, Dr. Burns was describing a person *in extremis*, even though it is undisputed that Mrs. Price, whose claim for pain and suffering was the only claim at issue, did not witness Mr. Price's death. Plaintiff contends that the jury knew Mrs. Price was not present because her own testimony clarified that point. But she testified three days after Dr. Burns, long after his testimony had achieved its emotional effect. More fundamentally, the fact that Plaintiff's testimony contradicted Dr. Burns confirms that his testimony was unsupported speculation.

Plaintiff cannot meet her burden under *Special* to show no reasonable possibility that Dr. Burns's testimony contributed to the verdict. Plaintiff offers no response to the point that Reynolds was prejudiced because it had no ability to cross-examine Mrs. Price—the actual, rather than hypothetical, spouse. IB 35–36. Her principal response is that his testimony was cumulative. But neither Plaintiff's live testimony nor Mrs. Price's deposition testimony provided the imaginative details present in Dr. Burns's hypothetical summary. And it remains true, despite Plaintiff's protests, that she called no fact witness to testify about Mrs. Price's experiences with her husband's physical condition at the end of his life. Mrs. Price discussed her husband's mobility problems while he lived at home, but not his last days in hospice.

See R.3:4686–87. In any event, the significant weight a jury may give to expert as opposed to lay testimony is alone sufficient to conclude that Dr. Burns's testimony contributed to "the process of at arriving at" the damages verdict. *Special*, 160 So. 3d at 1257; *see also Fla. Power Corp. v. Barron*, 481 So. 2d 1309, 1310–11 (Fla. 2d DCA 1986) (noting that "the importance and validity of the testimony of an expert witness are increased in the mind of the jury"). For the same reason, the arguments that the testimony is harmless because the $6.4 million award is less than the $10 million award affirmed in *Alexander* and the $10 million her counsel requested, or because Reynolds did not propose an alternative amount, misstates the harmless error test. "[H]armless error analysis is not limited to the result in a given case, but it necessarily concerns the process of arriving at that result." *Special*, 160 So. 3d at 1257. It is not credible to claim that the detailed, emotional, and ultimately speculative testimony by Dr. Burns had no effect on the jury's deliberative process.

IV. THE RELIANCE INSTRUCTION WAS ERRONEOUS.

Plaintiff defends the trial court's reliance instruction, which authorized liability based on mere silence (as distinguished from misleading statements or "half-truths"), by relying on cases that disprove her point. As to Florida law generally, Plaintiff's own discussion shows that something more than a "defendant's 'mere nondisclosure'" (*e.g.*, an act of suppression or artifice) is needed to create an actionable fraud. AB 62–63. In any event, whatever may be the general law of

fraudulent concealment, the theory pursued in *Engle* required a statement. IB 36–44. Plaintiff selectively quotes a passage from the *Engle* jury instructions that defines intentional concealment as existing where a party conceals defects in a product or chooses to speak but does so incompletely. AB 43. But she fails to note that this passage addresses just one of the elements relevant to fraudulent concealment. The preceding element asks "whether one or more of the Defendants omitted or concealed material facts that would be necessary *to make statements* by said Defendants not misleading." IB 38. This element shows that fraudulent concealment, as litigated in *Engle*, requires a statement. *Engle*'s res judicata effect does not suggest any other outcome. Both sides in *Engle* agreed on the need to prove reliance on a statement. Thus, concealment based on silence is not an issue that "could have been litigated in that action." AB 60.

Plaintiff resists this conclusion with cases that, if anything, confirm it. Those cases (AB 57) held that an *Engle*-progeny jury may "infer . . . reliance" based on "pervasive misleading advertising campaigns." *E.g.*, *R.J. Reynolds Tobacco Co. v. Martin*, 53 So. 3d 1060, 1069 (Fla. 1st DCA 2010). "[A]dvertising campaigns" necessarily consist of statements, and indeed, the jury instructions given by the trial court in *Martin* required the jury to determine whether the smoker detrimentally relied on any "statements" by a defendant. *Id.* at 1069–70. The recent decisions by the Second and Fourth Districts in *Calloway*, *Duignan*, and *McCall* do address the

need for a statements-based reliance instruction, and those decisions establish that "whether an instruction that a jury must find reliance 'on a statement' is necessary or proper will depend on the nature of the claims presented and the evidence at trial." *Philip Morris USA, Inc. v. Duignan*, No. 2D15-5055, 2017 WL 5471866, at *11 (Fla. 2d DCA Nov. 15, 2017); *see also Philip Morris USA Inc. v. McCall*, No. 4D16-2016, 2017 WL 6368617, at *8 (Fla. 4th DCA Dec. 13, 2017) (approving use of instruction requiring reliance on a statement "because there was evidence presented at the trial regarding Decedent's reliance on 'statements'").

Here, Plaintiff's own summary of her evidence confirms that she pursued a statements-based theory of liability on her fraud claims: "The evidence at trial established that R.J. Reynolds and its co-conspirators repeatedly promised, beginning with the Frank Statement, to fully disclose truthful information about smoking and health." AB 60. She claims that Reynolds "affirmatively suppress[ed] the truth" by "attack[ing] public-health organizations" and marketing "filtered cigarettes[ ] to give the false impression that their products were safe." AB 63. Plaintiff thus actively pursued a theory that Reynolds's *statements*—such as the Frank Statement published nationwide in leading newspapers—formed the basis of her reliance claim. Yet, Plaintiff's counsel also repeatedly urged the jury to hold Reynolds liable because of its silence. IB 44. This evidence and argument establish the necessity of Reynolds's requested instruction, and the harm from refusing to give

it.[2]

V. *SCHOEFF* CONFIRMS THE MERIT OF REYNOLDS'S ARGUMENT FOR A COMPARATIVE FAULT REDUCTION.

In its recent decision in *Schoeff v. R.J. Reynolds Tobacco Co.*, 232 So. 3d 294 (Fla. 2017), the Florida Supreme Court reaffirmed that a plaintiff may waive the comparative-fault statute's intentional-tort exception "by taking action inconsistent with that right during trial." *Id.* at 305 (quotation marks and citation omitted). And the Court's opinion highlighted specific examples of waiver, including situations where—as here—"[t]he verdict form" failed to "list the intentional torts *after* the interrogative about apportionment."[3] *Id.* at 306 (emphasis added); *see* R.2:5114–15. Moreover, the Supreme Court "disagreed with" *R.J. Reynolds Tobacco Co. v. Hiott*, 129 So. 3d 473 (Fla. 1st DCA 2014) and *Philip Morris USA, Inc. v. Green*, 175 So. 3d 312 (Fla. 5th DCA 2015), *only* "to the extent they held that the intentional tort exception is waived when an *Engle* progeny plaintiff argues comparative fault on the negligence counts." *Schoeff*, 232 So. 3d at 306. The *Schoeff* decision therefore

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[2] This Court generally grants a new trial for instructional errors. *See, e.g.*, *Jewett*, 106 So. 3d at 472. At a minimum, correcting the error will require a reduction in the judgment to account for comparative fault.

[3] The trial court so structured the verdict form despite Reynolds's argument that the jury should be told that comparative fault would not apply to the intentional tort claims, if the court decided that those claims would not be subject to comparative fault. R.3:7511 ("If your Honor has decided that a finding on the intentional torts would mean that there is no reduction, there is case law—and I have—I have a cite that says the jury should be told that.").

underscores that the intentional-tort exception may be waived when a plaintiff argues comparative fault related to a defendant's *intentional* conduct.[4] That is, of course, precisely what Plaintiff did here, where she repeatedly urged the jury to compare Mr. Price's conduct to Reynolds's intentional conduct—including *in the specific contexts of the intentional-tort claims and comparative fault. See* IB 46–47.

Reynolds in no way "waived" Plaintiff's waiver. AB 66–67. Reynolds did not do so by failing to object to Plaintiff's acts of waiver because Plaintiff's strategic choice to waive a right was not a violation of any rule. The error here lies not in Plaintiff's acts of waiver, but in the trial court's failure to hold Plaintiff to the consequences of those acts—and Reynolds clearly preserved its objection to *that*. Nor did Reynolds waive Plaintiff's waiver in its Phase II arguments, which, as discussed below, explicitly and accurately informed the jury that the trial court had not yet "decided" whether the jury's compensatory damages award would "be reduced" according to the jury's allocation of fault. R.3:8687. That accurate argument could not have misled the jury. In any event, because "Reynolds did not specifically assert that the jury's finding on comparative fault would be disregarded," Reynolds did not waive application of comparative fault. *R.J. Reynolds Tobacco Co.*

[4] Thus, contrary to the U.S. Court of Appeals' remark in *Smith v. R.J. Reynolds Tobacco Co.*, 880 F.3d 1272, 1282 (11th Cir. 2018), *Schoeff* makes perfectly clear "in what situations . . . the Florida Supreme Court might find waiver to have occurred."

v. Hiott, 129 So. 3d 473, 482 (Fla. 1st DCA 2014), *disagreed with on other grounds by Schoeff v. R.J. Reynolds Tobacco Co.*, 232 So. 3d 294 (Fla. 2017).

The trial court's determination that "Plaintiff's arguments did not mislead the jury," R.2:8484, cannot be squared with "the burden to prove harmless error under *Special*," *Green*, 175 So. 3d at 315, and in any event, jury confusion may be a sufficient basis for finding waiver or estoppel in this context, but it is not a necessary one. *See, e.g.*, *Fed. Mut. Implement & Hardware Ins. Co. v. Griffin*, 237 So. 2d 38, 41 (Fla. 1st DCA 1970) (estoppel arises from adopting an "inconsistent position toward the same parties and subject matter"); *Bd. of Cnty. Comm'rs v. Int'l Union of Operating Eng'rs*, 620 So. 2d 1062, 1065 (Fla. 1st DCA 1993) ("Waiver is the intentional or voluntary relinquishment of a known right, or conduct which warrants an inference of the relinquishment of a known right."). Plaintiff's argument that her counsel's comments addressed not comparative fault but causation is (a) a post-hoc rationalization for her agreement to accept a reduction "across the board," R.3:8689; (b) belied by the transcript, *see e.g.*, R.3:5287 ("So the percentages, in all fairness, he has some fault in this. But, goodness, gracious, I ask you when you compare, let's not compare it as if it was apples and apples. His negligence is not the same orange that they were doing on purpose."); and (c) incompatible with the rule that a plaintiff's own negligence cannot be a concurring cause. *See, e.g.*, *La Petite Academy v. Kamerzel*, 751 So. 2d 641, 642 (Fla. 5th DCA 1999).

ANSWER BRIEF ON CROSS APPEAL

STATEMENT OF THE CASE AND FACTS

The jury declined to award punitive damages against Reynolds. R.2:5130. In her conditional cross appeal, Plaintiff argues that the trial court abused its discretion in: (1) allowing Reynolds to suggest that the jury could take into account the compensatory damages award in making a decision about punitive damages; (2) admitting testimony concerning the Master Settlement Agreement ("MSA") and Florida Settlement Agreement ("FSA"); and (3) admitting testimony concerning current federal regulation of the tobacco industry. *See* AB 75–85.

1. Well before trial, Reynolds disclosed Dr. Ryan Potts as an expert witness. In doing so, Reynolds stated that Dr. Potts "w[ould] address," among other things, the "FDA's regulatory oversight of the tobacco industry" and the MSA "and individual settlement agreements with states, including Florida." R.1:1216–18. Reynolds also listed the only other case in which Dr. Potts had testified, explaining:

> Dr. Potts' testimony in this case may encompass subject matters that he has addressed in previous testimony. He has testified as a fact and expert witness at trial in *In Re: Engle Progeny Cases, Tobacco Litigation (Nally)*, Case No. 2007-CA-007627 (Pole County, Florida) on May 17, 2016.

Id. Plaintiff chose not to depose Dr. Potts.

2. Plaintiff moved to exclude from Phase II evidence relating to the FSA and MSA (collectively, the "Settlement Agreements"). R.3:5655–56. Recognizing

that no court had excluded evidence concerning the Settlement Agreements from an *Engle*-progeny case, the trial court denied Plaintiff's motion. R.3:5699.

During Phase II, Reynolds introduced only limited evidence concerning the Settlement Agreements. Reynolds neither admitted the Settlement Agreements into evidence nor elicited testimony concerning their specific terms. Instead, Reynolds called Dr. Potts, who testified briefly concerning payments made by Reynolds under the Settlement Agreements. Over two transcript pages, Dr. Potts explained that: (1) Reynolds has paid a combined $61 billion under the MSA and FSA; and (2) Reynolds's obligation to pay money under the MSA and FSA will continue indefinitely. R.3:5917–18.

3. Plaintiff initially moved to exclude evidence concerning regulation of the tobacco industry by the federal Food and Drug Administration. *See generally* R.1:3560–99. Notably, however, Plaintiff sought to "exclude[ ]" this evidence only "during Phase I of the trial." *See* R.1:3562. Plaintiff confirmed during a hearing that she did not seek to exclude evidence of FDA regulation from Phase II. Specifically, Plaintiff asserted: It is "fine if [Reynolds] want[s] to" introduce evidence of FDA regulation, "but it does open the door for us then to … go into" weaknesses in or difficulties facing the FDA's regulatory efforts. R.3:5671. Plaintiff added that she would "go into" those matters through "cross examination." R.3:5671–72. The Court accurately assessed the situation, observing that Plaintiff

"doesn't take opposition" to introduction of evidence concerning FDA regulation, but instead simply "put[ ] [Reynolds] on notice that [Plaintiff was] going to do some sort of cross-examination." R.3:5672.

During Phase II, Dr. Potts testified concerning the FDA's "broad authority" to oversee and regulate Reynolds and other tobacco manufacturers and the regulatory requirements imposed on Reynolds and other tobacco manufacturers by the FDA under that authority. R.3:5931; *see* R.3:5882–84, 5905–07, 5909–10, 5918–32. In keeping with the positions she took leading up to Phase II, Plaintiff did not object to the introduction of this testimony. Indeed, when the trial court specifically asked Plaintiff to identify any objections, Plaintiff objected only to three demonstratives relating to the funding of the National Institutes of Health. R.3:5847–48. In making those objections, Plaintiff stated that she did not "have a problem" with a demonstrative concerning the "agency" responsible for "policing the [tobacco] industry." R.3:5848.

4. Following Dr. Potts's testimony, the Court offered Plaintiff an opportunity for rebuttal. *See* R.3:6141 ("THE COURT: Okay. Any rebuttal?"). Plaintiff chose not to call a rebuttal witness to explain, qualify, or contradict Dr. Potts's testimony. *See* R.3:6141 ("MR. PRYSOCK: The only rebuttal from plaintiff, Your Honor, are the two documents we would move into evidence that I discussed at sidebar.").

5. When the parties presented their Phase II closing arguments, the trial court had not yet decided whether it would reduce the jury's compensatory-damages award to account for Mr. Price's comparative fault. *See* R.3:5042–52. During her closing argument, Plaintiff repeatedly: (1) emphasized to the jury that she was accepting responsibility on behalf of Mr. Price and (2) asked the jury to compare Mr. Price's negligence with Reynolds's allegedly intentional conduct, despite the trial court's suggestion that she explain to the jury that she was not accepting application of comparative fault with respect to her intentional tort claims. *See* R.3:862–63, 1381, 1405, 1568, 2159–60, 2176, 5049, 5052, 5271–72, 5285–87, 5466, 7935. In making those arguments, Plaintiff waived her right to application of the intentional-tort exception to the comparative-fault statute, *see* IB 44–50—but the trial court had not resolved that issue when the parties presented their Phase II arguments, *see* R.2:8480–86 (concluding Plaintiff did not waive the intentional-tort exception).

In the face of that uncertainty, Reynolds made its Phase II arguments to the jury. Reynolds argued that, for a variety of reasons, there was little, if any need for the jury to impose punitive damages for purposes of punishing and deterring Reynolds today. *See* R.3:6223–24 (personnel at Reynolds had long since changed); R.3:6223 (tobacco-industry organizations had been dissolved); R.3:6227, 6236–37 (Reynolds had already paid large punitive-damages awards); R.3:6227 (Reynolds has made and will continue to make payments under the Settlement Agreements);

R.3:6228–34, 6237 (Reynolds's conduct has changed); R.3:6234–35 (Reynolds and other tobacco companies now subject to FDA regulation). In other words, Reynolds implored the jury to base its decision on "whether there is a … need to deter" or "punish" "the Reynolds of 2016." R.3:6238–39.

As one part of that presentation, Reynolds advised the jury that it "ha[d] sent a very powerful, strong message to" Reynolds. R.3:6215. The jury did so by "determin[ing] that" Reynolds was part of a conspiracy that "harmed a human being" and imposing "a seven figure, $6.4 million damages verdict" as a result. R.3:6215. In so advising the jury, Reynolds made clear that the compensatory-damages award might yet be reduced to account for the jury's allocation of fault to Mr. Price. As Reynolds explained:

> And you should know this: That although you wrote on the form that Mr. Price was 60 percent responsible for that $6.4 million, there has been no determination yet, the judge simply hasn't decided whether this award will be reduced.

R.3:6218. Plaintiff at that point objected. *Id.* At a sidebar held outside the hearing of the jury, she explained that she objected because: (1) the amount of compensatory damages is irrelevant to the amount of punitive damages; and (2) she had accepted a comparative-fault reduction "[a]cross the board." *See* R.3:6218, 6220–21. The trial court at that point emphasized that it had not yet decided whether to reduce the award and, after ending the sidebar, gave a curative instruction in which it explained to the jury that the amount of the judgment might not reflect the unreduced amount

of the jury's compensatory verdict. *See* R.3:6220, 6222. Apparently satisfied, Plaintiff did not move to strike Reynolds's statement and never moved for a mistrial.

5. The jury decided not to award punitive damages. R.2:5130. The trial court declined to reduce the jury's compensatory damages verdict to account for Mr. Price's comparative fault. *See* R.2:8480–86. It also denied Plaintiff's motion for a new Phase II trial. *See* R.2:8472. The trial court entered final judgment for the full amount of the jury's $6.4 million compensatory-damages verdict. R:2.8477–79.

SUMMARY OF ARGUMENT

I. Reynolds neither acted improperly nor misled the jury when it mentioned the compensatory-damages verdict during its Phase II closing argument. Instead, Reynolds accurately recounted the question before the jury—whether additional damages, above compensatory damages, were needed for purposes of punishment and deterrence—while truthfully informing the jury that the trial court had not yet decided whether to reduce the compensatory verdict for comparative fault. But Reynolds's comments would not warrant a new Phase II trial even if they were improper because those comments were a small part of Reynolds's closing argument; the trial court took curative steps; and Plaintiff failed to preserve her objection.

II. The trial court did not abuse its discretion in admitting testimony concerning the payment obligations imposed by the FSA and the MSA. For one

thing, Plaintiff opened the door to that testimony by eliciting from her own witnesses testimony concerning the Settlement Agreements. And, in any event, testimony concerning the massive payment obligations imposed by the Settlement Agreements was independently relevant to the amount of punitive damages, because that testimony is mitigating evidence that tends to reduce the need for punishment and deterrence. Finally, the Settlement Agreements themselves do not preclude such testimony. The boilerplate provisions on which Plaintiff relies in arguing to the contrary simply prohibit the introduction of the Settlement Agreements themselves and testimony concerning the negotiations that led to them—neither of which were admitted into evidence here.

III. The trial court did not abuse its discretion in admitting testimony concerning FDA regulation of the tobacco industry. Indeed, Plaintiff conceded in the trial court that such testimony was admissible. In any event, evidence concerning FDA regulation was relevant to the question facing the jury in Phase II because the fact of the FDA's broad regulatory power tends to reduce the possibility that tobacco-industry misconduct will recur—and thus to reduce the need for deterrence through punitive damages.

IV. Finally, this Court should not entertain Plaintiff's complaint about supposed deficiencies in Dr. Potts's knowledge concerning Reynolds's compliance with the Settlement Agreements and the process through which the FDA develops

regulations. Plaintiff, as cross-appellant, has waived that argument by failing to carry her burden of asserting it as error on appeal and making the error clearly appear. In any event, Plaintiff, despite having ample opportunity to do so, chose neither to depose Dr. Potts after he was disclosed nor to locate and present her own witness on compliance with the Settlement Agreements and the FDA's regulatory process. As a result, Plaintiff has only herself to blame; she cannot claim to have been unfairly surprised by the purported deficiencies in Dr. Potts's knowledge.

ARGUMENT

I. REYNOLDS'S COMMENTS CONCERNING THE COMPENSATORY VERDICT PROPERLY STATED THE QUESTION BEFORE THE JURY AND DO NOT, IN ANY EVENT, WARRANT A NEW TRIAL.

Plaintiff asks this Court to reverse the trial court's order denying its motion for a new trial—and, thus, the jury's Phase II verdict—because Reynolds discussed the compensatory-damages verdict during its Phase II closing argument. *See* AB 75–76. This Court reviews only for an abuse of discretion a trial court's order denying a motion for a new trial. *See Engle v. Liggett Grp., Inc.*, 945 So. 2d 1246, 1271 (Fla. 2006). Plaintiff acknowledges as much.

But Plaintiff does not acknowledge other applicable principles. Specifically, Plaintiff acknowledges neither the requirements for preservation nor the onerous underlying standards that govern a trial court's decision on a new trial motion. To preserve an objection to an opponent's purportedly improper argument, a litigant

must object at the time the argument is made and, if the objection is sustained, move for a mistrial at the time the improper comment is made. *See Companioni v. City of Tampa*, 51 So. 3d 452, 453–54 (Fla. 2010). Even when the issue is so preserved, a new trial should be granted only if the objecting party can show that the argument was both improper and "so highly prejudicial and inflammatory that it denied the opposing party its right to a fair trial." *Engle v. Liggett Grp., Inc.*, 945 So. 2d 1246, 1271 (Fla. 2006).

Plaintiff faces an even higher hurdle because she failed to preserve her objection to Reynolds's argument. "To receive a new trial in a civil case based on unobjected-to closing argument, a complaining party must" show: (1) "that the argument being challenged is, in fact, improper"; (2) that the "comments … gravely impair[ed] a fair consideration and determination of the case by the jury"; (3) that "curative measures could not have eliminated the probability that the" allegedly improper "argument resulted in an improper verdict"; and (4) "that the argument so damaged the fairness of the trial that the public's interest in our system of justice requires a new trial." *Murphy v. Int'l Robotic Systems, Inc.*, 766 So. 2d 1010, 1028–30 (Fla. 2000). That "four-part test … all but closes the door on" unpreserved objections to "closing argument." *Id.* at 1032 (Pariente, J., concurring specially and in result only).

Plaintiff cannot satisfy the standard applicable to a preserved objection.

Obviously then, she cannot—and does not even try to—satisfy the more stringent *Murphy* standard that actually governs here.

A. Plaintiff did not preserve her objection to Reynolds's mention of the jury's compensatory-damages verdict. Plaintiff altogether failed to object to several of Reynolds's statements concerning the compensatory-damages verdict. *See* R.3:6215, 6217–18. Indeed, Plaintiff objected only three times (R.3:6221–22, 6225–27), and on two of those occasions the trial court took curative steps, including: (1) telling the jury that the final judgment might not reflect the full Phase I verdict, R.3:6222–23, and (2) requiring Reynolds to tell the jury that the two phases involved different types of damages, R.3:6227.

Moreover, at Plaintiff's request, the trial court gave the jury a second curative instruction at the close of Reynolds's argument. Specifically, the trial court instructed that "Phase I had to do with compensatory damages," whereas Phase II dealt "with punitive damages," which would be "in addition to any compensatory damages" and should be imposed based on delineated factors. R.3:6246 (listing "the nature, extent, and degree of misconduct and related circumstances, the financial resources, and any mitigating evidence"). Apparently satisfied with the trial court's curative instruction, Plaintiff moved right along, adding that the two types of damages were like "apples and oranges" because punitive damages were "about punishing" Reynolds and not compensating "for what was taken." R.3:6246.

Plaintiff never moved for a mistrial and, as a result, she has failed to preserve her objection. *See Companioni*, 51 So. 3d at 454; *Johnson v. State*, 348 So. 2d 646, 647 (Fla. 3d DCA 1977) ("[T]he record reflects that counsel for co-defendant upon objection asked for a curative instruction . . . [and] upon receiving and accepting the curative instruction, the error, if any, was waived.").

B. The comments about which Plaintiff complains were not, in any event, improper. In arguing to the contrary, Plaintiff asserts that those comments impermissibly suggested that the compensatory award "had a punitive element." Plaintiff mischaracterizes the portions of Reynolds's argument about which it complains. *See* AB 76.

On some of the pages cited by Plaintiff, Reynolds does not mention punishment at all, but instead argues only that it respects the jury's verdict and the message behind it. *See* R.3:5757, 6214–15, 6237; *see also* R.3:6221, 6225 (recounting a sidebar out of the jury's earshot). Those statements obviously do not improperly address punishment. On other pages cited by Plaintiff, Reynolds simply restated the question then before the jury. That question was whether additional damages, over and above the compensatory award, were warranted for purposes of punishment and deterrence. R.3:6217–18, 6222–24. It is of course entirely proper to straightforwardly recount the very question before the jury. *See Banks v. State*, 219 So. 3d 19, 30 (Fla. 2017) (prosecutor's statement held not improper where it

"was an accurate reflection of the record"); *Wickham v. State*, 124 So. 3d 841, 861 (Fla. 2013) (comment held "not improper" if it "was an accurate statement of the law"). And, in doing so, Reynolds specifically distinguished the Phase I compensatory verdict from punitive damages, stating that the jury found that the compensatory award "would fully compensate the plaintiff," and asking the jury to decide "whether more money is necessary to punish and deter." R.3:6217.

Reynolds properly invited the jury to consider the compensatory verdict in answering that question. The Federal Constitution and Florida law both require a jury considering punitive damages to do exactly that. *See, e.g., State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 419 (2003) ("[P]unitive damages should only be awarded if the defendant's culpability, *after having paid compensatory damages*, is so reprehensible as to warrant the imposition of *further* sanctions to achieve punishment or deterrence." (emphases added)); *Miami Beach Lerner Shops, Inc. v. Walco Mfg.*, 106 So. 2d 233, 236 (Fla. 3d DCA 1958) ("Punitive or exemplary damages" are imposed "in addition to" compensatory damages "as punishment to a defendant and as a warning and example to deter him and others."). It is not hard to see why: Punitive damages are permitted *only* to deter and punish, *see, e.g., Liggett Grp., Inc.. v. Engle*, 853 So. 2d 434, 469 (Fla. 3d DCA 2003), *decision approved in part, quashed in part sub nom Engle v. Liggett Group, Inc.*, 945 So. 2d 1246 (Fla. 2006), and compensatory damages do some of both, reducing the need for punitive

damages. *See Memphis Cmty. Sch. Distr. v. Stachura*, 477 U.S. 299, 307 (1986) ("Deterrence … operates through the mechanism of damages that are compensatory." (emphasis omitted)); *State Farm*, 538 U.S. at 426 ("Compensatory damages … contain [a] punitive element" that punishes for emotional distress.). Reynolds kept its argument well within the confines of this long-established law.

The cases cited by Plaintiff are inapposite. For instance, in *Arab Termite & Pest Control of Fla., Inc. v. Jenkins*, 409 So. 2d 1039 (Fla. 1982), the Florida Supreme Court did not address the factors that may be argued to a jury considering punitive damages. Rather, the Court concluded that a trial court may not remit a punitive-damages award on the ground that it was disproportionate to the amount of compensatory damages awarded. *Id.* at 1042–43. The Florida Supreme Court rejected that very conclusion in *Engle*, recognizing that it was inconsistent "with United States Supreme Court decisions." 945 So. 2d 1246, at 1264.

The Fourth District's decision in *R.J. Reynolds Tobacco Co. v. Gafney*, 188 So. 3d 53 (Fla. 4th DCA 2016), is likewise beside the point. In that case, the Fourth District held that it was improper for the plaintiff to ask the jury to "send a message" with its compensatory damages award, because that exhortation invited the jury to "award money not based on the proof supporting the proper recoverable" compensatory damages." *Id.* at 57 (quotation marks and citation omitted). In holding that counsel may not ask a jury to stray beyond compensation in awarding

compensatory damages, the Fourth District in no way suggested that *proper* compensatory damages awards lack an incidental component of deterrence or punishment. Nor did the Fourth District call into question the well-settled law saying just that—and allowing juries to consider compensatory awards in determining whether to award punitive damages, and in what amount. *See, e.g., Campbell*, 538 U.S. at 419; *Miami Beach*, 106 So. 2d at 236. That well-settled law controls here, and it suffices to foreclose Plaintiff's objection to Reynolds's argument.

C. In any event, this Court should affirm even assuming Reynolds's Phase II argument was improper. As cross-appellant, Plaintiff bears "the burden … to demonstrate reversible error." *Davis v. State*, 153 So. 3d 399, 401 (Fla. 1st DCA 2014) (quotation marks and citation omitted). Plaintiff has not carried that burden because she has not even tried to show that her unpreserved objections to Reynolds's argument meet the standards set out in *Murphy v. International Robotic Systems, Inc.*, 766 So. 2d 1010 (Fla. 2000).

First, Plaintiff has not attempted to show that "curative measures could not have eliminated the probability that" the allegedly impermissible "argument resulted in an improper verdict." *Murphy*, 766 So. 2d at 1030. Indeed, the trial court did take several curative measures and Plaintiff, apparently satisfied, never moved for a mistrial. Plaintiff's own actions thus belie any assertion that the allegedly improper argument could not have been cured. *See Johnson*, 348 So. 2d at 647 ("[T]he record

reflects that counsel for co-defendant upon objection asked for a curative instruction . . . [and] upon receiving and accepting the curative instruction, the error, if any, was waived.").

Second, even if it was improper to refer to the compensatory-damages award during Phase II, that argument did not "so damage the fairness of the trial that the public's interest in our system of justice requires a new trial." *Murphy*, 766 So. 2d at 1030. Very few arguments fall into "th[at] narrow category," and those that due are truly appalling, like arguments "appeal[ing] to racial, ethnic, or religious prejudices." *Id.* Those sorts of arguments are in a whole different ballpark from Reynolds's mentioning of the jury's compensatory-damages award.

Third, Plaintiff cannot plausibly claim Reynolds's mentioning of the compensatory-damages award "gravely impair[ed] a fair consideration and determination of the case by the jury." *Id.* Nor, for that matter, can Plaintiff satisfy the prejudice standard that would apply if she had actually preserved her objection; specifically, she cannot show that Reynolds's comments were "so highly prejudicial and inflammatory that [they]" deprived her of her "right to a fair trial." *Engle v. Liggett Grp., Inc.*, 945 So. 2d 1246, 1271 (Fla. 2006). Reynolds's 25-page closing argument focused on the fact that the Reynolds of today is a changed company not in need of punishment or deterrence through punitive damages. *See* R.3:6214–39. In support of that argument, Reynolds spoke at length about: (1) the change in

personnel at Reynolds, R.3:6223–24; (2) the fact that tobacco-industry organizations had been dissolved, R.3:6223; (3) Reynolds's earlier payments of large punitive-damages awards, R.3:6227, 6236–37; (4) Reynolds's past and future payment obligations under the Settlement Agreements, R.3:6227; (5) Reynolds's changed conduct, including its strategy of migrating consumers to safer products, R.3:6228–34, 6237; and (6) the FDA's regulatory authority over Reynolds and other tobacco companies, R.3:6234–35. While Reynolds dwelled on those topics, it mentioned the jury's compensatory-damages determination only in passing. *See* R.3:6215, 6217, 6218, 6227. In sum, Plaintiff complains about comments that were an insignificant part of the closing argument and, for that matter, the trial as a whole—and which therefore were not prejudicial under any standard. *See, e.g.*, *Gold v. West Flagler Assocs., Ltd.*, 997 So. 2d 1129, 1130 (Fla. 3d DCA 2008) (whether improper comments caused prejudice must be determined from "the entire trial record").

D. Finally, this Court should reject Plaintiff's attempt to force it into a false choice between (1) leaving in place the unreduced compensatory-damages award and (2) granting a new Phase II trial. *See* AB 75. Plaintiff offers no authority supporting her forced choice, and the Court should not make it. There is no inconsistency in deciding both that Reynolds did not waive its right to seek a comparative-fault offset, given that Reynolds never asserted that the "jury's finding on comparative fault would be disregarded,"*Hiott*, 129 So. 3d at 482; and that

Reynolds properly referred to the compensatory-damages verdict in its Phase II comments to the jury, for any of the various reasons discussed above.[5]

Finally, Plaintiff's unsupported argument also fails on its own terms because it depends on a premise that simply is not true. According to Plaintiff, Reynolds "should be forced to face some consequences" because it "misled the jury" by "suggest[ing] it was accepting that the jury's full compensatory award would go to Plaintiff." *See* AB 74, 75. But Reynolds never did any such thing. In fact, Reynolds explicitly and truthfully told the jury that "the judge simply hasn't decided whether" the compensatory-damages award would be reduced to account for the jury's allocation of fault. R.3:6218. The jury heard that despite Plaintiff's best efforts to cut off the truth with an objection, *see id.*, and the trial court later gave an instruction reiterating Reynolds's point, *see* R.3:6222 (explaining that the "judgment" was different from the "verdict," and suggesting that the judgment might not replicate the verdict due to the trial court's actions). In short, Reynolds never suggested that the compensatory-damages award would remain unreduced and thus never misled

[5] Plaintiff misplaces reliance (AB 68–69) on *Philip Morris USA Inc. v. Marchese*, 231 So. 3d 473 (Fla. 4th DCA 2017). In that case, the Fourth District found waiver based on the defendants' repeated and unequivocal statements to the jury—including during Phase I—that comparative fault would not apply if the jury found for Plaintiff on the intentional tort claims. *See id.* at 474, 476–77. Reynolds made no such statements here. Moreover, to the extent the Fourth District in *Marchese* applied a standard different than that applied by this Court in *Hiott*, *Marchese* is irrelevant here, where *Hiott* controls.

the jury. This Court should not invent and impose a novel "consequence" for actions Reynolds never took.

II. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ADMITTING TESTIMONY CONCERNING PAYMENTS UNDER THE SETTLEMENT AGREEMENTS.

Contrary to Plaintiff's suggestion, Reynolds did not introduce the MSA and FSA into evidence. *See* AB 77–80. Rather, Reynolds merely elicited from Dr. Potts two transcript pages' worth of testimony concerning payments required by those agreements. *See* R.3:5917–18. This Court reviews a trial court's decision on the admission of testimony for an abuse of discretion. *See Special*, 160 So. 3d at 1265. The trial court did not abuse its discretion in admitting testimony concerning Reynolds's payments under the Master Settlement Agreement and Florida Settlement Agreement, especially since, as Plaintiff's counsel acknowledged, this evidence is routinely admitted in *Engle*-progeny cases. R.2:6034; R.2:6114–44.

A. To begin with, the trial court could not have erred in admitting Dr. Potts's testimony concerning payment obligations under the Settlement Agreements. It is well settled that a party who has "opened the door" by introducing evidence concerning a subject "will not be heard to complain" that her adversary introduced additional, otherwise-inadmissible evidence relating to that subject. *Lawrence v. State*, 846 So. 2d 440, 452 (Fla. 2003) (quotation marks and citations omitted). As the Florida Supreme Court has held, "[t]he concept of opening the door," which is

"based on considerations of fairness and the truth-seeking function of a trial," "allows the admission of otherwise inadmissible testimony to qualify, explain, or limit testimony or evidence previously admitted." *Rodriguez v. State*, 753 So. 2d 29, 42 (Fla. 2000) (quotation marks and citations omitted).

Here, Plaintiff opened the door to Dr. Potts's testimony concerning the settlement agreements when she elicited, before Dr. Potts ever took the stand, testimony from her own witnesses concerning the MSA and FSA. For instance, during his direct examination in Phase I, Dr. Michael Cummings informed the jury that tobacco companies were required to produce internal documents under "agreements between state attorney generals and the tobacco industry"—*i.e.*, the MSA and FSA. R.3:2333. And, during Phase II, Plaintiff's expert economist, Dr. Frederick Raffa, explained to the jury that Reynolds's net income included expenses—which Dr. Raffa did not quantify—resulting from "various settlement agreements." R.3:5772. By introducing that testimony explicitly mentioning the Settlement Agreements, Plaintiff opened the door for Reynolds to introduce testimony "explain[ing]" them. *Rodriguez v. State*, 753 So. 2d 29, 42 (Fla. 2000) (quotation marks and citations omitted).

Because Plaintiff opened the door, the trial court did not err in admitting Dr. Potts's limited testimony concerning payment obligations imposed by the MSA and FSA. Indeed, it would have been reversible error *to exclude* Dr. Potts's testimony.

During Phase II, Dr. Raffa testified at length concerning Reynolds's financial health. *See* R.3:5768–75. By injecting Dr. Raffa's extensive testimony concerning Reynolds's financial condition into the case, Plaintiff opened the door for Reynolds to introduce testimony about payment obligations imposed by the MSA and FSA for the purpose of accurately explaining Reynolds's financial condition to the jury, which otherwise would have been confused and misled.

B. In challenging the admission of testimony concerning the MSA and FSA, Plaintiff relies primarily on a "Non-Admissibility" provision in each settlement agreement. *See* AB 79–80. Plaintiff misinterprets those provisions, which do not bar testimony about the way in which the MSA and FSA impact Reynolds's business today. Rather, the provisions consist of standard contractual language designed to prohibit the introduction of evidence of the settlement negotiations and the agreements themselves. Neither the MSA nor the FSA precludes a defendant in future litigation from introducing evidence of the payments made under or the obligations imposed by the Settlement Agreements. Indeed, witnesses can testify about those payments and obligations without admitting the Settlement Agreements into evidence. Following in the footsteps of witnesses in many *Engle*-progeny cases, Dr. Potts did just that—as did Plaintiff's own witnesses, Dr. Cummings and Dr. Raffa. *See* R.3:5699 ("THE COURT: … As it relates to the settlement agreement, do you have any cases that say I shouldn't allow that? … MR.

PRYSOCK: … No, sir … we don't have any cases, Your Honor."); R.2:6114–44 (excerpts of *Engle*-progeny trial transcripts in which evidence of payments under the MSA and FSA was admitted in Phase II);.

C. In a single paragraph, Plaintiff also asserts that testimony concerning the MSA and FSA is "irrelevant" to the issue of punitive damages because those agreements impose compensatory payment obligations, and do "not include any punitive element." AB 80. That argument is wrong as a matter of fact and as a matter of law.

First, Plaintiff's irrelevance argument rests on a mistaken factual premise. Contrary to Plaintiff's assumption, the MSA and FSA do contain "a[ ] punitive element." After all, the parties to those agreements entered them to settle lawsuits in which the State parties *sought to recover punitive damages from the tobacco-company parties*. *See* R.2:5769 (together defining "Released Claims" under the MSA to include "civil penalties and punitive damages"); R.2:5775–76 (providing that the FSA resolved with finality all of Florida's claims, "including those for punitive damages"); *see also* R.3:5663. As a result, evidence concerning the "[e]normous financial obligations … imposed by the" Settlement Agreements "clearly qualif[ies] as evidence relevant to punishment." *Liggett Group, Inc. v. Engle*, 853 So. 2d 434, 469 (Fla. 3d DCA 2003), *decision approved in part, quashed in part sub nom Engle v. Liggett Group, Inc.*, 945 So. 2d 1246 (Fla. 2006).

Second, Plaintiff's argument is wrong as a matter of law, even if the MSA and FSA do not contain "a[ ] punitive element." The Florida Supreme Court has made clear that a defendant facing possible punitive damages has a broad right to present evidence of "*any* mitigating circumstances." *St. Regis Paper Co. v. Watson*, 428 So. 2d 243, 247 (Fla. 1983) (emphasis added; quotation marks and citation omitted); *see also Humana Health Ins. Co. of Florida, Inc. v. Chipps*, 802 So. 2d 492, 496 (Fla. 4th DCA 2001) ("The 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." (quotation marks and citation omitted)). The defendant has a right to introduce evidence of any mitigating circumstances because mitigating circumstances tend to diminish the need to punish or deter—the "only legitimate objectives for a punitive damages award." *Engle*, 853 So. 2d at 469; *accord W.R. Grace & Co. v. Waters*, 638 So. 2d 502, 504 (Fla. 1994); *see also BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 568 (1996) (imposing punitive damages in amount greater than needed for purposes of punishment or deterrence violates the Federal Due Process Clause).

As the Third District Court of Appeal has held, these principles entitle *Engle*-progeny defendants to put before the jury evidence concerning their obligations under the Settlement Agreements. *See Engle*, 853 So. 2d at 469 ("The defendants were entitled to have the jury consider the FSA and MSA as potential mitigating

factors in determining the need for further punishment and deterrence, especially with regard to claims for the same alleged misconduct."). That holding makes sense, because evidence of obligations under the Settlement Agreements is relevant to the jury's determination about the amount of punitive damages, if any, that would be necessary and appropriate for the purposes of punishment and deterrence.

This Court's decision in *Johns-Mansville Sales Corp. v. Jansens*, 463 So. 2d 242 (Fla. 1st DCA 1984), is instructive. There, this Court observed that a defendant may "argue[ ] to the jury" that punishment was unnecessary because the defendant had "expend[ed] … funds in the defense of" earlier lawsuits and would continue to expend funds to defend future lawsuits. *Id.* at 252; *see also Owings-Corning Fiberglas Corp. v. Ballard*, 749 So. 2d 483, 485, 487 (Fla. 1999) (explaining that the trial court "properly instructed the jury" that it could consider "the existence of other civil awards" in "determining what, if any, amount of punitive damages to impose"). *A fortiori*, then, Reynolds's payments made *in settlement* of lawsuits tends to lessen the need for punishment.

Moreover, evidence of Reynolds's payment obligations under the Settlement Agreements was relevant to the need for deterrence, even assuming those payments are entirely compensatory. It is well established that compensatory payments have a deterrent effect. *See*, *e.g.*, *Stachura*, 477 U.S. at 307 ("Deterrence … operates through the mechanism of damages that are compensatory."(emphasis omitted));

Carey v. Piphus, 435 U.S. 247, 256 (1978) (noting that deterrence is "inherent in [an] award of compensatory damages"); *Travelers Indem. Co. v. PCR, Inc.*, 889 So. 2d 779, 794–95 (Fla. 2004) ("[M]ost tort liability … will serve both deterrent and compensatory goals."). As a result, evidence of a defendant's prior compensatory payments tends to show that there is either no need or a reduced need to impose punitive damages for purposes of deterrence. *See, e.g.*, *State Farm*, 538 U.S. at 419 ("[P]unitive damages should only be awarded if the defendant's culpability, after having paid compensatory damages, is so reprehensible as to warrant the imposition of further sanctions to achieve punishment or deterrence."); *Mathias v. Accor Economy Lodging, Inc.*, 347 F.3d 672, 677 (7th Cir. 2003) ("As the Court emphasized in *Campbell*, the … very substantial compensatory damages [of $1 million] … greatly reduced the need for giving [plaintiffs] a huge award of punitive damages … as well in order to provide an effective remedy.").

In sum, the Third District rightly held that evidence of payment obligations under the MSA and FSA is relevant to the amount, if any, of punitive damages to be imposed in an *Engle*-progeny case. *See Engle*, 853 So. 2d at 469. The trial court did not abuse its discretion in so concluding.

III. PLAINTIFF FAILED TO PRESERVE HER CHALLENGE TO THE ADMISSION OF TESTIMONY RELATING TO FDA REGULATION, WHICH IS IN ANY EVENT MERITLESS.

When a party has preserved a claim of error in the admission of evidence, this

Court will review the trial court's decision to admit the evidence for an abuse of discretion. *See Morris v. State*, 219 So. 3d 33, 42 (Fla. 2017). Here, however, Plaintiff did not press an argument that evidence concerning the FDA's regulation of Reynolds (and the tobacco industry generally) was irrelevant to the issues facing the jury in Phase II; in fact, Plaintiff agreed that evidence concerning FDA regulation was admissible. *See* R.3:5671–72. As a result, Plaintiff has waived that argument. *See Penalver v. State*, 926 So. 2d 1118, 1136 (Fla. 2006); *State v. Brockman*, 827 So. 2d 299, 303 (Fla. 1st DCA 2002). In any event, the trial court did not abuse its discretion in allowing Reynolds to introduce testimony of FDA regulation.

A. Plaintiff waived any argument that the trial court committed reversible error in admitting evidence of FDA regulation. For one thing, Plaintiff failed to object to the admission of evidence concerning FDA regulation during Phase II. *See supra* pp. 17–18. On its own, Plaintiff's failure to object amounts to waiver precluding appellate review. *See, e.g.*, *Penalver*, 926 So. 2d at 1136 n.9 ("These arguments were never made to the trial judge and are … not preserved for appellate review."); *Brockman*, 827 So. 2d at 303 ("The general rule is that failure timely and adequately to object to the admission of evidence waives the right to contest its admissibility later."). But Plaintiff's failure to object is not on its own: Plaintiff *actually agreed* to the admission of testimony concerning FDA regulation, explaining to the Court that it was "fine if [Reynolds] want[s]" to introduce

testimony concerning FDA regulation. R.3:5671. In so doing, Plaintiff clearly confirmed her waiver of challenges to the admission of that testimony. *See, e.g.*, *Penalver*, 926 So. 2d at 1136 (where "counsel agreed to admissibility," party "waived any objection").[6] Having waived the issue, Plaintiff cannot now assert it on appeal as a basis for disturbing the trial court's judgment.

B. Even if Plaintiff had preserved the issue, the trial court did not abuse its discretion in admitting testimony concerning the FDA's regulation of Reynolds and other tobacco producers. Contrary to Plaintiff's assertions (AB 83–85), that testimony was relevant to the jury's determination about the amount of punitive damages, if any, that to be awarded against Reynolds.

As already explained, the only legitimate reasons for imposing punitive damages are punishment and deterrence. Indeed, the Supreme Court of the United States has made clear that due process forbids punishment in an amount greater than

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[6] Plaintiff does not contend that the admission of evidence concerning FDA regulation amounts to fundamental error. *See* AB 83–85. Nor could she plausibly take that position. In admitting that evidence, the trial court committed no error at all—and certainly not an error so fundamental as to "reach[ ] down into the validity of the trial itself," *Dofour v. State*, 905 So. 2d 42, 74 (Fla. 2005), "equivalent of a denial of due process," *Jassan v. State*, 749 So. 2d 511, 512 (Fla. 2d DCA 1999). *See also* Charles W. Erhardt, 1 Fla. Prac., Evidence § 104.6 (2017) ("The [Florida Supreme Court] has … indicated that fundamental error will be found infrequently, particularly in civil cases. If purely evidentiary issues are involved, it appears that the courts will seldom, if ever, find the admission of evidence fundamental error." (footnotes omitted)).

reasonably necessary to accomplish the goals of punishment and deterrence. *See Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 22 (1991); *see also Gore*, 517 U.S. at 568 ("[W]hen an award can fairly be categorized as 'grossly excessive' in relation to" the interests of punishment and deterrence, "it enter[s] the zone of arbitrariness that violates the Due Process Clause of the Fourteenth Amendment."). Plainly, then, evidence tending to reduce the need for punishment and deterrence is relevant to the amount, if any, of punitive damages that should be imposed. *See* §§ 90.401–402, Fla. Stat.

Evidence of the FDA's regulatory power over Reynolds and other tobacco manufacturers is just that sort of evidence, because it tends to show that there is no (or less of a) need to impose punitive damages for the purpose of deterrence. Consider the impact of the regulations discussed by Dr. Potts:

- Tobacco companies must disclose to the FDA their research into "the health and dependency effects of tobacco products." R.3:5921; *see id.* at 5921–22.
- Cigarette manufacturers must disclose to the government "every single" additive and ingredient in their cigarettes "on a brand-by-brand basis." R.3:5922; *see* R.3:5883.
- Cigarette manufacturers must test the "content, delivery, and form of nicotine in each product" and report the results of those tests to the FDA. R.3:5923.
- Cigarette manufacturers must test their products for potentially harmful chemicals identified by the FDA and report the results of those tests to the FDA "on a brand-by-brand basis." R.3:5924.

- The FDA can require reduction of the nicotine content of a product. *See* R.3:5923.

- The FDA has the power to prevent a cigarette manufacturer from using any particular ingredient. *See* R.3:5923.

- Tobacco manufacturers must submit any proposed changes to a product to the FDA for review and preapproval. *See* R.3:5926.

- Tobacco manufacturers must obtain the FDA's preapproval before advertising that a product reduces or modifies risk. *See* R.3:5909.

- The FDA can review and require changes in a tobacco manufacturers' advertising. *See* R.3:5925.

- The FDA requires warning labels on tobacco products. *See* R.3:5905–07, 5909.

- The FDA can and does make unannounced inspections of manufacturing plants and the records of cigarette manufacturers. *See* R.3:5928–29.[7]

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[7] The FDA's regulatory steps are based primarily in the Family Smoking Prevention and Tobacco Control Act of 1999, Pub. L. No. 111-31, 123 Stat. 1776 (2009), which established a far-reaching federal regulatory program governing the design, manufacture, marketing, and distribution of tobacco products and the public dissemination of information about the health effects and addictiveness of smoking. § 2(47)-(49). The Act provides that the FDA is to be the "primary Federal regulatory authority with respect to the manufacture, marketing, and distribution of tobacco products" (§ 3(1)); creates a new Center for Tobacco Products to implement the Act's detailed regulatory mandate through administrative procedures (§ 901(e)); and establishes "comprehensive restrictions on the sale, promotion, and distribution of [tobacco] products" (§§ 2(6), 3(1). The Act provides the FDA with an array of powerful enforcement tools to ensure manufacturers' compliance with the Act. §§ 103, 904(b); 21 U.S.C. § 331. Moreover, the Act requires tobacco manufacturers to fund the FDA's tobacco program through yearly "user fees" amounting to hundreds of millions of dollars per year. 123 Stat. 1776, § 919; R.3:5930–31 (Dr. Potts's testimony that Reynolds has paid "somewhere north of $1.1 billion" to fund the FDA's regulation of tobacco, and that it will continue making those payments indefinitely).

The FDA's regulatory authority over Reynolds and other cigarette manufacturers plainly tends to reduce the need for deterrence through punitive damages. As Dr. Potts explained, the "FDA has very broad authority over the [tobacco] industry and what we do" and, as a result, it has "changed many aspects of [the] business." R.3:5920.

Those regulatory changes eliminate—or at least greatly reduce—the possibility that the sort of misconduct alleged by Plaintiff could recur. And, for that very reason, evidence concerning the FDA's regulatory authority shows that there is no—or at least a reduced—need to impose punitive damages to deter—or "discourage"—similar misconduct in the future. *See* BLACK'S L. DICT. (10th ed. 2014) (defining "deterrence" as "[t]he act or process of discouraging certain behavior, particularly by fear"). That evidence, then, was relevant to the Phase II inquiry.

Plaintiff's arguments to the contrary do not stand up to scrutiny. For instance, Plaintiff suggests that evidence of FDA regulation is irrelevant because it "does not speak to any" of the nine factors listed in *dicta* in *Jansens*, 463 So. 2d at 248. AB 84. But, because it tends to make recurrence of the alleged misconduct less likely, evidence of FDA regulation *does* speak to one of those factors: "the seriousness of the hazard to the public." *Id.*

In any event, this Court did not announce an *exclusive* list of factors in *Johns-*

Manville. Instead, the Court said only that the listed factors were "reasonable considerations" and that "evidence relevant to [them] would appear to be admissible" under earlier Supreme Court decisions establishing "that matters in aggravation or mitigation of punitive damages are relevant and admissible in evidence." *See id.* (citing *Rinaldi v. Aaron*, 314 So. 2d 762 (Fla. 1975)). In short, this Court in *Johns-Manville* did not purport to displace the fundamental principles governing punitive damages and the admissibility of evidence, under which evidence is admissible if it tends to reduce the need for punishment or deterrence. The trial court properly applied those fundamental principles in admitting Dr. Potts's testimony concerning FDA regulation.

Plaintiff fares no better with her more general argument that "[r]egulations are … irrelevant to deterrence" because they are "not mitigating evidence." AB 84. This argument rests entirely on Plaintiff's confusion (or conflation) of those two concepts, which are not coextensive. "Mitigating evidence" could mean (at least) either of the following two things: It could mean any evidence of a circumstance "that may bear on a … possibl[e] lessening of the severity of [a] judgment," BLACK'S L. DICT. (10th ed. 2014) ("mitigating circumstance"), or it could mean evidence that tends to "reduce or soften[ ] the moral or social culpability" of the defendant or its acts, *Chipps*, 802 So. 2d at 496. Evidence relating to deterrence tends to show that there is less of a need "to discourag[e] certain behavior," BLACK'S L. DICT. (10th ed.

2014) ("deterrence"). The upshot here is that the trial court properly admitted Dr. Potts's testimony concerning FDA regulation. That evidence might or might not have been "mitigating" evidence, depending on which definition is used; although it certainly had the possibility of "lessening the severity" of the jury's punitive damages determination. But it was clearly relevant to the need for additional deterrence, and for that reason alone the trial court did not err in admitting it.

IV. PLAINTIFF HAS WAIVED ANY ARGUMENTS ABOUT SUPPOSED DEFICIENCIES IN DR. POTTS'S TESTIMONY, WHICH IN ANY EVENT ARE NOT REVERSIBLE ERROR.

In contending that her claimed evidentiary errors were harmful, Plaintiff weaves into her brief a complaint that she was unfairly surprised by purported deficiencies in Dr. Potts's knowledge concerning Reynolds's compliance with the Settlement Agreements and the process through which the FDA develops regulations. *See* AB 81–83, 85. Where a party has preserved a claim that she was unfairly surprised by testimony, this Court will review for an abuse of discretion, and will reverse only "where no reasonable man would take the view adopted by the trial court." *Gouveia v. Philips*, 823 So. 2d 215, 222 (Fla. 4th DCA 2002) (quotation marks and citation omitted). Here, Plaintiff has waived this argument by failing to assert it as an error on appeal; and Plaintiff bears sole responsibility for her own failure to identify any deficiencies in Dr. Potts's knowledge and prevent any resulting prejudicial surprise.

A. Plaintiff has waived any argument relating to alleged insufficiencies in Dr. Potts's knowledge by failing to clearly assert it on appeal. "It is elementary that … the duty rests upon the appealing party to make error clearly appear." *Lynn v. City of Fort Lauderdale*, 81 So. 2d 511, 513 (Fla. 1955); *accord Henderson v. State*, 569 So. 2d 925, 927 (Fla. 1st DCA 1990). To that end, the Florida Rules of Appellate Procedure "require[ ] that counsel be vigilant in specifying for the court the errors committed" and give "attention [to] … the formulation of the questions presented." Rule 9.210, Florida Rules of Appellate Procedure, Committee Notes to 1977 Amendment. Specifically, Rule 9.210 requires a party to "identify," in her brief, "the issues presented for review" and to present an "[a]rgument with regard to each issue, with citation to appropriate authorities, and including the applicable appellate standard of review." Fla. R. App. P. 9.210(b).

Plaintiff nowhere identifies unfair surprise resulting from Dr. Potts's testimony as "an issue presented for review" upon which the trial court's judgment might be disturbed. Fla. R. App. P. 9.210(b); *see also* AB 74 (identifying only "[t]he trial court's *three errors*" as "warrant[ing] a new punitive-damages trial" (emphasis added)). Plaintiff provides no separate argument on that issue, no articulation of a standard of appellate review applicable to it, and no discussion or citation of substantive law that might govern such a claim. Instead, she simply tries to sneak her complaints about unfair surprise into the brief through her discussion of the

harmfulness of other purported errors. Accordingly, Plaintiff has waived any argument that the trial court's judgment should be reversed due to her alleged surprise at deficiencies in Dr. Potts's knowledge.

B. Even if Plaintiff had preserved this issue, there was no abuse of discretion. Florida courts have held that witness testimony that unfairly surprises the opposing party will require a new trial where the surprise testimony prejudices that opposing party. *See, e.g.*, *Menard v. Univ. Radiation Oncology Assocs., LLP*, 976 So. 2d 69, 74 (Fla. 4th DCA 2008). This can occur, for example, where a party calls a witness who was not disclosed as required by a pretrial order, *see Binger v. King Pest Control*, 401 So. 2d 1310, 1314 (Fla. 1981), or where a witness gives testimony at trial that deviates from her pretrial testimony, *see Grau v. Branham*, 626 So. 2d 1059, 1060–61 (Fla 4th DCA 1993); *Baptist Hosp., Inc. v. Rawson*, 734 So. 2d 1157, 1160 (Fla. 1st DCA 1999). Courts reverse in cases of that sort because the surprising testimony amounts to an "ambush" that renders worthless "[a]ll the discovery rules and the extensive efforts of parties to discover the other party's case." *Grau*, 626 So. 2d at 1062.

No such ambush occurred here. For one thing, there was no surprise. Reynolds disclosed Dr. Potts well before trial, explaining that he "w[ould] address," among other things, the "FDA's regulatory oversight of the tobacco industry" and "the Master Settlement Agreement … and individual settlement agreements with

states, including Florida." R.1:1216–18. In other words, Reynolds disclosed that Dr. Potts would address the very matters that he did, in fact, address at trial. Notably, Reynolds nowhere stated that Dr. Potts would address the matters about which Plaintiff complains—*i.e.*, the *process* by which the FDA develops regulations and Reynolds's purported *non-compliance* with the terms of the Settlement Agreements. *See* AB 82–83, 85. Plaintiff therefore cannot plausibly claim that she was unfairly surprised that Dr. Potts's lacked knowledge about those matters.

Even if Plaintiff was surprised, that surprise resulted only from Plaintiff's own lack of diligence—and therefore cannot justify reversal. Here, it helps to recall *why* an appellate court will reverse a trial court's judgment based on unfairly surprising testimony; the appellate court will do so because "[a]ll the discovery rules and the extensive efforts of the parties to discover the other party's case would be for naught if one side were able" to surprise the other party at trial. *Grau*, 626 So. 2d at 1062. The rule against surprise testimony thus has no application where a party is "surprised" only because she did not diligently engage in discovery and trial preparation.

That is precisely what happened in this case. Plaintiff chose not to depose Dr. Potts even though Reynolds disclosed him and the matters he would address.[8]

[8] Contrary to Plaintiff's intimation (AB 83), this Court's decision in *Nordyne, Inc. v. Fla. Mobile Home Supply, Inc.*, 625 So. 2d 1283 (Fla. 1st DCA 1993), is inapposite. In *Nordyne*, this Court affirmed the trial court's decision to sanction a

Indeed, not only did Reynolds make those disclosures, but it also explicitly stated that Dr. Potts had testified *In Re: Engle Progeny Cases, Tobacco Litigation (Nally)*, Case No. 2007-CA-007627 (Polk County, Florida)—where Dr. Potts admitted on cross-examination that his knowledge relating to the Master Settlement Agreement was limited to the requirements it imposed on tobacco companies. *See* R.2:6155 ("Q. So you just know that the document exists and that it put certain requirements on not only Reynolds but the other tobacco companies as well, true? … A. Yes, sir."). Moreover, Plaintiff could have, but did not, offer witnesses of her own to expand on, explain, or qualify Dr. Potts's testimony. *See* R.3:6141 (Plaintiff declining the trial court's invitation to present rebuttal evidence following Dr. Potts's testimony). In short, Plaintiff was not unfairly ambushed, but instead simply failed to diligently engage in discovery and preparation. Plaintiff cannot rely on her own failure in seeking a new trial. *See Chin v. Caiaffa*, 42 So. 3d 300, 310 (Fla. 3d DCA 2010) (trial court erred in excluding purportedly new expert testimony where opponent failed to take expert's deposition).

CONCLUSION ON CROSS-APPEAL

The Court should affirm the jury's verdict and the trial court's judgment on Plaintiff's punitive-damages claim.

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party for "'intentionally and willfully' with[olding] documents … which were within the perimeters of requests to produce served by the" opposing party. *Id.* at 1288. Reynolds committed no discovery violation here.

Date: February 27, 2018

Respectfully submitted,

/s/ Jason T. Burnette

Robert B. Parrish
Florida Bar No. 268739
David C. Reeves
Florida Bar No. 0072303
MOSELEY, PRICHARD, PARRISH, KNIGHT & JONES
501 West Bay Street
Jacksonville, Florida 32202
Telephone: (904) 356-1306
Facsimile: (904) 354-0194
bparrish@mppkj.com

Charles R.A. Morse
Florida Bar No. 91561
JONES DAY
250 Vesey Street
New York, New York 10281
Telephone: (212) 326-3939
Facsimile: (212) 755-7306
cramorse@jonesday.com

Jason T. Burnette
Florida Bar No. 125200
JONES DAY
1421 Peachtree Street, N.E., Suite 800
Atlanta, Georgia 30309
Telephone: (404) 581-8724
Facsimile: (404) 581-8330
jtburnette@jonesday.com

Counsel for Appellant/Cross-Appellee R.J. Reynolds Tobacco Company

CERTIFICATE OF SERVICE

I hereby certify that on February 27, 2018, a true and correct copy of the foregoing reply brief and answer brief on cross appeal was e-filed with the Court and served by email on the below listed counsel:

Attorneys for Plaintiff:
Gregory D. Prysock, Esq.
Katherine Massa, Esq.
MORGAN & MORGAN, P.A.
76 South Laura Street, Suite 1100
Jacksonville, Florida 32202
gprysock@forthepeople.com
kmassa@forthepeople.com

Keith R. Mitnik, Esq.
MORGAN & MORGAN, P.A.
P.O. Box 7979
Orlando, Florida 32808
kmitnik@forthepeople.com

Celene Humphries, Esq.
Maegen Peek Luka
Thomas J. Seider
BRANNOCK & HUMPHRIES
1111 West Cass Street, Suite 200
Tampa, FL 33606
tobacco@bhappeals.com

/s/ Jason T. Burnette
Attorney for Appellant/Cross-Appellee
R.J. Reynolds Tobacco Company

CERTIFICATE OF COMPLIANCE

Pursuant to Florida Rule of Appellate Procedure 9.210(a)(2), counsel for Reynolds hereby certifies that this brief complies with the applicable font requirements because it is written in 14-point Times New Roman font.

DATED: February 27, 2018

/s/ Jason T. Burnette
Attorney for Appellant/Cross-Appellee
R.J. Reynolds Tobacco Company

JUDGE THOMAS: Let me ask you a question about the jury instruction on fraud. Your argument that it was an incorrect jury instruction, and that it had to tell the jury that they, the plaintiff had to rely on statements here in order to be fraudulently induced to smoke. If we agree with you and rule in your favor on that point, how does that affect the comparative fault application to the remaining, assuming just for the sake of discussion, that we don't agree with you on the other issues requiring reversal of the negligence counts, but we agree that the fraud and the intentional torts have to be reversed because of the faulty instruction, then what happens to the 60% comparative fault finding?

MR. BURNETTE: So in that situation—

JUDGE THOMAS: You'd be entitled to a new trial. You didn't argue for a directed verdict and you don't argue that here.

MR. BURNETTE: That's correct, that's correct.

JUDGE THOMAS: Even though apparently the deceased said he didn't rely on any statements.

MR. BURNETTE: Correct, correct. He, we—

JUDGE THOMAS: I'm not sure why that argument's not been made, but that's none of my business.

MR. BURNETTE: Well, I, I—

JUDGE THOMAS: So if you, if you win a new trial on the fraud count, you've got the waiver arguments regarding the comparative fault, but if that portion of the verdict—the negligence counts—are affirmed, what happens to the comparative fault finding?

MR. BURNETTE: So—

JUDGE THOMAS: Does it wait until the verdict comes back on the second trial on the intentional torts?

MR. BURNETTE: That's exactly right, your Honor, I think that's what would happen. So the relevance of the issue regarding instructional error here is that because of the conspiracy finding by the jury in this case the—

JUDGE THOMAS: But the waiver argument regarding the comparative fault application is so tied in to the plaintiff's counsel's actions at trial urging the jury to find their client comparatively at fault et cetera, you're not going to have that in a new trial if you win one on the intentional torts. There'll be no discussion of comparative fault, right?

MR. BURNETTE: I believe that's correct, your Honor.

JUDGE THOMAS: So how can you, I'm just speculating, it is just a hypothetical question. So how can the Court address the issue of whether the comparative fault application, the finding by the jury, how would that apply in this kind of case if the negligence verdicts are upheld, the negligent counts on the verdict, and a new trial is awarded on fraud?

MR. BURNETTE: Let me see if this addresses your Honor's question. The comparative fault waiver issue that we have raised, and the instructional error on the reliance on a statement issue are two alternative reasons why the 60% apportionment finding would have to be applied.

JUDGE THOMAS: I guess that's my question. If we agree with you on the jury instruction, is that in of itself then grounds for reversal on the comparative false application?

MR. BURNETTE: It wouldn't be in and of itself, because as your Honor noted, there would need to be a new trial on the, the instructional errors generally require a new trial so—

JUDGE THOMAS: I know, but only on the intentional torts.

MR. BURNETTE: Correct. But it's the intentional torts that are—absent waiver. So we've argued that they've waived regardless of the finding on conspiracy and concealment, but, regardless of putting waiver aside, if after a new trial plaintiff were to lose the conspiracy, they've already lost concealment, lose the conspiracy finding, then the 60% apportionment finding by the jury would have to be applied to reduce the judgment.

JUDGE WINSOR: And conversely, if we agree with you on the waiver issue, there'd be no point in addressing whether or not you were guilty of the intentional torts.

MR. BURNETTE: None whatsoever. That is correct, Judge Winsor.

CERTIFICATE OF SERVICE

I certify that on November 30, 2020, I electronically filed this appendix with the Clerk of Court using the Florida Courts E-Filing Portal and that a true and correct copy of the appendix was served by e-mail on below listed individuals.

Gregory D. Prysock
Florida Bar No. 0062420
Katherine M. Massa
Florida Bar No. 0078316
Antonio Luciano
Florida Bar No. 105342
MORGAN & MORGAN, P.A.
76 S. Laura Street, Suite 1100
Jacksonville, FL 33202
(904) 398-2722
gprysock@forthepeople.com
kmassa@forthepeople.com
tluciano@forthepeople.com

Celene H. Humphries
Florida Bar No. 884881
Thomas J. Seider
Florida Bar No. 86238
Shea T. Moxon
Florida Bar No. 12564
BRANNOCK HUMPHRIES & BERMAN
1111 W. Cass Street, Suite 200
Tampa, FL 33606
(813) 223-4300
tobacco@bhappeals.com

Keith R. Mitnik
Florida Bar No. 0436127
MORGAN & MORGAN, P.A.
P.O. Box 7979
Orlando, FL 32808
(407) 849-2383
kmitnik@forthepeople.com

/s/ Marie A. Borland
Counsel for Respondent R.J. Reynolds Tobacco Company