

IN THE SUPREME COURT OF FLORIDA

LINDA PRENTICE, as Personal Representative
of the Estate of JOHN C. PRICE,

Petitioner,

Case No. SC20-291

vs.

L.T. Case Nos. 1D17-210

R.J. REYNOLDS TOBACCO COMPANY,

2007-CA-11551

Respondent.

ON REVIEW FROM THE DISTRICT COURT OF APPEAL
FIRST DISTRICT OF FLORIDA

APPENDIX TO PETITIONER'S INITIAL BRIEF ON MERITS

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APPENDIX TO PETITIONER'S INITIAL BRIEF ON MERITS

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served via the Florida Court's E-Filing Portal on all counsel in the attached service list on this 30th day of September 2020.

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Florida Circuit Court.

Howard A. ENGLE, Md., et. al., Plaintiffs,
v.

RJ Reynolds TOBACCO,et.,al., Defendants

No. 94-08273 CA-22.

|
Nov. 6, 2000.

FINAL JUDGMENT AND
AMENDED OMNIBUS ORDER

KAYE, Circuit J.

*1 THIS CAUSE having come on to be heard on the Defendants' "*Motion At The Conclusion Of Phase II-B For A New Trial Or Remittitur, To Set Aside The Verdict, And For Entry Of Judgement In Accordance With Defendants' Motions For Directed Verdict, To Grant All Motions For Mistrial previously pending Or Denied, To Decertify The Class, and Alternative Motion For New Trial*", and the Court having been fully advised pursuant to over 190 pages contained in the "Motion", and in addition, having read the 78 page memo in support for a New Trial and Or Remittitur, and in addition having read over the contents of 6 rather voluminous loose leaf volumes submitted by the defense, and several other equally voluminous loose leaf volumes submitted by the plaintiffs, and having reviewed the applicable Law as submitted by both sides, the Court feels it can rule on the issues without further argument, oral or otherwise.

THEREFORE, the Court issues the following: Omnibus Order:

MARY FARNAN

1.RJ Reynolds.....	Camels, Salem, Winston, Winston Lights
2.Philip Morris.....	Marlboro,
3.Brown and Williamson.....	Viceroy, Raleighs, Tareyton, Carlton, Pall Mall
4.Lorillard.....	Kent
5.American Tobacco.....	Lucky Strike

To say the least, this has been a most unusual and precedent setting trial. It consumed over TWO YEARS of hard fought trial by batteries of lawyers, required over 150 witnesses, involved thousands of documents and exhibits, and generated over 57,000 pages of testimony. The issues were highly complex and often novel, straining the ingenuity of the attorneys and of the Court.

This Case was brought alleging eight separate counts —1-Strict Liability, 2-Fraud and Misrepresentation, 3-Conspiracy to Misrepresent and Commit fraud, 4-Breach of Implied Warranty and Merchantability and Fitness, 5-Intentional Infliction of Emotional Distress, 6-Negligence,7-Equitable Relief, and 8-Breach of Express Warranty.

The defense filed motions for directed verdict as to each count and the Court will address each count separately. Many of defendants motions, although titled separately, make reference to the same material relating to an individual count, but combining references to separate plaintiffs. The ruling on the efficacy of each count will therefore apply to each plaintiff unless otherwise noted.

The defendants have filed 22 Motions for Directed Verdict, and more than 24 other motions dealing with the issues in this case all of which were deferred and need resolution.

First, it should be noted that the jury in both Phase I and II A found *each* of the defendants Guilty as to *all counts* with the exception of count 7 for Equitable relief which the court dismissed previously under the plaintiffs request for Medical Monitoring.

Second, because it may become important in resolving some of the motions, the following is a list of the manufacturer, and their products, each of the plaintiffs class representatives were alleged to have smoked over the years.

FRANK AMODEO

1.RJ Reynolds.....	Winston, Camels,
2.Philip Morris.....	Marlboro, Virginia Slims
3.Brown and Williamson.....	Viceroy,
4.American Tobacco.....	Lucky Strike

ANGIE DELLA VECCHIA

1.RJ Reynolds.....	Winston Lights,
2.Philip Morris.....	Benson & Hedges, Marlboro, Cambridge Lights, Parliament
3.Brown and Williamson.....	Pall Mall, Tareyton,
4.Lorillard.....	Kent
5.American Tobacco.....	Lucky Strike

MOTIONS FOR DIRECTED VERDICTS

As to Count I—Strict Liability —

*2 There was more than sufficient evidence at trial to satisfy the legal requirements of this Count and to support the jury verdict that cigarettes manufactured and placed on the market by the defendants were defective in many ways including the fact that the cigarettes contained many carcinogens, nitrosamines, and other deleterious compounds such as carbon monoxide. That levels of nicotine were manipulated, sometime by utilization of ammonia to achieve a desired “free basing effect” of pure nicotine to the brain, and sometime by using a higher nicotine content tobacco called Y-1, and by other means such as manipulation of the levels of tar and nicotine. The evidence more than sufficiently proved that nicotine is an addictive substance which when combined with other deleterious properties, made the cigarette unreasonably dangerous. The evidence also showed some cigarettes were manufactured with the breathing air holes in the filter being too close to the lips so that they were covered by the smoker thereby increasing the amount of the deleterious effect of smoking the cigarette. There was also evidence at trial that some filters being test marketed utilize glass fibers that could produce disease and deleterious effects if inhaled by a smoker. In addition, there was adequate evidence that all three of the class members whose claims were tried in Phase II–A smoked

one or more brands manufactured by one of more of the defendants.

The defendants have claimed that this count should have been dismissed as being barred by Section 402A of the restatement of Torts, comment (i). This Court is guided by  [Burton v. R.J. Reynolds Tobacco Co.](#), 884 F.Supp. 1515 (D Kan.1995) quoting  [Rogers v. R .J. Reynolds Tobacco Co.](#) 557 N.E. 2nd 1045 (Ind.App. 2 Dist.1990) which said:

“The reference in comment (i) to tobacco...does not as a matter of law remove all claims of defective tobacco products from the operation of 402A...[footnote 8]; Failing to warn the consumer of certain properties, such as nicotine addiction, in conjunction with its harmful qualities, render the product unreasonably dangerous....Also, a design defect which renders the product more addictive than it could be or addictive when it need not be at all, may render the cigarette unreasonably

dangerous in conjunction with its harmful qualities”

The Motion for Directed Verdict as to Count I Strict Liability, is DENIED

As to Count II—Fraud and Misrepresentation—

Abundant evidence was adduced at trial to support the legal requirements of this Count and to support the jury verdict of the Count of Fraud and Misrepresentation. From the early years of advertising up until July of 1969, defendants engaged in concerted advertising campaigns extolling the virtues of smoking and making references to the lack of health risks and stressing the alleged benefits of smoking. References were made to Doctors smoking with no ill effects, to Radio and Television stars like Arthur Godfrey, and to sports figures, all of whom smoked and hawked the health benefits of tobacco or lack of health risks. All the while the defendants knew by their own research and the work of others, that cigarettes were carcinogenic and caused **cancer** and other deadly diseases. Defendants reneged on their promises contained in the Frank Statement of 1954, and never revealed to the public the addictive nature of tobacco—a fact they all recognized but never admitted. Even after 1969, defendants continued campaigns of misinformation about the dangers of smoking and fostered the myth that there was a continuing controversy about causation in face of the overwhelming contrary body of evidence worldwide. Not only was there misinformation supplied by defendants, there was concealment of known information which affected the health of the public at large. Despite a duty not to deceive, and a duty to disclose, the defendants failed to reveal information they knew was contrary to that which they disseminated—information that the defendants had developed through their own research. The concept of duty to disclose and duty not to deceive can be stated in no clearer terms than the words of the Court in *Joiner v. McCullers*, 28 So 2nd 823 (Fla 1947)

*3 “the rule that fraud cannot be predicated of a failure to disclose facts where the information is as accessible to one party as to the other, and the truth may be ascertained by the exercise of reasonable diligence, does not justify a resort to active deceit or fraud, and hence, does not

apply where a party in addition to non-disclosure uses any artifice to throw the other party off his guard and to lull him into a false security. The concealment becomes a fraud where it is effected by misleading and deceptive talk, acts of conduct, or is accompanied by misrepresentations, or where in addition to a party's silence there is any statement, or act on his part which tends affirmatively to a suppression of the truth, or to a covering up or disguising of the truth, or to a withdrawal or distraction of a party's attention from the real facts; then the line is overstepped and the concealment becomes fraud.”

These words are as good today as they were in 1947 and apply directly to the Fraud count and the Conspiracy count below. The only conclusion that can be drawn from such activity is that the defendants intended that the public rely upon that which the defendants generated over extended periods of time and which the defendants knew were false. Having been exposed over the years to countless advertising exposures, it is reasonable, and the jury so found, that the plaintiffs relied upon the representations made by the defendants.

The Motion for Directed Verdict as to Count II Fraud and Misrepresentation is DENIED.

As to Count III Conspiracy to Misrepresent and Commit Fraud,-

The Court finds sufficient and more than adequate evidence to satisfy the legal requirements of this Count and to support the jury verdict that the defendants acted in concert to misinform and deceive. The Council For Tobacco Research and the Tobacco Institute were creatures of a joint effort by the defendants to either hide and/or conceal scientific research, or provide disingenuous and misleading information to the public at large. Evidence was established that these entities were not only funded and supported by the defendants, but were in some cases controlled and manipulated by them. The establishment of the “Special Products” division to allow corporate counsel to be involved and thereby invoke the protection of the “attorney-client” privilege all the while claiming these entities were independent of the defendants,

is a prime example of the collusion involved. In addition thereto, representatives met from time to time at conferences and retreats to discuss and share information about the health effects and addictive nature of smoking and reached certain agreements on how to deal with the scientific community, including the Surgeon Generals, and how best to continue the perceived controversy in the public's eye.

The Motion for Directed Verdict as to Count III Conspiracy to Misrepresent and Commit Fraud, is DENIED.

As to Count IV—Breach of Implied Warranty of Merchantability and Fitness—

*4 The record reflects sufficient evidence to support the legal requirements of this Count and the jury verdict that each of the three class representatives whose claims went to trial, adequately met the requirement to sustain the count of Implied warranty. The testimony revealed that each smoked and were exposed to the various brands manufactured by the defendants not only by the act of purchasing the products from retailers but also through the promotional activities of the defendants. Specific reference was made in the evidence to the mailin coupon program whereby the defendants, by direct mail, supplied the plaintiffs with the various brands which they smoked These coupons were found in packs of cigarettes purchased by the plaintiff and were not available without a purchase-therefore were not “free”. Other promotions offered merchandise that was available for redemption with purchased cigarette coupons. Still other promotions distributed free samples without a purchase directly from the manufacturer. The defendants rely upon the holding of  *Kramer v. Piper Aircraft Corp.*, 520 So 2nd 37 (Fla.1988) and  *Westinghouse Corp., v. Ruiz.*, 537 So 2nd 596 (Fla. 3rd DCA 1988) which stands for the proposition that a no-privity breach of implied warranty, is supplanted by the doctrine of strict liability. However, in this case the Court specifically finds that the evidence, as referred to above, clearly establishes the requirement of “privity” necessary to sustain a claim for implied warranty. See, i.e. *Sheppard v. Revlon, Inc.*, 267 So 2nd 662 (Fla. 3rd DCA 1972)

The motion for Directed Verdict as to Count IV-, Breach of Implied Warranty of Merchantability and Fitness, in so far as it is related to privity, is DENIED.

As to Count V—Intentional infliction of Emotional Distress—

The evidence in this case supports the legal requirements of this Count and the jury verdict that the plaintiffs not only suffered severe injuries caused by smoking cigarettes but, also suffered extreme mental anguish and disability from the emotional distress directly attributable to the physical injury. In addition thereto the plaintiffs also suffered emotional distress upon the realization of being *addicted* to the defendants product, a condition that doesn't necessarily manifest itself in any physical injury. Florida Courts have recognized the principle that there can be emotional distress with or without physical injury or impact. (*Metropolitan Life Ins. Co. v. McCarson* 467 So nd 277 Fla.1985) and (*Eastern Airlines, Inc. v. King*. 557 So 2nd 547 _ Fla.1990). Survivors are also entitled to, and so the jury found, a claim for Infliction of Emotional Distress.

The Motion for Directed Verdict as to Count V Intentional Infliction of Emotional Distress is, Denied.

As to Count 6— Negligence—

The verdict of the jury on the issue of Negligence is well supported by the evidence. The elements of negligence have certainly been sufficiently proven by the testimony in this case in that any reasonable person or entity, armed with the information the defendants had, should have done that which a reasonable person would have done under like circumstances, or should not have done what a reasonable person would not do under like circumstances.. It is obvious that a reasonable person or entity would not have allowed a condition to exist that he or it knew would injure someone, without taking appropriate measures to prevent it. The defendants according to the testimony, well knew from their own research, that cigarettes were harmful to health and were carcinogenic and addictive. By allowing the sale and distribution of said product under those circumstances without taking reasonable measures to prevent injury, constitutes, in this Courts opinion, and in the opinion of the jury as it turns out, negligence.

*5 The Motion for Directed Verdict as to Count VINegligence,, is DENIED.

As to Count VII—Equitable Relief—

This Count has previously been dismissed by the Court under the heading of Medical Monitoring.

The Motion for Directed Verdict as to Count VII Equitable Relief, is GRANTED

As to Count VIII— Breach of Express Warranty—

Evidence adduced at trial more than adequately supports the jury verdict and satisfied the legal requirements of express warranty in that the defendant tobacco companies for decades prior to July 1969, advertised their products as being safe, free of medical risks, etc, by using such techniques as having “doctors” promoting the products, etc. In some instances making claims that a particular brand is easier and smoother on the throat and less irritating. Subsequent to 1969, the advertising campaign shifted to claims of low tar and nicotine when in truth the defendants knew the tar and nicotine levels were either false or manipulated.

The Motion for Directed Verdict as to Count VIII Express Warranty, is DENIED.

In addition to the above, the defendants have filed numerous other motions for Directed Verdicts, which the Court will treat below:

Statute of Repose—

This issue as it relates to the facts of the case, has been resolved up to now by the decision in  [Pulmosan Safety Equipment Corp. v. Earl Barnes](#), 25 FLW S12 (case No. SC94544 Opinion filed January 6th, 2000). The Supreme Court reaffirmed the decision in  [Diamond v. E.R. Squibb & Sons, Inc.](#) 366 So 2nd 1221 (Fla 3rd DCA 1979) and held that there is an exception to the Statute of Repose in cases of latent injury in product liability cases.

“Therefore, we hold that in a products liability action where the now-defunct statute of repose is still applicable, the latent injury exception remains viable so that the statute of repose will not extinguish the plaintiff's cause of action if his or her injuries are latent and undiscoverable within the repose period.”

This concept has been following by the 2nd District in a recent opinion,  [Laschke v Brown and Williamson Tobacco Corporation et. al.](#) 2000 WL 868251 (FLA.App. 2nd Dist.) in which the Court said:

“The conspiracy of the defendants has been ongoing since at least December of 1953 and has been continuous through the present. We conclude that, because of the dispute surrounding these allegations, the date of the last act done in furtherance of the conspiracy presents a question of fact not proper for resolution on summary judgement. Therefore, the Laschkes' claim for conspiracy to commit fraud cannot be said to be barred by the statute of repose as a matter of law on this record.”

The Motion for Directed Verdict on the issue of the Statute of Repose, is DENIED.

Statute of Limitations re: Frank Amodeo

The jury in Phase 11A determined that plaintiff Frank Amodeo knew or should have known on or before May 5, 1990 (4 years prior to the filing of this case) that he was addicted to smoking, and further, that he had cancer reasonably caused by smoking. This finding acts as a bar to Frank Amodeo's claims for Strict Liability, Implied and Express Warranty, Negligence, and Emotional Distress. It does not however bar the claims under Fraud and Conspiracy pursuant to the holding in  [Pulmosan Safety Equipment Corp. v. Earl Barnes](#), 25 FLW S12 (case # SC 94544 January 6 2000) which recognizes an exception to the Statute Of Repose in the case of continuing fraud.

*6 The Motion for Directed Verdict on the Statute of Limitations re: Frank Amodeo is GRANTED as to the Counts of Strict Liability, Implied Warranty, Express Warranty, Negligence, and Intentional Infliction of Emotional Distress, and DENIED as to the Counts of Fraud and Misrepresentation, and Conspiracy to Misrepresent and Commit Fraud.

Federal Preemption

The seminal case regarding Federal preemption in tobacco cases is  *Cipollone v. Liggett Group*, 505 U.S. 504, 112 S.Ct. 2608, 120 L.Ed.2d 407 (1992). That case specifically exempted claims of Fraud and Conspiracy to commit Fraud and Misrepresentation from the pre-emption effect of the 1969 Act.

“In the 1969 Act, Congress offered no sign that it wished to insulate cigarette manufacturers from long standing rules governing fraud... Petitioner's fraudulent misrepresentation claims that do arise with respect to advertising and promotions are not pre-empted...such claims are...predicated on...the duty not to deceive.”

The 1969 Act does not pre-empt any claim for acts committed prior to 1969 in any event, and certainly does not pre-empt any acts of fraud or conspiracy committed by the defendants subsequent to 1969. The record in this case is replete with evidence relating to the fraud and conspiracy claims which the jury apparently considered, and believed, in finding the defendants guilty of those counts.

As to the issue of addiction, there seems to be a head on conflict between the issue of “failure to warn” after 1969, and the concept that the defendants had a “duty not to deceive”. Given the merits of those claims, and the realization that the defendants had the knowledge that nicotine addicts as early as the 50's and 60's and still publically declared, well into the 80's and 90's, that nicotine is not addictive, the record of the trial reflects that the plaintiffs presentation opted for evidence of a “duty not to deceive” which goes directly to the fraud and conspiracy exception under *Cipollone*, rather than the “failure to warn” preemption element. Also see *Joiner v. McCullers*, 28 So 2nd 823 (Fla.1974).supra.

The motion for Directed Verdict on the grounds of Federal Preemption is DENIED.

Failure to Warn Pre-1969

For guidance the Court relies on the decision in *Burton v. R.J. Reynolds Tobacco Co.*, 884_F.Supp. 1515 (D.Kan.1995),

which definitively rejected the defendants theory that there was no duty to warn because everybody was aware of the dangers of smoking. The defendants position is disingenuous because the defendants for decades had decried the health risks of smoking and publically stated that there was no conclusive proof cigarettes caused disease. At the same time the defendants were aware that nicotine was addictive—— something the general public did *NOT* know. Also, the defendants were under a *duty* not to deceive. This concept can be stated in no clearer terms than the words of the Court in *Joiner v McCullers*, 28 So 2nd 823 (Fla 1947).supra.

*7 The Motion for Directed Verdict for Failure to Warn is DENIED.

Motions for Directed Verdicts on behalf of Council For Tobacco Research and Tobacco Institute

Despite protests by these defendants that the plaintiffs were unable to point to any specific act of either of these defendants to establish plaintiffs claims, the jury, having found these defendants guilty on all counts for which they were charged, apparently found enough in the evidence to conclude that the thousands of pieces of information to which the plaintiffs were exposed over several decades, came from the concerted efforts of the defendants to provide such information to the public. Ironically, the defendants claim the plaintiffs could not possibly have known, and or, relied on the content of such dissemination, while at the same time arguing that the defendants cannot be held liable because over the years *everybody* knew of the dangers of smoking from *other unnamed* sources.

Since each of these defendants were acting on behalf of, or in concert with, the other defendants in the case, the jury reasonably could, and apparently did, conclude these defendants were guilty of fraudulent representation, concealment and conspiracy.

The motions for Directed Verdicts as to the Council For Tobacco Research and the Tobacco Institute are DENIED.

Application of Michigan and/or New York Law

This issue has already been decided by Judge Postman in his pre-trial order of January 6th, 1998 and is the law of the case. That order sets the principle that if a plaintiff was in the State of Florida at the time the medical condition was diagnosed and the causal relationship with smoking had manifested itself, and the plaintiff was a resident of Florida at that time,

then the law of Florida would apply regardless of the fact that the plaintiff had resided in another State and smoked prior to the diagnosis.

The Motions for Directed Verdicts on the application of Michigan and/or New York law are DENIED.

Motion for Directed Verdict on the issue of Punitive damages

The jury having heard the evidence submitted during the Phase I trial, definitively determined that the conduct and the behavior of the defendants rose to a level to entitle the plaintiffs to an award of punitive damages. The Court having heard the same testimony and evidence concurs the proofs were clear and convincing.

This motion is DENIED as to ALL defendants

OTHER MOTIONS FILED ON BEHALF OF THE DEFENDANTS MOTIONS IN LIMINE

The defendants in this case have filed numerous other motions, most of which were *MOTIONS IN LIMINE* or which in some regard related to the presentation of evidence. Most, if not all, were resolved during the evidentiary portion of the trial as the testimony was elicited and were either denied, or sustained in whole or in part or mooted, as the record will reflect, therefore there is no need to rule on those motions here.

MOTIONS FOR MISTRIAL

The Court has carefully considered the Motions for Mistrial in this cause and has determined that curative instructions to the jury, and/or motions to strike have been granted as requested by the movant, for most of the motions, and in any event the cumulative effect of the alleged error, was not in the opinion of the Court, sufficient to have so influenced the jury as to affect the outcome of the case considering the length of the trial, the number of witnesses presented, the quality and quantity of the testimony, the huge amount of documentary evidence, and specifically the substance of the alleged remarks. The jury in this case rendered three verdicts, each based upon a mountain of evidence over a period of two years in three separate trials. The court feels confident, that although some remarks of counsel may have been uncalled for, or subject to objection, they were not so egregious as to require a new trial. THEREFORE:

*8 All Motions for Mistrial which have been previously deferred or not previously denied, are hereby DENIED.

It should be noted here, that at the close of the Phase II B (punitive damages) trial, the defendants filed a plethora of motions, all outlined in a 190 page motion for *New trial or Remittitur, to Set Aside the Verdict and for Entry of Judgement based on previous Motions for Directed Verdicts, Mistrial, and for Decertification.*

The Court has already ruled upon the Motions for Directed Verdicts and Mistrials herein, however a review of the voluminous Motion for New trial reveals far too many alleged assignments of error for the Court to address on a one on one basis. In fact, the motion ostensibly reviews *every* objection raised during the entire two year, three phase trial and over 57 thousand pages of transcript. As to each of the objections raised during trial, the Court entered a ruling resolving the issue at the time the objections were made, and sees no reason to reverse itself at this time, nor does the Court feel that just because possibly hundreds of objections were made, that this necessarily resulted in such a cumulative error as to require a new trial. The Court has reviewed the motion and all the alleged errors cited, and has determined that on the merits of each claim, the motion is unsustainable.

Therefore: The Motion for New Trial is DENIED.

This leaves two issues to be resolved by the Court for which the Court feels a comment is appropriate: Decertification and Remittitur.

DECERTIFICATION

Although, the 3rd District Court of Appeals and the Florida Supreme Court have already addressed the issue of Certification, approving preliminarily the case to proceed as a class action case, see  [R.J. Reynolds Tobacco Co., v. Engle, 672 So.2nd 39 \(Fla. 3d DCA 1996\)](#) and Review Denied. Fla. S.Ct. Docket No. 88235 10/2/96., the matter is still before the Court for a ruling on Defendants Motion to Decertify, at the close of all the evidence.

This case was divided into separate phases-the first phase was to determine the common issues of liability, causation and entitlement to punitive damages. The second phase was a trial on the claims of three class representatives involving issues of individual compensatory damages, causation and

comparative fault. The third phase involved the issue of the amount, if any, of punitive damages in the aggregate.

The jury found for the plaintiffs in all three phases generally, and assessed compensatory damages of over 12 million dollars, and punitive damages in the neighborhood of 145 billion dollars.

In assessing whether a case should be classified as a “class action” lawsuit, controversy has arisen in product liability cases as compared to mass tort or accident cases. In product liability cases individual issues often outnumber common issues due to the fact that no single event has brought about the injury complained of, nor is there generally any single proximate cause which applies equally to all potential class members. Moreover, affirmative defenses such as Statutes of Limitation, Statutes of Repose and concepts of reliance etc, may depend on facts peculiar to each plaintiffs case.

*9 The Court in  *Amchem Products, Inc. v. Windsor*, 117 S.Ct. 2231, speaking about the 1996 revision of Rule 23 noted the committee opinion that mass tort cases are not ordinarily appropriate for class action, but the text of the rule does not categorically *exclude* mass tort cases from class certification. Since the late 1970's, courts have been certifying such cases in increasing numbers. See *Resnick, From “Cases” to “Litigation”*, 54 Law & Contemp. Prob.5, 17–19 (Summer 1991) (describing trend). (emphasis added).

In trying to determine whether a case should be certified as a class action, a majority of the courts look to three criteria: 1.) tort maturity, 2) efficiency and manageability, and 3) negative value.

TORT MATURITY

Not until torts are classified as “mature” and general causation has become relatively clear, will such cases be candidates for class action treatment. “*Manual for Complex Litigation (Third)* S 33.26 (1997).

In *Castano v. American Tobacco Co.* (5th Cir.1996) decertification was based on an “immature tort”. That case intended to encompass all potential future tobacco related personal injury claims against the Tobacco Industry, whereas the instant case involves only those who have an immediate disease or condition. It should be noted that this Court has denied the plaintiff's claim for Medical Monitoring precisely

to avoid the pitfall of the *Castano* case and  *Barnes v. American Tobacco Company*, 161 F.3rd. 127 (3rd Cir.1998) The Court refused to allow potential claimants who have not manifested a disease or condition to become a member of the class, therefore this is not an “immature tort” issue.

EFFICIENCY AND MANAGEABILITY

In part, this requirement is designed to evaluate whether the resolution of cases by class action is a viable and judicially economic alternative to individual suits.

The *Castano* decision to decertify the class action based its ruling on the fact that the lower court has not considered how each claim in the complaint varied under the law of difference states and on the fact that the lower court did not make a finding of whether litigation is manageable in light of these differences. *Id.* at 739. The *Castano* court found that there were “extensive manageability problems” which included “difficult choice of law determinations, sub-classing of eight claims with variations in state law, notice to millions of class members, further sub-classing taking account of transient plaintiffs, and the difficult procedure for determining who is nicotine dependent.” Likewise in  *Georgine v. Amchem*, 83 F.3d 610, 632–33 (3rd Cir.1996), as well as in *Castano*, a lack of judicial efficiency also derailed the proposed class.

However the instant case is unlike *Georgine* or *Castano* in that, the trial plan has effectively allowed the determination of general issues” en mass”, thereby conserving the Court's resources by then only requiring Phase II trials to determine individual issues of liability and entitlement particular to each representative member of the class. In the *Castano* case, the court portended 1) problems involving the manageability issues regarding the notification to a class of millions; 2) sub-classing for transient residents; and 3) problems with superiority requirements due to individual reliance and immaturity of the tort. The Court believes it has successfully addressed and allayed the above concerns of the *Castano* court.

*10 First, since the immediate class has a much more limited size and involves only Florida residents and Florida law, the Court has been able to effectively notify its potential members without having to concern itself with the variations of state law which were endemic in *Castano*.

Secondly, unlike *Castano*, the instant case involves a much smaller population, involving only residents of Florida who had manifested a disease or made a causal connection thereto.

Because Florida law is the only law to be applied to determine the rights and liabilities of the parties with respect to the instant action, this Court has been able to create a touchstone which will help determine the “choice of law” analysis for the Plaintiff class, thus the shortcomings of the *Castano* case in regard to transient residents has been successfully avoided in the instant case. See *infra* Engle Class Order dated January, 1998.

Thirdly, and again unlike the *Castano* court which based its decision to decertify on the assumption that at the time of decertification individual reliance *may* come to undermine the superiority requirement for maintaining a class action, the instant action has successfully avoided the problems associated with reliance in class action suits. Although Florida courts have an aversion to class action treatment for breach of contract or fraud claims, it is in limited circumstances, appropriate for class action. See  *Lance v. Wade*, 457 So.2d 1008 (Fla.1984); see also *Broin v. Philip Morris Companies, Inc.*, 641 So.2d 288.

In addition, since fraud has been shown by the Plaintiffs to be a result of deception and artifice, fraud may, under Florida law, be based upon an omission or non-disclosure. See  *Taylor v. American Honda Motor Co., Inc.*, 555 F.Supp.59 (M.D.Fla.1983). In such instances, the courts have recognized that a fraud class action based on an omission or non-disclosure is appropriate for class actions.

As such, the issue of superiority vis a vis individual reliance is no longer dispositive, as several courts, in similarly situated cases involving omission or non-disclosure, have found that reliance is not an obstacle to class action. See *Keyser v. Commonwealth National Financial Corp.* 121 F.R.D. 642 (M.D.Pa.1988).

At the close of Defendants' case, it has become apparent to this Court that class action treatment is superior to pursuing this matter by individual claims. If Plaintiffs were required to try their cases individually, issues such as reliance, causation, defendants knowledge, intent, or reckless disregard, and defendants' financial capacity, etc., will have to be litigated many of thousands of times. This is more than mere speculation. After having sat through the enormous complexities involved in this trial, it is self-evident that any trial would have to involve similar proceedings. And if there were to be individual trials, it is inevitable that the common issues of Defendants' conduct would become

a predominant aspect of each trial, which could result in conflicting verdicts thus proving that common issues become the most prominent aspect of this case.

*11 The closest parallel this Court can find to the instant case is asbestos litigation, which is undoubtedly one of the most complex of all mass tort litigation.  See *Ahern v. Fireboard Corporation*, 162 F.R.D. 505, 528 (the primary factual and legal issues such as disease causation, product, situs and defendant identification and standard of care have been identified and developed through extensive litigation; despite the maturity of asbestos litigation, it continues to be expensive, time-consuming, and complex.) The same can be said for tobacco litigation since it also has fully developed and resolved issues, and is subject to extensive litigation, thereby, contributing to the delay, high transaction costs, and arbitrary results that have become such a burden to the judicial system, (and providing further argument for the need to resolve these issues through class action litigation).

The Court is also aware that there exist legitimate Seventh Amendment concerns when a multi-phase trial involves separate and distinct issues of general and specific causation. However, the trial plan clearly limited general causation issues to Phase I and there was little to no risk that such issues would be revisited in any subsequent phases. See *In re: Dow Corning Corporation*, 211 B .R. 545 (E.D. Mich.1997) (In that case the trial court held in regard to separate trial for general causation, the VII Amendment would be a concern if a specific causation/damage jury revisited the issue of general causation in its deliberations. However, experienced trial judges in conjunction with parties could overcome that pitfall through careful controls over trial processes, and could minimize the danger of allowing a second jury to re-examine findings of first jury).

Likewise, in  *Cimino v. Raymark Industries, Inc.* 151 F.3d 297 (5th Cir.1998), the court approved a trial plan that adequately individualized and preserved the Seventh Amendment rights with respect to each individual's actual damages from an asbestos-related disease. Although that court ultimately held that the use of “extrapolation plaintiffs” in that case violated the VII Amendment, the court did find that such a plan can constitutionally divide general and specific causation. See also  *Jenkins v. Raymark Inds. Inc.*, 782 F.2d 468 (5th Cir.1986), (justifying class trial of common issues and individual trials of individual issues of exposure—causation and damages).

Several courts involving matters other than [asbestosis](#) have also allowed the separation of general and specific causation.

For example in [Sterling v. Velsicol Chemical Corp.](#) 855 F.2d 1188, 1200 (6th Cir.1988), a personal injury suit by individuals living in the neighborhood of a landfill allegedly contaminated by defendant, the Sixth Circuit noted that

“the [trial] court, as is appropriate in this type of mass tort class action litigation, divided its causation analysis into two parts. It was first established that Velsicol was responsible for the contamination and that the particular contaminants were capable of producing injuries of the types allegedly suffered by the plaintiffs. Up to this point in the proceeding, the five representative plaintiffs were acting primarily in their representative capacity to the class as a whole. This enabled the court to determine a kind of generic causation—whether the combination of the chemical contaminants and the plaintiffs' exposure to them had the capacity to cause the harm alleged. This still left the matter of individual proximate cause to be determined. Although such generic and individual causation may appear to be inextricably intertwined, the procedural device of the class action permitted the court initially to assess the defendant's potential liability for its conduct without regard to the individual components of each plaintiff's injuries. However, from this point forward, it became the responsibility of each individual plaintiff to show that his or her specific injuries damages were proximately caused by ingestion or otherwise using the contaminated water”.

*12 See also [Valentino v. Carter–Wallace, Inc.](#), 97 F.3d 1227, 1229, 1234 (9th Cir.1996) (in certifying [Fed R. Civ. P. 23\(b\)\(3\)](#) as a class in prescription drug products liability suit, the district court “specifically excluded the individual issues of proximate causation, and compensatory damages”); (Class certification reversed on other grounds, but [Fed R. Civ. P. 23\(c\)\(4\)\(A\)](#) exclusion of individual issues, essentially approved). See also [Watson v. Shell Oil Co.](#), 979 F.2d 1014 (5th Cir.1992) (panel affirmed trial plan for determination of liability and punitive damages to be followed by trials on individual issues).

Given the above reasoning, this Court held that in Phase I, the jury was required to determine, among other issues: 1) whether smoking cigarettes caused the disease(s) in question, 2) resolve general issues of causation, 3) determine the

extent of the defendants wrongful conduct, and 4) determine entitlement to punitive damages. The jury returned verdicts in favor of the plaintiff on all those issues. The same jury in Phase IIA was then asked to: among other issues, 1) determine individual issues of causation for the class representatives, and, 2) determine the representative class members compensatory damages. Again, the jury returned verdicts favorable to the plaintiffs. In Phase IIB, the jury was required to determine the amount of punitive damages to be award in the aggregate against all defendants. The jury, after hearing two years of trial in three stages, returned a multi-billion dollar punitive damage award.

In Phase III, the individual claims of the class members will be tried before different judges and different juries to determine whether the injuries complained of were the result of cigarette smoking or from other causes, and what if any, damages resulted from that activity. The Juries in Phase III will not be concerned with the general causation issues of the previous trials, nor the conduct or behavior of the defendants, or punitive damages, those issues have already been resolved, and subsequent juries may be so instructed.

The Defendants would be permitted to introduce evidence limited to the specifics of the individual plaintiff's circumstances. For example, the Defendants would be permitted to show that the plaintiff has a genetic predisposition to the disease, that s/he smoked cigarettes for too short a period of time for symptoms to have been caused by smoking cigarettes, or that the disease was caused by some other activity etc. Future Courts and Judges can, by skillful control of their cases, eliminate the danger of allowing a second jury to re-examine the findings of common issues determined by the first jury in Phases I, IIA and IIB

Parenthetically, the Court is also aware of the due process problems associated with findings of liability for class actions of unspecified size. The Court feels that a statistical finding of the class size preserves the Defendants' due process rights while at the same time preserving Plaintiff's individual rights to trial. Thus any claimants' rights are preserved through this action which otherwise would have precluded tort claimants for their day in court and many claimants who would never live to see their cause litigated nor have the opportunity to receive compensation have had an opportunity for redress.

NEGATIVE VALUE

*13 Finally, we address the issue of whether the case is a “negative value” suit. Negative value suits “permit the

plaintiffs to pool claims which would be uneconomical to litigate individually.” See  *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 809.  105 S.Ct. 2965, 86 L.Ed.2d 628 (1985); see also  *Rhone-Poulenc*, 51 F.3d 1293 (7th Cir.1995). Thus since issue of negative value does not inure to either Defendants or Plaintiffs in the instant action, the Court will not find it to be dispositive as to the superiority question. See also  *Ruiz v. American Tobacco Company*, 180 F.R.D. 194.

CONCLUSIONS REGARDING DECERTIFICATION

For the reasons above, the Court record establishes in a clear fashion that there has been resolution of the problems concerning immaturity of tort, efficiency and manageability,

Philip Morris, Incorporate

RJ Reynolds Tobacco Company.....

Brown & Williamson Tobacco Corporation,
individually and as successor by merger to the
American Tobacco Company.....

Lorillard Tobacco Company/Lorillard, Inc.....

Liggett Group Inc./Brooke Group Holding, Inc.....

Council For Tobacco Research.....

Tobacco Institute.....

The defendants have attacked the jury verdict as excessive and unreasonable and have asked for a new trial or in the alternative, a remittitur.

A remittitur is generally controlled by the principle of whether the manifest weight of the evidence shows that the amount of punitive damages assessed is out of all reasonable proportion to the malice, outrage, or wantonness of the tortious conduct.

and negative value. Thus, decertification is inappropriate in the instant action. The class certification and trial plan calling for trifurcation of the issues is the preferred option in this case.

Therefore: The Motion To Decertify The Class is -DENIED

REMITTITUR

The issue of Remittitur has been reserved for last because it was last in the scheme of things during the trial.

The case as has been stated above, was tried in three stages, the last being a punitive damage phase. The jury returned a multi-billion dollar verdict against the defendants to wit:

\$ 73,960,000,000

\$ 36,280,000,000

\$ 17,590,000,000

\$ 16,250,000,000

\$ 790,000,000

\$ 1,105,210

\$ 278,339

 *Arab Termite and Pest Control Of Florida, Inc., et al., v Jenkins* Fla., 409 So 2nd 1039 (S.Ct.1982). In addition thereto, it must be determined whether the award is out of proportion to the defendants net worth or ability to pay without going into bankruptcy or going out of business. see: *Bould v. Touchette*, 349 So 2nd 1181, and *Jones v. Greely*, 25 Fla. 629, 6 So 448 (1889).

The “reasonable proportion” controlling in this type of case must, of course, be affirmatively supported by the record, or the judge must find that the jury was influenced by matters outside the record. (Arab Termite *supra*). Another consideration is the meaning and effect of the term “net worth” as it relates to the imposition of punitive damages. Although net worth can simply be stated as the end result of comparing assets against liabilities, it is not the end-all when determining an award of punitive damages. The jury has the right to determine, when deciding punitive damages, the “financial resources” of a defendant see: *Florida standard Jury Instructions (Civ)* subparagraph (2) PD 1b (2). Therefore, “net worth” is only one factor in determining the “financial resources” of a defendant.

***14** Before going further, the court feels it necessary dispose of the issue of “outside influence”. The Court has determined that there is no evidence that the jury in this case was influenced by any matters outside the record. In fact the Court took special pains to instruct the jury on a daily basis about reading anything, seeing anything or listening to anything from any source whatsoever, be it radio, T.V., newspapers, magazines, the internet or conversation with others, that might have anything to do with the issues or subject matter in this case, and /or which might influence their verdict. The jury was told they must return a verdict based solely on the evidence and testimony adduced in court and on the instructions from the court and from no other source. The jurors were interrogated each day of trial by the Court, (the parties also had equal opportunity to question the jury), as to compliance with this instruction. After carefully evaluating the jury and their responses to the Court's inquiry, the Court is well satisfied that the jury was NOT influenced by any matters outside the record. Nor, in this Court's opinion, was the jury unduly influenced by matters even experienced at trial.

This then leaves the issues of whether the punitive damage award is out of proportion to the *defendants conduct*, or the *defendants ability to pay*, or *both*.

CONDUCT OF THE DEFENDANTS

The first major issue to be discussed is whether the *conduct or behavior of the defendants* warrants the \$144.08 billion dollar punitive damage award, and whether the award “shocked the conscience of the Court,” and therefore, whether a remittitur should issue.!!

This Court sat through two years of trial, listened to over 150 witnesses, heard over 57 thousand pages of testimony

and conducted hundreds of hearings on legal and evidentiary issues in addition to becoming familiar with the complexity of the issues from the very inception of the filing of the complaint in 1994. The Court truly believes it has more of an understanding of the case than any nonparticipant, and is in a better position to render such a judgement. Remember, the issues in this case go back to the 30's, 40's and 50's -*seventy* years or more of conduct by the defendants which led to the complaint in 1994 and which on some issues, continues to the present. That is what makes this case so unusual and unique.

At first blush, a \$144 BILLION dollar punitive damage award seems so far outside the comprehension of any reasonably thinking person that one would immediately say it is *shocking* and not in keeping with rational thought. However, keep in mind the enormity of the seventy years of behavior and the *almost incomprehensible* damage that was done to such a huge number of people. There has been testimony in this case that 400 thousand people have died each year from the ill effects of smoking tobacco products, and hundreds of thousands of people contracted diseases and suffered, and still suffer, the horrible effects of those diseases. The enormity of the damage is mind boggling, as is the realization that the ill effects of tobacco smoking was known as far back as the turn of the century!. Health official for years struggled with the concept of causation and sought through the scientific world to bring the matter to the attention of the public. The tobacco industry fought them at every turn, decrying the concept of causation and rallying behind the defense of “free choice”.

***15** The proof of the pudding, as it were, was in the fact that back in 1953 Dr. Wynder with his mouse painting studies, announced to the public, a link between smoking and [cancer](#). This led to the formation of the “Tobacco Institute Research Committee (TIRC), [later known as the Council for Tobacco Research (CTR)] by the tobacco industry which then resulted in what has been known as the “Frank Statement” in 1954. This was a statement published in 400 newspapers aimed at 43 million Americans, explaining that the tobacco industry recognized the dangers involved in smoking tobacco, and pledged to conduct a concerted research effort to develop a safer product, and to keep the public informed of its research results. The major tobacco companies of the day (the defendants in this case) all signed off on the document (with the exception of Liggett.). TIRC meanwhile, acting as a public relations arm of the tobacco industry, engaged in a concerted effort to refute any claims of health dangers as a result of smoking. A publication called “Tobacco and Health Research” was created to disseminate false and

misleading information regarding the issue of causation. Although the defendant tobacco companies had promised full public disclosure of its findings and research, the defendants, via The Council For Tobacco Research, suppressed reports and attacked research. In 1954, Liggett & Meyers, as it was known then, hired Arthur Little to duplicate Dr. Wynders skin painting tests and he got the same or similar results-but those results were never made public by the defendants.

During the ensuing years, the tobacco industry and the defendants became aware that tobacco smoke contained over 4,000 compounds, and over 40 carcinogens but did not reveal that information to the general public. In fact, the defendants knew about the addictive nature of nicotine as early as the 60's, and in 1972 in a Philip Morris report at a CTR conference a statement was made..."without nicotine there would be no smoking"...and... "cigarettes are a dispenser for a dose of nicotine".

As a matter of fact, tobacco scientists learned how to manipulate the levels of nicotine in cigarettes by adding ammonia to produce a "freebasing" nicotine which speeded up and enhanced the effect of nicotine on the brain. They also were able to develop the Y-1 strain of a high nicotine content tobacco plant grown in a foreign country. In addition, company scientists were able to devise ways of manipulating tar and nicotine content in cigarettes thus lulling the public into believing there was a "safer" cigarette.

Evidence existed regarding the conspiracy and fraud activities of the companies in the form of a so called "Gentlemen's Agreement" not to do independent research, with the idea of suppressing unwanted or damaging research results. Also, under some circumstances, research results were sent to company offices over-seas in order to prevent discovery.

Another problem area was the setting up of the "Special Project" unit of CTR, in which attorneys either controlled or had a say in determining which research projects would be undertaken and by whom. The way it was structured allowed the companies to claim an attorney-client privilege whenever necessary. Comment was made on this very subject by Federal Judge Sarokin in  [Haines v. Liggett Group, Inc](#) 140 F.R.D. 681 D.N.J.1992 who said defendants used the attorney-client privilege to hide documents-never intending to give full disclosure, and he called it a fraud to mislead the public. Judge Sarokin also said in that opinion "...the tobacco industry may be the king of concealment and disinformation". In conjunction with CTR, the defendants established the

"Tobacco Institute" and used it as a lobbying arm with government agencies to advance certain position strategies such as the "multi-factorial hypothesis", and the "genetic" defense, to counter-act the series of Surgeon General's Reports, and the studies of the scientific community.

*16 The record also reflects that in 1994, the C.E.O's. of the defendant companies went before congress and swore under oath that cigarettes and /or nicotine was not addictive, even though there was evidence as far back as the 60's to the contrary. That position was also voiced by the Vice President of the Tobacco Institute Brennan Dawson in 1994 who said cigarettes are not addictive, nor has it been established scientifically that smoking cigarettes was harmful to health. Dr. Alexander Spears of Lorillard denied before congress that the defendants manipulated nicotine levels. Charles Whitley of TI echoed that denial. However, in 1981, Dr Spears in an article for the 3rd Tobacco Chemists Research Conference had discussed manipulating nicotine levels. The defendants continued to claim that there is no proof that cigarettes cause harm. This, in face of the many Surgeon Generals reports and other scientific evidence, over several decades, that spelled out the harm caused by smoking, specifically [lung cancer](#) and a long list of other diseases. Throughout the decades since the "Frank Statement", the evidence revealed that the tobacco industry, specifically these defendants, have followed a line of telling the public that there is no scientific proof of "causation" and no verified link between smoking and disease, when their own research proved otherwise.

Evidence at trial was replete with the history of denials by the defendants about the health effects of tobacco. Trial evidence outlined the techniques of billion dollar advertising campaigns to sell their products to the public in general and youth in particular. Many documents from the defendant's files revealed reports, conferences, discussion and memo's dealing with youth and gender marketing and strategies to deny such practices..

Over-all, the entire two year trial record was full of examples of deceit, denials contrary to research results, efforts to conceal or suppress information, collusion among defendants to insulate themselves collectively from public and the scientific and public health communities criticism of the industry, and either outright misrepresentation, or failure to acknowledge that which was proven and obvious.

As a result of years and years of such activity, the public was led astray and confused by the seeming conflict in the

evidence about the harmful effect of tobacco, and kept in ignorance about the addictive nature of nicotine, and suffered untold misery and harm, including death, from the diseases, i.e.: cancer, emphysema, heart and circulatory problems, etc, all resulting from the use of the product.

If one really examined the entire record in detail of the decades of abuses committed by the defendants upon an ill informed and unsuspecting public, one could say it was *that concerted behavior on the part of the Defendants, over so many years, affecting so many people, that “shocks the conscience of the Court”, not the award itself.*

*17 In Phase I of the trial, the jury, having heard the testimony concerning the behavior and conduct of the defendants, decided that punitive damages were indeed appropriate in this case, and in Phase IIA the jury set those punitive damages as outlined herein.

Therefore:

As to the first issue-*behavior of the defendants*-, this Court has no problem accepting the rational of the jury who heard

all the evidence, that the award is warranted because of the behavior of the defendants. In other words, the Conscience of the Court is *NOT SHOCKED* either by the fact that an award was made, nor by the *amount* of the award rendered by the jury considering the scope of the behavior of the defendants, and the number of people affected thereby.

ABILITY TO PAY

THE PLAINTIFFS POSITION

Dealing next with the issue of *ability to pay*, the testimony on the plaintiffs side came from two experts who testified about the “financial worth” of each of the defendants, utilizing certain criteria they felt were in compliance with generally accepted standards of persons who evaluate businesses. Although there was controversy about the method used to make the calculations, Mr. Cherner testified that based on a projected figure that one percent of market share was worth \$1.5 billion, then each defendants “worth” can be calculated by the percentage of market share attributable to that defendant. Those calculations resulted in the following: (estimated values).

	MARKET SHARE %	MARKET SHARE VALUE
Phillip Morris.....	49.3.....	73.95B
R.J.Reynolds.....	24.12.....	36.18B
Brown & Williamson.....	14.0.....	21.B
Lorillard.....	10.7.....	16.05B
Liggett.....	1.2.....	1.8B

In addition to the above, the plaintiffs experts opined that net worth is not an accurate measure of a company's value. Net worth is reflected in a balance sheet, sometimes called book value, but the true worth of a company is based on net worth(book value/ balance sheet), *plus* intangibles, which in this case includes good will and trademark. In that event, the resulting values as calculated by the testimony, are fairly close to the figures above: (Philip Morris . \$80B ~~Morris~~ . \$80B, RJR.. \$36B, B & W.. \$22B, Lorillard.. \$17B, and Liggett.. \$1.8B.).

JOSEPH CHERNER

Plaintiffs expert Mr.Cherner indicated that his calculations are based on the only available comparables in the industry- the purchase by Philip Morris of 3 Liggett brands, which he then used to extrapolate the value of the other defendant companies. He therefore opined that since this was a Philip Morris estimate of another tobacco companies brand worth, therefore it is a more accurate indication of true worth of a company.(\$300 M for .2% of 1% of market share, which makes each 1% of market share worth \$1.5 billion) see chart above..

Mr. Cherner, in his testimony made several points. He said, for example, that RJR net worth is not the true value of the company -it is only stockholders equity, and RJR's worth is \$37.5 B or 5 times what RJR reports on it's 10K. He

said according to the way Philip Morris determined value in the purchase of the Liggett brands, Philip Morris brands are valued at \$75 Billion, and RJR is worth \$37.5 billion, and he would use the same formula to value B & W and Lorillard, because Philip Morris would be in a better position to know better than anyone in the world what cigarette brands are worth. He also said that when Philip Morris valued its own brands at \$75B it is valuing its brands including the legal liability it faces from this day forward.

***18** Mr. Cherner also said that the defendants, in order to pay the \$250 billion MSA/FSA obligation, simply raised prices 4.5 cents a cigarette and generated \$21 billion, and if by raising prices there was a decrease in consumption by 10%, they would still raise \$19 billion per year forever.

In another opinion, Mr. Cherner testified that Lorillard's valuation of market share would most likely be identical, and if not very similar, to Philip Morris's valuation of market share to-wit, \$15-16 billion dollars, even taking into account adjustments for assets and liabilities.

He also said that although Lorillard does not have \$15 B in the bank, that does not mean by any stretch of the imagination, that Lorillard cannot take place in a punitive damage award that collectively would come to \$250 Or \$300 billion.

As for the M.S.A. § and the FSA, Mr. Cherner agrees that the \$250 billion is to be paid out over a period of years-however he also acknowledges that the defendants have been able to make payments of up to \$10 billion dollars or more, adjusted for inflation, per year since the institution of the "Agreements".

When asked by the defense about how much Philip Morris can pay in punitive damages, Mr. Cherner said since Philip Morris has 50% of the market share, it should pay 50% of the punitive damage award.

With reference to RJR, Mr. Cherner said there is a confusion about calling shareholder equity net worth. If assets were valued at market prices and the liabilities were valued at market prices, then shareholder equity may mean the same thing as net worth, however very often assets are not valued at market level-for example one may have a building valued on the books for one million dollars, that is presently worth \$100 million, but still the book shows a value of only one million. So most often, assets minus liabilities does not equal stockholders equity. Mr. Cherner also said that it is misleading

to the jury to say that RJR has a net worth of \$7 billion dollars. It implies that is the value of the company, but it is not. It is the stockholders equity figure and is not net worth.

In regard to Liggett, under cross examination, Mr. Cherner opined that with reference to the M.S.A. § and the FSA and the ability of the defendants to raise \$20 billion dollars a year in extra income by increasing prices,...", this amounts to a present value of between a \$200 billion and a \$400 billion dollar settlement. So if we're trying to value what \$20 billion dollars a year would be worth in a punitive damage award, it would be worth a *present* value of an award of anywhere between \$200 billion and \$400 billion dollars. That's what a punitive damage would be worth under that scenario. He also said he was aware that Liggett has paid zero or a negligible amount under the MSA.

Concerning Brown and Williamson, Mr. Cherner said B & W was the only one of the defendants that was not doing well after the MSA-losing some market share from about 14% to around 11.6% currently. B & W operating income has also declined but still shows a net income of \$215 million.. He also was unaware that B & W has received a negative one billion rating from organization such as Smith Barney or Credit Suisse.

PROFESSOR GEORGE MUNDSTOCK

***19** The other plaintiffs expert, Professor Mundstock in essence echoed Mr. Cherner's views on whether financial statements reflect true value. He said there are three types of financial statements-an asset account, a liability account and an equity account. A balance sheet is just a snapshot in time and does not represent an appraisal or evaluation. Intangibles go into determining overall value-this is called intangible value - such as trademarks. Most of the time intangibles are not listed in the books. Generally speaking book value therefore, does not necessarily reflect market value.

He also said there is such a concept as market capitalization-the value of what a company thinks its stock is worth, however, the stock market value of the company doesn't fully reflect their ability to pay.

The real value of a business to an owner, he said, is the value of the cash they can pull out of a business and still keep going, and then figure out at current interest rates, what that future cash is worth-that's called capitalized earnings approach or present value approach or discounted earning approach. Prof. Mundstock said he used this type of approach because he

did not have adequate comparables to work with. According to Prof. Mundstock, because there were no comparables he could work with, he took his best guess of what kinds of excess cash the business would throw off; figured out what someone be willing to pay for that cash today and said that must be what the business is worth. He said he made those calculations based on information provided during the trial and reviewed some tax returns.

As regards Philip Morris, Professor said the parent company Philip Morris Companies inc, has several subsidiaries, one is called Philip Morris USA, another is called Philip Morris International.. Philip Morris stock which is traded on the stock exchange is held by the parent Philip Morris Companies Inc. The problem is then, how to value Philip Morris USA? According to Prof. Mundstock, a good part of Philip Morris USA profitability is because it owns some famous trademarks such as Marlboro, and Marlboro is sold internationally, and advertising in the USA sells Marlboro Internationally, and vice-versa—a sort of synergy exists with the sister corporation Philip Morris International which affects the value of Philip Morris USA. In his mind, Prof Mundstock said, to ignore the fact that Marlboro is a multi-national trademark in a related corporation is to ignore the tremendous value of Philip Morris' worldwide business and the tremendous value they have in the U.S. because Marlboro is an internationally promoted and marketed product.

Because it was almost impossible to separate out Philip Morris USA from the whole picture, Prof. Mundstock said he used the cash flow method and Philip Morris's numbers, not on the separate company, but using the numbers Philip Morris allocated to tobacco on their public statement, he evaluated their tobacco business and came up with the figure of \$118.5 billion dollars for the tobacco business of Philip Morris Companies Inc. He said he, kept in mind the ability of the parent corporation's to generate future excess cash flow, and then he figured the present value.

***20** Referring to net sales of the defendant tobacco companies since the master settlement Agreement, Prof. Mundstock said the defendants sold between 435 billion and 475 billion cigarettes and raised the price by about 4.5 cents a cigarette. Therefore as far as net sales are concerned the figures show in 1999, Philip Morris net sales were up 28%-RJR net sales up 32.4%-B & W net sales up 19.4%-Lorillards market share increased 15%, and Liggetts operating income was up 41%. In the first part of 2000, both Philip Morris and

RJR was ahead of 1999. The reason he said, is that the price went up more than consumption went down.

Professor Mundstock, then explained the meaning of “leveraged buyout” saying a company can buy out another company using money borrowed from a bank or sometimes multiple sources based on the value of the purchased company.

In addition to the above, using a standard of Philip Morris's purchase of the three Liggett brands, Professor Mundstock calculated the market share of the defendant companies and assigned a monetary value to the companies and came up with figures closely matching those found by Mr. Cherner. Again, Prof. Mundstock said in order to determine the value of a company you must add the value of the intangibles to the “book” value to get a true value.

On cross examination, Prof. Mundstock said Philip Morris USA value of \$6.4 billion dollars on its financial statement is its “book net worth” or stockholders equity. He also said his evaluation of \$118.4 billion dollars is for Philip Morris USA and Philip Morris International combined (*the tobacco* business of Philip Morris), and represents what those businesses could be sold for today.

He also admits he has never been paid to evaluate a business, other than for tax purposes. He is not a CPA. or an economist, nor does he have a MBA.

Prof. Mundstock admits the defendants don't have on hand, the amount of money he valued the companies at, but he said, they could borrow the money, probably over a 6 month period, in the capital market.

As to how he reached the figure of \$118.4 billion for Philip Morris tobacco business, Prof. Mundstock said he based it on present value of future excess cash, and that is based on the condition of the company in 1999 being fairly stable for the future years. He also said the cost of future litigation would directly impact future excess cash, as would sales and regulations. In making his calculations he did not take into consideration the size of the Engle class, nor the projected size of any compensatory award

Philip Morris's income statement shows for the year ending 1999, the net earnings, or profit reported was \$ 2.99 billion dollars—40 times less than the \$118.4 billion dollars figure

used earlier, but that \$118.4 billion is spread over 25 years, according to Prof. Mundstock.

Professor Mundstock when questioned about the two methods of evaluating business said he preferred the valuing of trademarks plus book value over valuing by trademark value alone (the Philip Morris–Liggett deal) -but he did both just as a check.

***21** As to Brown and Williamson, he does not agree with B & W figures showing that B & W is in poor financial condition-income was up 20% in 1999 from 1998 because they raised prices to meet the M.S.A. § obligation. He did admit that B & W market share was down by one or two percentage points, but also said there has not been any *negative* analysts reports since the FSA for B & W. In fact the analysts reports since the FSA have predicted a 2 or 3 % growth in the industry adjusted for inflation-this would offset any loss of 2–3 percentage points in the last year. Decreasing profits would portend trouble unless you are measuring profits using financial accounting numbers.. Professor Mundstock said he realizes that dealing with competition in either premium brands or generic could affect the ability to raise prices and therefore market share would suffer-but he also said he would rather have 1% of a very profitable market, than 100% of market share for a product that doesn't sell. He also said his previous calculation of B & W's worth at \$9.9 billion dollars was wrong and it is actually \$22 billion.

Considering Lorillard, Prof. Mundstock points out that Lorillard on their financial statements shows the obligations to the M.S.A. § as they are due, which is proper-but they also show the companies other obligations, even though they are not due.

It is important to note here that when questioned on cross examination, Professor Mundstock said using the method he feels more comfortable with, book value plus intangibles, the value of Lorillard would be about \$12.5 billion rather than the 16 billion using the market share method of Mr. Cherner. He also agreed that according to Lorillards figures their shareholder equity is around \$921 million. In order to raise \$12.5 they would have to sell off an interest in the equity of the assets since they don't own any stocks. His best guestimate is Lorillard could raise \$10 Billion (adjusting the \$12.5 Billion equity for commission and expenses) by borrowing against, or selling the equity interest. Professor

Mundstock also said that if it was structured as a *sale*, then Lorillard would be out of business.

Regarding RJR on cross examination, Professor Mundstock said, he previously testified that using the market share method, he would value RJR at \$36 billion dollars, but by using the method he prefers, the value would be \$19.6 Billion. The assets versus liability snapshot on the financial statement is not truly reflective of the company's financial picture. RJR sold off Japan tobacco and paid off billions in debt, but also bought back billions of their own stock without having to pay dividends. Currently, Prof. Mundstock agreed that after paying out all that money RJR no longer had a cushion and this was reflected in a current ratio of less than 1 which is a low ratio and means the company is not very liquid in the short term.

Professor Mundstock did say when questioned, that if RJR would be required to pay \$36 billion *today*, it would be out of business., or for that matter \$19.6 Billion.

***22** Regarding Liggett, Prof. Mundstock valued Liggett at \$1.8 billion but said under the more preferred method the value would be \$.9 billion. He also said that because Liggett has changed so much after the sale of three of its brands to Philip Morris, it was hard to figure what the future for Liggett will be. Although Liggetts books show cash or cash equivalent on hand to be less than \$3 million, and current assets to be about \$81 million, Prof. Mundstock opined that in an industry that generates the kind of cash flow that the tobacco industry can generate, low numbers of cash on hand are less telling indicators of a company liquidity. He also said that even if a parent company of Liggett has outstanding some senior priority notes, those notes don't pledge Liggetts assets, only the parents stock, which doesn't affect Liggetts ability to go to the financial market for a loan. He also notes that even if Liggetts market share is down from 2.5% in 1995 to 1.2% in 1999, and unit volume has decreased by 50% from 1995 to 1999 to 5.2 billion cigarettes sold, Liggetts *operating income is up 40%*

On Re-direct examination Professor Mundstock said that a company like Philip Morris which claims to have a net worth of \$6.4 billion, but can pay \$368 Billion in a proposed settlement agreement, can do so is for two reasons: one-the \$6.4 billion is not their true value, and two-because the payment are over time. These companies are cash cows, he said, and can throw off considerable cash flow over a period

of time. They pride themselves on their cash flow and ability to generate cash.

Plaintiff experts also offered an opinion regarding ability to pay, saying that if the tobacco companies originally offered the U.S. Government 367 Billion dollars in a settlement in 1997,(which was rejected), and then, in 1998 agreed to pay the Master Settlement Agreement 250 Billion, even if over a period of years, this is an indicator of, at the very least, a *present* ability to pay a considerable amount against a punitive damage award. It was noted that the defendant tobacco companies,under the M.S.A. § agreed to pay approximately 20 Billion dollars a year over the next 25 years or so, and in order to make those payments, the companies raised the price of cigarettes approximately \$1 a pack. Considering the defendants sell about 20 billion packs a year, this can amount to about 20 Billion dollars each year!!...most of the money, according to the testimony, therefore has come from the pocket of the consumer, and not from the pocket of the defendants.

THE DEFENDANTS POSITION

On the defense side of the case it is interesting to note that none of the defendants produce an “expert” witness. The Court would have welcomed and indeed, would have valued the opinions of a defendants financial expert, and/or corporate financial officer. This would have been a great help in resolving, not only for the Court, but also the Jury, the financial condition of the various defendants companies. However, the defendants relied instead, upon the testimony of the company C.E.O to discuss the company's financial position.

***23** The following is a summary of that testimony.

MICHAEL SZYMANCZYK (Philip Morris)

Michael Szymanczyk, C.E.O. of Philip Morris basically testified that Philip Morris could not pay \$127 Billion to the State on a settlement date in a single payment-that's why they had to raise prices to make the long term payment.. He claims that Philip Morris made \$41 billion in the last 25 years, but will have to pay the settlement \$93 billion in the next 25 years. According to him Philip Morris's net worth is \$6.4 billion and if they had to pay that amount in punitive damages, the company would be out of business. Mr. Szymanczyk said valuing Philip Morris at \$75 billion is wrong-it is more like \$3.75 Billion. If someone offered \$75 billion to buy Philip Morris, he would recommend the board of directors to accept

the deal. He also said that to properly value a company one has to consider potential litigation liabilities which in the case of Philip Morris is quite substantial, and that would offset potential earnings. Philip Morris, he said, tried but could not borrow any significant amount of money. He did admit the future outlook is good for the company. He further said current net worth of the company reflects the value of the Marlboro trademark because it reflects earning that come from that trademark.

NICK BROOKS (B & W)

Mr. Nick Brooks, C.E.O. of Brown and Williamson Tobacco Co, testified about B & W's financial condition and said the company's net worth was \$642 million, and has a market share of slightly under 12%. Lorillard has about 10%, RJR about 22 or 23%, and Philip Morris about 50 or 52% of market share. He also said that while B & W had a 12% market share, it only has 6% of the industry profit. Mr. Brooks said that B & W has been hurt more by the M.S.A. § and FSA than the other manufacturers. So far B & W has, according to Mr. Brooks, paid out \$2.1 Billion in payments under the settlements. In discussing B & W's financial condition since 1996, Mr. Brooks said they made a profit of \$295 million in 1996, \$10 million in 1997, registered a loss of \$482 million in 1998, and in 1999 realized a profit of \$216 million. In the last 4 years Mr. Brooks said the company made only 1cent per pack sold. Under the FSA, B & W lost 17cents a pack because of the way Florida calculates their rate of payment. Currently, according to Mr. Brooks, the economic picture shows a gradual decline for B & W in market share. As to industry profits, Mr. Brooks testified that B & W has 6%, Lorillard 14%,RJR 17% and Philip Morris 63%.

When asked by defense counsel whether B & W could continue to raise prices to pay for significant punitive damages, Mr. Brooks replied “clearly not”-that would accelerate the businesses decline. In fact he said the company had to lower prices to be competitive. On the issue of company valuation, Mr. Brooks said two entities, Morgan Stanley Dean Witter and Credit Suisse attempted to value the company and Morgan Stanley found a negative value of one billion dollars, and Credit Suisse found and even higher negative value. There also was a negative report from a Dutch firm ABN-Amro,which said B & W was declining because of competition and could face bankruptcy by the year 2012. On cross examination Mr. Brooks said the company is faced with “hundreds or thousands” of lawsuits but to date has not paid a dime to a single plaintiff.

*24 Mr. Brooks says the value of B & W today reflected on its net worth statement is \$894 million. He does say that there are other ways of determining the value of a company other than assets minus liabilities—for example a future cash flow method. According to Mr. Brooks, if B & W loses 1.5 to 2 points additional share points, the company would go “under water”.

Mr. Brooks also said that B & W has \$2.4 billion due from affiliates with current liabilities of \$1.9 billion. B & W also has a credit-borrowing arrangement with BATUS Holding company which owes B & W \$1.2 Billion coupled with \$678 Million owed to B & W from foreign affiliates.

B.A.T. (British American Tobacco Co.), according to Mr. Brooks made two capital contributions to B & W—one in 1994 to support the purchase by B & W of American Tobacco CO, (about \$1 billion) and another to allow B & W to enter the M.S.A. § (about \$459 million). That capital investment is not like a loan and doesn't have to be paid back, Brooks said, but B & W has to pay dividends on the funds. Mr. Brooks also said it was unlikely that B.A.T. would help finance a punitive damage claim-and said B & W has only \$25 million in cash

ANDREW SCHINDLER (RJR)

Mr. Schindler testified that over the last 16 years RJR has raised prices \$2.50–\$2.75 per thousand, but in 1998 the price increase was \$21 per thousand. He said RJR has shown a decline of 36% in volume from 1990 to 1999. For example he said the decline in volume from 1996 to 1999 was from 119 billion cigarettes to 96 billion.. He expects a further decline in 2000 of between 2% and 4%. As to market share, RJR had 26.9% in 1996—and so far in 2000, 23.5%. A share point represents about 4 billion cigarettes. Mr. Schindler said that there are no funds available to pay for the M.S.A. § or FSA obligations therefore RJR had to raise prices.

He said with reference to the balance sheet, RJR showed current assets at the end of last year or \$2.468 billion, and liabilities of \$3.068 billion, and cash on hand of \$600 million.. RJR, also lists good will at \$7.563 billion but claims they cannot sell off good will as a separate asset. Continuing to testify, Mr. Schindler said income from continuing operations last year totaled \$195 million-while net income showed \$2.3 billion reflecting a sale of the international operation. He went on to say that RJR has made cash payments to the M.S.A. § and FSA of \$768 million in 1998, \$1.6 billion in 1999, and estimates that for year 2000 the payment will be \$1.2 billion.

RJR also faces a substantial number of lawsuit with a potential large financial risk factor.

Concerning RJR stock, Mr. Shindler said the company bought back 6,370,656 shares of stock at a cost of 125 million when the stock was at \$15–\$16 a share. The stock was priced at about \$31 a share the previous June. Since RJR didn't have to pay the \$3.10 dividend they were able to save that cost and the stock to them was then worth \$15–\$16 a share.

*25 Regarding the M.S.A. § and other settlements, Mr. Shindler said RJR Is obligated to pay for the first 25 years, about \$63.5B depending upon the number of cigarettes they sell and the size of the industry. Under the FSA, the company is obligated to pay \$ 4.2B. Under cross examination by the plaintiff, Mr. Shindler admitted writing a letter to stockholders in which he painted a rosy picture of the company's future. In the letter he discussed how in 1999 RJR sold the international business for \$8 billion and substantially reduced the company debt to about \$2 billion, so that at the end of 1999, RJR had a debt of \$2 billion with cash and equity of \$1.2 billion and \$7.1 billion respectively. The letter also said the leverage ratio is low and the cash flow was strong, and the strong balance sheet and cash flow allowed RJR to pay out nearly half of cash net income as dividends and simultaneously allowed RJR to repurchase stock shares.

BENNET LEBOW (Liggett)

Mr. Lebow testified that he sold three brands to Philip Morris because he had to or go out of business. The \$300 million he received was used to pay off debts. According to Mr. Lebow, Liggett would not have paid \$300 million for the brands but Philip Morris would because they owned the international brands and had the structure to exploit the brands He said it was not appropriate to value Liggett based on the Philip Morris sale because Liggett deals mostly in discount brands not premium. Right now Liggett does not have a willing buyer because of the potential of all the litigation it faces.

Regarding the MSA, Mr. Lebow said Liggett is not paying because they don't have enough volume-however by that time Liggett had already agreed with 41 other states to pay 30% of its earnings. He said since Liggett sells discount brands it does not compete with the major premium brands. Liggett is in competition with 20 other discount brands who are not part of the settlements and do not have to pay such an obligation. Liggett has no obligation to the M.S.A. § unless its market share exceeds a base share of 125% of its 1997 market share or approximately 1.65% of the total cigarettes sold in the U.S.

Liggett is building a new plant which will produce 5.5 billion cigarettes a year which is financed by current sales.

With reference to financial worth. Mr. Lebow said GAAP accounting and fair market value will give you higher or lower numbers—a company can have a net capital deficiency of \$488 million, but be valued at \$100 million.

On cross examination by one other defendant, Mr. Lebow testified that at the time of the M.S.A. § Liggett raise prices part way even though they were not obligated to do so under the M.S.A. § criteria, and consequently Liggett made money unless its market share goes up above 1.67M. Mr. Lebow said Liggett is now doing well because of the fact that he could raise prices to go along with the other defendants and doesn't have to make M.S.A. § payment at Liggett's current level Liggett's stock today sells at \$17, up from \$5 in 1996. Liggett has 20 Million shares of stock. Mr. Lebow testified that when valuing a company, look at the multiple of earnings and cash flow. a reasonable multiple of earnings for a profitable company without significant liabilities is 5 to 5.5. earnings. A large foreseeable debt and a declining market can affect multiple earnings. Mr. Lebow conceded that Philip Morris has multiple earnings of less than zero according to the stock market—but he also said that he didn't think the M.S.A. § obligation for Philip Morris had any significance to the stock market. Mr. Lebow said that Philip Morris raised prices, and the money to pay the M.S.A. § is coming from the smokers and not out to Philip Morris's pocket. He also said that because of addiction, there not much of a limit on raising prices—maybe as much as \$4 to \$5.. According to Mr. Lebow, Philip Morris can easily raise prices to pay a punitive damage award—Liggett cannot..

MARTIN ORLOWSKY (Lorillard)

*26 According to Mr. Orlowsky Lorillard has 10% of the market, down .75% from the previous year. In fact in the last 15 yrs Lorillard's market share was between 7 and 10%, however sales are decreasing and Lorillard sales are down 6% from 1999. One reason is that competition is selling cheaper and Lorillard cannot lower prices because of the M.S.A. § obligation. In overall ranking with the other defendants. Mr. Orlowsky says Lorillard is # 4 out of 5 with 9 to 10% of the Florida market and Florida is 5% of Lorillard's sales. Mr. Orlowsky says financial reports are important because it tells the financial position of the company at a given point in time. It reflects assets minus liabilities to determine net worth. For the year 1999, Lorillard's balance sheet showed assets at

\$2,208.7 billion and liabilities of \$1,287.5 billion, resulting in a net worth of \$921,205 million.

Mr. Orlowsky further said that the company does not have the net worth money to pay out a debt, and to pay out the entire net worth, Lorillard would have to sell off all assets, pay all debts, and in essence, sell the business. Lorillard cannot borrow additional money—Mr. Orlowsky said he contacted a bank for a loan but was rejected. If any new obligations were imposed on the company, such as a large punitive damage award, Mr. Orlowsky said Lorillard would go out of business. He also said that the most accurate way to determine what a company can pay today is its net worth—not based on future income.

Mr. Orlowsky opined that what Philip Morris paid for three Liggett brands has nothing to do with the value of Lorillard and should not be used in valuing Lorillard. He said that in 1995 Lorillard offered Brown and Williamson \$35.9 million for a little over 1% of the market share for 3 or 4 B & W brands, and based on about \$36 million for 1% market share Lorillard would be worth \$360 million using Mr. Cherner's method. However that is only 1/3 of the net worth reflected on Lorillard's current balance sheet.

With reference to the MSA, Mr. Orlowsky said Lorillard's obligation for the first 25 years is \$25–\$30 billion. Annual payments are between \$1.3 and \$1.5 billion, and Lorillard has paid \$1.7 billion to date.

On another note, Mr. Orlowsky said Lorillard's total advertising budget in 1998 was \$43 million, but in 1999 it dropped to \$18 due to the MSA. This however resulted in a savings of \$25 million because of the billboard restrictions of the agreement and that money is now being used for magazine advertising. He also said that in 1999 Lorillard spent \$7.7 million to advertise cigarettes and \$8.4 million for youth prevention. He did say in a deposition however, that the company spent \$12 Million for youth prevention and \$250 million for advertising and promotion in 1999. Lumping advertising and promotion reveals that youth prevention is only 5%–6% of Lorillard's budget. According to Mr. Orlowsky, at the time of the settlements, if business stayed constant, Lorillard could afford the payments without going out of business. Lorillard knew they would have to raise prices to make the payments—in effect they mortgaged the business. The difference between the Government proposed settlement and the M.S.A. § was that under the Government proposal, punitive damages would be capped which would

have allowed the companies to stay in business with some degree of stability because it eliminated lawsuit liability even if it cost \$100 billion dollars more than the MSA.

*27 Mr. Orlowsky said that in 1999 Lorillard took in less than \$4 Billion in sales revenue which included \$600 million in Federal excise taxes-therefore revenue was not all profit. However if punitive damages exceed net worth, Lorillard will go out of business.

On examination, Mr. Orlowsky admitted that Lorillard has not yet had to pay any judgement in a lawsuit involving smoking and health. He also admitted that net income rose about 85% from 1998 to 1999 (\$352 million to \$652 Million) and revenue increased 41%.

In 1997 Lorillard paid dividends to Lowes (parent), of \$100 million, in 1998 \$450 million and in 1999 \$300 million. In 1999 Lorillard retained what was left in 1999 after paying Lowes \$300 as part of assets and used the money to buy \$759 million of marketable securities.

According to Mr. Orlowsky, Lorillards net worth is \$921 million.

SUMMARY

This then was a summary of the financial testimony of the C.E.O.'s of the various defendants. They also spent hours, and in some cases days, discussing how their individual company has changed attitudes and procedure and how each company has implemented anti-youth smoking programs costing millions of dollars. It should be noted, if not stated already, that despite the huge obligations the individual defendants have under the M.S.A. § and the FSA, those payments, amounting to 22 billion dollars or more, have been made by the defendants after raising the price of cigarettes sufficiently to generate such sums, and without having to make any outlay of monies from their own pockets. The consumer or smoking public has so far, because of the price increase, been the source of funds for those huge payments.

That means that despite the shift in market share or profit margins as a result of the price increase, the tobacco companies were in no worse financial shape than they were before the M.S.A. § or FSA for all intent and purposes.

One thing the C.E.O.'s. did say was that they no longer challenge the Surgeon General's, Public Health or Scientific Communities position on generic causation and the ill effects

of tobacco, and have now embarked, via the Internet, on a concentrated effort to educate the public about the good qualities of the industry and their individual company, and the dangers of youth smoking.

ISSUES

The question to be answered therefor, is whether the *amount* of the punitive damage award, considered in the light of the evidence of (1) the behavior of the defendants, and (2) the ability of the defendants to pay, is unreasonable.

As to the first issue-*behavior of the defendants*-, this Court has no problem accepting the rational of the jury who heard all the evidence, that the award is warranted because of the behavior of the defendants. In other words, the Conscience of the Court is *NOT SHOCKED* either by the fact that an award was made, nor by the *amount* of the award rendered by the jury considering the scope of the behavior of the defendants, and the number of people affected thereby.

*28 The second issue-*ability to pay*-, gives the Court far more difficulty in making a determination.

The testimony at trial on this issue ranged from the low end, the suggested punitive damage award figures by the various defendants, to the high end, the estimated total worth of the defendant companies which at least one plaintiffs expert said, could exceed 200 Billion dollars. Although the individual C.E.O.'s. testified that if an award, in the amount of, or exceeding the defendants estimated individual "net worth," was rendered by the jury, it would put them out of business, these comments were mere "naked statements" without any proof or evidence submitted that such a condition would result. It seems to this Court that not only does the defendant have the burden of proving it's net worth, it also has the burden to show, *with proof*, that it will go out of business if a punitive damage award reaches a certain level. It is not the burden of the plaintiffs to establish that the defendants have the financial

ability to pay a specific punitive damage award.  [*Denis Rety v. Arthur Green and Southern Commodity Corp.*, 546 So. 2nd 410 \(Fla. 3rd DCA 1989\)](#). A mere statement to the effect that in a C.E.O.'s opinion, a company will go out of business or be bankrupt, is not sufficient without more. Remember, the defendants, although they had listed several financial expert witnesses in their pre-trial documents, declined to call any of them, nor did they see fit to call any company financial officer or consultant. This record, therefore, is devoid of such proof. Conversely, the Plaintiffs experts did not present any proof

that if a punitive damage award was the same or close to the experts estimated total worth figures, the Defendants would *not* got out of business. However, as explained in the “Rety” case, this is not the Plaintiffs burden.

The Court is then left with a seemingly impossible task, trying to determine at what level a punitive damage award will put any of the defendants out of business. There are no figures which have been submitted as proof, that will aid the Court-only conjecture and supposition. It is easy for a C.E.O. to say that a company will go out of business if it has to pay a certain amount of money-but will it really go out of business.? Some of the testimony in this case was to the effect that in the world of high finance, there are many ways to leverage large loans or financial support to bail out a company in trouble and keep that company from going under. Plaintiffs experts explored that avenue, and even though some of the defendant C.E.O.'s testified that they tried to obtain loans from one or more banks or financial institutions and were unsuccessful, there was no proof of that submitted. The language of *Inter*

 *Union of Operating Engineers v. Lassiter*, 295 So.2d 634 (Fla 4th DCA 1974) rev'd on Other grounds 314 So 2nd 761 (Fla 1975) is some what helpful in this regard.

“... the term (financial resources) gives the trial judge a more *liberal standard* to determine whether a given proffer of evidence is relevant and material. For instance, there could well be, and properly so, proof as to income, cash flow, expenses, anticipated income, anticipated diminution of income, anticipated casualties...these items, among others of like moment, would be receivable in addition to net worth figures under the scope of *financial resources*. All of this material, including the reflection of net worth, goes to make up a defendants financial resources which the jury is entitled to consider in assessing punitive damages as commanded in Florida Standard Jury Instruction 6 .12”
“(emphasis added.)

*29 What really needs to be determined then is what is the meaning of “net worth”. Most commonly “net worth” is referred to as the difference between assets and liabilities, however this can be misleading because, as the evidence in this trial pointed out, a “net worth” statement or report is only a *snapshot of a moment in time* and not an indicator of true worth or value. If what the courts are really interested in is whether a particular defendant has the capability of paying a large punitive damage award, then it is more than reasonable to look to that defendants actual worth or value, and not a “snapshot in time”. The financial experts in this

case testified that in valuing a company one must take into consideration many things other than “net worth”. The financial resources of a company then is the best indicator of the condition of a company in determining its true value or worth. There was ample testimony in this case of the “financial resources” available to these companies to enable the experts to reach opinions as to each defendants actual worth,; ergo; a defendants ability to pay beyond a bare recitation of currant net worth!.

The experts testified, for example, that although Philip Morris declared a net worth of only \$6.4 Billion dollars, the companies true value or worth was in the neighborhood of \$75 Billion dollars when the company's “financial resources” were taken into consideration. There is obviously a huge gap between the two figures which then confuses the issue of when a company such as Philip Morris will have to go into bankruptcy in order to pay a punitive damage award.

It should be noted here that this Court is mindful of the line of cases that involve the issue of whether punitive damages that will result in bankruptcy or putting a defendant out of business, should be allowed,  *Arab Termite \$ Pest Control v. Jenkins* 409 So. 2nd 1039 (Fla_1982), *Brooks v. Rios* 707 So 2nd 374 (Fla 3rd DCA 1998) and *Hockensmith v. Waxler*, 524 So 2nd 714 (Fla 2nd DCA 1988), to name a few, However, none of these cases involve the kind of situation we find ourselves facing in this class action lawsuit. In those cases there was either *unrebutted* evidence of net worth, or the *lack* of evidence of net worth. What we have in the instant case, is a *conflict* in the evidence of net worth and actual worth. That is to say, a conflict in what a company claims its net worth is, and what an opposing expert says the company's net worth really is. Without a clear delineation or resolution of that conflict, it is hardly possible to determine the fine line of bankruptcy or “going out of business” without indulging in the purest of speculation.

The jury heard all of this evidence-they were exposed to the same testimonial conflicts about whether a company will go “bankrupt” or “go out of business” as the Court heard. In fact the jury was informed of their duty, in deciding this case, that they must award an amount of money without financially destroying or bankrupting the defendant. (see *Jury Instructions Phase IIB* page 10.). Was the jury in any less or better a position to make that determination than the Court, given the testimony and evidence presented?. The law, as we know, dictates that the Court shall not allow a verdict that will financially destroy or bankrupt a defendant. In this case who

is to say what will or will not bankrupt a defendant or put them out of business?-the evidence certainly is not dispositive of that issue-therefore that decision will have to be made on speculation and conjecture in this particular case since there is no definable threshold available.

***30** If one takes the defendants position that the threshold on this issue is the “current net worth”, then by implication, the Court must reject the testimony of the experts, accept at face value the position of the defendants, and disregard all testimony to the contrary. If that be the case, then there was no need for the Plaintiffs expert witnesses to testify that they disagree with the defendants figures. Under that scenario, the Court would disregard the Plaintiffs experts testimony that the *true* “current net worth” must include *financial resources*, and accept the defendants position at face value. This would be not only unfair, but also erroneous. This is one step this Court declines to take. There was, in this Courts opinion, insufficient evidence presented at trial, to determine that one or more of the defendants will go out of business or into bankruptcy just because they say they will. That's almost akin to asking a defendant who has just been convicted of a crime, how much of a sentence he feels he would like to serve without it having an adverse effect on him.

The Jury heard all of the testimony and saw all the evidence from both sides, and more important, the Jury heard the arguments of counsel at the close of the case before they rendered their verdict. If the jury heard what the Court heard, and there is insufficient evidence to establish that one or more defendant will go out of business or go into bankruptcy, and if the Jury would have to speculate on that threshold issue, just as the Court would have to speculate, then in the absence of sufficient proof, how can, or even why should the Court overrule the Jury verdict and grant a remittitur?

There is also the issue of what punitive damages is all about. Succinctly, punitive damages should punish a defendant and act as a deterrent to future behavior. Punishment in this context means to cause some “hurt” to the defendant (in this case monetary hurt), that will send him or it a message. If a monetary sanction was imposed that caused no “hurt” then the purpose of the punitive award is negated. Continuing with this thought, and harking back to what has been said about the way the defendants have financed their obligations under the M.S.A. § and the FSA, if a punitive damage award was imposed upon the defendants that they could satisfy by simply raising the price of their products, then what has been accomplished in this case

This Court is not of the opinion that just because we are talking about vast sums of money, that there automatically has to be a remittitur. This Court after very careful consideration, in good conscience really could not set a figure, or a level, at which a remittitur could be set without indulging in the sheerest of speculation. To do so would be nothing more than engaging in an arbitrary exercise, given the state of the evidence or lack thereof.. To remit to the level that the defendants have espoused (their net worth statement) would be wrong as explained above. The Court feels it best to consider the level found by the jury who, as the court has said many times herein, heard the same testimony and evidence as the Court.

***31** It should be noted here that this Court has carefully considered the criteria dictated in [F.S.A. Sec 768.74\(5\)](#) and has determined that:

1. This jury after sitting for two solid years in trial, did not evince any prejudice, passion or corruption in rendering its verdict. The jury had to render three separate verdicts in this cause-each one was derived after an enormous amount of evidence was presented, and in this Courts opinion, each verdict comported with the evidence adduced at trial.
2. Again, after sitting for two solid years in trial, it is inconceivable that this jury ignored or misconceived the evidence or the merits of the case. The Court observed the jury taking careful notes during the trial—in fact filling several notepads in most cases, and being attentive throughout.
3. In reaching its verdict in this case, the jury was exposed to a great deal of testimony regarding the activities, and the financial condition of the various defendants. The evidence of financial condition was discussed by two Plaintiffs experts, and at least five C.E.O.'s of the defendant companies. It was highly complex, but did cover a range of amounts and economic theories from which the jury could make a decision.
4. This was a class action case, in which the issue of punitive damages was determined in the aggregate for the entire class which, the evidence indicated, could be as high as several hundred thousand people. Although the compensatory damage claim was tried for only three class representatives, the awards amounted to approximately 12.7 million dollars. Extrapolating that figure to the overall size of the class results in an extraordinarily high figure, therefore, one can say there is a reasonable relationship to damages proved and the

injuries suffered, but more important, the award is in keeping with the degree of the wrongful conduct without sending the defendant into bankruptcy.

5. In the Courts opinion, the amount of the jury verdict is within the parameters of the evidence at trial-within the limits of the highs and the lows, albeit on the high side, but when the enormity of the facts and issues of this case are considered, the award cannot be said to be unreasonable.

Therefore; Defendant's Motion for Remittitur or New Trial, is *DENIED*.

WHEREFORE, IT IS ORDERED AND ADJUDGED as follows:

1. Class Representative Mary Farnan shall recover from Defendants Philip Morris Incorporated, R.J. Reynolds Tobacco Company, Brown & Williamson Tobacco Corporation, individually and as successor by merger to the American Tobacco Company, Lorillard Tobacco Company/Lorillard, Inc., Liggett Group, Inc. and Brooke Group Holding, Inc., jointly and severally, the sum of \$2,850,000 that shall bear interest at the rate of 10% a year, for which let execution issue.

2. Class Representative Frank Amodeo shall recover from Defendants Philip Morris Incorporated, R.J. Reynolds Tobacco Company, Brown & Williamson Tobacco Corporation, individually and as successor by merger to the American Tobacco Company, Lorillard Tobacco Company/Lorillard, Inc., Liggett Group, Inc. and Brooke Group Holding, Inc., jointly and severally, the sum of \$5,831,000 that shall bear interest at the rate of 10% a year, for which let execution issue.

***32** 3. Class Representative Ralph Della Vecchia, as surviving spouse of Angie Della Vecchia, deceased, shall recover from Defendants Philip Morris Incorporated, R.J. Reynolds Tobacco Company, Brown & Williamson Tobacco Corporation, individually and as successor by merger to the American Tobacco Company, Lorillard Tobacco Company/Lorillard, Inc., Liggett Group, Inc. and Brooke Group Holding, Inc., jointly and severally, the sum of \$1,500,000 that shall bear interest at the rate of 10% a year, for which let execution issue.

4. James Della Vecchia, as surviving minor son of Angie Della Vecchia, deceased, shall recover from Defendants

Philip Morris Incorporated, R.J. Reynolds Tobacco Company, Brown & Williamson Tobacco Corporation, individually and as successor by merger to the American Tobacco Company, Lorillard Tobacco Company/Lorillard, Inc., Liggett Group, Inc. and Brooke Group Holding, Inc., jointly and severally, the sum of \$2,000,000 that shall bear interest at the rate of 10% a year, for which let execution issue.

5. The Estate of Angie Della Vecchia shall recover from Defendants Philip Morris Incorporated, R.J. Reynolds Tobacco Company, Brown & Williamson Tobacco Corporation, individually and as successor by merger to the American Tobacco Company, Lorillard Tobacco Company/Lorillard, Inc., Liggett Group, Inc. and Brooke Group Holding, Inc., jointly and severally, the sum of \$523,000 that shall bear interest at the rate of 10% a year, for which let execution issue.

6. The Florida Class shall recover from Defendant Philip Morris, Incorporated the sum of \$73,960,000,000 that shall bear interest at the rate of 10% a year, for which let execution issue.

7. The Florida Class shall recover from Defendant R.J. Reynolds Tobacco Company the sum of \$36,280,000,000 that shall bear interest at the rate of 10% a year, for which let execution issue.

8. The Florida Class shall recover from Defendant Brown & Williamson Tobacco Corporation, individually and as successor by merger to the American Tobacco Company, the sum of \$17,590,000,000 that shall bear interest at the rate of 10% a year, for which let execution issue.

9. The Florida Class shall recover from Defendant Lorillard Tobacco Company/Lorillard, Inc., the sum of \$16,250,000,000 that shall bear interest at the rate of 10% a year, for which let execution issue.

10. The Florida Class shall recover from Defendant Liggett Group, Inc./Brooke Group Holding, Inc., the sum of \$790,000,000 that shall bear interest at the rate of 10% a year, for which let execution issue.

11. The Florida Class shall recover from Defendant Council for Tobacco Research, the sum of \$1,195,210 that shall bear interest at the rate of 10% a year, for which let execution issue.

12. The Florida Class shall recover from Defendant Tobacco Institute, the sum of \$278,339 that shall bear interest at the rate of 10% a year, for which let execution issue.

In addition thereto pursuant to the Jury Verdict on Punitive Damages, the Court awards the following.

Philip Morris, Incorporate.....	\$ 73,960,000,000
RJ Reynolds Tobacco Company.....	\$ 36,280,000,000
Brown & Williamson Tobacco Corporation, individually and as successor by merger to the American Tobacco Company.....	\$ 17,590,000,000
Lorillard Tobacco Company/Lorillard, Inc.....	\$ 16,250,000,000
Liggett Group Inc./Brooke Group Holding, Inc.....	\$ 790,000,000
Council For Tobacco Research.....	\$ 1,105,210
Tobacco Institute.....	\$ 278,339

*33 That shall bear interest at the rate of 10% a year.

further proceedings pursuant to the Mandate of the Third District Court of Appeal of Florida.

FOR WHICH LET EXECUTION ISSUE.

True copies of the written Verdicts in Phases I, II and II-B are attached hereto.

AMENDED ORDER DENYING MOTION
TO INTERVENE OF THE SOUTHEASTERN
IRON WORKERS HEALTH CARE PLAN

All sums payable to the Florida Class shall be paid to the Registry of the Dade County Circuit Court and will be maintained for the benefit of the Florida Class.

This cause, having come before the Court on Intervener, The Southeastern Iron Workers Health Care Plan's Motion to Intervene filed July 14, 2000, and the Court having considered the Motion to Intervene, and being otherwise fully advised in the premises, it is

This Court reserves jurisdiction to award attorneys fees to Class Counsel, Stanley and Susan Rosenblatt and to award costs.

ORDERED AND ADJUDGED as follows:

This Court further reserves jurisdiction to enforce the terms of this Final Judgment Nunc Pro Tunc, to supervise the maintenance and disposition of the punitive damage fund to class members and to enter any further Orders and conduct

1. The Motion to Intervene and the proposed Complaint in Intervention are legally deficient in that there is no identification of any members or beneficiaries of the Intervener who are class members. The claims in intervention

are speculative and remote and depend upon future events that may or may not occur.

2. Intervention is untimely where based upon future potential compensatory damage claims of unnamed class members. The Intervener will have ample opportunity to protect its subrogation and reimbursement rights, including intervention, if and when any beneficiaries of the Intervener, who are class members, proceed with compensatory damage claims.

3. The Intervener does not have a “direct and immediate” interest in this litigation as required by the Florida Supreme Court in  *Union Cent. Life, Co. v. Carlisle*, 593 So2d 505,

507 (Fla.1992); an indirect or contingent future interest is inadequate.  *Faircloth v. Mr. Boston Distiller Corp*, 245 So2d 240, 244 (Fla.1970), overruled on other grounds, 523 So2d 156, 158 (Fla.1988).

4. Intervention is unnecessary where the Intervener's interest is adequately represented by the Plaintiff Class.

5. The Motion to Intervene of the Southeastern Iron Workers Health Care Plan, be and the same is hereby Denied.

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Not Reported in So.2d, 2000 WL 33534572

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2001 WL 34136737 (Fla.App. 3 Dist.) (Appellate Brief)
District Court of Appeal of Florida, Third District.

LIGGETT GROUP INCORPORATED; Brooke Group Limited; Philip Morris Incorporated;
Council for Tobacco Research-USA, Incorporated; Tobacco Institute, Incorporated; Lorillard
Tobacco Company; Lorillard, Incorporated; Brown & Williamson Tobacco Corporation;
American Tobacco Company; and R.J. Reynolds Tobacco Company, Defendants-Appellants,

v.

Howard A. ENGLE, M.D., et al., Plaintiffs-Appellees.

No. 3D00-3400.

Consolidated: 3D00-3206, 3D00-3207, 3D00-3208, 3D00-3210, 3D00-3212, 3D00-3215
Lower Tribunal Case No. 94-08273 CA 22.
November 26, 2001.

On Appeal From The Circuit Court For The Eleventh Judicial Circuit In And For Miami-Dade County, Florida

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to order copies of documents related to this or other matters.

Additional charges apply

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36528-29.) He told the jurors that the courthouse in which they sat once had “Whites Only” drinking fountains. (T. 36490.) And he compared defendants to defenders of slavery and the Holocaust. (T. 36348.)

Defendants made repeated requests for a mistrial based on these and other statements. (T. 36525-33, 37484-86, 37525-30.) Outside the jury's presence, the court warned plaintiffs' counsel that he was proceeding “at [his] own peril” and he should consider the effect his statements “may have on any appellate court.” (T. 36533.) The court told plaintiffs' counsel: “[What] you shouldn't do in front of the jury is pander. . . . Shouldn't pander [to] the jury.” (T. 36547.) Nevertheless, the court refused to grant a mistrial because of the length of the trial proceedings that had already occurred:

We've been here 10, 11 months. In this one final argument day, which is the first day, there has been at least two, maybe even three motions for mistrials.

It just seems to me that it would be foolish to put ourselves in that position because of whatever reason, whatever behavior, whatever was said, to lose this opportunity to get this case resolved.

It's an unusual case. . . . And to throw it away at the last minute, after 10, 11 months, because of some comment made or something that's unforeseen that happens during closing argument, to me, *is ludicrous.*

And I'm concerned. I really am. I don't think any of us really want it, even though motions have been made. I don't think we really want that to happen. (T. 36538, emphasis added.)

3. Phase I Jury Instructions

Defendants repeatedly asked the court to require plaintiffs to plead and prove their fraud and other claims with specificity. Defendants made such requests in pretrial motions, throughout the Phase I trial, during arguments for a directed verdict, and during arguments concerning the Phase I verdict form. (T. 6536-6539, 23174-90, 26703-22, 27447-61, 36298-301; R. 214: 49258-72, 49296-322.) Defendants requested that the Phase I verdict form include specific findings of fact that would be applicable in future phases of the trial and permit the necessary review after trial. (E.g., T. 35915-16, 35952-54.) Defendants argued that specific findings were required, for example, because plaintiffs had introduced numerous statements by various defendants at various times over the course of nearly half a century. (E.g., T. 23174-90.) Defense counsel pointed out to the court:

If you merely ask this jury whether the defendants made a misstatement of a material fact, and they are not required to identify what it is, when you go into the Phase II and Phase III trials of the individual smokers' claims, that finding will have no meaning. So we believe that, for it to have meaning going forward, it needs specificity. (T. 35953-54; see also R. 210: 48499-563.)

Plaintiffs opposed specificity. (T. 35891-93, 35952-53; R. 215: 49429-36.) The court denied defendants' requests and adopted a generalized verdict form. (R. 304: 69449-60, A. 1: 12.)

With respect to plaintiffs' fraud claims, the court also refused defendants' request that it give Florida's Standard Jury Instruction on the issue of “materiality.” (T. 37571-73.) The court gave no explanation for its refusal.

4. The Phase I Verdict

On July 7, 1999, the jury rendered its Phase I verdict. (R. 304: 69449-60, A. 1: 12.) The jury found that smoking causes several types of [cancer](#), [heart disease](#), and other ailments but does not cause [asthmatic bronchitis](#), infertility, or BAC ([bronchioloalveolar carcinoma](#), a form of [lung cancer](#)). (R. 304: 69449-50, A. 1: 12.) The jury found that cigarettes that contain nicotine are “addictive or dependence producing.” (R. 304: 69450, A. 1: 12.) The jury also made generalized findings concerning some elements of plaintiffs' legal theories. (R. 304: 69450-59, A. 1: 12.) The jury did not specify the factual basis for its findings, did not connect its findings to any particular class member, and did not decide all elements of liability with regard to any claim. For example, the jury found that defendants had made “a false statement of a material fact,” but it did not identify any statement(s) and did not find that anyone had relied on the statement(s). (R. 304: 69452-53, A. 1: 12.) Finally, the jury found that each defendant had engaged in conduct that “rose to a level that would permit a potential award or entitlement to punitive damages,” but it did not identify the conduct, and it did not identify anyone who was potentially “entitled” to punitive damages. (R. 304: 69460, A. 1: 12.)

Defendants filed post-verdict motions asserting numerous prejudicial errors during Phase I. (R. 219: 50063-375.). The court summarily denied the motions. (R. 221: 50687.)

D. The Phase II-A Trial

1. Revision of the Trial Plan for Phase II

In August 1999, between the Phase I verdict and the beginning of Phase II-A, the trial court revised the trial plan with respect to Phase II. First, the court relieved plaintiffs of the necessity to begin Phase II by trying the individual claims of Howard Engle and the other original named plaintiffs. Instead, the court allowed plaintiffs to begin Phase II by trying the individual claims of three other persons, selected by plaintiffs' counsel, who were added as named plaintiffs long after the case was filed -- Frank Amodeo, Angie Della Vecchia, and Mary Farnan. (R. 221: 50690-94, A. 1: 13; T. 38096-105.)

Second, as already noted (Section B.2 above), the court abandoned its original “basis or ratio” method for assessing punitive damages. Plaintiffs had urged the court to abandon that method and adopt a classwide, lump-sum procedure because, among other reasons, the latter procedure would exert greater pressure on defendants to settle the case immediately. (R. 215: 49443.) The court granted plaintiffs' request. The court acknowledged that, under its new procedure, the amount of the punitive lump-sum award would remain fixed even if only a few class members proved to be “qualified” at the end of Phase III, and in that event class members who shared in the award would receive “a very significant and unanticipated windfall.” (R. 221: 50692, A. 1: 13.)

When the trial court announced this fundamental change in its procedure for assessing punitive damages, defendants moved to enforce this Court's 1996 mandate, which required that “the issue of damages” be “tried as to each class member.”  [Engle, 672 So. 2d at 41](#). This Court granted defendants' motion for enforcement, ordering the trial court to abandon its new plan and adopt an individualized approach to punitive damages. (Order, Sept. 3, 1999, A. 1: 15.) Two weeks later, this Court vacated its order *sua sponte*. (Order, Sept. 17, 1999, A. 1: 16.) After oral argument, this Court denied defendants' motion for enforcement without prejudice, specifically preserving defendants' right to raise the same issue in an “appropriate subsequent appeal.” (Order, Oct. 20, 1999, A. 1: 17.)

2. The Phase II-A Evidence

The Phase II-A trial began on November 1, 1999. The jury returned its verdict five months later, on April 7, 2000. (T. 38691, 50372; R. 304: 69461-78, A. 1: 20.)

Each of the three named plaintiffs presented extensive testimony concerning his or her individual claims: 18 witnesses for Frank Amodeo, 16 witnesses for Angie Della Vecchia, 15 witnesses for Mary Farnan. The testimony and other evidence focused on each individual's smoking and medical history; each individual's awareness of the health risks of smoking; each individual's exposure to and alleged reliance on statements made by defendants; each individual's ability to quit smoking; each individual's

Similarly, here the trial court's "extrapolation" creates an irrebuttable presumption that 700,000 or more unidentified individuals suffered injuries comparable to those suffered by the three Phase II-A plaintiffs. The presumption is irrebuttable because the \$145 billion award will remain fixed, even if Phase III shows that the vast majority of class members did *not* suffer such injuries. This irrebuttable presumption violates the law applied in *Associated Industries*.

3. The Trial Plan Deprived Defendants Of Their Right To Have Punitive Damages Determined Separately For Each Class Member

As a separate matter, the trial plan violated Florida law by denying defendants' right to have the jury decide, on an individualized basis, whether and to what extent particular class members should receive punitive damages. This Court's 1996 mandate specifically recognized that "the issue of damages" in this case must "be tried as to each class member."  [Engle, 672 So. 2d at 41](#). This Court's ruling made no distinction between compensatory and punitive damages.

The trial plan improperly deprived the jury of the ability to decide punitive damages "as to each class member." Where claims are individualized, the jury must be able to award or withhold punitive damages through an individualized exercise of discretion. Under settled Florida law, "awarding punitive damages along with compensatory damages [is] discretionary, even if the elements authorizing punitive damages [are] present."  [Bankers Multiple Line Insurance, 464 So. 2d at 532](#); see also  [Owens-Corning Fiberglas Corp. v. Ballard, 749 So. 2d 483, 486-87 \(Fla. 1999\)](#);  [Wackenhut Corp. v. Canty, 359 So. 2d 430, 436 \(Fla. 1978\)](#);  [Humana Health Insurance Co. v. Chipps, 2001 WL 1093051 \(Fla. 4th DCA Sept. 19, 2001\)](#); 1 J. Kircher & C. Wiseman, *Punitive Damages: Law & Practice* § 5: 23, at 5-152 (2d ed. 2000) ("the jury, in its discretion, may withhold [punitive] damages in the face of overwhelming proof of the requisite egregious conduct on the part of the defendant").

The jury's exercise of individualized discretion is necessary in this case because key elements of each class member's claims are individualized. The jury must make particularized determinations as to whether, and how, punishable conduct affected each claimant. One class member's circumstances cannot serve as a proxy for another's. See, e.g.,  [Smith v. Texaco, 263 F.3d at 410](#) (where class members' injuries are not uniform, "an individualized inquiry is necessary" to determine punitive damages);  [In re Copley Pharmaceutical, Inc., 161 F.R.D. 456, 467 \(D. Wyo. 1995\)](#) (rejecting proposal to try punitive liability as a classwide issue because "punitive damages are measured, in part, by how outrageous such punitive conduct is *relative to a particular plaintiff*") (emphasis added); see also  [Reap v. Continental Casualty Co., 199 F.R.D. 536, 549 \(D.N.J. 2001\)](#) (denying class certification because "calculating compensatory and punitive damages . . . would prove to be quite an individualized task"); [Adams v. Henderson, 197 F.R.D. 162, 172 \(D. Md. 2000\)](#) (denying class certification due to, among other things, "the individualized damages inquiries that inevitably accompany a claim for compensatory and punitive damages"). (See also Point VI below.)

B. The Generalized Phase I Findings Violated Defendants' Jury Trial And Due Process Rights

The Phase I jury findings are legally useless and cannot be properly applied to the Phase III trials that must follow for all other class members. Because the Phase I findings lack necessary specificity, defendants face endless "re-examination" of those findings by new juries in Phase III. The resulting risk of inconsistent verdicts violates defendants' rights to a jury trial and due process.

Under the trial plan, new juries in Phase III must apply the Phase I jury's findings to determine the liability and compensatory-damage claims of hundreds of thousands of class members. By requiring only generalized Phase I findings, the court left Phase III juries unable to determine whether the conduct found to be wrongful in Phase I was the legal cause of any Phase III claimant's injury.

In Phase I, plaintiffs presented evidence of alleged misconduct by various companies at different times over nearly half a century. Defendants requested that the Phase I verdict form require specification of any conduct the jury might deem improper. (R. 210: 48512-18; R. 215: 49495-98; T. 35915-16, 35952-54, 35967-71, 36298-300.) The court denied defendants' requests and instead adopted a generalized verdict form that made it impossible to determine the basis for the jury's verdict. (R. 304: 69449-60, A. 1: 12.)

For example, during Phase I plaintiffs placed in the record hundreds of documents, asserting generally that they evidenced fraudulent misstatements or omissions. (E.g., T. 11707-11, 11746-48, 11751-54, 11763-67, 11823-24, 11831-35, 14514-24, 14534-38, 14590-94, 19656-72, 19685-86, 19718-20, 19746-50, 24010-11, 24017-18, 24133-35, 24139-42, 36175-76.) The Phase I verdict form, however, merely asked whether each defendant “ma[d]e a false statement of a material fact”; it did not ask what that statement was or to whom it was made. (R. 304: 69452-53, A. 1: 12.) Thus, the jury may have found that only a few of the statements presented in Phase I were fraudulent and all of the others were proper. Nevertheless, Phase III juries will be free to decide that any of the *other* statements were fraudulent and impose liability on that basis. The possibilities of jury re-examination and inconsistent verdicts are endless.

The verdict form asked a similarly generalized question with respect to “fraudulent concealment.”¹¹ Furthermore, under the heading “Entitlement to Punitive Damages,” the verdict form merely asked whether defendants' conduct “rose to a level that would permit a potential award or entitlement to punitive damages.” Again, the jury was never asked to specify what that conduct was -- either in Phase I or in Phase II. (R. 304: 69460, A. 1: 12; R. 266: 59327; R. 304: 69461-78, A. 1: 20; R. 285: 64337-38; R. 286: 64605; R. 304: 69479-80, A. 1: 21.)

The right to a jury trial under the Florida Constitution (Art. I, § 22) “is not to be narrowly construed.”  *In re Forfeiture of 1978 Chevrolet Van*, 493 So. 2d 433, 435 (Fla. 1986). Florida's right is as broad as the right guaranteed by the Seventh Amendment of the U.S. Constitution. *See id.* (“federal decisions construing [the Seventh Amendment] are helpful and persuasive in construing this state's constitutional provision of like import”); *see also*  *Department of Revenue v. Printing House*, 644 So. 2d 498, 500 (Fla. 1994) (construing Florida's jury trial right by reference to the Seventh Amendment). Under the Seventh Amendment, issues decided by one jury cannot be re-examined by other juries. *See*  *Gasoline Products Co. v. Champlin Refining Co.*, 283 U.S. 494, 500 (1931);  *Castano v. American Tobacco Co.*, 84 F.3d 734, 750-51 (5th Cir. 1996);  *In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293, 1302-03 (7th Cir. 1995);  *Smith v. Brown & Williamson*, 174 F.R.D. at 96 & n. 7.

This rule is inherent in the guarantee of a trial by jury. It avoids the re-examination of issues by multiple juries, which impermissibly exposes defendants to the risks of jury confusion and inconsistent verdicts. *See*  *Alabama v. Blue Bird Body Co.*, 573 F.2d 309, 318 (5th Cir. 1978); *cf.*  *Rowlands v. Signal Construction Co.*, 549 So. 2d 1380, 1383 (Fla. 1989) (some issues are so intertwined that they have to be tried together); *Casper v. Melville Corp.*, 656 So. 2d 1354, 1356 (Fla. 4th DCA 1995);  *Lindenfield v. Dorazio*, 606 So. 2d 1255, 1258 (Fla. 4th DCA 1992); *Diamond v. Whaley, Chapman & Hannah, M.D.'s, P.A.*, 550 So. 2d 54, 55 (Fla. 2d DCA 1989) (where a “risk of inconsistent verdicts is a legitimate concern,” use of a verdict form with “special interrogatories” is appropriate).

By exposing defendants to jury confusion and inconsistent verdicts, jury re-examination also violates state and federal due process. *See*  *Gasoline Products*, 283 U.S. at 500 (where two issues are “so interwoven” that one “cannot be submitted to the jury independently of the [other] without confusion and uncertainty,” trying the issues separately “would amount to a denial of a fair trial”);  *Malcolm v. National Gypsum Co.*, 995 F.2d 346, 352 (2d Cir. 1993) (trying cases in a way that is “likely to lead to jury confusion” is a denial of fundamental fairness); *Flintkote Co. v. Allis-Chalmers Corp.*, 73 F.R.D. 463, 464-65 (S.D.N.Y. 1977) (in devising trial procedures, “considerations of convenience and economy must yield to the interests of justice

in a fair and impartial trial”);  *Kritzman v. State*, 520 So. 2d 568, 569-70 (Fla. 1988) (“due process requires that a defendant be given a fair trial in the substantive sense”); *State v. Davis*, 720 So. 2d 220, 227 (Fla. 1998) (a defendant's right to a fair trial is protected by “federal and Florida” due process).

The impropriety of a generalized verdict in a multi-phase proceeding is aptly illustrated in  *Blyden v. Mancusi*, 186 F.3d 252 (2d Cir. 1999), a prisoners' class action alleging illegal reprisals by prison officials in the aftermath of a riot. The trial took place in two phases. The first phase purported to address defendants' “liability or non-liability to the entire class.” The second phase involved “new juries determining the damages suffered by each individual plaintiff.”  *Id.* at 257. This procedure violated defendants' rights because the first-phase verdict form was improperly generalized:

[The first-phase verdict form] did not ask the jury to specify which acts were found to be “reprisals” and which were not.... [T]he jurors in the [second-phase] damages trials were told that there had been “reprisals” but were asked to determine for themselves which particular acts constituted such “reprisals.”... This of course created the real possibility -- amounting to a probability -- that acts found to be “reprisals” by the liability jury were different from the acts found to be “reprisals” by the damages juries.

 *Id.* at 268-69. As a result, the second-phase juries “reexamine[d] issues decided by the liability jury and thereby violated the Seventh Amendment.”  *Id.* at 268; see also  *Henley v. FMC Corp.*, 2001 WL 733110, at *8 (4th Cir. June 29, 2001) (without identification of the ground for the jury's finding, the court could not “resolve whether the jury's denial of relief is binding on the entire class”).

As the following examples demonstrate, the same jury trial and due process problems are pervasive here because the Phase I verdict form lacked essential specificity:

Fraud. In Phase I, plaintiffs introduced numerous advertisements and other statements stretching over nearly half a century. (E.g., T. 11202-03, 12879-83, 12940-51, 16385-87, 18982-19000.) However, over defendants' objections, the jury was never asked to specify the advertisement(s) or other statement(s) it found to be fraudulent, or which fact(s) defendants fraudulently concealed or omitted. (T. 35915-16, 35952-54, 35967-71, 36298-301, 37571-72; R. 215: 49495-97; R. 304: 69452-53, A. 1: 12.)

Then, in Phase II-A, the same jury was asked to determine whether the three individual plaintiffs were aware of and reasonably relied to their detriment on “any false statements of material fact *which formed the basis of your verdict in Phase I.*” (T. 50249, emphasis added; R. 304: 69452-53, A. 1: 12.) Similarly, the jury was asked to determine whether any concealment or omission, “*as determined in Phase I*, was the legal cause of injury to” the three individual plaintiffs. (T. 50250, emphasis added.) No such determinations can be made in Phase III trials because those trials will be resolved by *different* juries -- juries that did not render the verdict in Phase I and have no way of knowing what statement(s), concealment(s), or omission(s) the Phase I jury found to be fraudulent. (R. 132: 31279, A. 1: 9.) Therefore, in order to determine the fraud claims of any particular Phase III claimant, a Phase III jury will have to re-determine for itself the fraudulent character of the conduct that allegedly caused the Phase III claimant's injury, in violation of defendants' jury trial and due process rights.

For example, although plaintiffs in Phase I placed heavy emphasis on the 1954 “Frank Statement,” the jury may have found that the “Frank Statement” was *not* fraudulent. (PX0018; T. 10857-64, 36433-34, 36463-64.) Juries in Phase III, however, will have no idea whether the Phase I jury found that the “Frank Statement” was fraudulent, and so any Phase III jury faced with a plaintiff who claims to have relied on the “Frank Statement” will have to re-determine whether that statement was fraudulent. The potential for inconsistent verdicts is manifest.

“Emotional Distress.” The same problems apply to any Phase III determination of class members' claims for “intentional infliction of emotional distress.” In Phase I, the jury made a generalized finding that defendants had “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.” (T. 37742; R. 304: 69459, A. 1: 12.) There was no specification of what that conduct was. Then, in Phase II-A, the jury was merely asked whether the three individual plaintiffs had suffered “severe emotional distress,” and, if so, “whether [each] Defendant's extreme and outrageous conduct” was the legal cause of injury to him or her -- again, without specifying the conduct involved. (R. 304: 69473, A. 1: 20.) Because no one can say what conduct the Phase I jury found to be “extreme and outrageous,” the Phase III juries cannot properly determine whether *that conduct* was the legal cause of “severe emotional distress” to any Phase III claimants. Thus, Phase III juries will be free to hold defendants liable for conduct that the Phase I jury may have found *not* to be extreme and outrageous.

Comparative Negligence. Similarly, whenever comparative negligence is raised in Phase III trials, separate juries will have to decide that issue without knowing the basis for the Phase I findings of negligence, strict liability, and breach of warranty. As this Court recognized in *Metropolitan Dade County v. Cox*, 453 So. 2d 1171, 1173 (Fla. 3d DCA 1984), a jury “cannot” assess comparative negligence “without complete information as to the quantity, quality, nature and degree of the defendant's conduct so that the jury knows just what to ‘compare’ with its assessment of the plaintiff's.” Because negligence and comparative negligence are plainly interrelated, those issues must be considered together by a single jury:

Comparative negligence means comparison. The trier of fact compares the negligence of plaintiff and defendant. Fault is compared to fault. Thus to determine the negligence of the parties, the trier of the facts must hear the totality of fault.

Id. (quoting *Amend v. Bell*, 570 P.2d 138, 142 (Wash. 1977)); *see also* *Rowlands*, 549 So. 2d at 1383 (“liability is inextricably bound up with the apportionment of damages under the doctrine of comparative negligence”).

* * * *

As the preceding illustrations show, the Phase I findings are legally useless and cannot be applied in Phase III. This was the result of the court's failure to give the jury a particularized verdict form. It was also the result of a year-long trial in which the evidence itself was improperly generalized.

For example, Florida law required plaintiffs to plead and prove their fraud claims with particularity. *See* Fla. R. Civ. P. 1.120(b); *Reina v. Gingerale Corp.*, 472 So. 2d 530, 531 (Fla. 3d DCA 1985); *Steyr Daimler Puch of America v. A & A Bicycle Mart, Inc.*, 453 So. 2d 1149, 1150 (Fla. 4th DCA 1984). State and federal due process impose a corresponding requirement. “Due process requires that the defendant know what he is accused of having misrepresented.” *Schopler v. Smilovits*, 689 So. 2d 1189, 1189-90 (Fla. 4th DCA 1997); *State Farm Mutual Automobile Insurance Co. v. Rosenfeld*, 1986 WL 2376, at *1 (E.D. Pa. Feb. 14, 1986).

The court repeatedly failed to enforce these requirements as the trial proceeded. (T. 6536-39, 23174-90, 26703-22, 27447-61, 36298-301; R. 214: 49258-72, 49296-322.) In its post-trial review of the evidence, the court itself failed to specify any supposed misstatement other than the “Frank Statement” and unidentified advertising “over extended periods of time.” (R. 304: 69487-89, A. 1: 22.) Thus, neither the trial record nor the jury's findings provide any guidance for the Phase III trials to come, in which new juries will necessarily make their own determinations of whether various statements or omissions were fraudulent.

In addition, the generalized nature of plaintiffs' proof improperly divorced the Phase I evidence from any actual, identifiable claimants. The court subjected defendants to an artificial proceeding, not a real trial, in which the jury was inundated with evidence of abstract "misconduct" unconnected to any real person's knowledge, choices, or other circumstances -- thus setting the stage for an enormous punitive award in Phase II-B. Plaintiffs were allowed to "mix and match" their evidence, creating a hypothetical plaintiff who was exposed to and relied on every alleged misstatement over the course of nearly 50 years, smoked every brand of cigarette, and suffered every asserted disease plus "emotional distress." (R. 132: 31277, A. 1: 9; T. 36760-62, 37405-07, 37561-65, 37570-78.) This composite form of "trial" violates state and federal due process, even in cases where only a single jury is involved. See  *Broussard v. Meineke Discount Muffler Shops, Inc.*, 155 F.3d 331, 344-45 (4th Cir. 1998); see also *M.W. v. Davis*, 756 So. 2d 90, 97 (Fla. 2000) (Florida due process requires "fair treatment through the proper administration of justice where substantive rights are at issue") (quoting  *Department of Law Enforcement v. Real Property*, 588 So. 2d 957, 960 (Fla. 1991)). (See also Point VI.C below.) Here, with the addition of separate juries in thousands of Phase III trials, the lack of specific proof tied to *some* real person creates due process violations that are infinitely worse.

The trial court failed to address either defect -- (1) the impermissibly composite nature of plaintiffs' proof, and (2) the improper generality of the jury's findings. Instead, the court attempted to sidestep all re-examination problems in its final judgment by suggesting that the only issues left to be determined in Phase III were "whether the injuries complained of were the result of cigarette smoking or from other causes, and what[,], if any, damages resulted from that activity." (R. 304: 69508, A. 1: 22.) Thus, the court closed its eyes to a host of other issues -- e.g., individual knowledge, reliance, and the statute of limitations -- which *must* be tried in Phase III, just as they were tried in Phase II-A.

Any procedure that seeks to avoid such issues by relieving class members of their obligation to prove essential elements of their claims, or to confront and overcome affirmative defenses, violates defendants' due process and jury trial rights under Florida and federal law. See, e.g., *Ramos v. State*, 505 So. 2d 418, 421 (Fla. 1987) ("Substantive rights conferred by law can be neither diminished nor enlarged by procedural rules");  *Boyd v. Becker*, 627 So. 2d 481, 484 (Fla. 1993);  *Cimino*, 151 F.3d at 312 (class action rules cannot "alter the required elements which must be found to impose liability and fix damages (or the burden of proof thereon)").

C. The Trial Court Improperly Entered A "Final Judgment" Before All Judicial Labor Was Completed

At the end of Phase II, the trial court precipitously entered a "final judgment" for \$145 billion in punitive damages, ordering defendants to pay that amount immediately into the court's registry even though 99.999% of all class members had not yet established -- and may never establish -- their liability and compensatory-damage claims. (R. 304: 69483-549, A. 1: 22.) The court did so without briefing or oral argument on the issue of whether such a judgment was proper at this stage of the proceedings. Quite apart from the improprieties discussed above, the court's premature entry of a final judgment was reversible error.¹²

Florida law forbids entry of a final judgment if any "judicial labor" remains to be performed.  *McGurn v. Scott*, 596 So. 2d 1042, 1043 (Fla. 1992). A trial court cannot enter a final judgment until it has "determine[d] the rights and liabilities of all parties with reference to the matters in controversy and le [ft] nothing of a judicial character to be done." *Id.* (quoting *Gore v. Hansen*, 59 So. 2d 538, 539 (Fla. 1952)). In particular, a final judgment cannot be entered if any "element of damages" in the case remains to be adjudicated, "regardless of how straight-forward and ministerial the calculation of those damages may be."  596 So. 2d at 1044.

In *Del Castillo v. Ralor Pharmacy, Inc.*, 512 So. 2d 315, 318-19 (Fla. 3d DCA 1987), this Court held that where, as here, plaintiffs seek both compensatory and punitive damages, *both* categories of damages must be fully determined before a final judgment can be entered. The trial court in *Del Castillo* had entered a "final" judgment for compensatory damages, even though punitive damages remained to be adjudicated. This Court held that because "compensatory and punitive damages claims are part

Fourth, the instruction was nonsensical. The court told the jury “to follow only the legal definition of cause that I have given you” -- but it provided no such instruction. The court even acknowledged to the parties that “I’m not instructing on the legal definition of cause.” (T. 37540.) A verdict based on “contradictory and confusing charges concerning a major point in the case -- causation” -- must be reversed. *Poole v. Lowell Dunn Co.*, 573 So. 2d 51, 54 (Fla. 3d DCA 1990).

3. The Verdict Form's Question On “Fraudulent Concealment” Was Inherently Confusing And Inconsistent With The Jury Instructions

The Phase I verdict form was prejudicially confusing on the issue of “fraudulent concealment.” Question 4a asked: “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 [sic] to disclose a material fact concerning or proving the health effects and/or addictive nature of smoking cigarettes?” (R. 304: 69453, A. 1: 12, emphasis added.) This language nonsensically allowed defendants to be held liable for concealing or omitting “false and misleading” information. Defendants objected to the error, to no avail. (R. 215: 49496, T. 48291-98.) A new trial is required on that basis alone.

Reversal is also required because the question on the verdict form contradicted the court's jury instructions on fraudulent concealment. See *Schlein v. Florida East Coast Ry.*, 339 So. 2d 1142, 1143 (Fla. 3d DCA 1976); *Triple Paving, Inc. v. Broward County*, 774 So. 2d 50, 57 (Fla. 4th DCA 2000) (“reversal is required where the jury could have been misled or confused by a verdict form which is inconsistent with the jury instructions”). The court instructed the jury that it could not make a finding of fraudulent concealment unless it found that defendants had “omitted or concealed material facts that would be necessary to make *statements* by said defendants not misleading.” (T. 37572, emphasis added.) The court's instruction properly limited fraudulent concealment to situations in which the concealment rendered *affirmative statements* misleading. However, Question 4a in the verdict form merely asked whether defendants “conceal[ed] or omitt[ed] material information” or “failed to disclose a material fact.” (R. 304: 69453, A. 1: 12.) The question improperly allowed the jury to impose liability for a pure concealment of fact, unrelated to any affirmative statement. Defendants objected to the verdict form on that basis, to no avail. (R. 215: 49496.)

Florida law does not recognize a claim for a pure concealment of fact, except in cases involving a sale of residential real estate, a fiduciary duty to disclose, or other circumstances not present here. See, e.g., *TransPETROL, Ltd. v. Radulovic*, 764 So. 2d 878, 879-80 (Fla. 4th DCA 2000) (“A defendant's knowing concealment or non-disclosure of a material fact may only support an action for fraud where there is a duty to disclose” as a result of a “fiduciary or other relation of trust or confidence” between the parties) (citations and quotation marks omitted); *Casey*, 740 So. 2d at 62; *Gutter v. Wunker*, 630 So. 2d 1117, 1118 (Fla. 4th DCA 1994); *Don Slack Insurance, Inc. v. Fidelity & Casualty Co.*, 385 So. 2d 1061, 1064 (Fla. 5th DCA 1980);  *Taylor v. American Honda Motor Co.*, 555 F. Supp. 59, 64-65 (M.D. Fla. 1983) (applying Florida law).

This error was perpetuated in Phase II. There the jury was peremptorily instructed in the words of the Phase I verdict form, not the Phase I instruction. (T. 50241.) Because fraudulent concealment was a cornerstone of plaintiffs' entire case, including their claim for punitive damages, the court's error requires a new trial.

C. The Trial Court Allowed A Legally Improper Claim To Proceed And Admitted Scores Of Privileged Documents Without The Necessary Review

The reversible errors in Phase I did not begin with closing arguments and jury instructions. They occurred throughout the Phase I proceedings. Defendants present here two additional errors.

1. The Court Erroneously Refused To Dismiss Plaintiffs' Claim For “Intentional Infliction of Emotional Distress”

IN THE DISTRICT COURT OF APPEAL
THIRD DISTRICT

CASE NO. 3D00-3400

CONSOLIDATED: 3D00-3206 3D00-3210
3D00-3207 3D00-3212
3D00-3208 3D00-3215

LIGGETT GROUP, INC.; BROOKE GROUP, LTD.;
PHILIP MORRIS INCORPORATED; R.J. REYNOLDS
TOBACCO COMPANY; LORILLARD TOBACCO
COMPANY, LORILLARD, INC.; BROWN &
WILLIAMSON TOBACCO CORP., individually and as
Successor by merger to the American Tobacco Company,
COUNCIL FOR TOBACCO RESEARCH U.S.A., INC.
and TOBACCO INSTITUTE, INC.,

Appellants,

v.

HOWARD A. ENGLE, M.D., et al., on behalf of themselves
and all others similarly situated,

Appellees. _____ /

CONSOLIDATED ANSWER BRIEF
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(that is not challenged here). Any error is harmless. *Goldschmidt v. Holman*, 571 So.2d 422, 425 (Fla. 1990).

3. The Trial Court Acted Within its Discretion with Respect to the "Fraudulent Concealment" Question on the Phase 1 Verdict Form.

The fraudulent concealment question on the Phase 1 Verdict Form, read together with the jury instruction on fraudulent concealment, (which defendants do not challenge here), is clear and was not confusing, as defendants assert (CB 79). The fraud by concealment jury instructions read:

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 defendant was without knowledge as to its truth or falsity, or knew of the existence of material facts that were not disclosed; and

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 defendants, you are also to consider whether the defendants' conduct occurred before or after May 5, 1982 (T. 37572-73).

Question 4A, Fraud by Concealment reads:

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? (T. 37586).

At no time during the hearings on the verdict form did any defendant express an objection or confusion with respect to proposed question 4A (T. 35928-35971; 36165-36186). Significantly, defendants' only references to the transcript under this point refer to Phase 2A when defense counsel suggested to Judge Kaye (after the fact) that the language of question 4A was confusing (T. 48175-76; 48291-92). The trial court handed out the final verdict form on June 18, 1999 and on June 21, 1999 defendants filed a pleading incorporating their earlier verbalized objections, adding that question 4A is "unintelligible" (R. 49493 at 4). Although several last minute changes to the language of the verdict form and certain jury instructions were made, defendants remained silent as to question 4A (T. 38614), failing to bring it to Judge Kaye's attention. See *Klepper v. J.C. Penney Co., Inc.*, 340 So.2d 1170, 1171 (Fla. 4th DCA 1977).

In the context of this two-year trial, and where defendants did not object to the fraud by concealment jury instruction, any alleged error is both harmless and invited. *See Fla. Stat. §59.041; Rucker v. Garlock*, 672 So.2d 100, 101 (Fla. 3d DCA 1996); *Gonzalez v. Rose*, 752 So.2d 41; *Fuller v. Palm Auto Plaza*, 683 So.2d 654, 655 (Fla. 4th DCA 1996); *Bould v. Touchette*, 349 So.2d 1181, 1186 (Fla. 1996); *Letzter v. Cephas*, 792 So.2d 487-88.

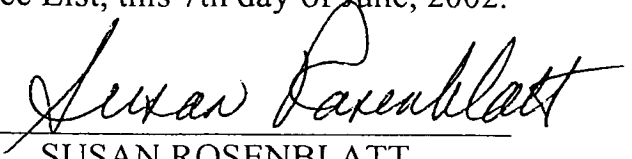
C. The Claim of Intentional Infliction of Emotional Distress Was Properly Submitted to the Jury.

The Engle Class alleged and proved that the defendants intentionally made drug addicts of the Engle Class through misconduct that included the manipulation of levels of nicotine to cause class members to get addicted and to remain addicted to cigarettes, causing class members severe emotional distress. The Class alleged and proved an independent tort that is not subsumed by the other causes of action, and is recognized in Florida. *Metropolitan Life Ins. Co. v. McCarson*, 467 So.2d 277 (Fla. 1985). The Final Judgment states:

... [T]he plaintiffs also suffered emotional distress upon the realization of being addicted to the defendants' product, a condition that doesn't necessarily manifest itself in any physical injury. Florida Courts have recognized the principle that there can be emotional distress with or without physical injury or impact (*Metropolitan Life. . . and Eastern Airlines, Inc. v. King*, 557 So.2d 547 (Fla. 1990). . . . (CA 1 at 9).

CERTIFICATE OF SERVICE

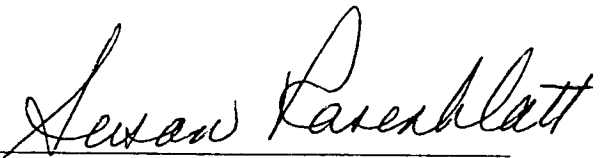
WE HEREBY CERTIFY that a true and correct copy of the above and foregoing Appendix to Consolidated Answer Brief of Appellees was served by hand delivery to local counsel of all defendants and was served by Federal Express to all out of state co-counsel, as per the attached Service List, this 7th day of June, 2002.



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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the foregoing Consolidated Answer Brief of Appellees complies with the font requirements of Fla.R.App.P. 9.210(a)(2) and was prepared in Times New Roman, 14 point font.



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**IN THE DISTRICT COURT OF APPEAL OF FLORIDA
THIRD DISTRICT**

Case No. 3D00-3400

**Consolidated: 3D00-3206 3D00-3207 3D00-3208
 3D00-3210 3D00-3212 3D00-3215**

Lower Tribunal Case No. 94-08273 CA 22

**On Appeal From The Circuit Court For The Eleventh Judicial Circuit
In And For Miami-Dade County, Florida**

**LIGGETT GROUP INCORPORATED; BROOKE GROUP LIMITED;
PHILIP MORRIS INCORPORATED; COUNCIL FOR TOBACCO
RESEARCH-USA, INCORPORATED; TOBACCO INSTITUTE,
INCORPORATED; LORILLARD TOBACCO COMPANY; LORILLARD,
INCORPORATED; BROWN & WILLIAMSON TOBACCO
CORPORATION; AMERICAN TOBACCO COMPANY; and R.J.
REYNOLDS TOBACCO COMPANY,
Defendants-Appellants,**

v.

**HOWARD A. ENGLE, M.D., et al.,
Plaintiffs-Appellees.**

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class member. (Pl. Br. at 11-81.)¹ In any event, the errors raised here are essentially legal, not factual, in nature. Defendants therefore will address the legal issues that actually determine this appeal.

I. THE TRIAL PLAN AND ITS IMPLEMENTATION VIOLATED SETTLED FLORIDA LAW AND DEFENDANTS' DUE PROCESS AND JURY TRIAL RIGHTS

Defendants' initial brief showed that the trial plan and its implementation violated Florida and federal law in at least three respects: (1) the trial court assessed and ordered payment of a classwide punitive award before the necessary findings of liability and compensatory damages; (2) the court allowed the jury to make generalized Phase I "findings," which cannot be applied by separate juries in Phase III without improper "re-examination" of issues supposedly determined in Phase I; and (3) the court entered a "final judgment" on behalf of the entire class before Phase III has even begun. (Def. Br. at 34-55.)²

These errors stem from a trial plan that improperly allowed plaintiffs to assert abstract "wrongdoing" during a year-long Phase I trial, without tying their claims to any supposed "class representatives" or other identifiable class members. Phase I was a plaintiff-less proceeding, a "trial" in name only, in which plaintiffs

¹ Citations in the form of "Pl. Br. at ____" and "Def. Br. at ____" refer to plaintiffs' answer brief and defendants' initial brief respectively. The original record on appeal is cited as "R. [volume number]: [page number(s)]." The Transcript is cited as "T. [page number(s)]." Defendants have moved to supplement the record with additional materials that are cited as "S.R. [volume number]: [page number(s)]."

For the Court's convenience, certain materials cited in this reply brief are contained in the accompanying Reply Brief Appendix, including all cited portions of the Transcript, which appear in the Reply Brief Appendix at tab 55. For all non-transcript items contained in the Reply Brief Appendix, a parallel citation is provided as "R.A. [volume number]: [tab number]."

² Plaintiffs assert that the standard of review is abuse of discretion. (Pl. Br. at 89.) But the flaws in the trial plan are errors of law and thus subject to *de novo* review. (Def. Br. at 34.) An error of law is a *per se* abuse of discretion. *See, e.g., Resnick v. Uccello Immobilien GMBH, Inc.*, 227 F.3d 1347, 1350 (11th Cir. 2000).

were allowed to rest their claims on the fiction that every advertisement or other statement by a tobacco company at any time over nearly five decades was seen or heard by, and injured, all class members, *regardless* of their varying knowledge, conduct, and circumstances. For example, plaintiffs spend page after page of their brief discussing the centerpiece of their fraud and conspiracy case -- the "Frank Statement," which was published once, in 1954. (See Pl. Br. at 12, 14, 16, 20-25, 28, 33.) But plaintiffs have never shown that *any* class member ever saw or heard of the "Frank Statement," let alone relied on it. (See, e.g., T. 40341-46, 41592-626, 41641-43, 41750-54, 41843-44, 41852-58, 44243.)

Notions of "efficiency" cannot justify this artificial, plaintiff-less proceeding. The "benefits of efficiency can never be purchased at the cost of fairness." *Malcolm v. National Gypsum Co.*, 995 F.2d 346, 350 (2d Cir. 1993). Defendants were denied a fair opportunity in Phase I to demonstrate that the alleged "misconduct" did not injure identifiable class members or otherwise failed to warrant punitive damages in light of class members' individual circumstances. In violation of due process, defendants' right to make that showing was "lost in the shadow of a towering mass litigation." *Id.* (citation and internal quotation marks omitted). "Evidence that would not have been admissible in any single plaintiff's case" became admissible as to *every* class member, because plaintiffs never presented in Phase I a real person against whom such evidence could be tested. See *Cain v. Armstrong World Industries*, 785 F. Supp. 1448, 1457 (S.D. Ala. 1992). By the time individual plaintiffs made a belated appearance in this case, in Phase II-A, the damage was done: the Phase I verdict had set the stage for a bankrupting, classwide punitive award. Due process prohibits trial plans that homogenize claims, or portions of claims, in ways that preclude defendants from

effectively asserting their defenses, or that adjudicate "wrongdoing" based on fictionalized plaintiffs. (See Def. Br. at 52, 163-65.)³

Plaintiffs fail to offer any justification for such a proceeding. As a threshold matter, they attempt to sidestep all issues regarding the trial plan through two maneuvers:

First, plaintiffs assert "waiver" and "harmless error" with respect to the trial plan because defendants have not challenged the trial court's denial of a directed verdict on all counts. (Pl. Br. at 94.) But plaintiffs expressly concede that defendants have preserved their objections to "the structure of the trial plan." (*Id.*)⁴ All verdicts produced by the defective trial plan are subject to challenge on that basis; defendants need not go further and seek a judgment in their favor based on the insufficiency of evidence. The trial court's rulings on directed verdict motions are irrelevant to the underlying legal rulings at issue here. *See, e.g., Eickmeyer v.*

³ *See, e.g., Elmore v. Henderson*, 227 F.3d 1009, 1012 (7th Cir. 2000) (procedural devices that seek to achieve "economies in litigation" may not "merge the plaintiffs' rights so that the defendant loses defenses he might have had against one of the plaintiffs"); *Broussard v. Meineke Discount Muffler Shops, Inc.*, 155 F.3d 331, 343-45 (4th Cir. 1998) (invalidating trial of composite claims on due process grounds); *In re Chevron U.S.A., Inc.*, 109 F.3d 1016, 1019-21 (5th Cir. 1997) (invalidating trial plan involving mass aggregation on due process grounds); *Western Electric Co. v. Stern*, 544 F.2d 1196, 1199 (3d Cir. 1976) (due process guarantees defendants' "right to present a full defense on the issues"); *Gwathmey v. United States*, 215 F.2d 148, 155-56 (5th Cir. 1954) (consolidation of claims violated defendants' due process right to a "fair opportunity to have [their cases] determined from the evidence in reasonable proceedings"); *Union Pacific Resources Group, Inc. v. Hankins*, 51 S.W.3d 741, 749 (Tex. Ct. App. 2001) (aggregation violates due process unless defendants have an "opportunity to adequately and vigorously present any material claims and defenses").

⁴ See also R. 50: 9865-925, R.A. 1: 1; R. 50: 9926-53, R.A. 1: 2; R. 50: 9954-71, R.A. 1: 3; R. 50: 9974-78, R.A. 1: 4; R. 79: 16501-08, R. 1: 5; R. 89: 18989-95, R.A. 1: 6; R. 92: 20705-22, R.A. 1: 7; R. 217: 49898-908, R.A. 1: 8; R. 218: 50056-62, R.A. 1: 9; R. 65: 13642-64, 13685-701, R.A. 1: 10; R. 80: 16716-35, 16751-63, R.A. 1: 11; R. 94: 20997-21023, R.A. 1: 12; R. 105: 23394-407, 23413-19, 23425-29, R.A. 1: 13; T. 37806-30; Motion To Enforce Mandate Or To Obtain Other Relief, Aug. 16, 1999, R.A. 1: 14.)

Dunkin Donuts of America, Inc., 507 So. 2d 1193, 1195 & n.4 (Fla. 3d DCA 1987); *Winn & Lovett Grocery Co. v. Luke*, 24 So. 2d 310, 313-14 (Fla. 1945); *see also Carnival Corp. v. Hertz Corp.*, 748 So. 2d 323, 325-26 (Fla. 3d DCA 1999) (error was harmful and required reversal even without entitlement to a directed verdict).

Second, plaintiffs improperly seek to change the trial plan and eliminate Phase III with the stroke of a pen. Their brief now re-labels Phase II-B -- in which the jury assessed a lump-sum punitive award of \$145 billion -- as "Phase 3," the "final" phase of the case. (See, e.g., Pl. Br. at 89-91.) In the trial court, neither plaintiffs nor anyone else ever referred to Phase II-B in that manner. (See, e.g., R. 284: 64139-46, R.A. 1: 15; R. 304: 69479-80, R.A. 1: 16; T. 57783-94.) Throughout the proceedings below, plaintiffs and the trial court acknowledged that this case would, and must, involve individual hearings of each class member's claims, in compliance with this Court's 1996 mandate requiring individual adjudications "on at least the issue of damages, if not other issues as well." *R.J. Reynolds Tobacco Co. v. Engle*, 672 So. 2d 39, 41 (Fla. 3d DCA 1996). (See, e.g., R. 49: 9634-48, R.A. 1: 17; R. 221: 50692, R.A. 1: 18; R. 65: 13676, R.A. 1: 10; R. 80: 16743-49, R.A. 1: 11; R. 94: 20992-94, R.A. 1: 12; T. 10358, 10370, 35760-68, 35779-84, 35891-92, 36018, 36031-36.) Accordingly, the trial plan provides that "Phase III" will consist of a series of trials to determine liability and, if necessary, damages for each remaining class member. (R. 132: 31276-80, R.A. 1: 19: "In Phase III, separate individual juries will independently address issues unique to each Plaintiff's Compensatory Damage claims (e.g. injury, causation, and quantum)") Plaintiffs have not cross-appealed from that order. They cannot avoid Phase III by rewriting the trial plan in their brief.⁵

⁵ In seeking to discard Phase III, plaintiffs also contradict the complaint they filed and the representations they made to the class. Plaintiffs now suggest that determining class members' compensatory-damage claims in Phase III is

b. The Phase I Verdict Did Not Constitute A Finding That Defendants Are Liable To *Anyone* -- Much Less *Everyone* -- In The Class

As an alternative, plaintiffs argue that the Phase I verdict actually *did* establish defendants' "liability" -- to every member of the class, on every claim -- and therefore *Ault* is satisfied. (Pl. Br. at 92, 98-99.)

Plaintiffs' argument flies in the face of the Phase I verdict form itself. The jury made no findings as to who (if anyone) was affected by any alleged act or omission. The jury also made no findings concerning reliance, proximate cause, affirmative defenses, or other matters necessary to establish *liability* on plaintiffs' punitive counts (or any other counts). Indeed, the trial court explicitly designated reliance, proximate cause, actual damages, and affirmative defenses as "specific issues of liability" and *excluded* them from Phase I, requiring that they be litigated on an individual basis in Phase II (for certain named plaintiffs) and in Phase III (for all other claimants). (R. 132: 31277-79, R.A. 1: 19.)

Ignoring these undisputed facts, plaintiffs now try to convert Phase I into a classwide finding of "liability" by relying on two baseless notions: "class-wide generic" causation, and "presumed reliance." (Pl. Br. at 98-100.)

"Class-wide generic" causation. In Phase I, under the heading "generic causation," the jury found that smoking causes certain diseases. The jury also found that, during the nearly 50-year period in issue, defendants had made one or more false statements of material fact, omitted material facts, and engaged in "extreme and outrageous conduct . . . with the intent to inflict severe emotional distress." (R. 304: 69451-58, R.A. 1: 21.) However, the Phase I verdict failed to

(continued...)

without violating due process. See, e.g., *Cheatwood v. Barry University, Inc.*, 2001 WL 1769914, at *17 n.54 (Fla. Cir. Ct. Dec. 26, 2001); *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 612-13 (1997); *Cimino v. Raymark Industries, Inc.*, 151 F.3d 297, 312 (5th Cir. 1998).

specify any improper statement or other improper conduct, and it failed to tie any such statement or conduct to any class member's disease. Even though the verdict on its face omits such findings, plaintiffs now contend that the verdict determined causation on a "*class-wide* generic basis," which somehow translates into liability. (Pl. Br. at 99-100, emphasis added.) But the mere finding that smoking causes certain diseases does not establish that anyone was defrauded or was otherwise the victim of a tort. Indeed, the mere finding that smoking causes certain diseases does not even establish the *causation* elements of liability -- i.e., specific medical causation and legal causation -- which must be established on an individualized basis, along with other elements of liability. (See Def. Br. at 152, citing cases.)⁸ Findings of specific medical and legal causation were not (and could not be) made in the plaintiff-less Phase I trial. The trial court itself expressly recognized this point: In Phase I, "we aren't discussing a legal cause issue at this time [Legal cause] comes up into play in the second phase, when you start talking about individual cases" (T. 36317; see also Def. Br. at 74-75.)

Nevertheless, plaintiffs argue that "specific causation is incorporated within the class definition and can be easily established." (Pl. Br. at 99.) But the class definition is not self-executing. To establish liability, each class member still must prove specific medical and legal causation -- i.e., that wrongful conduct proximately caused his or her illness -- as well as other elements of liability. And, as Phase II-A demonstrated, those elements are not determined "easily." It took five months to determine those elements for just three individuals. The

⁸ See, e.g., *Smith v. Brown & Williamson Tobacco Corp.*, 174 F.R.D. 90, 96 (W.D. Mo. 1997) ("a finding of 'general causation' would do little to advance this litigation. Liability will not turn on whether cigarettes are generally capable of causing disease; liability will depend upon whether cigarettes caused a particular plaintiff's disease").

indispensable purpose of Phase III is to determine the same elements for every other class member on an individual basis.

The Phase II-A verdict form confirms this point. The first question on the verdict form asked whether smoking caused each of the Phase II-A plaintiffs' illnesses. (R. 304: 69461, R.A. 1: 22.) That question would have been unnecessary if Phase I had already established specific medical causation. And that was just the beginning of the Phase II-A inquiry, not the end. After answering "yes" to the question concerning specific medical causation, the jury still had to answer questions concerning other elements of liability for fraud, concealment, and "emotional distress" (as well as plaintiffs' other claims), including individual legal causation. (R. 304: 69462-74, R.A. 1: 22.) Plaintiffs themselves proposed that the jury answer such questions in Phase II-A, thus acknowledging that liability had not been established in Phase I. (S.R. 2: 177-90, R.A. 1: 50; T. 48438-39, 48444, 48470-72.)⁹

Attempting to bolster their argument, plaintiffs now refer to general statistics introduced in Phase I concerning "[t]he morbidity and mortality to Floridians from smoking." (Pl. Br. at 99.) But statistics say nothing about the extent to which diseases are caused by tortious -- much less punishable -- conduct. Consequently, they cannot bridge the chasm between "generic causation" and liability. Statistics cannot determine specific causation and other elements of liability, as well as affirmative defenses. Any such use of statistics here would violate due process. *See, e.g., Cimino v. Raymark Industries, Inc.*, 151 F.3d 297, 319 (5th Cir. 1998);

⁹ Plaintiffs' argument that Phase I established liability also contradicts other positions they took below. For example, plaintiffs told the trial court that if the Phase I verdict favored plaintiffs, there was "not a chance" that defendants could appeal the verdict under Fla. R. App. P. 9.130(a)(3)(C)(iv) (since repealed), which allowed interlocutory review of verdicts that determine *liability*. (T. 32487-88.)

Mahoney v. R.J. Reynolds Tobacco Co., 204 F.R.D. 150, 160 (S.D. Iowa 2001);
Arch v. American Tobacco Co., 175 F.R.D. 469, 493 (E.D. Pa. 1997).

"Presumed reliance." Plaintiffs also suggest that this Court could create classwide liability by *presuming* that every class member actually and reasonably relied on whatever unspecified statement(s) the jury found in Phase I to be false. (Pl. Br. at 98.) But plaintiffs never proved that every class member even *saw or heard* whatever statement(s) the Phase I verdict rests on. In any event, Florida law bars any presumption of reliance here. *See, e.g., Humana, Inc. v. Castillo*, 728 So. 2d 261, 265 (Fla. 2d DCA 1999) (under Florida law, the reliance requirement in common-law fraud cases "cannot be satisfied by assumptions"). Furthermore, a conclusive presumption of reliance by every class member would eliminate plaintiffs' burden of proof with respect to an essential element of liability. The Florida Supreme Court has held that such a presumption violates due process. *Agency for Health Care Administration v. Associated Industries of Florida, Inc.*, 678 So. 2d 1239, 1254 (Fla. 1996).¹⁰

In any event, a presumption of reliance still would be insufficient to establish *liability* for fraud or concealment, because other matters remain to be determined -- e.g., the statute of limitations and other affirmative defenses. Again, the Phase II-A verdict confirms the point. Under the jury's express findings in Phase II-A, all of Frank Amodeo's claims are time barred. (R. 304: 69474, R.A. 1:

¹⁰ The only case plaintiffs cite to support their "presumed reliance" theory -- *Latman v. Costa Cruise Lines, N.V.*, 758 So. 2d 699 (Fla. 3d DCA 2000) (Pl. Br. at 98) -- is inapposite. *Latman* was not even a common-law fraud case; it was brought under the Florida Deceptive and Unfair Trade Practices Act. Furthermore, reliance was the only possible explanation for the plaintiffs' payment of the phony "port charges" at issue there. *Id.* at 703 ("Reliance and damages are sufficiently shown by the fact that the passenger parted with money for what should have been a 'pass-through' port charge, but the cruise line kept the money"). Here, in contrast, there are many possible explanations for why individual class members smoked, unrelated to any alleged misrepresentation or omission by defendants.

22; Def. Br. at 86-88; see also Point III.A below.) And a presumption of reliance would do nothing to establish liability for "emotional distress."

In sum, there was no determination in the plaintiff-less Phase I trial that defendants were liable to *any* class member on *any* count, much less *every* class member on *every* punitive count. It was not until Phase II-A that defendants' liability was determined as to any class member, and then only with respect to three individuals -- Mr. Amodeo, Mary Farnan, and Angie Della Vecchia.

c. The Phase II-A Verdict Did Not Establish Defendants' Liability To Every Class Member

As yet another theory, plaintiffs argue that the *Phase II-A* verdict -- which concerned only Mr. Amodeo, Ms. Farnan, and Ms. Della Vecchia -- established defendants' liability to *everyone* in the class. To support this theory, plaintiffs characterize the three individuals as "class representatives" and suggest for the first time that their claims constitute "test cases." (Pl. Br. at 100.)

Plaintiffs' theory is baseless. This case has never been the type of class action in which proving one class member's claim -- even that of a supposed "class representative" -- proves the claim of any other class member, much less the claims of *all* other class members. If the trial of three individuals' claims could establish liability with respect to the entire class, this Court had no reason to reduce the nationwide class to a statewide class based on the manageability problems of trying "in excess of one million" class members' claims. *Engle*, 672 So. 2d at 41-42. Under plaintiffs' theory, the adjudication of three individuals' claims would determine liability for a class of *any* size. Under this Court's decision, the necessity -- and the consequent burdens -- of trying each class member's claims individually are unavoidable.

The Phase II-A trial confirmed that liability must be determined individually. For example, the facts underlying Frank Amodeo's claim -- what he

among class members (which, as already noted, contradicts their arguments about "extrapolation"). However, plaintiffs are *incorrect* about punitive damages. Although classwide punitive awards may be feasible in other types of class actions, they are not feasible in cases such as this, where key elements of class members' claims are inherently individualized. In such cases, punitive damages *do* vary from one class member to another. Defendants cited a series of cases to that effect. (Def. Br. at 44-45.) Plaintiffs fail to respond to any of them on the merits.²²

B. The Generalized Phase I Findings Violated Defendants' Jury Trial And Due Process Rights

Defendants' initial brief showed that the Phase I jury findings are legally useless. They lack essential specificity and are subject to boundless "re-examination" by separate juries in Phase III, in violation of defendants' jury trial and due process rights. (Def. Br. at 45-53.) Plaintiffs offer a hodgepodge of meritless arguments in response.

Constitutional basis. As a threshold matter, plaintiffs suggest that re-examination cannot be challenged as a violation of defendants' jury trial rights because "the Seventh Amendment does not govern proceedings in state courts." (Pl. Br. at 91-92.) But defendants expressly based their arguments not on the Seventh Amendment but on Article I, Section 22 of the Florida Constitution, which embodies a jury trial right as broad as the right protected by the Seventh

²² Plaintiffs also assert: "Defendants argue that the amount of punitive damages should be determined individually but object to having other juries consider individual issues for absent class members. Defendants have refused to stipulate to the very procedure they were urging the trial court and now urge this Court to adopt." (Pl. Br. at 109.) In fact, defendants consistently argued that a single jury must determine compensatory and punitive damages on an individualized basis. In contrast, under plaintiffs' proposed procedure, the same jury would *not* decide both compensatory and punitive damages for any given plaintiff. (T. 36017-18, 36034-37.) Defendants were under no obligation to waive their constitutionally protected jury rights and accede to such demands.

Amendment. Moreover, defendants also relied on Florida and federal due process. (See Def. Br. at 46-48.)

The necessity and scope of Phase III. Plaintiffs assert that this Court can render "moot" any possibility of re-examination in Phase III simply by rewriting the trial plan and eliminating Phase III entirely. (Pl. Br. at 111-12; see also *id.* at 84: "future compensatory damage trials of class members are unnecessary.") Plaintiffs' position is analogous to saying that all trial errors can be rendered "moot" by holding a defendant liable with no trial at all. Plaintiffs never explain how, in the absence of Phase III, class members would establish their individual claims and their entitlement to share in the punitive award -- or what the trial court would do with the \$145 billion (plus interest) that will sit in its registry. As already shown, plaintiffs cannot salvage Phases I and II by lopping off Phase III.

Alternatively, plaintiffs argue that because Phase III has not yet occurred, any objections to re-examination are premature. (Pl. Br. at 117.) But re-examination is an inevitable consequence of the existing trial plan, which has already been put into effect. Separate Phase III juries must address the same issues that were addressed in Phase II-A before defendants' liability to Phase III plaintiffs can be determined; the re-examination problem will not become more concrete through further trials in Phase III. Similar assertions that re-examination objections are premature or "speculative" have been rejected in other cases. *See Castano v. American Tobacco Co.*, 84 F.3d 734, 751 & n.31 (5th Cir. 1996); *see also In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293, 1303 (7th Cir. 1995) (striking down class action on re-examination grounds before commencement of trial).²³

²³ The cases plaintiffs cite here are irrelevant (Pl. Br. at 117); they simply recite general principles of standing applicable to taxpayer actions and have nothing to do with trial plans or re-examination. *See Department of Revenue v. Kuhnlein*, 646 So. 2d 717 (Fla. 1994); *Reinish v. Clark*, 765 So. 2d 197 (Fla. 1st DCA 2000), *cert. denied*, 122 S. Ct. 458 (2001).

Plaintiffs also assert that the Phase III trials will be "limited" and thus will avoid all re-examination problems. (Pl. Br. at 111-12.) But the Phase III trials cannot be "limited"; they still must involve individual adjudications of reliance, affirmative defenses such as comparative fault, and other issues that *inevitably* require re-examination of the Phase I verdict. Denying defendants "the right to present a full defense on the issues would violate due process." *Western Electric*, 544 F.2d at 1199. (See also other cases cited in fn. 3 above.) Indeed, plaintiffs never explain how the Phase III trials could be any more "limited" than the Phase II-A trial. Defendants gave specific examples of issues that are subject to re-examination in Phase III, including fraud, "emotional distress," and comparative negligence. (Def. Br. at 49-51.) Plaintiffs simply ignore those issues.²⁴

Bifurcation and severance. Plaintiffs assert that defendants cannot complain about re-examination because "trial courts have the discretion to bifurcate or sever issues to be tried before different juries." (Pl. Br. at 91.) But the rules cited by plaintiffs say nothing about the use of *separate juries*. Furthermore, any discretionary severance of issues still must satisfy defendants' due process and jury trial rights, avoiding overlaps or gaps that allow one jury to re-examine another jury's findings. The issue is not severance per se, but severance with an

²⁴ Plaintiffs refer to various *Engle*-related cases brought by individual smokers, including *Lukacs v. Brown & Williamson Tobacco Corp.*, No. 01-03822 (Fla. Cir. Ct., 11th Jud. Cir.) (Pl. Br. at 153-55 & n.29, citing appeal). *Lukacs* dramatically illustrates the impropriety of using the Phase I verdict in Phase III trials. Mr. Lukacs, a self-described *Engle* class member, claimed reliance on two or three advertisements in the 1940s and 1950s but presented no evidence that they were false; he asserted instead that the Phase I *Engle* verdict established their falsity. The trial court reviewed the Phase I verdict and asked: "What's the false statement [found by the *Engle* jury]?" Defense counsel explained that no one knows what it is, or even whether it is an advertisement. Faced with that situation, the court apparently felt compelled to declare as "law of the case" that *all* "cigarette advertising is false and misleading." (*Lukacs* T. 2009-14, 2279-84, 2308-09, R.A. 1: 27.) (Simultaneously with the filing of this brief, defendants have moved for judicial notice of the portions of the *Lukacs* trial record cited here.)

improperly generalized verdict form, which fails to inform subsequent juries what the first jury decided. Defendants have already discussed *Blyden v. Mancusi*, 186 F.3d 252 (2d Cir. 1999), which precisely illustrates the problem. (Def. Br. at 48.) Plaintiffs have no response to *Blyden* and never even mention it.²⁵

The Phase I verdict form. Plaintiffs assert "invited error" and "waiver" with respect to the Phase I verdict form because defendants "ultimately" preferred the trial court's verdict form to "interrogatory questions proposed by the Class." (Pl. Br. at 112-13.) But defendants objected to *both* plaintiffs' and the court's versions of the verdict form, characterizing the court's version as the lesser of two evils (a "middle ground"), but objectionable nonetheless. Defendants maintained their objection to the court's form and continued to request the necessary specificity. (T. 35969-71.) *Cf. Whitman v. Castlewood International Corp.*, 383 So. 2d 618, 619 (Fla. 1980) (objection is preserved if special verdict is requested "at the close of the evidence and before the instruction conference").²⁶

Plaintiffs also contend that defendants "waived" their objections by proposing an improper, "fill in the blanks" verdict form. (Pl. Br. at 112-13, 115-16.) There was nothing improper about defendants' proposed form. Plaintiffs themselves cite *United States v. Ogando*, 968 F.2d 146, 148, 149 (2d Cir. 1992) (Pl. Br. at 116), which *approved* the use of a similar verdict form. *See also Blyden*,

²⁵ Plaintiffs cite three cases that supposedly support a severance of issues for trial before multiple juries. (Pl. Br. at 91.) None says anything about re-examination. Indeed, only one case clearly indicates that multiple juries were used at all, and that one involved a severance of *damages from liability*. *See Watts v. Mantooth*, 196 So. 2d 230, 232 (Fla. 2d DCA 1967). In contrast, this case involves the improper severance of some liability issues from other liability issues.

²⁶ Plaintiffs suggest that they proposed proper, specific questions to which defendants nevertheless objected. (Pl. Br. at 112, 114.) In fact, plaintiffs' proposed questions were both non-specific and grossly biased. For example, one of plaintiffs' proposed fraud questions asked: "Do one or more of the Tobacco Companies intentionally target the most susceptible and vulnerable individuals as new smokers, including underage adolescents, women, minorities and members of our armed forces during times of combat?" (R. 210: 48413, R.A. 1: 28.)

186 F.3d at 268-69. Defendants were under no obligation to submit additional proposals once the trial court rejected their requested verdict form. Defendants' original request was sufficient to preserve the error. *See, e.g., Cooper v. State*, 742 So. 2d 855, 857 (Fla. 1st DCA 1999); *see also Blyden*, 186 F.3d at 267-68 (a simple objection to a proposed verdict form sufficed to preserve the re-examination issue for appeal).²⁷

Plaintiffs argue further that the Phase I verdict form was sufficiently specific because it was "twelve pages in length, single spaced," and broken down by defendant and a few basic time periods. (Pl. Br. at 112.) Plaintiffs exalt form over substance. However long the verdict form may have been, it still failed to specify the *conduct* found to be unlawful. For example, nothing identifies any fraudulent misstatement or omission, by any defendant, in any time frame.

Jury instructions. Plaintiffs suggest that any lack of specificity in the verdict form was somehow cured by the trial court's jury instructions. (Pl. Br. at 119-20.) But the instructions, to which defendants objected (T. 35969-71), only vaguely describe plaintiffs' allegations. For example, the instructions addressing plaintiffs' fraud claims merely refer to "a public relations campaign" and "internal tobacco documents proving that nicotine is addictive." (T. 37562-63.) If the jury

²⁷ Plaintiffs' suggestion that defendants had a "burden" to propose further forms is unsupported by their citations. (Pl. Br. at 115.) In both *E.F. Hutton v. Sussman*, 504 So. 2d 1372 (Fla. 3d DCA 1987), and *S & S Toyota, Inc. v. Kirby*, 649 So. 2d 916 (Fla. 5th DCA 1995), the defendants apparently did not object to the generalized verdict forms or offer verdict forms of their own, unlike defendants here; and in both cases, the instructions and verdict forms were sufficient to permit jurors to reach a correct verdict. *See E.F. Hutton*, 504 So. 2d at 1373; *S & S Toyota*, 649 So. 2d at 918. Plaintiffs' other cases are similarly inapposite. *See Whitman*, 383 So. 2d at 619-20 (straightforward application of Florida's "two-issue rule"; defendant failed to object to the general verdict form until after jury instructions were delivered); *Commodore Plaza at Century 21 Condominium Association v. Cohen*, 350 So. 2d 502, 505-06 (Fla. 3d DCA 1977) (addressing waiver of the right to seek attorneys' fees, not waiver of error); *Letzter v. Cephas*, 792 So. 2d 481, 487 (Fla. 4th DCA 2001) (party asserting error *objected* to use of a special interrogatory -- the reverse of the situation here).

found any "campaigns" or "documents" to be fraudulent, the instructions do nothing to identify them. If a Phase III claimant refers to any campaigns or documents as supporting his or her fraud claims, the Phase III jury must determine from scratch whether they are fraudulent; nothing ensures that any campaigns or documents found to be fraudulent by that Phase III jury will be the *same* as any found to be fraudulent by the Phase I jury (or indeed by other Phase III juries).

Defendants' statements to the jury. Plaintiffs argue that defendants cannot complain about re-examination because defense lawyers told the jury during Phase II-B that they had heard the jury's "message" in Phase I concerning punitive entitlement. (Pl. Br. at 117-19.) But there is an obvious difference between hearing the general "message" of a verdict and being able to identify its specific factual basis. Defendants repeatedly stated that only *the Phase I jury* knew the precise basis for its verdict. (T. 38831, 49375-76, 49873, 49903, 51243, 57403.)

Generalized pleadings and proof. Finally, plaintiffs argue that defendants have "improperly inject[ed] other issues that were not raised under Point I, including the alleged failure to plead and prove fraud with particularity (CB 51-52), and the alleged generalized nature of the Class' proof with a 'composite' form of trial with a 'hypothetical plaintiff' (CB 52)." (Pl. Br. at 120.) Plaintiffs miss the point of defendants' arguments, which illustrate and confirm the defects of the generalized Phase I verdict form and, indeed, of the entire trial plan. A generalized verdict form may be appropriate even in a bifurcated class action with separate juries, if the pleadings and proof provide sufficient particularity to establish precisely what the jury found to be unlawful. Here, in contrast, plaintiffs never provided the necessary particularity in their pleadings *or* in their proof *or* in their verdict form. The absence of particularized proof and particularized findings with respect to any real plaintiff invalidates the Phase I verdict as a basis for further proceedings in Phase III. Plaintiffs offer no substantive response to this point.

argument that defendants had already presented to the jury damaged defendants' credibility and bolstered that of plaintiffs, who correctly predicted to the jury the court's ultimate instruction. (Def. Br. at 77-78.)³⁶

Plaintiffs also contend that their fraud evidence was sufficient to support a verdict and therefore any instructional error was "harmless," citing *Goldschmidt v. Holman*, 571 So. 2d 422, 425 (Fla. 1990). (Pl. Br. at 140-41.) But *Goldschmidt* supports *defendants'* position (see Def. Br. at 70) by confirming that reversible error occurs when "instructions are reasonably calculated to confuse or mislead the jury." *Id.* *Goldschmidt* goes on to hold that it is not erroneous to refuse to give an instruction that is unsupported by the evidence. *Id.* It does not suggest that a patently erroneous instruction is "harmless" merely because there may be sufficient evidence to support the verdict under a *correct* instruction.

Finally, plaintiffs ignore the fact that the court's instruction was nonsensical. The court told the jury to "follow only the legal definition of cause that I have given you" (T. 37562), when in fact no such "definition" had been given. The jury could not possibly have made sense out of this defective and confusing instruction.

3. The Verdict Form's Question On "Fraudulent Concealment" Was Inherently Confusing, Contradicted The Jury Instructions, And Conflicted With Florida Law

Defendants showed that Question 4A on the Phase I verdict form allowed the jury to find that defendants committed fraud by *concealing* false and misleading information. (Def. Br. at 80.) Plaintiffs do not dispute the confusing nature of this question.³⁷ Indeed, even the trial court later acknowledged that the

³⁶ Plaintiffs misleadingly suggest that defendants delayed any opposition to plaintiffs' proposed "curative" instruction until after closing arguments were completed. (Pl. Br. at 138-39.) In fact, defendants told the court immediately that they would submit a written response (T. 37264) and did so the very same day (R. 217: 49777-80, R.A. 1: 36).

³⁷ The question asked: "Did one or more of the Defendants *conceal or omit* material information, not otherwise known or available, *knowing the material was*

question made no sense: "It's curious wording that counsel points out. When you look at it, you say: How can you be accused of concealing information that you knew was false?" (T. 48294.) Nevertheless, the court *repeated* its error by re-incorporating the same nonsensical language in the Phase II-A verdict form.³⁸

Plaintiffs contend that defendants "waived" this error by failing to object orally to the question until Phase II-A. (Pl. Br. at 142-43.) Their contention is false. Defendants preserved the error by filing a written objection a full week before the trial court submitted the defective question to the jury. (R. 215: 49496, R.A. 1: 37.) At the same time, defendants orally notified the court that they would rest on their written objections. (T. 36320-21.) As plaintiffs' own citations show, no waiver occurs so long as defendants brought the error to the court's attention in time to rectify the problem. *See Klepper v. J.C. Penney Co.*, 340 So. 2d 1170, 1171 (Fla. 4th DCA 1976). That was clearly done here.³⁹

In addition to being confusing, the verdict form was legally defective. Its premise that "pure concealment" is actionable is contrary to Florida law. (Def. Br. at 80-81.) Plaintiffs do not dispute that the verdict form permitted the jury to base liability on this improper theory. Instead, they argue that the jury instructions cured the error. (Pl. Br. at 141-42.) But even a correct jury instruction cannot cure an erroneous verdict form that conflicts with the instruction. Defendants cited case

(continued...)

false and misleading, or failed [sic] to disclose a material fact concerning or proving the health effects and/or addictive nature of smoking cigarettes?" (R. 304: 69453, R.A. 1: 21, emphasis added.)

³⁸ Question No. 4 in the Phase II-A verdict form reiterated the Phase I finding of fraudulent concealment: "In your Verdict of July 7, 1999 you found that each of the Defendants concealed or omitted material information, not otherwise known or available, *knowing the material was false and misleading . . .*" (R. 304: 69466, R.A. 1: 22, emphasis added.)

³⁹ Also false is plaintiffs' assertion that defendants "invited" the error. (Pl. Br. at 143.) Defendants did not ask for this question on the verdict form; they opposed it. (R. 215: 49496, R.A. 1: 37.)

law clearly establishing that principle. (Def. Br. at 80.) Plaintiffs do not dispute that law. A verdict form that permits findings of fraudulent conduct more expansive than the law allows is manifestly prejudicial and requires reversal.

C. The Trial Court Submitted To The Jury A Legally Invalid "Emotional Distress" Claim And Admitted Scores of Privileged Documents Without The Necessary Review

1. The Trial Court Erroneously Refused To Dismiss Plaintiffs' Claim For "Intentional Infliction Of Emotional Distress"

To establish an "emotional distress" claim under Florida law, a plaintiff must plead and prove "outrageous conduct" causing severe emotional injury that *does not constitute any other recognized tort*. (Def. Br. at 81-83.) An "emotional distress" claim functions solely as a "gap filler"; it can be asserted only when all other tort claims are unavailable. Here plaintiffs alleged "emotional distress" in connection with physical injuries for which plaintiffs brought a variety of other tort claims. The "emotional distress" claim thus should not have been submitted to the jury. *See Foshee v. Health Management Associates*, 675 So. 2d 957, 960 (Fla. 5th DCA 1996).

Plaintiffs try to avoid Florida's established law on this point by citing one authority -- a footnote in *Vernon v. Medical Management Associates of Margate, Inc.*, 912 F. Supp. 1549, 1558 n.6 (S.D. Fla. 1996) -- which merely observed that the Florida Supreme Court had not yet ruled on the issue. But this Court and other district courts of appeal have squarely held that "emotional distress" claims cannot be based on conduct that constitutes another recognized tort. *See Lavis Plumbing Services, Inc. v. Johnson*, 515 So. 2d 296, 297 (Fla. 3d DCA 1987); *Foshee*, 675 So. 2d at 960 (post-dating *Vernon*); *Boyles v. Mid-Florida Television Corp.*, 431 So. 2d 627, 635-36 (Fla. 5th DCA 1983). Plaintiffs say nothing about these cases.

Plaintiffs also argue that they proved "an independent tort" by showing that smokers were addicted by the alleged manipulation of nicotine levels and other

public at large rather than a particular individual. (Def. Br. at 82-83.) Plaintiffs contend that conduct directed at the public is legally sufficient (Pl. Br. at 144), but they fail to cite a single case that supports their position.⁴⁰

2. The Court Improperly Admitted Privileged Documents

The trial court admitted scores of privileged documents in a wholesale fashion without a detailed privilege review and without the evidentiary hearing required to resolve plaintiffs' assertions of "waiver." (Def. Br. at 83-86.) Plaintiffs' brief misstates the record and addresses irrelevant matters, leaving defendants' essential point unanswered. The court's error requires reversal. *See, e.g., State Farm Mutual Automobile Insurance Co. v. Kendrick*, 780 So. 2d 231, 233 (Fla. 3d DCA 2001); *Town Center @ Boca Raton Trust v. Hirokawa*, 789 So. 2d 1230, 1231-32 (Fla. 4th DCA 2001).

III. THE PHASE II-A VERDICTS CANNOT BE SUSTAINED

A. Mr. Amodeo's Claims Were Time-Barred

The jury found in Phase II-A that Frank Amodeo had actual or constructive knowledge, more than four years before commencement of this suit, that (a) he was "addicted" to smoking and (b) there was a reasonable possibility his cancer was caused by smoking. (R. 304: 69474, R.A. 1: 22.) Consequently, all of Mr. Amodeo's claims were barred by the four-year statute of limitations. The trial court improperly overrode the jury's finding and entered judgment in Mr. Amodeo's favor on his fraud and conspiracy claims. (R. 304: 69494-95, R.A. 1:29.) That was plain legal error. (See Def. Br. at 86-88.)

Plaintiffs have nothing to say about the jury's specific Phase II-A finding concerning Mr. Amodeo's knowledge. Referring only to the *general* Phase I

⁴⁰ Defendants repeatedly moved for a directed verdict on the "emotional distress" claim in light of the lack of evidence as to any particular individuals. (T. 26810-20, 35519-20, 35528-29, 35972, 44393, 48035.)

finding of unspecified concealments -- which were never tied to any identifiable class member -- plaintiffs declare that Mr. Amodeo was an unidentified "victim" of that "fraud" and remained so until "1994." (Pl. Br. at 150, 151.) Plaintiffs' references to "concealment" (Pl. Br. at 150) are irrelevant because the jury specifically found that Mr. Amodeo was aware of *both* his alleged injuries *and* the alleged falsity of defendants' statements by May 1990 -- more than four years before he sued. (R. 304: 69474, R.A.1: 22.)⁴¹

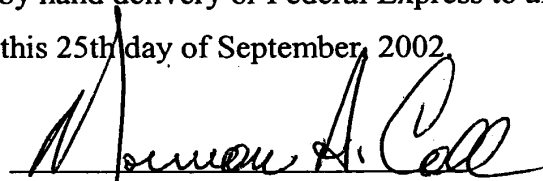
Plaintiffs cannot assert that by May 1990 Mr. Amodeo discovered only his "addiction" and cancer, not the alleged "fraud." Plaintiffs argued throughout the trial that the alleged "fraud" effectively involved *denials* that cigarettes are addictive and cause cancer. (E.g., T. 36349, 36361-63, 36366-67.) According to the jury's express finding, Mr. Amodeo discovered the opposite by May 1990 -- i.e., he discovered that any such denials were untrue. As a matter of law, that discovery was sufficient to trigger the running of the statute. *See, e.g., Korman v. Iglesias*, 825 F. Supp. 1010, 1015 (S.D. Fla. 1993), *aff'd*, 43 F.3d 678 (11th Cir. 1994) (Def. Br. at 87-88).⁴²

⁴¹ For the same reason, plaintiffs' references to "equitable estoppel" (Pl. Br. at 150) are equally irrelevant. Indeed, the jury made no findings of "equitable estoppel," and even the trial court never relied on such a theory. "Fraudulent concealment" cannot be bootstrapped into "equitable estoppel." *See generally Major League Baseball v. Morsani*, 790 So. 2d 1071, 1077 (Fla. 2001).

⁴² Plaintiffs have no response to *Korman*, which applies Florida law. *See also Sands v. Blando*, 575 So. 2d 1306, 1307 (Fla. 3d DCA 1991) (refusing to toll the statute of limitations for fraud). Instead, plaintiffs cite other cases that have no bearing here. For example, they simply reiterate the trial court's misapplication of *Pulmosan Safety Equipment Corp. v. Barnes*, 752 So. 2d 556 (Fla. 2000), which defendants have already addressed. (Def. Br. at 87-88.) Likewise, plaintiffs' other cases (Pl. Br. at 149-51) are inapplicable where, as here, a jury has found that actual or constructive discovery occurred more than four years before suit was commenced.

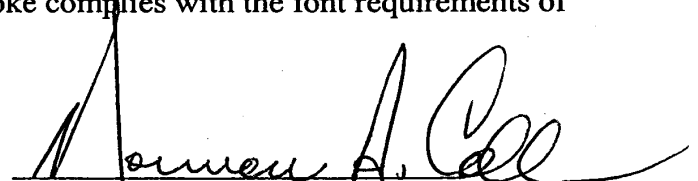
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Combined Reply Brief Of All Appellants Other Than Liggett And Brooke was served by hand delivery to Stanley M. Rosenblatt, STANLEY M. ROSENBLATT, P.A., counsel for appellees, Concord Building, 66 W. Flagler Street, Miami, FL 33130, and to Kelly A. Luther, CLARKE SILVERGLATE CAMPBELL WILLIAMS & MONTGOMERY, counsel for Liggett and Brooke, 799 Brickell Plaza, 9th Floor, Miami, FL 33131; and by hand delivery or Federal Express to all other counsel on the attached service list this 25th day of September, 2002.


Norman A. Coll

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the foregoing Combined Reply Brief Of All Appellants Other Than Liggett And Brooke complies with the font requirements of Fla. R. App. P. 9.210(a)(2).


Norman A. Coll

IN THE SUPREME COURT OF FLORIDA

No. SC03-1856

HOWARD A. ENGLE, M.D., et al.,

Petitioners,

v.

LIGGETT GROUP, INC., et al.,

Respondents.

RESPONDENTS' MOTION FOR REHEARING¹

Pursuant to Fla. R. App. P. 9.330(a), defendants move for rehearing of this Court's decision of July 6, 2006.

Summary

Point I: The Court's preservation of certain Phase I jury findings cannot be squared with its invalidation of other findings. To begin with, the Court's rejection of the misrepresentation finding (Finding 4, "fraud and misrepresentation") necessarily invalidates the derivative conspiracy finding as well (Finding 5, "civil conspiracy--misrepresentation"). The Court overlooked this inconsistency. More generally, in preserving certain Phase I findings while rejecting others, the Court overlooked the fact that the preserved findings have precisely the same defects as the rejected findings: all are "nonspecific" and "inadequate to allow a subsequent

¹ This motion is filed on behalf of all respondents except Liggett and Brooke (hereinafter, "defendants").

Point II: The Court's retroactive "(d)(4)(A)" certification is unprecedented under class-action law and, in the absence of prior briefing and argument, violates defendants' rights to notice and an opportunity to be heard. The specific errors and consequences of the Court's ruling have never been briefed because "issue certification" under Fla. R. Civ. P. 1.220(d)(4)(A), which the Court now invokes, has never been litigated here or in the lower courts.

Point III: Before any further proceedings take place, unresolved issues remain to be addressed by the Third District (and potentially by this Court).

Point IV: The Court made an error in its treatment of the class definition, relying on mistaken assumptions that have never been briefed or argued.

I. Findings 3, 4a, 5, 5a, 6, And 8 Cannot Be Applied In Subsequent Actions To Determine Legal Causation And Other Essential Issues

The Court held unanimously that Findings 4, 7, and 9 -- "fraud and misrepresentation," "breach of express warranty," and "intentional infliction of emotional distress" -- cannot be applied in subsequent actions. The Court stated that such findings were "nonspecific" and therefore "inadequate to allow a subsequent jury to consider individual questions of reliance and legal cause" (Op. at 4)⁴ or the "apportionment of fault" among defendants (Op. at 2).

⁴ Although this passage refers specifically to Findings 4 and 9, the rest of the Court's opinion indicates that Finding 7 was invalidated on the same basis. See Op. at 4, 52-53 (listing the preserved findings and omitting Finding 7). Defendants request express confirmation that Finding 7 has been invalidated.

A majority of the Court, however, went on to preserve Findings 3, 4a, 5, 5a, 6, and 8 -- "strict liability," "fraud by concealment," "civil conspiracy--misrepresentation," "civil conspiracy--concealment," "breach of implied warranty," and "negligence." (Op. at 4, 52-53.) The Court thus overlooked the fact that the preserved findings are just as "inadequate" as the invalidated findings -- and for the very same reasons. All are "nonspecific" and cannot be legally or constitutionally applied in subsequent actions to determine essential issues such as legal causation, reliance, comparative fault, and apportionment of fault among defendants. Indeed, the findings cannot even be applied to determine whether conduct that supposedly injured an individual claimant was found by the Phase I jury to be tortious.

A. The Court's Recognition That Findings 4, 7, And 9 Are "Nonspecific" And Inapplicable In Subsequent Actions Extends Equally To Findings 3, 4a, 5, 5a, 6, And 8

Nothing in the Phase I verdict identifies the misconduct that underlies the jury's findings. This is not a "mass tort" case in which all claimants were injured simultaneously by a single, discrete event such as a refinery explosion or a plane crash. Even the trial court observed that plaintiffs' assertions involved "hundreds of thousands" of acts, statements, and omissions concerning diverse products and marketing activities at different times over nearly half a century.⁵ Many if not

⁵ T35813. The Engle trial transcript is cited as "T__[page(s)]"; other portions of the record are cited as "R__[volume]:__[page(s)]." Cited record materials are collected in the accompanying Respondents' Rehearing Appendix

most of those assertions are irrelevant to any individual's claims. And no one can say now which assertions the Phase I jury accepted as the basis for its findings.

Findings 4a ("fraud by concealment"), 5 ("civil conspiracy--misrepresentation"), and 5a ("civil conspiracy--concealment"). One inconsistency in the Court's rulings must be noted at the outset. The Court rejected Finding 4 ("fraud and misrepresentation") because "fraud" is "individualized." (Op. at 36.) But that ruling automatically invalidates Finding 5 as well ("civil conspiracy--misrepresentation"). Conspiracy is not a free-standing cause of action; it requires proof of the completed underlying tort -- here, "misrepresentation."⁶ The Court's rejection of the "misrepresentation" finding because it was "individualized" requires rejection of the derivative conspiracy finding, too.

Furthermore, none of the preserved fraud-based findings identifies what was "misrepresented" or "concealed" -- a failing they share with invalidated Finding 4. Plaintiffs asserted a myriad of "misrepresentations" and "concealments" dating

(RRA); non-transcript items bear a parallel citation as "RRA__ [tab]," and all Engle transcript pages are collected at RRA7. This Court's opinion and the Third District's opinion are reproduced at RRA1 and RRA6 respectively. The Third District's opinion is cited as "853 So. 2d at ____."

⁶ See, e.g., Loeb v. Geronemus, 66 So. 2d 241, 243 (Fla. 1953) ("The gist of a civil action for conspiracy is not the conspiracy itself but the civil wrong which is alleged to have been done pursuant to the conspiracy"); Blatt v. Green, Rose, Kahn & Piotrkowski, 456 So. 2d 949, 951 (Fla. 3d DCA 1984).

back to 1954.⁷ No judge or jury in a subsequent action can identify the "misrepresentation(s)" or "concealment(s)" found by the Phase I jury and then determine whether that conduct actually deceived and caused injury to an individual Engle claimant. A causal link between fraudulent conduct and the individual plaintiff's injury is an essential element of liability. Each plaintiff must show that he or she would have acted otherwise "but for" the alleged misrepresentation or concealment.⁸

The Phase I jury is the only jury that could apply Findings 4a, 5, and 5a to make those essential determinations. The Phase II-A jury instructions and verdict form confirm the point. In Phase II-A, the jurors were instructed to remember the basis for their Phase I findings and then apply that memory to the three named plaintiffs. For example, the judge told the jury: "The issues that you determined in Phase I were not relitigated in Phase II; therefore, you will now have to determine whether defendants' conduct upon which you based your Phase I verdict was the

⁷ See, e.g., T11235, 12592-94, 13475-77, 15423-24, 16470, 17265, 18225-27, 18746-57.

⁸ See, e.g., Soler v. Secondary Holdings, Inc., 771 So. 2d 62, 69 (Fla. 3d DCA 2000) (a claim of fraudulent misrepresentation or concealment "requires proof of detrimental reliance"); Humana, Inc. v. Castillo, 728 So. 2d 261, 264-65 (Fla. 2d DCA 1999) (fraud claims require proof that "but for the alleged misrepresentation or nondisclosure, the party would not have entered the transaction"); see also Blyden v. Mancusi, 186 F.3d 252, 268-69 (2d Cir. 1999) (liability and damages must be tied to identifiable misconduct); Broussard v. Meineke Discount Muffler Shops, Inc., 155 F.3d 331, 344-45 (4th Cir. 1998) (due process requires that defendants have an opportunity to contest causation and other liability issues).

legal cause of injury to Mary Farnan, Frank Amodeo and Angie Della Vecchia."⁹

Similarly, the Phase II-A verdict form repeatedly reminded the jurors of what "you found" in Phase I and then asked them to apply their memory to the three individuals' specific claims of deception and reliance.¹⁰ Juries in subsequent actions, however, will have no way to retrace the Phase I jury's steps in addressing the claims of other Engle claimants. In short, Findings 4a, 5, and 5a are no more specific, and no more applicable in subsequent actions, than invalidated Finding 4.

⁹ T50236 (emphasis added). Likewise, on fraudulent concealment, the jury was instructed: "[I]n your earlier verdict you found that each of the defendants concealed or omitted material information The issue in Phase II as to the three class representatives is whether these concealments or omissions were a legal cause of injury [to the three individuals]." T50241 (emphasis added). See also T50235, 50249-52, 50262-63, 50265-66, 50271, 50275-76, 50279-81.

¹⁰ During Phase II-A, for example, Farnan and Amodeo testified that they were unaware of specific facts that defendants allegedly concealed -- e.g., that smoking could cause throat and laryngeal cancer, that cigarette smoke contained various chemicals and carcinogens, that cigarettes contained ammonia or other additives, that some individuals may inhale more frequently or deeply when smoking low-tar cigarettes, that nicotine levels were subject to adjustment, and that certain research was conducted overseas and not provided to public health officials. T40244-54, 41369, 41438-42. When their claims were submitted to the jury, the Phase II-A verdict form, Question 4, reminded the jury of its general Phase I finding that "each of the Defendants concealed or omitted material information"; it then asked the jury to decide whether each defendant's "concealment or omission" was "a legal cause of injury to [that individual]." R304:69466 (RRA5). Similarly, Question 5 reminded the jury of its general Phase I finding of "an agreement to misrepresent information relating to the health effects of cigarette smoking, or the addictive nature of smoking cigarettes"; it then asked the jury to decide whether the individuals' injuries were "legally caused by acts done in furtherance of an agreement among two or more defendants to commit an act of fraud or misrepresentation, as found in Phase One." R304:69469 (RRA5) (emphasis added).

Moreover, Florida law does not recognize fraud claims based on nondisclosure except in cases involving a sale of residential real estate, a fiduciary duty to disclose, or other circumstances not present here.¹¹ Defendants raised this point in the Third District and it remains unaddressed. (See Defendants' Merits Brief, Appendix Vol. 3, Tab 28, at 79-81; see also Point III below.)

Findings 3 ("strict liability"), 6 ("breach of implied warranty") and 8 ("negligence"). The same lack of specificity invalidates the other preserved findings. Findings 3 and 6 ("strict liability" and "breach of implied warranty") simply state that unspecified cigarettes were "defective," and Finding 8 ("negligence") simply states that defendants "failed to exercise the degree of care which a reasonable cigarette manufacturer would exercise under like circumstances."¹² It is impossible to state what defect or negligence the jury found, or to identify the cigarette brands, types, or designs to which the findings apply.

At trial, to support their assertions of "defect," plaintiffs attacked scores of particular cigarette brands or types (many of which were modified during the nearly 50 years in issue). Plaintiffs attacked cigarettes with reference to particular features, e.g., cigarettes with high deliveries of tar and nicotine; cigarettes advertised as "light"; cigarettes with certain filters; cigarettes with ventilation

¹¹ See, e.g., TransPETROL, Ltd. v. Radulovic, 764 So. 2d 878, 879-80 (Fla. 4th DCA 2000); Don Slack Insurance, Inc. v. Fidelity & Casualty Co., 385 So. 2d 1061, 1064 (Fla. 5th DCA 1980).

¹² R304:69450, 69456, 69458 (RRA4).

holes; cigarettes with ventilation holes placed at varying distances from the tip; cigarettes with different leaf blends; cigarettes with different flavorings or other ingredients; and cigarettes processed with ammonia compounds (which allegedly increased addictiveness). This is only a partial list of the specific designs, ingredients, and manufacturing processes that plaintiffs challenged as involving various defects or failures to warn.¹³

Similarly, to support their assertions of "negligence," plaintiffs relied on the same broad spectrum of assertions, with added allegations concerning various methods of advertising, marketing, and promotion -- e.g., cigarette sampling, celebrity advertising, couponing, "youth marketing," "glamour advertising," and a host of other activities at different times over nearly half a century.¹⁴

Given the Phase I record and findings, no subsequent factfinder can identify the act(s) or omission(s) that created the "defect" or constituted the "negligence," and then determine whether that conduct caused an individual plaintiff's injury. But linking wrongful conduct to a particular plaintiff's injury is indispensable to a determination of liability.¹⁵

¹³ See, e.g., T13475-77, 25505-08, 25903, 25911, 26139-41, 26164-66, 26169, 26181-85, 26231, 26284-87, 26292-94, 36352, 36421, 36451, 36483-86, 36562-65, 36664-65, 36720-21, 36729-32.

¹⁴ See, e.g., T11235, 12592-94, 13475-77, 15423-24, 16470, 17265, 18225-27, 18750-57, 36480-83, 36492-95.

¹⁵ See, e.g., Edward M. Chadbourne, Inc. v. Vaughn, 491 So. 2d 551, 553 (Fla. 1986) (strict liability, negligence, and warranty); West v. Caterpillar Tractor Co.,

Identification of wrongful conduct linked to the plaintiff's injury is also necessary for determining comparative fault. Contrary to the Court's suggestion (Op. at 38), future juries cannot make that determination on the basis of the Phase I findings. A jury must have "complete information as to the quantity, quality, nature and degree of the defendant's conduct so that the jury knows just what to 'compare' with its assessment of the plaintiff's." Metropolitan Dade County v. Cox, 453 So. 2d 1171, 1173 (Fla. 3d DCA 1984). Because negligence and comparative negligence are inextricably intertwined, they must be considered together by a single jury. No subsequent jury can look at the Phase I findings to determine the nature and extent of a defendant's fault, then weigh that against the nature and extent of an Engle claimant's fault:

Comparative negligence means comparison. The trier of fact compares the negligence of plaintiff and defendant. Fault is compared to fault. Thus to determine the negligence of the parties, the trier of the facts must hear the totality of fault.

336 So. 2d 80, 86 (Fla. 1976) (strict liability); Sardell v. Malanio, 202 So. 2d 746, 747 (Fla. 1967) (a "direct" link must be established "between the negligent act and the injury" so that "it can reasonably be said that but for the act the injury would not have occurred"); see also State v. J.P., 907 So. 2d 1101, 1113 n.4 (Fla. 2004) ("a plaintiff must establish a causal connection between the injury and the conduct complained of" as a matter of constitutional standing); Royal v. Black & Decker Mfg. Co., 205 So. 2d 307, 309 (Fla. 3d DCA 1967) (in a products case, "the heart" of both negligence and strict-liability theories is a causal link between the defect and the plaintiff's injury); Mullen v. Treasure Chest Casino, LLC, 186 F.3d 620, 628 (5th Cir. 1999) ("Our precedent limits a negligent party's liability to injuries that are caused by the same condition that rendered the party negligent").

Id. (quoting Amend v. Bell, 570 P.2d 138, 142 (Wash. 1977)).¹⁶

Finally, the generality of the Phase I findings precludes their use as a basis for determining punitive damages. Due process requires a linkage between punitive damages and the misconduct that harmed the particular plaintiff. Under State Farm Mutual Automobile Insurance Co. v. Campbell, 538 U.S. 408 (2003), the misconduct for which punitive damages are awarded "must have a nexus to the specific harm suffered by the plaintiff." Id. at 409-10. "A defendant's dissimilar acts, independent from the acts upon which liability was premised, may not serve as the basis for punitive damages." Id. at 422 (emphasis added). Here, however, individual Engle claimants cannot link a claim for punitive damages to "the acts upon which liability was premised," because the Phase I verdict fails to identify any such "acts."

The gamut of problems discussed above cannot be sidestepped simply by assuming that every cigarette was defective or negligently made or marketed; or that defendants concealed (or conspired to misrepresent or conceal) every supposed fact a claimant might choose as the gravamen of a fraud claim; or that the

¹⁶ See also Rowlands v. Signal Construction Co., 549 So. 2d 1380, 1383 (Fla. 1989) ("liability is inextricably bound up with the apportionment of damages under the doctrine of comparative negligence"); In re Rhone-Poulenc Rorer Inc., 51 F.3d 1293, 1302-03 (7th Cir. 1995) (comparative negligence "overlaps the issue of liability"); Rink v. Cheminova, Inc., 203 F.R.D. 648, 652 (M.D. Fla. 2001) ("juries in the hundreds or thousands or tens of thousands of 'mini-trials' on causation and damages would be required to reconsider the findings of the original jury in the liability case in order to compare and apportion fault").

assumed defect, assumed negligence, or assumed concealment caused every claimant's smoking-related injury. By stripping defendants of their right to contest legal causation and reliance, any such assumptions would violate settled law and due process.¹⁷

B. Findings 3, 4a, 5, 5a, 6, And 8 Cannot Be Given Conclusive Effect Under Principles Of Res Judicata, Collateral Estoppel, Or Any Other Preclusion Doctrine

In giving the Phase I findings "res judicata" effect, the Court overlooked or misapprehended legal and constitutional requirements that render res judicata -- or any other preclusion doctrine -- inapplicable here.

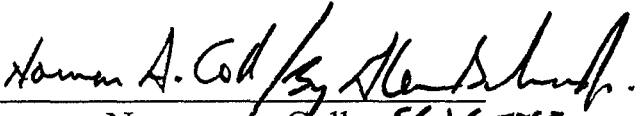
Judgment on a claim or cause of action. Res judicata requires a judgment on the merits that resolves a "claim" or "cause of action." See, e.g., Florida Dep't

¹⁷ See, e.g., West, 336 So. 2d at 86; Wyeth, Inc. v. Gottlieb, 930 So. 2d 635, 640 (Fla. 3d DCA 2006) (class certification cannot override requirement of individual causation); Volkswagen of America, Inc. v. Sugarman, 909 So. 2d 923, 924 (Fla. 3d DCA 2005) (same); Humana, 728 So. 2d at 265 (reliance requirement in an omissions case "cannot be satisfied by assumptions"); Lindsey v. Normet, 405 U.S. 56, 66 (1972) (due process guarantees defendants a chance to "present every available defense"); Agency for Health Care Administration v. Associated Industries, 678 So. 2d 1239, 1254 (Fla. 1996) (irrebuttable presumption violated due process); Broussard, 155 F.3d at 344-45 (due process requires opportunity to contest individual causation).

Furthermore, the requirements of substantive tort law and due process cannot be altered by class actions, which are a purely procedural device. See, e.g., State v. Domingo Garcia, 229 So. 2d 236, 237 (Fla. 1969) (Supreme Court rules "cannot abrogate or modify substantive law"); Hoyte v. Stauffer Chemical Co., 2002 WL 31892830, at *56 (Fla. 2d DCA Nov. 6, 2002) ("The class action device is procedural in nature only and cannot be used to change the substantive law"); see also Amchem Products, Inc. v. Windsor, 521 U.S. 591, 613 (1997) (federal class-action rules may not modify "any substantive right").

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of Respondents' Motion for Rehearing was served by U.S. Mail on all counsel on the attached Service List this 7th day of August, 2006.


Norman A. Coll F&W 405807

IN THE SUPREME COURT OF FLORIDA
CASE NO.: SC03-1856

Lower Tribunal Nos.: 3D00-3400, 3D00-3206, 3D00-3207,
3D00-3208, 3D00-3210, 3D00-3212,
3D00-3215

HOWARD A. ENGLE, M.D., et al.,

Petitioners,

vs.

LIGGETT GROUP INC., et al.,

Respondents.

**MOTION FOR REHEARING AND/OR CLARIFICATION
BY RESPONDENT LIGGETT GROUP LLC (FORMERLY
LIGGETT GROUP INC. AND BROOKE GROUP HOLDING INC.)**

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*Counsel for Respondent Liggett Group LLC (formerly Liggett Group Inc.
and Brooke Group Holding Inc.)*

Pursuant to Florida Rule of Appellate Procedure 9.330(a), Respondent Liggett Group LLC, formerly known as Liggett Group Inc. (“Liggett”) and Brooke Group Holding Inc. (“Brooke”) (together, the “Liggett defendants”), respectfully moves for rehearing and/or clarification of the Court’s July 6, 2006 opinion. The instant motion addresses issues that are specific to Liggett and Brooke.¹

I. Introduction

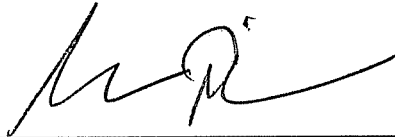
In its July 6, 2006 opinion, this Court held that the Third District was correct in its determination that the final judgment entered in favor of all three of the individual class representatives should be reversed as against the Liggett defendants:

We also agree with the Third District that the judgments against defendants Liggett and Brooke in favor of Farnan and Del [sic] Vecchia must be reversed because there was insufficient evidence to support these judgments. As the Third District explained, “it is undisputed that the Liggett defendants did not manufacture or sell any of the products that allegedly caused injury to the individual plaintiff representatives. It is also undisputed that the jury found the Liggett defendants zero percent at fault with respect to each of the named plaintiffs.” *Engle II*, 853 So. 2d at 466 n.46. A defendant who is found to be zero percent at fault for a plaintiff’s damages cannot be held jointly and severally liable for those damages. We agree with the Third District that this inconsistency in the verdict requires

¹ The Liggett defendants also hereby adopt and incorporate by reference the points and arguments set forth in the Respondents’ Motion For Rehearing submitted by all respondents other than Liggett and Brooke (the “Combined Motion”) in their entirety.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served by U.S. Mail on all counsel on the attached Service List this 7th day of August 2006.

By: 
Alvin B. Davis, P.A.

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UNITED STATES SECURITIES AND EXCHANGE COMMISSION

Washington, D.C. 20549

FORM 10-K

(Mark One)

☒ **ANNUAL REPORT PURSUANT TO SECTION 13 OR 15(d) OF
THE SECURITIES EXCHANGE ACT OF 1934**
For the fiscal year ended December 31, 2008

OR

☐ **TRANSITION REPORT PURSUANT TO SECTION 13 OR 15(d) OF
THE SECURITIES EXCHANGE ACT OF 1934**

Commission file number: 1-32258

Reynolds American Inc.

(Exact name of registrant as specified in its charter)

North Carolina

(State or other jurisdiction of incorporation or organization)

20-0546644

(I.R.S. Employer Identification Number)

401 North Main Street

Winston-Salem, NC 27101

(Address of principal executive offices) (Zip Code)

(336) 741-2000

(Registrant's telephone number, including area code)

Securities registered pursuant to Section 12(b) of the Act:

Title of each class	Name of each exchange on which registered	Title of each class	Name of each exchange on which registered
Common stock, par value \$.0001 per share	New York	Rights to Purchase Series A Junior Participating Preferred Stock	New York

Securities registered pursuant to Section 12(g) of the Act: None

Indicate by check mark if the registrant is a well-known seasoned issuer, as defined in Rule 405 of the Exchange Act. Yes ☒ No ☐

Indicate by check mark if the registrant is not required to file reports pursuant to Section 13 or 15(d) of the Act. Yes ☐ No ☒

Indicate by check mark whether the registrant (1) has filed all reports required to be filed by Section 13 or 15(d) of the Securities Exchange Act of 1934 during the preceding 12 months (or for such shorter period that the registrant was required to file such reports), and (2) has been subject to such filing requirements for the past 90 days. Yes ☒ No ☐

Indicate by check mark if disclosure of delinquent filers pursuant to Item 405 of Regulation S-K is not contained herein, and will not be contained, to the best of registrant's knowledge, in definitive proxy or information statements incorporated by reference in Part III of this Form 10-K or any amendment to this Form 10-K. ☐

Indicate by check mark whether the registrant is a large accelerated filer, an accelerated filer, a non-accelerated filer, or a smaller reporting company. See the definitions of "large accelerated filer," "accelerated filer" and "smaller reporting company" in Rule 12b-2 of the Exchange Act. (Check one):

Large accelerated filer ☒ Accelerated filer ☐ Non-accelerated filer ☐ Smaller reporting company ☐
(Do not check if a smaller reporting company)

Indicate by check mark whether the registrant is a shell company (as defined in Rule 12b-2 of the Exchange Act). Yes ☐ No ☒

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RAI's operating subsidiaries could be subject to substantial liabilities and bonding difficulties from litigation related to cigarette products or smokeless tobacco products, thereby reducing operating margins and cash flows from operations. Adverse litigation outcomes could have a negative impact on RAI's ability to continue to operate due to their impact on cash flows.

RJR Tobacco, the Conwood companies and their affiliates, including RAI, and indemnitees, including B&W, have been named in a large number of tobacco-related legal actions, proceedings or claims. The claimants seek recovery on a variety of legal theories, including negligence, strict liability in tort, design defect, fraud, misrepresentation, unfair trade practices and violations of state and federal antitrust laws. Various forms of relief are sought, including compensatory and, where available, punitive damages in amounts ranging in some cases into the hundreds of millions or even billions of dollars.

The tobacco-related legal actions range from individual lawsuits to class-actions and other aggregate claim lawsuits. In particular, class-action suits have been filed in a number of states against individual cigarette manufacturers, including RJR Tobacco, alleging that the use of the terms "lights" and "ultra lights" constitutes unfair and deceptive trade practices. Many of these "lights" cases were stayed pending review of the *Good v. Altria Group, Inc.* case by the U.S. Supreme Court. On December 15, 2008, the U.S. Supreme Court decided that these claims are not preempted by the Federal Cigarette Labeling and Advertising Act or by the U.S. Federal Trade Commission's, referred to as FTC, historic regulation of the industry. In light of this decision, it is likely that the stayed cases will be activated, additional cases may go to trial, new cases will be filed and defense costs will increase. In the event RJR Tobacco and its affiliates and indemnitees lose one or more of the pending "lights" class-action suits, RJR Tobacco, depending upon the amount of any damages ordered, could face difficulties in obtaining the bond required to stay execution of the judgment. For a more complete description of these cases, see "— Class-Action Suits — 'Lights' Cases" in Item 8, note 16 to consolidated financial statements.

In addition, in *Engle v. R.J. Reynolds Tobacco Co., et al.* (Circuit Court, Dade County, Florida, filed May 5, 1994), the Florida Supreme Court issued a ruling that, among other things, determined that the case could not proceed further as a class action. The ruling also permitted members of the *Engle* class to file individual claims, including claims for punitive damages, through January 11, 2008. RJR Tobacco refers to these cases as the *Engle* Progeny Cases. Although the final number of *Engle* Progeny Cases is not yet known, RJR Tobacco has been served in 3,156 cases on behalf of approximately 8,808 plaintiffs. The *Engle* Progeny Cases will result in increased litigation activity, including an increased number of trials in 2009, and increased expenses. For a more complete description of the *Engle* Progeny cases, see "— Engle Progeny Cases" in Item 8, note 16 to consolidated financial statements.

It is likely that similar legal actions, proceedings and claims arising out of the sale, distribution, manufacture, development, advertising, marketing and claimed health effects of cigarettes and smokeless tobacco products will continue to be filed against RJR Tobacco, the Conwood companies, or their affiliates and indemnitees and other tobacco companies for the foreseeable future.

Victories by plaintiffs in highly publicized cases against RJR Tobacco and other tobacco companies regarding the health effects of smoking may stimulate further claims. A material increase in the number of pending claims could significantly increase defense costs. In addition, adverse outcomes in pending cases could have adverse effects on the ability of RJR Tobacco and its indemnitees, including B&W, to prevail in other smoking and health litigation.

For a more complete description of the litigation involving RAI and its operating subsidiaries, including RJR Tobacco and the Conwood companies, see "— Litigation Affecting the Cigarette Industry" and "— Smokeless Tobacco Litigation" in Item 8, note 16 to consolidated financial statements.

As a result of the order issued in a case brought by the U.S. Department of Justice, RJR Tobacco could be subject to additional, substantial marketing restrictions, which would negatively impact revenue, increase related compliance costs and reduce operating margins of RJR Tobacco, and, consequently of RAI.

In September 1999, the U.S. Department of Justice brought an action against RJR Tobacco, B&W and other tobacco companies. The government sought, in addition to other remedies, pursuant to the civil provisions of RICO, disgorgement of profits the government contends were earned as a consequence of a RICO racketeering

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NOTES TO CONSOLIDATED FINANCIAL STATEMENTS — (Continued)

fiscal quarter ended September 30, 2008, filed with the SEC on October 24, 2008, and a cross-reference to the discussion of each case type.

Case Type	RJR Tobacco's Case Numbers as of February 6, 2009	Change in Number of Cases Since October 10, 2008 Increase/(Decrease)	Page Reference
Individual Smoking and Health	102	(36)	106
West Virginia IPIC (Number of Plaintiffs)*	1(687)	—	107
<i>Engle</i> Progeny (Number of Plaintiffs)**	3,156 (8,808)	846	108
<i>Broin II</i>	2,620	No Change	108
Class-Action	15	No Change	108
Health-Care Cost Recovery	4	No Change	115
MSA-Enforcement and Validity	60	No Change	119
Antitrust	2	No Change	122
Other Litigation	10	(1)	122

* Beginning with this report, the West Virginia Individual Personal Injury Cases have been separated from the Individual Smoking and Health cases for reporting purposes.

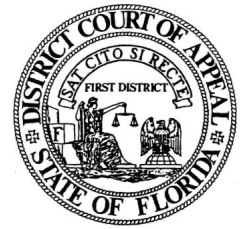
** The *Engle* Progeny Cases have been separated from the Individual Smoking and Health cases for reporting purposes. Plaintiffs' counsel are attempting to include multiple plaintiffs in most of the cases filed. The increase in the number of cases includes new cases served and new cases filed by severed plaintiffs.

Four pending cases against RJR Tobacco and B&W have attracted significant attention: the Florida state court class-action case, *Engle v. R. J. Reynolds Tobacco Co.*, the Louisiana state court class-action case, *Scott v. American Tobacco Co.*, the federal RICO case brought by the U.S. Department of Justice, and the federal lights class action *Schwab [McLaughlin] v. Philip Morris USA, Inc.*

In 2000, a jury in *Engle* rendered a punitive damages verdict in favor of the "Florida class" of approximately \$145 billion against all defendants. On July 6, 2006, the Florida Supreme Court, among other things, affirmed an appellate court's reversal of the punitive damages award, decertified the class going forward, preserved several class-wide findings from the trial, including that nicotine is addictive and cigarettes are defectively designed, and authorized class members to avail themselves of these findings in individual lawsuits under certain conditions. After subsequent motions were resolved, the Florida Supreme Court issued its mandate on January 11, 2007, thus beginning a one-year period in which former class members were permitted to file individual lawsuits. On October 1, 2007, the U.S. Supreme Court denied the defendants' petition for writ of certiorari. As of February 6, 2009, RJR Tobacco had been served in 3,156 *Engle* Progeny Cases in both state and federal courts in Florida. These cases include approximately 8,808 plaintiffs. The number of cases will likely change due to individual plaintiffs being severed from multi-plaintiff cases.

In 2004, a jury in *Scott* returned a verdict in favor of the "Louisiana class" for \$591 million to establish a state-wide smoking cessation program. In 2007, the Louisiana Court of Appeals upheld class certification, significantly reduced the scope of recovery, and remanded the case for further proceedings. The Louisiana and U.S. Supreme Courts denied the defendants' applications for writ of certiorari. In July 2008, the trial court entered an amended judgment in favor of the class for approximately \$263 million plus interest from June 30, 2004. On December 15, 2008, the trial court signed the order for appeal of the amended judgment. The briefing schedule with the Court of Appeals has not been set.

In the U.S. Department of Justice case, brought in 1999 in the U.S. District Court for the District of Columbia, the government sought, among other forms of relief, the disgorgement of profits pursuant to the civil provisions of RICO. The U.S. Court of Appeals for the District of Columbia ruled in 2005 that disgorgement is not an available remedy in the case. The bench trial ended in June 2005, and the court, in August 2006, issued its ruling, among other



Case No. 1D10-4585

**IN THE DISTRICT COURT OF APPEAL, FIRST DISTRICT
STATE OF FLORIDA**

R.J. REYNOLDS TOBACCO COMPANY,

Defendant/Appellant,

v.

LYANTIE TOWNSEND, AS PERSONAL REPRESENTATIVE
FOR THE ESTATE OF FRANK TOWNSEND, DECEASED,

Plaintiff/Appellee.

Appeal from a Final Judgment rendered by the Circuit Court in and for Alachua
County, Florida, Case No. 01-2008-CA-003978
Hon. Victor L. Hulslander, Circuit Judge

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Fairness considerations reinforce this conclusion. Giving preclusive effect to a prior judgment that may not have decided a particular issue is akin to deciding the issue with no process at all. The Due Process Clause was intended to prevent just that sort of arbitrary deprivation of property. After all, “[t]he fundamental requisite of due process of law is the opportunity to be heard,” *Goldberg v. Kelly*, 397 U.S. 254, 267 (1970) (citation omitted), “to litigate the issues raised,” *Armour & Co.*, 402 U.S. at 681-82, and “to present every available defense,” *Williams*, 549 U.S. at 353 (quoting *Lindsey*, 405 U.S. at 66). The trial court’s misapplication of preclusion law negates all those bedrock procedural rights.⁶

III. MR. TOWNSEND DID NOT RELY ON ANY STATEMENT BY ANY ENGLE DEFENDANT.

This Court should reverse the findings of liability for fraudulent concealment and conspiracy because Mrs. Townsend failed to prove reliance. In turn, the punitive-damages award cannot stand because, as the trial court correctly instructed, *T.33:2739-40 (R.96:3402-03)*, punitive damages here must rest on proof of the intentional torts of fraudulent concealment or conspiracy.

⁶ Use of the *Engle* findings violates due process for the independent reason that *Engle* proceeded under an unconstitutional trial plan. See, e.g., *Gasoline Prods. Co. v. Champlin Ref. Co.*, 283 U.S. 494, 500 (1931); *Broussard v. Meineke Discount Muffler Shops, Inc.*, 155 F.3d 331, 344-45 (4th Cir. 1998). The Florida Supreme Court has rejected certain constitutional challenges to the *Engle* trial plan, see 945 So. 2d at 1271-74, and this Court is bound by that ruling. Nonetheless, Reynolds wishes to preserve all of its constitutional arguments for potential review in the U.S. Supreme Court, and we thus raise the issue here.

A. Standard Of Review.

The refusal to direct a verdict is subject to review *de novo*. *Harris v. Soha*, 15 So. 3d 767, 769 (Fla. 1st DCA 2009).

B. Mrs. Townsend Failed To Prove Reliance.

Reasonable reliance is an essential element of a claim for fraudulent concealment, without which there can be no causal connection between any concealed information and injury. *See Humana*, 728 So. 2d at 265 (“Florida law imposes a reliance requirement in an omissions case, which cannot be satisfied by assumptions.”); *see also Soler v. Secondary Holdings, Inc.*, 771 So. 2d 62, 70 (Fla. 3d DCA 2000) (since plaintiff “did not detrimentally rely on [defendant’s] alleged concealment . . . , the trial court correctly found that no fraud existed as a matter of law”); *Cole Taylor Bank v. Shannon*, 772 So. 2d 546, 553 (Fla. 1st DCA 2000) (same). And because fraudulent concealment is the predicate tort for Mrs. Townsend’s conspiracy claim, reliance is also an essential element of that claim. *See Raimi*, 702 So. 2d at 1284 (conspiracy requires “actionable underlying tort”).

To prove reliance, a plaintiff must “establish that but for the alleged . . . nondisclosure, the party would not have entered the [relevant] transaction.” *Humana*, 728 So. 2d at 265. In other words, a plaintiff must show that, had he known of the omitted information, he would have “take[n] action . . . amounting to [a] substantial change of position.” *Johnson Enters. of Jacksonville, Inc. v. FPL*

Group, Inc., 162 F.3d 1290, 1315 (11th Cir. 1998). A plaintiff cannot show reliance and therefore cannot recover if he already knows of the omitted information. *See McDonald v. Rose*, 50 So. 2d 878, 880 (Fla. 1951) (parties “cannot claim that they were deceived into relying upon . . . representations” where they “know that the . . . representations . . . were incorrect”).

Mrs. Townsend failed to present any evidence that Mr. Townsend reasonably relied on any statement by any *Engle* defendant, much less that he reasonably relied on any statement that was misleading due to concealed information. *First*, she presented no individualized evidence about Mr. Townsend’s alleged reliance. In fact, she admitted that she did not have any information that her husband ever relied on any statement or cigarette advertisement in deciding to start or continue smoking. *T.20:1499-1500 (R.88:1853-54)*. Mrs. Townsend never discussed tobacco advertising of any kind with Mr. Townsend, *T.19:1467 (R.87:1796)*, and had no knowledge concerning whether Mr. Townsend had received any communications from any tobacco industry groups, *T.19:1466-67 (R.87:1795-96)*. Mrs. Townsend’s own expert testified that there is “no evidence that Mr. Townsend began smoking because of anything a tobacco company said or did.” *T.18:1355 (R.87:1665)*. No witness ever suggested that Mr. Townsend would have quit smoking and avoided his lung cancer if he had not seen some unidentified statement from a tobacco company.

Second, Mr. Townsend could not have relied on any statements containing fraudulent omissions about the health effect of cigarettes because undisputed evidence shows that he already knew, from an early date, that smoking causes health problems and is addictive. In 1959, Mr. Townsend agreed not to smoke around his pregnant wife, out of concern for the health of their baby. *T.19:1417, 1449 (R.87:1746, 1778)*. The Townsends repeatedly warned their son not to smoke because it was a “bad habit” and not good for his health. *T.30:2335-37 (R.93:2909-11)*. And Mr. Townsend himself acknowledged to friends that he “need[ed] to give up” smoking. *T.21:1587 (R.88:1963)*. Many courts have held that a plaintiff cannot recover where, as here, he already knew about the information allegedly concealed. *See Soler*, 771 So. 2d at 69-70; *Stow v. Nat’l Merch. Co.*, 610 So. 2d 1378, 1383 (Fla. 1st DCA 1992); *Rivera v. Philip Morris, Inc.*, 395 F.3d 1142, 1154 (9th Cir. 2005); *Estate of White v. R.J. Reynolds Tobacco Co.*, 109 F. Supp. 2d 424, 435 (D. Md. 2000).⁷

Mrs. Townsend’s contrary evidence amounted to an improper fraud-on-the-market theory. To prove reliance, Mrs. Townsend presented expert testimony

⁷ Even more obviously, Mr. Townsend did not reasonably rely on any alleged concealment within the twelve-year repose period for fraud claims set forth in § 95.031(2)(a), Fla. Stat. As noted above, Mr. Townsend was aware of the health risks of smoking as early as 1959. Furthermore, every package of cigarettes that Mr. Townsend purchased since 1966—some 26 years before *Engle* was filed—contained a federally-mandated warning label that made plain the health risks of smoking. *See* 15 U.S.C. § 1334.

about the tobacco industry's communications about the health risks and addictive nature of smoking. *See T.16:1125 (R.85:1376)* (expert Michael Cummings). No expert had any "individual" information about what Mr. Townsend knew or relied upon. *T.14:973-74 (R.84:1189-90); T.16:1178 (R.86:1429)*. Rather, Mrs. Townsend argued that cigarette advertising must have influenced Mr. Townsend because tobacco images were "everywhere." *See T.16:1178-79 (R.86:1429-30)* (expert testimony describing so-called "wallpaper effect").

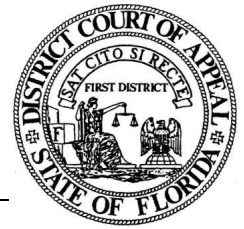
Widespread speech does not create a jury question on reliance. To the contrary, the "reliance requirement" under Florida law "cannot be satisfied by assumptions" about the behavior of listeners in general. *Humana*, 728 So. 2d at 265. Florida courts thus have categorically rejected application of fraud-on-the-market theories to common-law fraud claims. *See, e.g., Morgan v. W.R. Grace & Co.—Conn.*, 779 So. 2d 503, 506 (Fla. 2d DCA 2000) (rejecting theory that the defendant "lulled the general public . . . into a false sense of security"); *Palmas y Bambu, S.A. v. E.I. Dupont de Nemours & Co.*, 881 So. 2d 565, 573 (Fla. 3d DCA 2004) ("reliance cannot be presumed due to a defendant's subjection of 'the whole market' to deceptive advertising" (citation omitted)); *Chudasama v. Mazda Motor Corp.*, 123 F.3d 1353, 1369, n.39 (11th Cir. 1997) ("The fraud on the market theory of securities law . . . is based on concepts and policies that simply do not apply in a products liability case."); *Butterworth v. Quick & Reilly, Inc.*, 998 F.

Supp. 1404, 1410-11 (M.D. Fla. 1998) (“Plaintiff must prove actual reliance . . . because [the] ‘fraud on the market theory’ is unavailable in Florida.”). Other courts likewise have rejected these arguments in tobacco litigation. *See McLaughlin v. Am. Tobacco Co.*, 522 F.3d 215, 225 (2d Cir. 2008) (rejecting smokers’ “fraud on the market theory” because “reliance is too individualized to admit of common proof”); *Brown v. Philip Morris Inc.*, 228 F. Supp. 2d 506, 519 (D.N.J. 2002) (same).

Moreover, to allow such wholly generalized proof of reliance would be contrary to *Engle* itself. The Florida Supreme Court decertified the *Engle* class precisely because “reliance and legal cause” raise “*individual* questions” not provable on a classwide basis. 945 So. 2d at 1255 (emphasis added); *see id.* at 1268 (decertifying class because “individualized issues” predominate). If generalized, market-wide evidence were sufficient to establish reliance as to every member of the smoking public, reliance would have been a common issue in *Engle*, not an individual one.

IV. THE COMPENSATORY DAMAGES AWARD WAS EXCESSIVE.

Assuming liability, the \$10.8 million award for Mrs. Townsend’s non-economic damages was excessive. Under Florida law, “the function of a remittitur is to correct an improper verdict as to damages.” *Gould v. Nat’l Bank of Fla.*, 421 So. 2d 798, 802 (Fla. 3d DCA 1982). If damages are “excessive,” then “remittitur



Case No. 1D10-5282

**IN THE DISTRICT COURT OF APPEAL, FIRST DISTRICT
STATE OF FLORIDA**

R.J. REYNOLDS TOBACCO COMPANY,

Defendant/Appellant,

v.

EARLINE ALEXANDER, AS PERSONAL REPRESENTATIVE OF
THE ESTATE OF JOHN PAUL ALEXANDER,

Plaintiff/Appellee.

Appeal from a Final Judgment rendered by the Circuit Court in and for Alachua
County, Florida, Case No. 08-CA-5067
Hon. Victor L. Hulslander, Circuit Judge

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FEBRUARY 4, 2011

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17, T.11:1591-99 (testimony regarding cigarette marketing in the 1970s and 1980s). Without proper instructions, it is impossible to know whether the jury based its concealment and conspiracy findings on conduct that occurred outside of the repose period or on conduct that occurred after the effective date of the Labeling Act's express preemption provision. While the statute of repose and the Labeling Act should foreclose any claim, the trial court's refusal to give jury instructions relating to those provisions at a minimum requires a new trial. *See Sheen v. Jenkins*, 629 So. 2d 1033, 1035-36 (Fla. 4th DCA 1993) (ordering new trial where appellate court could not "say for certain that the jury's verdict was not affected by the erroneous instruction").

II. MR. ALEXANDER DID NOT REASONABLY RELY ON ANY STATEMENT OR OMISSION BY ANY *ENGLE* DEFENDANT

The concealment, conspiracy, and punitive-damages claims also fail for a second, independent reason: Plaintiff failed to prove that Mr. Alexander reasonably lied to his detriment on any tobacco-company statement.

A. Standard Of Review

The trial court denied Reynolds a directed verdict for failure to prove reliance. *See* R.71:10287-88. This denial is subject to de novo review. *See Harris v. Soha*, 15 So. 3d 767, 769 (Fla. 1st DCA 2009).

B. Mrs. Alexander Failed To Prove Reliance

Reasonable reliance is an essential element of a claim for fraudulent concealment. *See, e.g., R.J. Reynolds Tobacco Co. v. Martin*, No. 1D09-4934, 2010 WL 5074839 at *7-8 (1st DCA Dec. 14, 2010); *Humana, Inc. v. Castillo*, 728 So. 2d 261, 265 (Fla. 2d DCA 1999); *Palmas y Bambu, S.A. v. E.I. DuPont de Nemours & Co.*, 881 So. 2d 565, 573 (Fla. 3d DCA 2004). To prove reasonable reliance, a plaintiff must “establish that but for the alleged . . . nondisclosure, the party would not have entered the [relevant] transaction.” *Humana*, 728 So. 2d at 265; *see also Johnson Enters. of Jacksonville, Inc. v. FPL Group, Inc.*, 162 F.3d 1290, 1315 (11th Cir. 1998). Courts routinely hold that where the person already knew about the information allegedly concealed, it is impossible to prove reasonable reliance. *See, e.g., Soler v. Secondary Holdings, Inc.*, 771 So. 2d 62, 69-70 (Fla. 3d DCA 2000); *Stow v. Nat’l Merch. Co.*, 610 So. 2d 1378, 1383 (Fla. 1st DCA 1992); *Rivera v. Philip Morris, Inc.*, 395 F.3d 1142, 1154 (9th Cir. 2005); *Estate of White v. R.J. Reynolds Tobacco Co.*, 109 F. Supp. 2d 424, 435 (D. Md. 2000).

In this case, Mr. Alexander could not have reasonably relied on any tobacco-company statements allegedly downplaying the health risks of smoking, because he undisputedly knew that smoking is dangerous:

- Mr. Alexander’s wife and daughter told him that he would die from smoking. *See* R.94:3426-27, T.22:2809-10 (Mrs. Alexander told Mr. Alexander that smoking would kill him and that he should not smoke); R.91:2971, T.19:2441 (Mr. Alexander’s daughter, Clara Holmes, told Mr. Alexander that smoking would kill him).
- Mr. Alexander’s doctors advised him to quit smoking. *See* R.88:2336-37, T.14:1937-38.
- Mr. Alexander watched television news regularly during a time when the health risks of cigarette smoking were covered extensively. *See* R.94:3438, 3442-43, T. 22:2821, 2825-26.

This Court’s recent decision in *Martin* is not inconsistent with this analysis. In *Martin*, a panel of this Court held that a jury could “infer” actual reliance based on the “pervasive” character of cigarette advertising. *See Martin*, 2010 WL 5074839 at *8. That holding speaks to the question whether exposure to and reliance upon cigarette advertising may be presumed in cases where the plaintiff cannot identify any specific statement on which the individual smoker at issue is alleged to have relied. It does not address the distinct question at issue here: whether any reliance can be reasonable where the smoker already knew the information that allegedly was concealed. As explained above, the answer to that question is no.

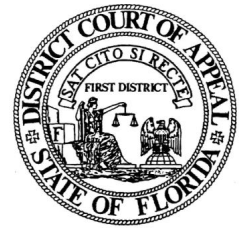
Reynolds respectfully disagrees with the *Martin* panel’s holding that reliance may be presumed from the allegedly pervasive nature of past cigarette advertising. We believe that Florida law is to the contrary. *See, e.g., Humana*, 728 So. 2d at 265 (proof of reliance “cannot be satisfied by assumptions”); *Palmas*, 881 So. 2d at 573 (“reliance cannot be presumed due to a defendant’s subjection of ‘the whole market’ to deceptive advertising” (citation omitted)). We also believe that proof of actual reliance fails in this case because Mrs. Alexander did not identify any specific tobacco-company statement that Mr. Alexander allegedly read or heard, and we wish to preserve this argument for further review in the event that *Martin*’s reliance holding is modified after further review. Nonetheless, regardless of whether a jury may presume exposure and reliance from the pervasive nature of cigarette advertising, it may not presume reasonable reliance on the omission of facts undisputedly known to the individual smoker. *Martin* says nothing about that issue, and certainly offers no support for the trial court’s decision to allow Plaintiff to establish reliance despite having had actual knowledge of the dangers that were supposedly concealed. On that basis alone, Reynolds is entitled to judgment on the concealment, conspiracy, and punitive-damages claims.

Moreover, the decision in *Martin* did not purport to (and could not) eliminate the federal due process requirement that punitive damages may only be awarded to punish conduct that actually harmed the plaintiff. *See Philip Morris*

USA v. Williams, 549 U.S. 346, 353-57 (2007); *see also State Farm Auto Ins. Co. v. Campbell*, 538 U.S. 408, 423 (2003) (reversing an award of punitive damages based on conduct that bore no relation to the plaintiff's harm). This due process limitation requires a causal nexus between the conduct to be punished and a plaintiff's alleged injury. *Williams*, 549 U.S. at 349 (holding that an award of punitive damages based on harm to someone other than the plaintiff "would amount to a taking of 'property' from the defendant without due process"). Even if the reliance element of a concealment claim may be satisfied by an inference of reliance for state law purposes (which again, Reynolds disputes), because Plaintiff presented no evidence of any specific nexus between the alleged misconduct and her husband's injury, the punitive damages award in this case fails the due process standard required under *Williams* and *State Farm*.

III. THE TRIAL COURT'S USE OF THE *ENGLE* FINDINGS TO ESTABLISH ELEMENTS OF MRS. ALEXANDER'S CLAIMS VIOLATED FLORIDA LAW AND DUE PROCESS

Reynolds is entitled to a new trial because the trial court's decision to relieve Plaintiff of the burden to prove necessary elements of her claims violated Florida preclusion law, federal due process, and the Supreme Court's instruction in *Engle*.



Case No. 1D10-5544

**IN THE DISTRICT COURT OF APPEAL, FIRST DISTRICT
STATE OF FLORIDA**

R.J. REYNOLDS TOBACCO COMPANY,

Defendant/Appellant,

v.

FINNA A. CLAY, AS PERSONAL REPRESENTATIVE
FOR THE ESTATE OF JANIE MAE CLAY, DECEASED,

Plaintiff/Appellee.

Appeal from a Final Judgment rendered by the Circuit Court in and for Escambia
County, Florida, Case No. 2007-CA-003020
Hon. Terry D. Terrell, Circuit Judge

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an instruction on the Labeling Act was needed because Plaintiff presented evidence of alleged failure to disclose information occurring after 1969. *See, e.g.*, T.11:1246-47 (testimony of Dr. Cummings); T.14:1660-62; 1664-66 (testimony of Dr. Burns). Without proper instructions, it is impossible to know that the jury did not base its concealment and conspiracy findings on conduct that occurred outside of the repose period or after the effective date of the Labeling Act's express preemption provision. While the statute of repose and the Labeling Act should foreclose any claim, the trial court's refusal to give jury instructions relating to those provisions at a minimum requires a new trial. *See Sheen v. Jenkins*, 629 So. 2d 1033, 1035-36 (Fla. 4th DCA 1993) (ordering new trial where appellate court could not "say for certain that the jury's verdict was not affected by the erroneous instruction").

III. MRS. CLAY DID NOT RELY ON ANY STATEMENT OR OMISSION BY ANY *ENGLE* DEFENDANT

The concealment, conspiracy, and punitive-damages claims also fail for a second, independent reason: Plaintiff failed to prove that Mrs. Clay relied to her detriment on any tobacco-company statement.

A. Standard Of Review

The trial court denied Reynolds a directed verdict on these claims based on failure to prove reliance. *See* T.21:2555. This denial is subject to *de novo* review. *See Harris v. Soha*, 15 So. 3d 767, 769 (Fla. 1st DCA 2009).

B. Plaintiff Failed To Prove Reliance

Reasonable reliance is an essential element of a claim for fraudulent concealment. *See, e.g., R.J. Reynolds Tobacco Co. v. Martin*, No. 1D09-4934, 2010 WL 5074839, at *7-8 (Fla. 1st DCA Dec. 14, 2010); *Humana, Inc. v. Castillo*, 728 So. 2d 261, 265 (Fla. 2d DCA 1999); *Palmas y Bambu, S.A. v. E.I. DuPont de Nemours & Co.*, 881 So. 2d 565, 573 (Fla. 3d DCA 2004). To prove reasonable reliance, a plaintiff must “establish that but for the alleged . . . nondisclosure, the party would not have entered the [relevant] transaction.” *Humana*, 728 So. 2d at 265; *see also Johnson Enters. of Jacksonville, Inc. v. FPL Group, Inc.*, 162 F.3d 1290, 1315 (11th Cir. 1998). Courts routinely hold that a plaintiff cannot prove reasonable reliance where she already knew about the information allegedly concealed. *See, e.g., Soler v. Secondary Holdings, Inc.*, 771 So. 2d 62, 69-70 (Fla. 3d DCA 2000); *Stow v. Nat’l Merch. Co.*, 610 So. 2d 1378, 1383 (Fla. 1st DCA 1992); *Rivera v. Philip Morris, Inc.*, 395 F.3d 1142, 1154 (9th Cir. 2005); *Estate of White v. R.J. Reynolds Tobacco Co.*, 109 F. Supp. 2d 424, 435 (D. Md. 2000).

In this case, Mrs. Clay could not have reasonably relied on any tobacco-company statements allegedly downplaying the health risks of smoking, because she undisputedly knew that smoking is dangerous:

- Plaintiff herself testified that Mrs. Clay knew cigarettes were bad for her health. *See* T.19:2409-10.
- Mrs. Clay told her sister that she knew she should not be smoking. *Id.*

- Mrs. Clay’s son, Robert, often referred to her cigarettes as “cancer sticks.” *Id.*
- Mrs. Clay’s husband told her “many times” that smoking was bad for her health. *See* T.20:2448-49.
- Mrs. Clay’s doctors and nurses repeatedly advised her to quit smoking. *See* T.19:2409; T.26:3139-41; Ex. SD03268 at 1058, 1065 (App. Tab 3).
- Mrs. Clay’s doctors told her that smoking had contributed to her heart attack. *Id.*

Because Mrs. Clay already knew the health risks of smoking, she cannot have reasonably relied on the omissions alleged here.

This Court’s recent decision in *Martin* is not inconsistent with this analysis. In *Martin*, a panel of this Court held that a jury could “infer” reliance based on the “pervasive” character of cigarette advertising. *See Martin*, 2010 WL 5074839, at *8. That holding speaks to the question whether exposure to and reliance upon cigarette advertising may be presumed in cases where, as here, the plaintiff cannot identify any specific tobacco-company statement on which the individual smoker at issue is alleged to have relied. It does not address the distinct question at issue here: whether reliance can be reasonable where the smoker already knows the information that allegedly was concealed. As explained above, the settled answer to that question is no.

Reynolds respectfully disagrees with the *Martin* panel’s holding that reliance may be presumed from the allegedly pervasive nature of past cigarette advertising.

We believe that Florida law is to the contrary. *See, e.g., Humana*, 728 So. 2d at 265 (proof of reliance “cannot be satisfied by assumptions”); *Palmas*, 881 So. 2d at 573 (“reliance cannot be presumed due to a defendant’s subjection of ‘the whole market’ to deceptive advertising” (citation omitted)). We also believe that proof of reliance fails in this case because Plaintiff failed to identify any specific tobacco-company statement that Mrs. Clay herself was alleged to have read or heard, and we wish to preserve that argument for further review. Nonetheless, regardless of whether a jury may presume exposure and reliance from the mere pervasive nature of cigarette advertising, it may not presume reasonable reliance on the omission of facts undisputedly known to the individual smoker. *Martin* says nothing about that issue, and certainly offers no support for the trial court’s decision to allow Plaintiff to establish reliance despite having had actual knowledge of the dangers that were supposedly concealed. On that basis alone, Defendants are entitled to judgment on the concealment, conspiracy, and punitive-damages claims.

Moreover, the decision in *Martin* did not purport to (and could not) eliminate the federal due process requirement that punitive damages may only be awarded to punish conduct that actually harmed the plaintiff. *See Philip Morris USA v. Williams*, 549 U.S. 346, 353-57 (2007); *see also State Farm Mut. Auto Ins. Co. v. Campbell*, 538 U.S. 408, 423 (2003) (reversing an award of punitive damages based on conduct that bore no relation to the plaintiff’s harm). This due

process limitation requires a causal nexus between the conduct to be punished and a plaintiff's alleged injury. *Williams*, 549 U.S. at 349 (holding that an award of punitive damages based on harm to someone other than the plaintiff "would amount to a taking of 'property' from the defendant without due process"). Even if the reliance element of a concealment claim may be satisfied by an inference of reliance for state law purposes (which again, Reynolds disputes), because Plaintiff presented no evidence of any specific nexus between the alleged misconduct and Mrs. Clay's injury, the punitive-damages award in this case fails the due process standard required under *Williams* and *State Farm*.

IV. THE TRIAL COURT'S USE OF THE *ENGLE* FINDINGS TO ESTABLISH ELEMENTS OF PLAINTIFF'S CLAIMS VIOLATED FLORIDA LAW AND DUE PROCESS

Reynolds is entitled to a new trial because the trial court's decision to relieve Plaintiff of the burden to prove necessary elements of her claims violated Florida preclusion law, federal due process, and the Supreme Court's instruction in *Engle*.

A. Standard of Review

This Court reviews *de novo* decisions to apply preclusion. See *Felder v. Dep't of Mgmt. Servs., Div. of Ret.*, 993 So. 2d 1031, 1034 (Fla. 1st DCA 2008) (per curiam).

Case No. 1D11-6061

**IN THE DISTRICT COURT OF APPEAL, FIRST DISTRICT
STATE OF FLORIDA**

PHILIP MORRIS USA INC. AND
R.J. REYNOLDS TOBACCO COMPANY,

Defendants/Appellants,

v.

ANDY R. ALLEN SR., AS PERSONAL REPRESENTATIVE OF THE ESTATE OF
PATRICIA ALLEN, DECEASED,

Plaintiff/Appellee.

Appeal from a Final Judgment rendered by the Circuit Court in and for Duval County,
Florida, Case No. 2007-CA-8311-B, Hon. Tyrie W. Boyer, Circuit Judge

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APRIL 13, 2012

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is reviewed under an abuse of discretion standard. *Gray*, 956 So. 2d at 507. The Court reviews *de novo* whether a claim may support a punitive-damages award. *Estate of Williams v. Tandem Health Care of Fla., Inc.*, 899 So. 2d 369, 376 (Fla. 1st DCA 2005).

B. Ms. Allen Did Not Rely On An *Engle* Defendant's Statements Because She Already Knew The Health Risks Of Smoking.

Mr. Allen failed to present any evidence that Ms. Allen reasonably relied on statements by any *Engle* defendant, much less that she reasonably relied on any statements that were misleading due to concealed information. *See, e.g., Taylor Bank v. Shannon*, 772 So. 2d 546, 553 (Fla. 1st DCA 2000); *Humana, Inc. v. Castillo*, 728 So. 2d 261, 265 (Fla. 2d DCA 1999). The trial court itself acknowledged the lack of evidence in an instruction given during Dr. Cummings's testimony. *See* T.32:2615-16 ("Ladies and Gentlemen, just so that there's no confusion by any earlier testimony, there is no direct evidence thus far in this case that the deceased ever saw or relied upon any advertising by the defendants."). Instead, Plaintiff has staked his fraud claim entirely on the proposition that the jury can *infer* detrimental reliance from the alleged scope of the fraud itself. Defendants recognize that this Court is bound by its prior decision in *R.J. Reynolds Tobacco Co. v. Martin*, 53 So. 3d 1060 (Fla. 1st DCA 2010), which held that the jury in that case was permitted to infer reliance based on evidence of what the court characterized as "pervasive misleading advertising campaigns" and "the false

controversy created by the tobacco industry . . . aimed at creating doubt among smokers that cigarettes were hazardous to health.” *Id.* at 1069. Defendants respectfully submit that the holding in *Martin* is contrary to Florida law and wish to preserve their argument for further review.

In any event, *Martin* did not purport to disturb settled law that a plaintiff cannot recover where, as here, she already knew about the information allegedly concealed. *See McDonald v. Rose*, 50 So. 2d 878, 880 (Fla. 1951); *Rose v. ADT Sec. Servs., Inc.*, 989 So. 2d 1244, 1247 (Fla. 1st DCA 2008). The inference approved by *Martin*, like all other inferences, may not be used to overcome actual, direct evidence to the contrary. *See, e.g., Marlo Invs., Inc. v. Verne*, 227 So. 2d 58, 60 (Fla. 4th DCA 1969) (“when there is direct evidence that proves the contrary, the inferences from circumstantial evidence must evaporate”). In this case, there is direct evidence that Ms. Allen was aware of the health risks of smoking cigarettes, including before she started smoking. For example, Ms. Allen’s sister testified that growing up as children, their parents “always told [them] not to smoke.”

T.38:3199. In fact, when Ms. Allen’s sister discovered Ms. Allen had started smoking, she encouraged her to quit, telling her that “smoking will kill you.” *Id.* at 3206-07. Later, Ms. Allen’s family and doctors repeatedly asked her to stop smoking because of the risk to her health. *See, e.g.,* T.40:3353-54; T.31:2529-30.

Even “pervasive” advertising and marketing does not create a substantial conflict in the evidence in light of the direct evidence that Ms. Allen already knew the risks.

C. A New Trial Is Required To Correct The Trial Court’s Faulty “Material Fact” Instruction.

In the alternative, even if there were sufficient evidence of reliance, a new trial should be ordered because the trial court erred by giving, over defense objection, a “material fact” instruction that eliminated the “but for” requirement made explicit in the standard instruction and in the instruction proposed by Defendants. See R.61:12289 (“A material fact is one that is of such importance that Ms. Allen would not have acted as she did **but for** the concealment or omission of that fact.” (emphasis added)); *Florida Standard Jury Instructions In Civil Cases*, Inst. 409.5 (“A material fact is one that is of such importance that (claimant) would not have [entered into the transaction] [acted], **but for** the false statement.” (emphasis added)). Instead, the trial court instructed the jury that “[a] material fact is of such importance that Patricia Allen would have considered the same significant in her decision making process.” T.49:4147. The trial court adopted this non-standard instruction because it was similar to the one given during the general conduct phase of *Engle*. T.47:4034-46; T.48:4084 (“Okay. I’m going to do what they did in *Engle* . . .”).

That was error. Indeed, prejudicial error, as the instruction was “reasonably calculated to confuse or mislead the jury.” *Sanchez v. Hussey Seating Co.*, 698 So.

CERTIFICATE OF SERVICE

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Case No. 3D11-2417

**IN THE DISTRICT COURT OF APPEAL, THIRD DISTRICT
STATE OF FLORIDA**

R.J. REYNOLDS TOBACCO COMPANY,

Defendant/Appellant,

v.

JULIE A. REESE,

Plaintiff/Appellee.

Appeal from a Final Judgment rendered by the Circuit Court in and for Miami-Dade
County, Florida, Case No. 07-30296 CA 01
Hon. Jose M. Rodriguez, Circuit Judge

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motion on its statute-of-limitations defense. Reynolds recognizes that its argument on this point is presently foreclosed by *Frazier*, but wishes to preserve the argument given the existing inter-district conflict on this point between *Frazier* and *Philip Morris USA, Inc. v. Barbanell*, No. 4D09–3987, 2012 WL 555402 (Fla. 4th DCA Feb. 22, 2012).

ARGUMENT

I. MS. REESE DID NOT REASONABLY RELY ON ANY STATEMENT OR OMISSION BY REYNOLDS

Reynolds is entitled to judgment on the concealment and conspiracy claims because Ms. Reese failed to prove that she reasonably relied to her detriment on any statement by Reynolds or any other *Engle* defendant.²

Reasonable reliance is an essential element of a claim for fraudulent concealment. *Humana, Inc. v. Castillo*, 728 So. 2d 261, 265 (Fla. 2d DCA 1999); *Soler v. Secondary Holdings, Inc.*, 771 So. 2d 62, 70 (Fla. 3d DCA 2000); *Cole Taylor Bank v. Shannon*, 772 So. 2d 546, 553 (Fla. 1st DCA 2000). And because fraudulent concealment is the predicate tort for Ms. Reese’s conspiracy claim, she must demonstrate reliance to establish the conspiracy claim as well. *See Raimi v. Furlong*, 702 So. 2d 1273, 1284 (Fla. 3d DCA 1997) (conspiracy claim requires

² The trial court denied Reynolds a directed verdict on these claims based on failure to prove reliance. SR.6-12, 51-57; R.27:5106-23; R.32:6040, 6044-6134; T.16:2253-58, 2261; 21:2885-86. That denial is subject to *de novo* review. *See Harris v. Soha*, 15 So. 3d 767, 769 (Fla. 1st DCA 2009).

“actionable underlying tort”). To prove reliance, a plaintiff must “establish that but for the alleged ... nondisclosure, the party would not have entered the [relevant] transaction.” *Humana*, 728 So. 2d at 265. A plaintiff cannot establish reasonable reliance if she already knows of the omitted information. *See, e.g., McDonald v. Rose*, 50 So. 2d 878, 880 (Fla. 1951) (no reliance where plaintiffs “know that the ... representations ... were incorrect”). Ms. Reese failed to prove reasonable reliance in two different respects.

1. Ms. Reese failed to introduce any evidence that she relied on any specific statement or statements by Reynolds or any other *Engle* defendant, much less statements that were misleading due to fraudulent omissions. To the contrary, her own testimony shows that tobacco advertisements played no role in any of her smoking-related decisions. She does not “believe any tobacco company has withheld information from [her] that would have affected [her] smoking decisions.” T.10:1368–71. By her own account, her “initial” decision to begin smoking and to continue doing so for the next “six years *had nothing to do with R.J. Reynolds Tobacco Company*.” T.10:1323–24 (emphasis added). Rather, she smoked hand-rolled cigarettes because “[e]verybody was smoking.” T.10:1280–83. Moreover, although Ms. Reese subsequently switched cigarette brands a number of times, her decisions to do so were not influenced by any statement or omission by Reynolds or any other *Engle* defendant:

- Ms. Reese began smoking Camels “just because those were the ones that [her] folks had or friends would get,” and continued doing so because she “was familiar with them.” T.10:1324–25.
- She later switched to Kools because they were “smoothing and mentholated.” T.10:1329.
- She first smoked Pall Mall Reds because she “wanted to try something different,” and later because of their “kick” and “calming effect.” T.10:1329, 1333. “[N]o ads had anything to do with switching back to Pall Mall reds.” T.10:1334.
- She chose to smoke Pall Mall “because it was filtered [and] the doctor told [her] to quit smoking,” even though the same doctor also told her that filtered cigarettes were just as harmful as non-filtered ones. T.10:1332–33.
- Many years later, Ms. Reese smoked Camel Signatures because “[t]hey were half the price,” and for “no other reason.” T.10:1334–35.
- Finally, she smoked Marlboros when Camel Signatures were discontinued solely because they were “full flavored.” T.10:1335–36.

Ms. Reese’s contrary argument amounted to an improper fraud-on-the-market theory. During closing arguments, her counsel all but conceded that she could not identify any misleading statements or omissions “with scientific precision,” T.22.2965, but asked the jury to “build in a little bit of some leeway here in terms of having a recollection as ... when these things happened.” *Id.* He invited the jury to conclude that Ms. Reese smoked because Reynolds “put[] commercials out about the fun of smoking, reassuring the public that everything is all right, creating controversy, instilling doubt.” T.22.2966.

This theory of reliance is directly contrary to the law of this District, which

holds that the reliance requirement “cannot be satisfied by assumptions” about the behavior of listeners in general. *Humana*, 728 So. 2d at 265. Florida courts, including this one, have thus refused to apply a fraud-on-the-market theory to common-law fraud claims. *See, e.g., Palmas y Bambu, S.A. v. E.I. Dupont de Nemours & Co.*, 881 So. 2d 565, 573 (Fla. 3d DCA 2004) (“reliance cannot be presumed due to a defendant’s subjection of ‘the whole market’ to deceptive advertising”); *Morgan v. W.R. Grace & Co.—Conn.*, 779 So. 2d 503, 506 (Fla. 2d DCA 2000) (rejecting theory that the defendant “lulled the general public ... into a false sense of security”); *see also Chudasama v. Mazda Motor Corp.*, 123 F.3d 1353, 1369 n.39 (11th Cir. 1997) (holding that “‘fraud on the market theory ... do[es] not apply in a products liability case’”); *Butterworth v. Quick & Reilly, Inc.*, 998 F. Supp. 1404, 1410–11 (M.D. Fla. 1998) (same). Other courts likewise have rejected fraud-on-the-market arguments in tobacco litigation. *See McLaughlin v. Am. Tobacco Co.*, 522 F.3d 215, 225 (2d Cir. 2008); *Brown v. Philip Morris Inc.*, 228 F. Supp. 2d 506, 519 (D.N.J. 2002).

Moreover, to allow such wholly generalized proof of reliance would be contrary to *Engle* itself. The Florida Supreme Court decertified the *Engle* class precisely because “reliance and legal cause” raise “*individual* questions” not provable on a classwide basis. 945 So. 2d at 1255 (emphasis added); *see id.* at 1268 (decertifying class because “individualized issues” predominate). That

holding would be inexplicable if, as Ms. Reese suggests, evidence about the extent of cigarette advertising were sufficient to establish reliance. The First District recently concluded that a jury can infer reliance if the dissemination of misleading advertising is sufficiently “pervasive.” *See R.J. Reynolds Tobacco Co. v. Martin*, 53 So. 3d 1060, 1069-70 (Fla. 1st DCA 2010). However, that ruling is at odds with the Florida Supreme Court’s decision in *Engle*, with this Court’s decision in *Humana*, and with the various other authorities noted above. It should not govern in this District.

2. In any event, Ms. Reese could not have reasonably relied on any misleading statements about the risks of smoking, because she already knew that smoking causes health problems. As explained above, Ms. Reese first learned of the health risks of smoking in the 1940s, T.10:1350–53, and learned from her own doctor, in the 1960s, that smoking was causing her own health problems, T.10:1332, 1353–54. Armed with this knowledge, she chose “not to tell [her] doctors the truth about [her health] problems,” because she “didn’t want the doctors to tell [her] to stop smoking,” as she “had already made a decision about smoking,” T.10:1354–55. Ms. Reese likewise paid no attention to the cigarette pack warnings that first appeared in 1966, because she “already knew that smoking was bad for [her].” T.10:1363–65. Given this undisputed knowledge of significant smoking risks, Ms. Reese cannot have reasonably relied on any statement or

suggestion in identified or unidentified cigarette advertisements that smoking was safe. *See, e.g., McDonald*, 50 So. 2d at 880; *Rose v. ADT Security Servs., Inc.*, 989 So. 2d 1244, 1247 (Fla. 1st DCA 2008) (per curiam). For that reason, too, she cannot establish liability for concealment or conspiracy. Accordingly, in the event of a remand, only the non-intentional claims should be re-tried.

II. MS. REESE SHOULD NOT HAVE BEEN PERMITTED TO USE THE *ENGLE* FINDINGS TO ESTABLISH ESSENTIAL ELEMENTS OF HER CLAIMS

Reynolds is entitled to a new trial on all remaining claims because Ms. Reese was improperly permitted to rely on the *Engle* findings to prove essential elements of her claims.³ In *Engle*, the Florida Supreme Court held that the preserved Phase I findings would have “res judicata effect” in subsequent cases brought by former class members. 945 So. 2d at 1269. This Court likewise has “acknowledged the preclusive effect of the Phase I findings in *Engle*.” *Frazier*, 2012 WL 1192076, at *9. This appeal turns on the extent of that “preclusive effect.”

Reynolds contends that the “preclusive effect” of the *Engle* findings is to establish the facts necessarily decided by the *Engle* jury—no more and no less. Thus, the *Engle* findings establish that cigarettes cause over twenty diseases and

³ A trial court’s decision regarding the application of preclusion is reviewed *de novo*. *Campbell v. State*, 906 So. 2d 293, 295 (Fla. 2d DCA 2004); *State v. Myers*, 814 So. 2d 1200, 1201 (Fla. 1st DCA 2002).

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IN THE FLORIDA SECOND DISTRICT COURT OF APPEAL

PHILIP MORRIS USA INC. and R.J. REYNOLDS TOBACCO COMPANY,

Defendants/Appellants,

v.

THEODORE HALLGREN, as personal representative of the Estate of
CLAIRE HALLGREN, deceased,

Plaintiff/Appellee.

Appeal from the Circuit Court in and for Highlands County, Florida

Case No. 10-000761-GCS

Hon. J. David Langford, Circuit Judge

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NOVEMBER 1, 2012

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STATEMENT OF THE CASE AND FACTS

Plaintiff Theodore Hallgren brought this wrongful death action against Philip Morris USA Inc. (“PM USA”) and R.J. Reynolds Tobacco Co. (“Reynolds”) (together, “defendants”) to recover for the death of his wife, Claire, a longtime smoker diagnosed with lung cancer and chronic obstructive pulmonary disease (“COPD”). In May 2011, plaintiff filed his second amended complaint, alleging claims for strict liability, negligence, fraudulent concealment, and conspiracy to commit fraudulent concealment. R. 4:590 [App. Tab B].¹

Plaintiff filed suit pursuant to the Florida Supreme Court’s decision in *Engle v. Liggett Group, Inc.*, 945 So. 2d 1246 (Fla. 2006) (per curiam) (“*Engle III*”), a class action against defendants and other members of the tobacco industry. R. 4:590 [App. Tab B]. Before it was decertified by the Florida Supreme Court, the *Engle* class encompassed “[a]ll [Florida] citizens and residents, and their survivors, who have suffered, presently suffer or have died from diseases and medical conditions caused by their addiction to cigarettes that contain nicotine.” *R.J. Reynolds Tobacco Co. v. Engle*, 672 So. 2d 39, 40, 42 (Fla. 3d DCA 1996). When

¹ The trial transcript is cited as “T. [page number(s)].” Non-transcript portions of the record compiled by the trial court clerk are cited as “R. [volume number]: [page number(s)].” Defendants have filed an unopposed motion to supplement the record with trial documents not included in the original record. Supplemental materials are cited as “SR. [volume number]:[page number(s)].” For the Court’s convenience, copies of cited record items are included in an Appendix to this brief, which is cited as “App. Tab [letter].”

the Florida Supreme Court decertified the *Engle* class, it stated that former class members could “initiate individual damages actions” within one year of its mandate and that the “common core findings” made by the jury in Phase I of the class action proceedings “will have res judicata effect in those trials.” *Engle III*, 945 So. 2d at 1269. As relevant here, those findings included that, at some unspecified time, each defendant “placed” unspecified “cigarettes on the market that were defective and unreasonably dangerous” in some unspecified respect, “failed” in some unspecified way “to exercise the degree of care which a reasonable cigarette manufacturer would exercise under like circumstances,” made unspecified statements that “concealed or omitted” information regarding the health effects or addictiveness of smoking, and entered into an “agree[ment]” of unspecified extent and duration “to conceal or omit information” regarding the health effects or addictiveness of smoking. *R.J. Reynolds Tobacco Co. v. Martin*, 53 So. 3d 1060, 1064 (Fla. 1st DCA 2010).

Plaintiff alleged that Ms. Hallgren was a member of the *Engle* class. *See* R. 4:590 [App. Tab B]. Over defendants’ objection, the trial court ruled that, upon proving class membership, plaintiff could rely on the *Engle* findings to establish the conduct elements of his tort claims, and would not be required to prove those elements at trial. *See* R. 78:12421 [App. Tab C]; R. 89:14151 [App. Tab D at 1].

The trial court also granted plaintiff summary judgment on defendants' statute-of-limitations defense. *See* R. 89:14151 [App. Tab D at 89]; R. 78:12421 [App. Tab C]. Although the evidence established that Ms. Hallgren had been aware that she suffered from COPD caused by smoking years before the *Engle* class action was filed in 1994, *see* R. 54:8321 [App. Tab E]; T. 1956-58, 1961-65 [App. Tab P]; R. 54:8321 [App. Tab F at 63], the court ruled that Ms. Hallgren's only relevant injury for purposes of the four-year limitations period was her lung cancer. And the trial court found no evidence that Ms. Hallgren had notice of her cancer before May 5, 1990—four years before *Engle* was filed. *See* R. 89:14151 [App. Tab D at 89]; R. 78:12421 [App. Tab C at 7].

The case proceeded to trial in two phases in January 2012. In Phase I, the jury was asked to determine whether Ms. Hallgren was a member of the *Engle* class, and if so, to determine whether defendants' unspecified tortious conduct (as embodied in the *Engle* findings) was the legal cause of Ms. Hallgren's death, to assign comparative fault among the parties, and to determine a compensatory damages award. T. 3501-04 [App. Tab P]. If the jury found in plaintiff's favor on any of his claims, the jury also would be asked to determine whether punitive damages were warranted. *Id.* at 3504. The jury would determine the amount of punitive damages, if any, in Phase II of the trial. *Id.* at 3510-11.

In Phase I, the jury heard testimony from family members and expert witnesses regarding Ms. Hallgren's personal background and smoking history. The evidence showed that Ms. Hallgren, who was born in 1922 and passed away in 1995, began to smoke in the 1930s and was aware of the health risks of smoking cigarettes beginning at least in the 1960s. T. 1012, 1913, 1957-58, 3299 [App. Tab P]. Plaintiff and other family members—including Ms. Hallgren's daughter, Sally Hallgren, an osteopathic physician—repeatedly warned Ms. Hallgren about the dangers of smoking and urged her to quit as early as 1968. *Id.* at 1012, 1957-58, 3299. The jury also learned that Ms. Hallgren successfully quit smoking temporarily in 1968 and permanently in 1995, without significant withdrawal symptoms. *Id.* at 1911, 1931, 1972, 1999-2000, 2480, 2793. On the issue of plaintiff's damages, the evidence showed that plaintiff was in a long-term relationship with a woman he began dating approximately one year after Ms. Hallgren died, and that he was in "[a] hundred percent love" with this woman and considered her to be his "soulmate." *Id.* at 2807.

At the close of evidence in Phase I, the trial court instructed the jury that, for purposes of plaintiff's claims for fraudulent concealment and conspiracy to commit fraudulent concealment, "plaintiff must show that Claire Hallgren relied on statements by [defendants] that omitted material information concerning the health effects or addictive nature of cigarettes or both." T. 3276-77 [App. Tab P]. The

Carter, 778 So. 2d at 937 (alterations and internal quotation marks omitted). Accordingly, defendants' statute-of-limitations defense should have been submitted to the jury, and a new trial is required.

II. THE TRIAL COURT ERRED IN DENYING DEFENDANTS' MOTIONS FOR JUDGMENT AND FOR A NEW TRIAL ON PLAINTIFF'S FRAUDULENT-CONCEALMENT AND CONSPIRACY CLAIMS.

The trial court also erred in denying judgment in defendants' favor on plaintiff's claims for fraudulent concealment and conspiracy to commit fraudulent concealment. Defendants were entitled to judgment on those claims because plaintiff failed to prove the element of reliance, and because the statute of repose independently barred his fraud-based claims. At a minimum, a new trial is required because the trial court failed to instruct the jury on the statute of repose and gave the jury erroneous instructions regarding the element of reliance.⁴

A. Plaintiff Failed To Prove The Essential Element Of Reliance.

Reliance is an "essential element[]" of every fraud claim. *Tonkovich v. Fla. Citrus Indus., Inc.*, 185 So. 2d 710, 712 (Fla. 2d DCA 1966). Thus, to prevail on a claim for fraudulent concealment, a plaintiff must prove that, "but for" the

⁴ A ruling on a motion for directed verdict is reviewed *de novo*. *Fell v. Carlin*, 6 So. 3d 119, 120 (Fla. 2d DCA 2009). A directed verdict should be granted where no view of the evidence could support a verdict for the nonmoving party. *Sims v. Cristinzio*, 898 So. 2d 1004, 1005 (Fla. 2d DCA 2005). A ruling on "whether the jury should be instructed at all on an issue" is reviewed *de novo*, *McConnell v. Union Carbide Corp.*, 937 So. 2d 148, 152-53 (Fla. 4th DCA 2006), as is the question "whether a jury instruction was legally adequate," *Santiago v. State*, 77 So. 3d 874, 876 (Fla. 4th DCA 2012).

defendant's alleged nondisclosure of material information, he "would not have entered the transaction." *Humana, Inc. v. Castillo*, 728 So. 2d 261, 265 (Fla. 2d DCA 1999); *see also Philip Morris USA, Inc. v. Hess*, 95 So. 3d 254, 260-61 (Fla. 4th DCA 2012). In other words, the plaintiff must "demonstrate a causal connection between the defendant's conduct and the plaintiff's misapprehension." *Humana*, 728 So. 2d at 265. The same proof of reliance is required for a claim of conspiracy to commit fraudulent concealment. *See Liappas v. Augoustis*, 47 So. 2d 582, 582 (Fla. 1950); *R.J. Reynolds Tobacco Co. v. Martin*, 53 So. 3d 1060, 1068 (Fla. 1st DCA 2010).

To establish the element of reliance here, plaintiff was required to prove that Ms. Hallgren relied to her detriment on a particular statement that was misleading because it concealed material information regarding the health risks or addictive nature of smoking cigarettes. Plaintiff failed to meet that burden. He did not identify a *single* allegedly fraudulent statement that Ms. Hallgren saw, read, or heard regarding the health effects of smoking—much less prove that she detrimentally relied on such a statement. In fact, plaintiff's daughter testified that she could not recall Ms. Hallgren mentioning any advertisements or other statements by defendants or other tobacco companies. *See, e.g.*, T. 2001 [App. Tab P] ("Q. Let me be more specific about this. Did she actually tell you that she took note of particular cigarette ads on television? A. I don't recall."); *id.* at 2006 ("Q.

Did your mother have any discussions with you relating at all to any statements that she attributed to the tobacco companies? A. I'm sure she did. Q. Can you think of anything in particular? A. No."); *id.* at 2019 ("Q. Did you ever hear your mother say that the tobacco companies had concealed information from her? A. I don't recall.").

Moreover, the claim that Ms. Hallgren detrimentally relied on statements by defendants or their alleged co-conspirators is inconsistent with other aspects of plaintiff's case. Plaintiff's theory was that Ms. Hallgren started smoking cigarettes and became addicted in 1938—*before* defendants and their purported co-conspirators allegedly began concealing the health risks of smoking in the 1950s. *See, e.g.*, T. 1061, 1097, 3297 [App. Tab P]. Plaintiff also asserted that Ms. Hallgren's addiction to nicotine was so strong that she continued smoking even after she knew of the associated health risks. *Id.* at 1012-13, 3293, 3299, 3307. But that argument regarding the strength of Ms. Hallgren's addiction flatly contradicts plaintiff's claim that Ms. Hallgren decided to continue smoking based on statements by defendants concealing those health risks.

Plaintiff cannot evade his obligation to prove Ms. Hallgren's reliance on a particular advertisement or other statement by the tobacco industry by pointing to the industry's supposedly "pervasive" advertising practices. This Court has held that reliance must be established with "*evidence*," and "cannot be satisfied by

assumptions.” *Humana*, 728 So. 2d at 265 (emphasis added). In fact, in *Morgan v. W.R. Grace & Co.-Conn.*, 779 So. 2d 503 (Fla. 2d DCA 2000), this Court rejected a plaintiff’s attempt to establish reliance by asserting only that “various documents [produced by the company] aimed at the general public . . . lulled the . . . public, including her, into a false sense of security.” *Id.* at 506. This assertion was inadequate, the Court explained, because it did not show that the plaintiff had “read and relied upon *specific* publications” that “influenc[ed] her decision” and caused her alleged injury. *Id.* (emphasis added). Plaintiff’s concealment and conspiracy claims fail for the same reason.

To be sure, the First District Court of Appeal has held that reliance can be “infer[red]” from “pervasive misleading advertising.” *Martin*, 53 So. 3d at 1069. But *Martin* should not be followed here because it is directly at odds with this Court’s decisions in *Humana* and *Morgan*, which make clear that reliance cannot be proved solely through inferences and assumptions. *Martin* is also inconsistent with the decisions of other Florida appellate courts on this question. *See, e.g., Palmas Y Bambu, S.A. v. E.I. DuPont de Nemours & Co.*, 881 So. 2d 565, 573 (Fla. 3d DCA 2004) (“[R]eliance cannot be presumed due to a defendant’s subjection of the whole market to deceptive advertising.”) (internal quotation marks omitted); *Morgan v. Canaveral Port Auth.*, 202 So. 2d 884, 887 (Fla. 4th DCA 1967) (“It cannot be assumed that [plaintiffs] relied to their detriment upon any act or

omission”); *see also Grills v. Philip Morris USA, Inc.*, 645 F. Supp. 2d 1107, 1124 (M.D. Fla. 2009) (fraud plaintiff must show “precisely what statements . . . [or] omissions were made and . . . the time and place of each such statement and person responsible for making (or, in the case of omissions, not making) same”) (internal quotation marks omitted). Moreover, *Martin*’s holding conflicts with the Florida Supreme Court’s decision in *Engle* itself: *Martin* holds that reliance can be inferred for every member of the *Engle* class based on the same generalized evidence regarding the *Engle* defendants’ conduct, but the Florida Supreme Court identified reliance as an issue requiring *individualized* proof in progeny suits brought by *Engle* class members. *Engle III*, 945 So. 2d at 1263.

Thus, rather than merely introduce evidence of “pervasive misleading advertising,” plaintiff was required to prove that Ms. Hallgren relied to her detriment on a particular fraudulent statement by defendants or their alleged co-conspirators. Because plaintiff failed to introduce any such evidence of reliance—and because plaintiff’s own theory of the case precludes a finding that Ms. Hallgren relied to her detriment on any allegedly fraudulent statement by defendants or other tobacco companies—this Court should order judgment for defendants on plaintiff’s claims for fraudulent concealment and conspiracy to commit fraudulent concealment.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served by electronic mail on counsel listed below this 1st day of November, 2012.

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Case No. 3D13-2099

**IN THE DISTRICT COURT OF APPEAL, THIRD DISTRICT
STATE OF FLORIDA**

R.J. REYNOLDS TOBACCO COMPANY,

Defendant/Appellant/Cross-Appellee,

v.

VIRGINIA WILLIAMS, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF
MILTON T. WILLIAMS, DECEASED,

Plaintiff/Appellee/Cross-Appellant.

Appeal from a Final Judgment rendered by the Circuit Court in and for Miami-Dade
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where the child had been warned to cross only at appropriate places).

Because the jury's allocation of fault was contrary to the manifest weight of the evidence, this Court should order a new trial on liability.

III. THE FRAUD AND CONSPIRACY CLAIMS CANNOT STAND.

The Court must set aside Reynolds's liability for concealment and conspiracy for two additional, independent reasons: first, because Mrs. Williams failed to prove that her husband detrimentally relied on a tobacco company statement; and second, because the trial court erred in failing to instruct the jury on the statute of repose. Reynolds acknowledges that, under the existing judgment, the compensatory award is independently supported by the verdict for Mrs. Williams on the claims for strict liability and negligence. However, should the Court order a new trial on liability for any of the reasons set forth in Part II of this brief, it should either eliminate the concealment and conspiracy claims from the case (based on a failure of proof of reliance) or, at a minimum, should order those claims to be re-tried with a proper repose instruction.

A. Mrs. Williams Failed To Prove Reliance.

In the trial court, Mrs. Williams conceded that there was no direct evidence of her husband's reliance, *see, e.g.*, S.R.285, but sought to invoke the holding in *R.J. Reynolds Tobacco Co. v. Martin*, 53 So. 3d 1060 (Fla. 1st DCA 2010), that a jury may "infer" reliance from evidence of "pervasive misleading advertising

campaigns.” *Id.* at 1060. The *Martin* inference, however, cannot substitute here for the required proof of individualized reliance. The trial court’s denial of Reynolds’s motion for directed verdict is reviewed *de novo*. *Diaz v. Impex of Doral, Inc.*, 7 So. 3d 591, 593 (Fla. 3d DCA 2009).

1. There is no evidence that Mr. Williams relied on any tobacco-company statement.

Florida law requires proof of detrimental reliance for a claim of fraudulent concealment. *See Soler v. Secondary Holdings, Inc.*, 771 So. 2d 62, 69 (Fla. 3d DCA 2000) (“a claim of fraudulent . . . concealment requires proof of detrimental reliance on a material misrepresentation” (citing *Johnson v. Davis*, 480 So. 2d 625, 627 (Fla. 1985)); *Humana, Inc. v. Castillo*, 728 So. 2d 261, 265 (Fla. 2d DCA 1999) (“Florida law imposes a reliance requirement in an omissions case . . .”). To prove reliance, a party must show that “but for the alleged . . . nondisclosure, the party would not have entered the transaction.” *Id.*

Engle-progeny plaintiffs are not exempt from proving reliance on their concealment or conspiracy claims. *See Philip Morris USA Inc. Douglas*, 110 So. 3d 419, 425, 428 (Fla. 2013) (*Engle* “disapproved the use of the Phase I conduct findings relating to . . . fraud and . . . civil conspiracy because they were ‘inadequate to allow a subsequent jury to consider individual questions of reliance and legal cause’”) (quoting *Engle*, 945 So. 2d at 1255); *Philip Morris USA Inc. v. Hess*, 95 So. 3d 254, 259 (Fla. 4th DCA 2012) (“*Engle* did not relieve plaintiffs of

the burden of proof with respect to the element of reliance in a fraud based claim.”). Thus, to prevail on her concealment and conspiracy claims, Mrs. Williams had to prove her husband’s detrimental reliance—*i.e.*, that in the absence of a concealment of material information by Reynolds, he would not have smoked or would have quit smoking in time to avoid his smoking-related injuries. *See* T.22:2778; R.12:3077–79.

At trial, both Mrs. Williams and her daughter Mrs. Denson—the only fact witnesses with any personal knowledge of Mr. Williams’s smoking decisions—testified they were unaware of any tobacco-company statement or omission upon which Mr. Williams detrimentally relied. When Mrs. Williams met her husband in 1962, he was already a regular smoker. T.17:2206, 2210. She thus had no knowledge of what prompted him to begin smoking. T.17:2251, T.18:2316. Mrs. Williams admitted that her husband had never heard of the Tobacco Industry Research Committee, never seen the Frank Statement, and never relied on anything from the tobacco companies. T.18:2314–15. The only cigarette advertisement that she recalled her husband ever seeing was a Pall Mall television advertisement. T.17:2216–17. But even then, she could neither describe the advertisement’s content nor say whether Mr. Williams relied on it. *See* T.17:2217. Moreover, because federal law prohibited television broadcasts of cigarette advertisements after 1971, *see, e.g.*, T.14:1788, this evidence, even if it could permit a finding of

reliance, is well outside the twelve-year period set by the applicable statute of repose. *See infra* Section III.B.

Mrs. Denson’s testimony was no different. She had no knowledge of why her father started smoking. T.11:1370. She did not know whether he ever knew about or saw any publications by the Tobacco Industry Research Committee, the Council for Tobacco Research, or the Tobacco Institute—publications that Mrs. Williams contended created a “false controversy” about the health risks of smoking. *See, e.g.*, T.11:1373–78. Mrs. Denson was also not aware of Mr. Williams ever having seen any cigarette advertising. *See* T.11:1373–78.

Finally, Mrs. Williams’s own expert, Dr. Proctor, did not even consider what knowledge Mr. Williams may have had about the health risks of smoking. *See* T.14:1816–17. Dr. Proctor conceded that he had no information to indicate that cigarette advertising influenced Mr. Williams’s decision to start or continue smoking. *See* T.16:2108–09 (“Q. But you don’t know why Milton Williams started smoking, do you? A. No. Q. And you don’t know any specific advertisement or whether any advertisement influenced him, do you? A. No.”).

2. *Martin* does not save Mrs. Williams’s fraud claims.

At trial, Mrs. Williams argued that she did not need to introduce evidence of her husband’s reliance under *Martin*, which held that a jury could “infer” reliance from evidence of “pervasive misleading [cigarette] advertising campaigns” and the

alleged “false controversy created by the tobacco industry” about the health risks of cigarettes. 53 So. 3d at 1069; *see also Putney*, 117 So. 3d at 802. The trial court erred in apparently accepting that argument.

To begin with, *Martin* is not the law of this District. Before *Martin*, this Court in *Palmas Y Bambu, S.A. v. E.I. DuPont de Nemours & Co.*, 881 So. 2d 565 (Fla. 3d DCA 2004), held that “fraud on the market” and other theories of indirect proof of reliance—including specifically “a defendant’s subjection of ‘the whole market’ to deceptive advertising”—could not satisfy the plaintiff’s burden to prove reliance. *Id.* at 573 (quoting *Chudasama v. Mazda Motor Corp.*, 123 F.3d 1353, 1369 n. 39 (11th Cir. 1997)). Based on that holding, this Court affirmed the entry of directed verdict on a fraud-based RICO claim. *See id.* *Palmas* was consistent with prior decisions by this Court. *See, e.g., Liggett Grp., Inc. v. Engle*, 853 So. 2d 434, 446 n.10 (Fla. 3d DCA 2003) (“Florida law bars any presumption of reliance in cases involving fraud”), *aff’d in part and quashed in part on other grounds, Engle*, 945 So. 2d 1246; *Kahler v. E.F. Hutton*, 558 So. 2d 144, 145 (Fla. 3d DCA 1990). Thus, the trial court should have followed *Palmas*, not *Martin*.

In any event, *Palmas* has the sounder basis in law and logic, even assuming it were not binding. Under Florida law, proof of reliance “cannot be satisfied by assumptions.” *Humana*, 728 So. 2d at 265; *Morgan v. W.R. Grace & Co.-Conn.*, 779 So. 2d 503, 506 (Fla. 2d DCA 2000) (rejecting argument that “various

documents aimed at the general public . . . lulled the . . . public, including her, into a false sense of security about the safety of such reclaimed land”); *Morgan v. Canaveral Port Auth.*, 202 So. 2d 884, 887 (Fla. 4th DCA 1967) (it “cannot be assumed that the appellants relied to their detriment upon any act or omission on the part of the appellees”). The *Martin* inference improperly eliminates the need to demonstrate *individual* reliance, by focusing only on the scope of the alleged fraud. In other words, *Martin* does not merely allow *Engle*-progeny plaintiffs to prove one element of their claims inferentially; it does so by collapsing two distinct elements into one. This result improperly changes the elements of the tort. Moreover, it is inconsistent with *Engle* itself, where the Florida Supreme Court held that the jury findings of concealment and conspiracy, no matter how pervasive, did *not* establish *individualized* issues of “legal causation and reliance” and thus “did not determine whether the defendants were liable to anyone.” *Engle*, 945 So. 2d at 1263.

B. The Trial Court Erred In Failing To Instruct The Jury On The Statute Of Repose.

The trial court denied Reynolds’s request for a jury instruction on the proper application of the statute of repose—*i.e.*, that Reynolds could not be liable for concealment or conspiracy unless the jury found that Mr. Williams relied on a statement made after May 5, 1982. *See* R.11:2643–44; T.7:976–77, 981. Refusal to give a requested instruction is reviewed for an abuse of discretion. *See R.J.*

Reynolds Tobacco Co. v. Jewett, 106 So. 3d 465, 467 (Fla. 1st DCA 2012).

Reynolds recognizes that this Court has held that a repose instruction is unnecessary in *Engle*-progeny cases, at least where the plaintiff “introduced evidence of deceptive statements or omissions occurring after May 5, 1982.”

Frazier v. Philip Morris USA Inc., 89 So. 3d 937, 947–48 (Fla. 3d DCA 2012), *rev. granted sub nom. Philip Morris USA, Inc. v. Russo*, No. SC12-1401 (Fla. Sept. 3, 2013). *But see Alexander*, 123 So. 3d at 75 (appearing to require proof of reliance within repose period; “[s]ince the statute of repose begins in 1982, [decedent’s] belief and reliance through 1985 was relevant to show that his cause of action was not barred by the statute of repose”). *Frazier* conflicts with many decisions of the Fourth District, and the Florida Supreme Court recently accepted jurisdiction to resolve that conflict. *See Russo, supra; Hess v. Philip Morris USA, Inc.*, No. SC12-2153 (Fla. June 3, 2013). Reynolds thus wishes to preserve the repose point for further review.

The failure to give a requested instruction is reversible error if the instruction was “(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.” *Jewett*, 106 So. 3d at 467. Reynolds’s requested repose instruction satisfies each of these elements. Florida’s statute of repose requires any claim based on fraud to be filed within twelve years “after the date of the commission of the alleged fraud.”

§ 95.031(2)(a), Fla. Stat. Because *Engle* was filed on May 5, 1994, the repose date for an *Engle* progeny suit is May 5, 1982. *Philip Morris USA, Inc. v. Cohen*, 102 So. 3d 11, 15 (Fla. 4th DCA 2012). Thus, to recover on her concealment and her conspiracy-to-conceal claims, Mrs. Williams was required to prove that actionable fraud—including both concealment by Reynolds and reasonable reliance by Mr. Williams—occurred after May 5, 1982. *See id.* Yet at trial, much of Mrs. Williams’s evidence involved allegedly misleading statements made by Reynolds and other tobacco companies decades before *Engle* was filed. *See, e.g.*, T.14:1830 (testimony about the Frank Statement published in 1954); T.14:1786–88 (testimony concerning billboard advertisements in the 1970s); T.22:2838, 2841 (Mrs. Williams’s closing argument recounting evidence from the 1950s, 1960s, and 1970s). Thus, a repose instruction in this case was necessary for the jury to understand the permissible basis for liability on the concealment and conspiracy claims, and the refusal to instruct the jury on repose requires a new trial.

If this Court reaches the repose issue and decides it adversely to Reynolds, the Court should at least certify a conflict with *Hess*. *See R.J. Reynolds Tobacco Co. v. Hiott*, No. 1D12-5956 (1st DCA Jan. 3, 2014), Slip op. at 10–11 (certifying same conflict). Such a certification would enable the Florida Supreme Court to consider the repose issue in this case, and thus ensure that like cases will ultimately receive like treatment.

Case Nos. 2D13-5255, 2D14-26
L.T. Case No. 10-005736-CI

**IN THE DISTRICT COURT OF APPEAL, SECOND DISTRICT
STATE OF FLORIDA**

HARRY SCHLENTHER, et al., REPRESENTATIVE of the estate of
BEVERLY SCHLENTHER, his wife,

Plaintiff/Appellee,

v.

R.J. REYNOLDS TOBACCO COMPANY,

Defendant/Appellant.

On Appeal from a Final Order rendered by the Sixth Judicial Circuit Court,
in and for Pinellas County, Florida
Hon. Bruce Boyer, Circuit Judge

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MARCH 21, 2014

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SUMMARY OF ARGUMENT

I. Reynolds is entitled to judgment on the issue of class membership because Plaintiff failed to prove that Mrs. Schlenther's COPD manifested before November 21, 1996, the class cut-off date. Mrs. Schlenther was not diagnosed with COPD until 2001, and Plaintiff's medical witnesses failed to show that Mrs. Schlenther knew or should have known that she had COPD before November 21, 1996. Without class membership, the claims here are untimely.

II. The judgment on conspiracy should be set aside on two grounds. *First*, there was no evidence that Mrs. Schlenther detrimentally and reasonably relied on any statement made pursuant to the conspiracy. As a matter of law, a party cannot reasonably rely on the concealment of facts already known to her. Here, Mrs. Schlenther herself testified that she knew about the health risks of smoking as early as the 1950s. Although this Court recently held that reliance may be inferred from evidence of pervasive and misleading cigarette advertising, that does not undermine the independent principle that, as a matter of law, a party cannot reasonably rely on statements concealing facts already known to her. *Second*, the trial court erred in refusing to instruct the jury on the governing statute of repose for the conspiracy claim, under which Plaintiff could recover only for conduct that occurred after May 5, 1982.

that Mrs. Schlenther knew the health risks of smoking, she could not have reasonably relied on any statements made pursuant to the *Engle* conspiracy.¹⁰

4. This Court’s decision in *Philip Morris USA, Inc. v. Hallgren*, 124 So. 3d 350 (Fla. 2d DCA 2013), is not to the contrary. In *Hallgren*, this Court, following *Martin v. R.J. Reynolds Tobacco Co.*, 53 So. 3d 1060 (1st DCA 2010), held that reliance may be inferred from evidence of pervasive and misleading cigarette advertising. See 124 So. 3d at 353. Nothing in *Hallgren* addresses, much less implicitly overrules, the decades-old rule—codified in the Restatement and reflected in cases like *McDonald*, *M/I Schottenstein Homes*, and *Rose v. ADT*—that an individual cannot reasonably rely on the concealment of facts *admittedly known* to that individual.

Moreover, *Martin* and *Hallgren* merely establish a permissive inference, which can be overcome by direct evidence to the contrary. See *Kam Seafood Co. v. State*, 496 So. 2d 219, 219 (Fla. 1st DCA 1986) (reversing a trial judge’s ruling because it was based on an “inference” that was “unreasonable under the [direct] evidence”); *Marlo Invs., Inc. v. Verne*, 227 So. 2d 58, 60 (Fla. 4th DCA 1969) (“[W]hen there is direct evidence that proves the contrary, the inferences from

¹⁰ Even more clearly, Mrs. Schlenther did not reasonably rely on the concealment of any information about the health risks of smoking after May 5, 1982. Thus, if Reynolds’s legal position on the statute of repose is correct, see *infra* Part II.B, then Reynolds is entitled to outright judgment on that claim.

circumstantial evidence must evaporate.”). This was not a case where an inference of reliance was necessary because the smoker did not testify at trial, and thus could not provide any direct evidence. To the contrary, Mrs. Schlenther did testify at trial through her deposition, and directly admitted that she knew the health risks of smoking. Moreover, she expressly denied that she heard or relied on any advertisement or other statement by Reynolds or any other tobacco company during the time that she smoked. R.111:T.13 at 1629–31, 1657–58, 1660; *see also* R.110:T.10 at 1300–01 (Mrs. Schlenther’s daughter testifying that Mrs. Schlenther never suggested that she started or continued smoking because of anything a tobacco company did or did not say). She thus provided a direct admission of her own non-reliance, and it is thus hardly surprising that the record contains no other evidence of actual or reasonable reliance. *See, e.g.*, R.110:T.10 at 1300–01; R.111:T.13 at 1629–31, 1657–58.

B. The Trial Court Erred By Refusing To Instruct The Jury As To The Statute Of Repose On Plaintiff’s Conspiracy Claim

A trial court “is required to instruct the jury regarding the law applicable to the facts in evidence and the law of the case.” *Wransky v. Dalfo*, 801 So. 2d 239, 243 (Fla. 4th DCA 2001). The failure to give requested instructions is reversible if the “instructions contained an accurate statement of the law, ... the facts in the case supported a giving of the instructions, and ... the instructions were necessary for the jury to properly resolve the issues.” *Brown Distrib. Co. v. Marcell*, 890



Case No. 3D13-2597

**IN THE DISTRICT COURT OF APPEAL, THIRD DISTRICT
STATE OF FLORIDA**

R.J. REYNOLDS TOBACCO COMPANY,

Defendant/Appellant,

v.

RALPH BALLARD AND MARIA BALLARD,

Plaintiffs/Appellees.

Appeal from a Final Judgment rendered by the Circuit Court in and for
Miami-Dade County, Florida, Case No. 07-30336 CA 23
Hon. Michael A. Genden, Circuit Judge

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this case regarding class membership, liability, or compensatory damages for harms suffered by the Ballards. Moreover, references of harm to persons other than Mr. Ballard also constituted improper character evidence. *See* § 90.404(1), (2)(a), Fla. Stat.; *Edwards v. Orkin Exterminating Co.*, 718 So. 2d 881, 883 (Fla. 3d DCA 1998) (granting plaintiff a new trial in negligence action where the trial court improperly admitted evidence of the plaintiff's failure to pay child support and prior drug use).

When considered with counsel's exhortation to punish Reynolds simply for defending itself in this case, the evidence of conduct unrelated to Mr. Ballard and harm to others became even more damaging. Especially because there was no claim for punitive damages in this case, neither Reynolds's character nor the reprehensibility of its conduct was at issue. Plaintiffs' repeated attempts to put it at issue were clearly improper arguments to inflame the jury.

III. THE JUDGMENT FOR CONSPIRACY IS LEGALLY INFIRM

The conspiracy judgment is infirm for two independent reasons: first, because Plaintiffs failed to prove the essential element of reliance; and second, because the trial court erred in failing to instruct the jury on the statute of repose. These errors would become live if the Court were to remand for a new trial based on the improper arguments and evidence discussed above. Because Plaintiffs failed to prove reliance, the new trial on remand should exclude the claim for

conspiracy. Alternatively, any new trial on the conspiracy claim should occur with a proper instruction on the statute of repose.¹³

A. Plaintiffs Failed To Prove Reliance

To establish a claim for conspiracy to fraudulently conceal under Florida law, Plaintiffs had to prove that Mr. Ballard relied to his detriment on statements made pursuant to a conspiracy that fraudulently concealed information. *See, e.g., Philip Morris USA, Inc. v. Hess*, 95 So. 3d 254, 258, 260-61 (Fla. 4th DCA 2012) (approving of jury instruction that to find in favor of plaintiff on a concealment claim, the jury must find that “but for [the decedent’s] reliance, the loss would not have occurred”); *Humana, Inc. v. Castillo*, 728 So. 2d 261, 265 (Fla. 2d DCA 1999) (plaintiff must prove that he “would not have entered into the transaction had the [concealed] information been disclosed”).

Far from proving that he relied on any misleading statement made pursuant to the conspiracy found in *Engle*, Mr. Ballard conclusively admitted that he did *not*

¹³ The trial court’s ruling on Reynolds’s motion for directed verdict and motion to set aside the verdict are reviewed *de novo*. *See, e.g., Harris v. Soha*, 15 So. 3d 767, 769 (Fla. 1st DCA 2009); *Republic Servs. of Fla., L.P. v. Poucher*, 851 So. 2d 866, 869 (Fla. 1st DCA 2003). The trial court’s refusal to give a requested instruction is reviewed for abuse of discretion. *See, e.g., Langston v. State*, 789 So. 2d 1024, 1026 (Fla. 1st DCA 2001). A trial court “by definition abuses its discretion when it makes an error of law.” *Koon v. United States*, 518 U.S. 81, 100 (1996); *Krolick v. Monroe ex rel. Monroe*, 909 So. 2d 910, 913–14 (Fla. 2d DCA 2005). Moreover, the question “whether the jury should be instructed at all on an issue actually presents a question of law.” *McConnell v. Union Carbide Corp.*, 937 So. 2d 148, 152–53 (Fla. 4th DCA 2006).

so rely. In particular, Mr. Ballard expressly admitted that he did not rely on any advertisements in deciding to smoke. T.11:1272 (“Q. ... And when you started smoking, you didn’t pay attention to any ads about cigarettes, did you? A. No.”); T.11:1273 (“[D]id anything, any ad put out by a tobacco company, an advertisement about cigarettes, either in print or on television or radio, did any of those have anything to do with your decisions about smoking? A. No.”). Given this failure of proof, the trial court erred in not directing a verdict for Reynolds on the conspiracy claim. *See, e.g., Lipsig v. Ramlawi*, 760 So. 2d 170, 181 (Fla. 3d DCA 2000).

The First District’s decision in *R.J. Reynolds Tobacco Co. v. Martin*, 53 So. 3d 1060 (1st DCA 2010), is not to the contrary. *Martin* held that a jury could infer reliance based on the assertedly pervasive nature of cigarette advertising. *Id.* at 1069–70. However, like all other permissive inferences, the *Martin* inference may be overcome by direct evidence to the contrary. *See, e.g., Paniello v. Smith*, 606 So. 2d 626, 627-28 (Fla. 3d DCA 1992) (“It is a well-settled principle that a fact cannot be established by circumstantial evidence which is perfectly consistent with direct, uncontradicted, reasonable and unimpeached testimony that the fact does not exist.” (citing *Alan & Alan, Inc. v. Gulfstream Car Wash, Inc.*, 385 So. 2d 121 (Fla. 3d DCA 1980))). *Martin* did not involve a living smoker who testified

unequivocally that he did *not* rely on any tobacco-company statements, and it certainly does not authorize courts to disregard such direct party admissions.¹⁴

B. The Trial Court Erred By Refusing To Instruct The Jury On The Statute Of Repose

Florida's statute of repose requires any claim based on fraud to be filed within twelve years "after the date of the commission of the alleged fraud, regardless of the date the fraud was or should have been discovered."

§ 95.031(2)(a), Fla. Stat. Because *Engle* was filed on May 5, 1994, the repose date for an *Engle*-progeny suit is May 5, 1982. See *Philip Morris USA, Inc. v. Cohen*, 102 So. 3d 11, 15 (Fla. 4th DCA 2012). Thus, to recover on their conspiracy claim, Plaintiffs had to prove that both concealment pursuant to the conspiracy and reasonable reliance by Mr. Ballard occurred after May 5, 1982. See *Philip Morris USA, Inc. v. Kayton*, 104 So. 3d 1145, 1151 (Fla. 4th DCA 2012). And that is exactly the instruction that Reynolds sought. See R.14:2812-13; T.18:1616 (objecting to the court's instruction on reliance based on the statute of repose).

The trial court erred in failing to give the instruction Reynolds requested on the statute of repose. This Court has held that such an instruction is not required, see *Frazier v. Philip Morris USA Inc.*, 89 So. 3d 937, 947 (Fla. 3d DCA 2012), but

¹⁴ In *R.J. Reynolds Tobacco Co. v. Williams*, No. 3D13-2099, Reynolds is asking this Court to reject *Martin*'s holding that a jury may generally infer that an individual smoker relied merely from the pervasive nature of cigarette advertising. The Court need not reach that issue in this case, given the incontrovertible, direct evidence of non-reliance.

the Florida Supreme Court has granted review on the repose issue in *Frazier*, which is set for oral argument in that Court on April 30, 2014. *See Philip Morris USA, Inc. v. Russo*, No. SC12-1401 (Fla. Sept. 3, 2013). Accordingly, Reynolds wishes to preserve its repose argument for further review. To ensure that this case and *Frazier* receive like treatment, we request that the Court either defer the decision in this appeal pending the Florida Supreme Court's decision in *Frazier*, or else cite to its decision in *Frazier* to ensure that Reynolds may receive the benefit of any favorable subsequent decision in *Frazier* by the Florida Supreme Court.

IV. THE COMPENSATORY DAMAGES AWARD WAS EXCESSIVE

Even if the liability determination could stand, the \$7.8 million compensatory award to Mr. Ballard is excessive and thus warrants either a new trial or remittitur.¹⁵

If damages are excessive, then “remittitur or new trial on damages is the remedy.” *ITT Hartford Ins. Co. v. Owens*, 816 So. 2d 572, 576 (Fla. 2002) (internal quotations omitted); *see* § 768.74(2), Fla. Stat (“If the court finds that the amount awarded is excessive . . . it shall order a remittitur”). In determining excessiveness, several considerations are relevant, including (a) whether the award

¹⁵ A trial court's decision denying a new trial or remittitur is reviewed for abuse of discretion. *See, e.g., City of Hollywood v. Hogan*, 986 So. 2d 634, 647 (Fla. 4th DCA 2008). However, that discretion must be exercised consistent with the legislative command that “[a]wards of damages” must “be subject to close scrutiny by the courts.” § 768.74(3), Fla. Stat.

**IN THE DISTRICT COURT OF APPEAL, THIRD DISTRICT
STATE OF FLORIDA**

R.J. REYNOLDS TOBACCO COMPANY,

Defendant/Appellant,

v.

WILLIAM CRAWFORD,

Plaintiff/Appellee.

On Appeal from a Final Order rendered by the Eleventh Judicial Circuit Court,
in and for Miami-Dade County, Florida, Hon. Ronald Dresnick, Circuit Judge

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II. MR. CRAWFORD'S CONCEALMENT AND CONSPIRACY CLAIMS FAIL AS A MATTER OF LAW

The trial court erred in refusing to direct a verdict for Reynolds on the claims for concealment and conspiracy.⁷ Accordingly, any new trial should be limited to the claims for strict liability and negligence. At a minimum, because the trial court correctly instructed the jury that it could award punitive damages only on the claims for concealment and conspiracy, *see* T.XVII:2192, T.XXI:2594, the punitive award must be set aside.

To establish liability for fraudulent concealment (or for derivative conspiracy claims), Florida law requires proof of detrimental reliance. *See Soler v. Secondary Holdings, Inc.*, 771 So. 2d 62, 69 (Fla. 3d DCA 2000) (“a claim of fraudulent . . . concealment requires proof of detrimental reliance on a material misrepresentation” (citing *Johnson v. Davis*, 480 So. 2d 625, 627 (Fla. 1985))); *Humana, Inc. v. Castillo*, 728 So. 2d 261, 265 (Fla. 2d DCA 1999) (“Florida law imposes a reliance requirement in an omissions case”). *Engle*-progeny cases are fully subject to this rule. *See, e.g., Philip Morris USA Inc. v. Hess*, 95 So. 3d 254, 259 (Fla. 4th DCA 2012) (“*Engle* did not relieve plaintiffs of the burden of proof with respect to the element of reliance in a fraud based claim.”). Thus, to prevail on his concealment and conspiracy claims, Mr. Crawford had to prove detrimental

⁷ The denial of Reynolds’s motion for directed verdict is reviewed de novo. *Diaz Impex of Doral, Inc.*, 7 So. 3d 591, 593 (Fla. 3d DCA 2009).

reliance—*i.e.*, that in the absence of any concealment of information by Reynolds or other *Engle* defendants, he would not have smoked or would have quit in time to avoid his injury. As explained below, Mr. Crawford failed entirely to meet that burden of proof.

A. Mr. Crawford Did Not Detrimentally Rely On Any Tobacco-Company Statement

Far from proving that he relied on any statements or omissions by tobacco companies in his smoking decisions, Mr. Crawford affirmatively admitted that he did not. According to his own testimony, he began smoking for reasons that had nothing to do with any statement or omission by Reynolds or any other *Engle* defendant: “Q: [Y]ou personally believe that the only person that was responsible for you starting to smoke was your brother Henry; is that correct? A: I do.” T.XIII:1737-38. Mr. Crawford further admitted that he did not select which brands to smoke based on cigarette advertising. He agreed that “the reason [he was] smoking Camels and Luckys and Raleighs as a young kid . . . wasn’t because of advertising,” but rather, “because that’s what [his] friends could supply [him] with.” T.XIII:1743. He also admitted that he would “probably” “have smoked whatever brand they could find.” T.XIII:1743-44. Similarly, the reason Mr. Crawford “started smoking Kools was because that’s the brand [his] mother picked.” T.XIII:1744; *see also* T.XIII:1744, 1751 (“Q: And you don’t have any idea why you started smoking Kools other than that, correct? A: That is

correct. . . . Q: And that time . . . when you started smoking Kools unfiltered, you had not seen or heard anything that made you want to try Kools, correct? . . . A: I had not seen anything.”).

Mr. Crawford also failed to prove that he saw, read, or heard any misleading cigarette advertising, much less that such advertising affected his decision to start or continue smoking. To the contrary, Mr. Crawford testified that he could not recall any statement by any tobacco company. T.XIII:1753-54. He similarly testified that before filing his lawsuit he had never heard of—much less looked to as a source of information—the Tobacco Institute, the Council for Tobacco Research, or the Tobacco Industry Research Committee. *See* T.XIII:1758-59. He explained that he did not “remember ever seeing anything called ‘a [F]rank [S]tatement to cigarette smokers,’” and he disclaimed any suggestion that the “[F]rank [S]tatement . . . caused [him] to continue smoking.” T.XIII:1754; *see also* T.XII:1546-47 (Mr. Crawford’s daughter testifying that Mr. Crawford never mentioned TI, CTR, or TIRC). Finally, Mr. Crawford’s expert, Dr. Proctor, expressly declined to render an opinion on whether Mr. Crawford relied on any statement by any tobacco company. T.IX:1122.”

To be sure, Mr. Crawford did testify that unspecified cigarette advertisements affected his decision to smoke filtered cigarettes instead of unfiltered cigarettes, T.XIII:1707, though he could not remember “which

statement” he saw or where he saw it, T.XIII:1709. But even if Mr. Crawford did rely on cigarette advertising in switching from unfiltered to filtered cigarettes, he introduced no evidence that this induced him to smoke any more than he otherwise would have. To the contrary, Mr. Crawford admitted that “even if filters weren’t around,” he “probably” would have “continued smoking the unfiltered brands [he] liked.” T.XIII:1749. And the jury was only asked whether *smoking* caused his laryngeal cancer, not whether it was caused by his change from unfiltered to filtered cigarettes. *See, e.g.*, R.XIV:3818 (“Was smoking cigarettes a legal cause of William Crawford’s laryngeal cancer?”).

In sum, Mr. Crawford failed to prove that he detrimentally relied on any tobacco-company statements or omissions, and his own admissions conclusively show that he did not.

B. Mr. Crawford Knew That Smoking Was Hazardous

Mr. Crawford’s concealment and conspiracy claims also fail for a second, independent reason: because Mr. Crawford knew that smoking was dangerous and could cause cancer, any purported reliance on statements concealing that fact was unreasonable as a matter of law.

1. As a matter of law, an individual cannot reasonably rely on the concealment of facts already known to the individual. This common-sense rule is enshrined in the Torts Restatement: “The recipient of a fraudulent

C. *Martin* Cannot Save The Concealment And Conspiracy Claims

At trial, Mr. Crawford argued that the court should apply the First District's *Martin* decision, *see* T.XIV:1916-20, which held that a jury could "infer" reliance from evidence of pervasive misleading cigarette advertising. *R.J. Reynolds Tobacco Co. v. Martin*, 53 So. 3d 1060, 1069 (Fla. 1st DCA 2010). For at least three reasons, *Martin* cannot salvage the concealment and conspiracy claims.

First, like all other permissive inferences, the *Martin* "inference" of reliance may be overcome by direct evidence to the contrary. *See, e.g., Paniello v. Smith*, 606 So. 2d 626, 627-28 (Fla. 3d DCA 1992) ("It is a well-settled principle that a fact cannot be established by circumstantial evidence which is perfectly consistent with direct, uncontradicted, reasonable and unimpeached testimony that the fact does not exist.") (quoting *Alan & Alan, Inc. v. Gulfstream Car Wash, Inc.*, 385 So. 2d 121 (Fla. 3d DCA 1980)); *Kam Seafood Co. v. State*, 496 So. 2d 219, 219 (Fla. 1st DCA 1986) (prohibiting "inference" that was "unreasonable under the [direct] evidence"); *Marlo Invs., Inc. v. Verne*, 227 So. 2d 58, 60 (Fla. 4th DCA 1969) ("when there is direct evidence that proves the contrary, the inferences from circumstantial evidence must evaporate"). As shown above, Mr. Crawford himself testified he did *not* rely on cigarette advertising in choosing to begin and continue smoking. *Martin* did not involve a living smoker who so

testified, and it certainly does not authorize courts to disregard such unequivocal party admissions.

Second, Martin did not disturb the settled rule that a party cannot reasonably rely on the concealment of facts already known to that individual. As shown above, Mr. Crawford knew for decades that smoking could cause cancer—and indeed that he personally risked developing cancer if he continued smoking. Thus, any purported reliance was unreasonable as a matter of law.

Third, Martin is inconsistent with the law of this District. In *Palmas v. Bambu, S.A. E.I. DuPont de Nemours & Co.*, 881 So. 2d 565 (Fla. 3d DCA 2004), this Court rejected “fraud on the market” and similar theories of indirect proof of reliance. *Id.* at 573. In particular, this Court made clear that reliance could not be inferred merely from “‘a defendant’s subjection of ‘the whole market’ to deceptive advertising.’” *Id.* (quoting *Chudasama v. Mazda Motor Corp.*, 123 F.3d 1353, 1369 n. 39 (11th Cir. 1997)). In *Engle* itself, in a portion of its opinion left undisturbed by the Florida Supreme Court, this Court made the same point. *Liggett Grp., Inc. v. Engle*, 853 So. 2d 434, 446 n. 10 (Fla. 3d DCA 2003) (“Florida law bars any presumption of reliance in cases involving fraud”), *aff’d in part and quashed in part on other grounds, Engle*, 945 So. 2d 1246; *see also Kahler v. E.F Hutton*, 558 So. 2d 144, 145 (Fla. 3d DCA 1990).

More generally, proof of reliance “cannot be satisfied by assumptions.” *Humana*, 728 So. 2d at 265; *see, e.g., Morgan WR. Grace & Co.-Conn.*, 779 So. 2d 503, 506 (Fla. 2d DCA 2000) (rejecting argument that “various documents aimed at the general public . . . lulled the . . . public, including [plaintiff], into a false sense of security”); *Morgan Canaveral Port Auth.*, 202 So. 2d 884, 887 (Fla. 4th DCA 1967) (it “cannot be assumed that the appellants relied to their detriment upon any act or omission on the part of the appellees”). By focusing entirely on the scope of the alleged fraud, *Martin* eliminates any need for the plaintiff to prove reliance on an individual basis. That, in turn, is inconsistent not only with this Court’s decisions, but also with the very structure of *Engle* itself. In *Engle*, the named plaintiffs were not permitted to establish liability for concealment and conspiracy based on the assertedly pervasive misconduct found in Phase I. To the contrary, in Phase II-A, there were entirely separate trials addressing the reliance of each individual plaintiff on a case-by-case basis, *see* 945 So. 2d at 1257, which is precisely why the Florida Supreme Court confirmed that the misconduct found in Phase I—no matter how pervasive—“did *not* determine whether the defendants were liable to anyone.” *Id.* at 1263 (citation omitted).

For all of these reasons, *Martin* does not support an affirmance of the judgment as to concealment and conspiracy.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 31st day of March, 2014, served a copy of the foregoing Initial Brief of Appellants to counsel below by electronic mail:

s/ Alina Alonso Rodriguez
Attorney for Appellant
R.J. Reynolds Tobacco Company

Case No. 2D16-1651

**IN THE DISTRICT COURT OF APPEAL
SECOND DISTRICT, STATE OF FLORIDA**

R. J. REYNOLDS TOBACCO COMPANY and PHILIP MORRIS USA INC.,
Defendants/Appellants,

v.

INA E. AHRENS, as Personal Representative of the Estate of KARL ROBERT
AHRENS,
Plaintiff/Appellee.

Appeal from a Final Judgment rendered by the Circuit Court of the 6th Judicial
Circuit in and for Pinellas County, Florida, Case No. 14-005826-CI
Hon. Jack Day, Circuit Judge

**REPLY BRIEF OF APPELLANTS R.J. REYNOLDS TOBACCO
COMPANY AND PHILIP MORRIS USA INCORPORATED**

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reason why it would incorporate a lay definition of “addiction” (or any other term).

State v. Traster, 610 So.2d 572 (Fla. 4th DCA 1992) (per curiam), does say that criminal defendants are “not required to prove [their] drug addiction by expert testimony to support a downward departure” at sentencing, but that was dicta, since the determination in that case rested on expert testimony. *Id.* at 573–74. And *Zwinge v. Hettinger*, 530 So. 2d 318, 323 (Fla. 2d DCA 1988), concerns lay testimony of “intoxication”—something on which any adult is qualified to opine.

It is irrelevant whether Defendants argued that the addictive effects of cigarettes have been known for a century (AB 35); propensity to addict neither establishes addiction in a particular case nor qualifies laypeople to make the diagnosis.

II. Plaintiff Failed To Prove Reliance On Misleading Statements

In defense of the trial court’s reliance instruction, which authorized liability based on mere silence (as distinguished from misleadingly incomplete statements or “half-truths”), Plaintiff cites *Philip Morris USA Inc. v. Putney*, 199 So. 3d 465 (Fla. 4th DCA 2016), *R.J. Reynolds Tobacco Co. v. Martin*, 53 So. 3d 1060 (Fla. 1st DCA 2010), and *Philip Morris USA, Inc. v. Hallgren*, 124 So. 3d 350 (Fla. 2d DCA 2013). But those cases held only that an *Engle*-progeny jury can “infer ... reliance on pervasive misleading advertising campaigns.” *Martin*, 53 So. 3d at 1069; *see also Putney*, 199 So. 3d at 470; *Hallgren*, 124 So. 3d at 353. Far from helping Plaintiff, these cases support Defendants: “an advertising campaign” nec-

essarily involves statements. There would be no need for the *Martin* inference if a plaintiff could prevail without proving reliance on a statement.

Evers is likewise unhelpful to Plaintiff. She claims this Court rejected the statement requirement when it reversed a directed verdict for the defendants on fraudulent concealment and conspiracy. AB 38. But this Court reversed because the plaintiff in that case had carried her burden with evidence of “misleading advertising campaigns”—that is, evidence of misleading statements—not because an *Engle*-progeny plaintiff can recover for detrimentally relying on silence. See *Evers*, 195 So. 3d at 1140.

The Fourth District did recently note in dicta that fraudulent-concealment instructions “need not include reliance on ‘a statement’ unless the facts of the case warrant it.” *Calloway*, 201 So. 3d at 766. The opinion does not specify what facts would “warrant” dispensing with the requirement of a statement, but as we showed in our initial brief, Florida law permits liability based on silence only if the defendant had an affirmative duty to speak based on a fiduciary or other special relationship. IB 34. There are no facts suggesting the existence of such a duty here.

Plaintiff argues for a broader doctrine of fraud based on silence, but the law does not support her. The Restatement provisions she cites (AB 40) are inapposite. One proposes liability for a defendant who takes affirmative steps to frustrate a plaintiff’s investigation, which is not the situation here. See Restatement (Second)

of Torts § 550. The other concerns nondisclosure in a “business transaction,” which was not the form of dealing between Defendants and Mr. Ahrens. *See id.* § 551. And even then, it requires a fiduciary relationship or a misleading statement or some other special circumstance. *See id.* § 551(2).

And whatever may be the general law of fraudulent concealment, the theory pursued in *Engle* required a statement. IB 35–37. 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.” R.19168 (emphasis added). This element shows that fraudulent concealment, as litigated in *Engle* and (therefore) *Engle*-progeny cases, 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 “was or could have been litigated by the parties in *Engle*.” AB 44.

III. The Guaranteed Sum Should Offset The Punitive Damages Award.

Plaintiff argues that Defendant Philip Morris USA cannot claim a set-off

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1 IN THE CIRCUIT COURT OF THE
2 EIGHTH JUDICIAL CIRCUIT, IN AND FOR
3 ALACHUA COUNTY, FLORIDA

4 EARLINE ALEXANDER, as
5 Personal Representative
6 of the Estate of JOHN PAUL
7 ALEXANDER, deceased,

8 Plaintiff,

9 v.

CASE NO.: 01-2008-CA-5067
DIVISION: K

10 PHILIP MORRIS USA, a
11 Virginia corporation; R.J.
12 REYNOLDS TOBACCO COMPANY, a
13 North Carolina corporation;
14 LIGGETT GROUP, LLC, a
15 Delaware limited liability
16 company; and VECTOR GROUP,
17 LTD., INC., a Delaware
18 corporation,

19 Defendants.

20 _____/

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Volume XXIII

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Pages 2845 to 3045

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APPEARANCES OF COUNSEL

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4 is a legal cause of injury if it directly and in
5 natural and continuous sequence produces or
6 contributes substantially to producing the injury so
7 that it can reasonably be said that but for the
8 concealment or omission the injury would not have
9 occurred.

10 In order to be regarded as a legal cause of
11 injury, it need not be the only cause. It may be a
12 legal cause of injury even though it operates in
13 combination with the act of another, some natural
14 cause or some other cause, if it contributes
15 substantially to producing such loss.

16 If the greater weight of the evidence supports
17 Mrs. Alexander's claim against R.J. Reynolds, then
18 your verdict on this claim should be for
19 Mrs. Alexander. If the greater weight of the
20 evidence does not support Mrs. Alexander's claim on
21 this issue, then your verdict should be for
22 R.J. Reynolds on this claim.

23 The Court has instructed you that R.J. Reynolds
24 agreed with other tobacco companies and groups to
25 conceal material information about the health

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1 effects or addictive nature of cigarettes or both.
2 The issue for your determination on Mrs. Alexander's
3 claim for conspiracy is whether this agreement to
4 conceal or omit material information was a legal
5 cause of Mr. Alexander's death.

6 Conspiracy is the agreement between two or more
7 parties to do an unlawful act or to do a lawful act
8 by unlawful means while doing any overt act in
9 furtherance of the conspiracy.

10 Each party to a conspiracy is responsible for
11 the acts or omissions of any other part -- should
12 that be party?

13 MS. VALLEJOS-NICHOLS: Yes, sir.

14 MR. AVERA: Yes, sir.

15 THE COURT: That should be an interlineation,
16 and make that word which is now "part" "party." And
17 I'll now reread the sentence with that correction.

18 Each party to a conspiracy is responsible for
19 the acts or omissions of any other party to the
20 conspiracy so long as the acts or omissions were in
21 furtherance of the conspiracy.

22 A material fact is one that is of such
23 importance that Mr. Alexander would not have acted
24 as he did but for the concealment or omission of the
25 fact by one or more of the members of the

2973

1 conspiracy. Additionally, to be a legal cause of
2 Mr. Alexander's death, the concealed or omitted
3 facts must have been unknown to Mr. Alexander.
4 Moreover, if those facts were unknown, either they
5 must have been not otherwise available to
6 Mr. Alexander or Mr. Alexander's opportunity to
7 learn them was less than that of R.J. Reynolds'.

8 The concealment or omission of a material fact
9 is a legal cause of injury if it directly and in
10 natural and continuous sequence produces or
11 contributes substantially to the produce -- to
12 producing the injury so that it can reasonably be
13 said that but for the concealment or omission the
14 injury would not have occurred.

15 In order to be regarded as a legal cause of
16 injury, it need not be the only cause. It may be a
17 legal cause of injury even though it operates in
18 combination with the act of another, some natural
19 cause or some other cause, if it contributes
20 substantially to producing such loss.

21 If the greater weight of the evidence supports
22 Mrs. Alexander's claim against R.J. Reynolds, then
23 you verdict on this claim should be for
24 Mrs. Alexander. If the greater weight of the
25 evidence does not support Mrs. Alexander's claim on

2974

1 this issue, then your verdict should be for
2 R.J. Reynolds on this claim.

3 If the greater weight of the evidence does not
4 support one or more of Mrs. Alexander's claims, your
5 verdict should be for R.J. Reynolds on those claim.
6 That should be "s" there on the end of "claims."

7 If, however, the greater weight of the evidence
8 supports one or more of Mrs. Alexander's claims,
9 then you shall consider the defenses raised by
10 R.J. Reynolds.

11 On the first defense the issue for you to
12 decide is whether Mr. Alexander knew or by the use
13 of reasonable care should have known before May 5th,
14 1990, that there was a reasonable possibility that
15 his COPD was caused by smoking cigarettes.

16 If the greater weight of the evidence
17 supports R.J. Reynolds' defense on this issue,
18 Mrs. Alexander's claims are time-barred and your
19 verdict should be for R.J. Reynolds.

20 If, however, the greater weight of the evidence
21 does not support R.J. Reynolds' defense on this

**IN THE CIRCUIT COURT OF THE FOURTH JUDICIAL CIRCUIT
DUVAL COUNTY, FLORIDA
CIVIL DIVISION**

NORMA WARRICK, as Personal
Representative of the ESTATE OF
EVELINE WARRICK,

Plaintiff,

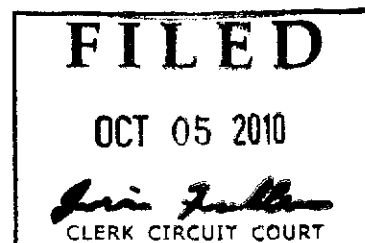
vs.

R.J. REYNOLDS TOBACCO COMPANY,
And PHILIP MORRIS USA

Defendants.

Case No. 16-2007-CA-011654-QXXX-MA

CV-A



JURY INSTRUCTIONS

INSTRUCTION 1

Members of the jury, I shall now instruct you on the law that you must follow in reaching your verdict. 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 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.

INSTRUCTION 18

The Court has instructed you that R.J. Reynolds Tobacco Co. and Philip Morris USA Inc. agreed with each other and with other tobacco entities to conceal or omit material information regarding the health effects of cigarettes or their addictive nature with the intention that smokers and the public would rely on this information to their detriment. The issue for your determination on Plaintiff's agreement to conceal claim is whether the agreement to withhold health information or information regarding addiction and the acts proven in furtherance of that agreement were a legal cause of the loss, injury, damage or death of Eveline Warrick. In order for the agreement to conceal to be the legal cause of Mrs. Warrick's loss, injury, damage or death, the omitted fact must have been unknown to Mrs. Warrick and/or not available.

An agreement to conceal or omit material information is a legal cause of loss, injury, damage or death if it directly and in natural and continuous sequence produces or contributes substantially to producing such loss, injury, damage or death, so that it can reasonably be said that, but for the agreement and the acts proven in furtherance of that agreement, the loss, injury, damage or death would not have occurred.

In order to be regarded as a legal cause of loss, injury, damage or death, an agreement to conceal or omit material information need not be the only cause. An

agreement to conceal or omit material information may be a legal cause of loss, injury, damage or death, even though it operates in combination with the act of another, some natural cause or some other cause if such other cause occurs at the same time as the agreement to conceal or omit material information.

1 IN THE CIRCUIT COURT, EIGHTH
2 JUDICIAL CIRCUIT, IN AND FOR
LEVY COUNTY, FLORIDA

3 CASE NO.: 38 2009 CA 001285

4 VOLUME XXXII
5 (Pages 2691 - 2776)

6
7 DIANNE WEBB, Personal Representative of
the ESTATE OF JAMES CAYCE HORNER,

8 Plaintiff,

9 vs.

10 R.J. REYNOLDS TOBACCO COMPANY,

11 Defendant.
12 -----

13 Jury Trial before The Honorable Stanley H.
14 Griffis, III, Circuit Judge, in the above-entitled
15 action, on Monday, November 15, 2010, at 9:00 a.m., at
16 the Levy County Courthouse, 355 South Court Street,
17 Bronson, Florida, before Marjie M. Kline, CSR-3545, and
18 a Notary Public in and for the State of Florida at
19 Large.
20

21 - - -
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23
24
25

1 them was less than that of R.J. Reynolds Tobacco
2 Company.

3 The concealment or omission of a material fact
4 is a legal cause of injury if it directly and in
5 natural and continuous sequence produces or
6 contributes substantially to producing the injury,
7 so that it can be reasonably said that but for the
8 concealment or omission, the injury would not have
9 occurred.

10 In order to be regarded as a legal cause of
11 injury, it need not be the only cause. It may be a
12 legal cause of injury even though it operates in
13 combination with the act of another, some natural
14 cause, or some other cause if it contributes
15 substantially to producing such loss.

16 If the greater weight of the evidence supports
17 Ms. Webb's claim against R.J. Reynolds Tobacco
18 Company, then your verdict on this claim should be
19 for Ms. Webb. If the greater weight of the evidence
20 does not support Ms. Webb's claim on this issue then
21 your verdict should be for R.J. Reynolds Tobacco
22 Company on this claim.

23 Conspiracy.

24 The court has instructed you that R.J. Reynolds
25 Tobacco Company agreed with other tobacco companies

1 and groups to conceal material information about the
2 health effects or addictive nature of cigarettes or
3 both.

4 The issue for your determination on Ms. Webb's
5 claim for conspiracy is whether this agreement to
6 conceal or omit material information was a legal
7 cause of Mr. Horner's death. Conspiracy is the
8 agreement between two or more parties to do an
9 unlawfully act or to do a lawful act by unlawful
10 means, while doing any overt act in furtherance of
11 the conspiracy. Each party to a conspiracy is
12 responsible for the acts or omissions of any other
13 party to the conspiracy so long as the acts or
14 omissions were in furtherance of the conspiracy.

15 A material fact is one that is of such
16 importance that Mr. Horner would not have acted as
17 he did but for the concealment or omission of the
18 fact by one or more of the members of the
19 conspiracy. Additionally, to be a legal cause of
20 Mr. Horner's death, the concealed or omitted facts
21 must have been unknown to Mr. Horner. Moreover, if
22 those facts were unknown, either they must have not
23 been otherwise available to Mr. Horner or
24 Mr. Horner's opportunity to learn them was less than
25 that of R.J. Reynolds Tobacco Company.

1 The concealment or omission of a material fact
2 is a legal cause of injury if it directly and in
3 natural and continuous sequence produces or
4 contributes substantially to producing the injury,
5 so that it can be reasonably said that but for the
6 concealment or omission the injury would not have
7 occurred.

8 In order to be regarded as a legal cause of the
9 injury it need not be the only cause. It may be a
10 legal cause of injury even though it operates in
11 combination with the act of another, some natural
12 cause or some other cause if it contributes
13 substantially to producing such loss.

14 If the greater weight of the evidence supports
15 Ms. Webb's claims against R.J. Reynolds Tobacco
16 Company, then your verdict on this claim should be
17 for Ms. Webb. If the greater weight of the evidence
18 does not support Ms. Webb's claim on this issue then
19 your verdict should be for R.J. Reynolds Tobacco
20 Company on this claim.

21 Burden of Proof on Main Claim.

22 If the greater weight of the evidence does not
23 support one or more of Ms. Webb's claims, your
24 verdict should be for R.J. Reynolds Tobacco Company
25 on that claim.

3634

1 IN THE CIRCUIT COURT, EIGHTH
2 JUDICIAL CIRCUIT, IN AND FOR
3 ALACHUA COUNTY, FLORIDA
Case No. 01-200-CA-3714
Division J

4

5 ANNA LOUISE HUISH, Personal
Representative of the Estate of

6 JOHN DELBERT HUISH,
7 Plaintiff,

8 vs.

9 R.J. REYNOLDS TOBACCO COMPANY.

PHILIP MORRIS-USA, INC., LORILLARD

10 TOBACCO COMPANY, LORILLARD, INC.,
LIGGETT GROUP, LLC (f/k/a Liggett Group,
11 Inc., f/k/a Liggett & Myers Tobacco Company)
and VECTOR GROUP, LTD., INC., (f/k/a Brooke
12 Group, Ltd.,)
13

14

Defendants.

_____ /

15

16

VOLUME XL

17

(Page 3634 - 3727)

18

19

Jury Trial before the Honorable

20

Stanley H. Griffis, II, Circuit Judge, in the
21 above-entitled action, on Tuesday, February 22nd, 2011
22 at 8:45 a.m., at the Alachua County Courthouse, 201 E.
23 University Avenue, Courtroom 4A, Gainesville, Florida,
24 before Linda J. Beumer, Court Reporter, and a Notary
25 Public in and for the State of Florida at Large.

3635

1

APPEARANCES OF COUNSEL

2

On behalf of the Plaintiff:

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Gabriel Zambrano, Esquire

4

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5

P.O. Box 3626

West Palm Beach, FL 33402

6

and

James Gustafson, Jr., Esquire

7

SEARCY DENNEY SCAROLA

BARNHART & SHIPLEY, P.A.

8

517 North Calhoun Street

Tallahassee, FL 32301

10 have occurred.

11 In order to be regarded as a legal cause of
12 injury, it need not be the only cause. It may be
13 a legal cause of injury even though it operates
14 in combination with the act of another some
15 natural cause, some natural cause, or some other
16 cause if it contributes substantially to
17 producing such loss.

18 Additionally, to be a legal cause in
19 Mr. Huish's injury, the concealed or omitted
20 facts must have been unknown to Mr. Huish.
21 Moreover, if those facts were unknown, either
22 they must have been not otherwise available to
23 Mr. Huish or Mr. Huish's opportunity to learn
24 them was less than that of R.J. Reynolds Tobacco
25 Company and Philip Morris-USA, Inc.

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1 Agreement to conceal. The Court has
2 instructed you that R.J. Reynolds Tobacco Company
3 and Philip Morris-USA, Inc. agreed with other
4 tobacco companies and groups to conceal material
5 information about the health effects or addictive
6 nature of cigarettes or both.

7 The issue for your determination on
8 Plaintiff's claim for conspiracy is whether this
9 agreement to conceal or omit material information
10 was a legal cause of Mr. Huish's injury.
11 Conspiracy is the agreement between two or more
12 parties to do an unlawful act or to do a lawful
13 act by unlawful means, while doing an overt act
14 in furtherance of the conspiracy. Each party to
15 a conspiracy is responsible for the acts or
16 omissions of any other party to the conspiracy so
17 long as the acts or omissions were in furtherance
18 of the conspiracy.

19 A material fact is one that is of such
20 importance that Mr. Huish would not have acted as
21 he did but for the concealment or omission of the
22 fact by one or more of the members of the
23 conspiracy.

24 Additionally, to be a legal cause of
25 Mr. Huish's injury, the concealed or omitted

3655

1 facts must have been unknown to Mr. Huish.
2 Moreover, if those facts were unknown, either
3 they must have been not otherwise available to
4 Mr. Huish or Mr. Huish's opportunity to learn
5 them was less than that of R.J. Reynolds Tobacco

6 Company and Philip Morris-USA, Inc.

7 The concealment or omission of material fact
8 is a legal cause of injury if it directly and in
9 natural and continuance sequence produces or
10 contributes substantially to producing injury, so
11 that it can be reasonably be said that, but for
12 the concealment or omission, the injury would not
13 have occurred.

14 The greater weight of the evidence does
15 not -- if the greater weight of the evidence does
16 not support one or more of Plaintiff's claims,
17 your verdict should be for R.J. Reynolds Tobacco
18 COMPANY and Philip Morris-USA, Inc., on that
19 claim.

20 Defense issues. If, however, the greater
21 weight of the evidence supports one or more of
22 Plaintiff's claims, then you shall consider the
23 defense raised by R.J. Reynolds Tobacco Company
24 and Philip Morris-USA, Inc.

25 The issue for you to decide is whether

3656
1 Mr. Huish was himself negligent in his efforts to
2 quit smoking and, if so, whether that negligence
3 was a contributing legal cause of his death.

4 Plaintiff has admitted that Mr. Huish was
5 negligent in his efforts to quit smoking and that
6 this negligence was a partial cause of his death,
7 in combination with the acts and omissions of
8 R.J. Reynolds Tobacco Company and Philip
9 Morris-USA, Inc. --

10 If the greater weight of the evidence shows
11 that the conduct of both Mr. Huish and R.J.
12 Reynolds Tobacco Company and Philip Morris-USA
13 Inc., contributed as a legal cause to Mr. Huish's
14 injury, you should decide and write on the
15 verdict form the percentage of any fault on the
16 part of Mr. Huish and R.J. Reynolds Tobacco
17 Company and Philip Morris-USA Inc.

18 Negligence defined. Negligence is the
19 failure to use reasonable care, which is the care
20 that a reasonably careful person would use under
21 like circumstances. Negligence is doing
22 something that a reasonably careful person would
23 not do under like circumstances or failing to do
24 something that a reasonably careful person would
25 to under like circumstances.

3657
1 Wrongful death damages. If your verdict is

4060

1 IN THE CIRCUIT COURT, FOURTH
2 JUDICIAL CIRCUIT, IN AND FOR
3 DUVAL COUNTY, FLORIDA
4 CIVIL DIVISION
5 VOLUME XLIX (Pages 4060 - 4140)

6 IN RE: ENGLE PROGENY CASES CASE NO.: 2008-CA-15000
7 TOBACCO LITIGATION DIVISION: TOBACCO

8 Pertains to: Michelle Mrozek, as Personal
9 Representative of the Estate of
10 Jacqueline Swann Miller vs.
Lorillard Tobacco Company
Case No. 16-2007-CA-0119252

10

11

12

13 Proceedings before the Honorable A.C. Soud in
14 the above-entitled action, on Tuesday, March 1st, 2011,
15 at 2:25 p.m. - 5:30 p.m, in Courtroom B5 at the Duval
16 County Courthouse, 3490 Beach Boulevard, Jacksonville,
17 Florida 33202, before Heidi Hunter, RPR, UCSR, NVCRR,
18 and Notary Public for the State of Florida at Large.

19

20

21

22

23

24

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4061

1 A P P E A R A N C E S

2 On behalf of the Plaintiff:

3 BRUCE ANDERSON, Esquire

EVAN J. YEGELWEL, Esquire

4 ANGELO N. PATACCA, Jr., Esquire

Terrell, Hogan, Ellis, Yegelwel, PA

5 223 East Bay Street

8th Floor

6 Jacksonville, Florida, 32202

7

8 For the Defendant:

9 DANIEL F. MOLONY, Esquire

Shook, Hardy & Bacon, LLP

10 100 N. Tampa Street.

Suite 2900

5 concealment or omission, the injury would not have
6 occurred.

7 In order to be regarded as a legal cause of
8 injury it need not be the only cause. It may be a
9 legal cause of injury even though it operates in
10 combination with the act of another, if it
11 contributes substantially to producing such loss.

12 If the greater weight of the evidence does not
13 support Mrs. Mrozek's claim on this issue, then
14 your verdict should be for Lorillard on this claim.
15 However, if the greater weight of the evidence
16 supports Mrs. Mrozek's claim against Lorillard,
17 then your verdict on this claim should be for
18 Mrs. Mrozek.

19 Number ten, the conspiracy claim. The court
20 has instructed you that Lorillard agreed to conceal
21 or omit information regarding the health effects of
22 cigarettes or their addictive nature with the
23 intention that smokers and the public would rely on
24 this information to their detriment. The issue for
25 your determination on Ms. Mrozek's claim for

4112
1 conspiracy is whether this agreement to conceal or
2 omit material information was a legal cause of
3 Mrs. Miller's death.

4 Conspiracy is the agreement between two or
5 more parties to do an unlawful act or to do a
6 lawful act by unlawful means while doing any overt
7 act in furtherance of the conspiracy out of which
8 one is injured or damaged. Each party to a
9 conspiracy is responsible for the acts or omissions
10 of any other party to the conspiracy so long as the
11 acts or omissions were in pursuit of the
12 conspiracy.

13 A material fact is one that is of such
14 importance that Mrs. Miller would not have acted as
15 she did but for the concealment or omission of the
16 fact by one or more of the members of the
17 conspiracy and she justifiably relied on the
18 concealment or omission. Additionally, to be a
19 legal cause of Mrs. Miller's death, the concealed
20 or omitted fact must have not otherwise -- must
21 not -- must have been not otherwise known or
22 available to Mrs. Miller. The concealment or
23 omission of a material fact is a legal cause of
24 injury if it indirectly and in natural and
25 continuous sequence produces or contributes

4113

1 substantially to producing the injury so that it
2 can reasonably be said that but for the concealment
3 or omission, injury would not have occurred.

4 In order to be regarded as a legal cause of
5 injury, it need not be the only cause. It may be a
6 legal cause of injury even though it operates in
7 combination with the act of another, if it
8 contributes substantially to producing such loss.

9 If the greater weight of the evidence does not
10 support Mrs. Mrozek's claim on this issue, then
11 your verdict should be for Lorillard on this claim.
12 However, if the greater weight of the evidence
13 supports Mrs. Mrozek's claim against Lorillard,
14 then your verdict on this claim should be for
15 Mrs. Mrozek.

16 Number 11, wrongful death damages. If your
17 verdict for Lorillard on all -- if your verdict is
18 for Lorillard on all counts, you will not consider
19 the matter of damages. But if the greater weight
20 of the evidence supports any of Mrs. Mrozek's
21 claim, you should determinate and write on the
22 verdict form in dollars the total amount of damage
23 which the greater weight of the evidence shows the
24 estate of Mrs. Miller and her survivors sustained
25 as a result of her injury and death, including any

4114
1 damages that are reasonably certain to incur or
2 experience in the future.

3 During jury selection there was a comment by a
4 potential juror and some comments by Judge Arnold
5 regarding under what circumstances adult children
6 should be able to recover damages for the death of
7 a parent. You should disregard those comments, and
8 you are now instructed that under Florida law where
9 there is no surviving spouse, the children of the
10 deceased may recover damages regardless of their
11 age in a case like this one.

12 In determining the damages recoverable on
13 behalf of Mrs. Miller's estate, you shall consider
14 the funeral expenses due to her death which were
15 paid by or on behalf of her estate. In determining
16 any damages to be awarded Mrs. Miller's personal
17 representative for the benefit of Mrs. Miller's
18 surviving children, you shall consider certain
19 additional elements of damage for which there is no
20 exact standard for fixing the compensation to be
21 awarded. Any such award should be fair and just in
22 light of the evidence regarding the loss by

IN THE CIRCUIT COURT EIGHTH JUDICIAL CIRCUIT
IN AND FOR ALACHUA COUNTY, FLORIDA
CIVIL DIVISION

PETER MACK, JR., as
Personal Representative
of the Estate of PETER MACK,
SR.,

Plaintiff, CASE NO.: 01-2008-CA-3256
DIVISION: J
vs. VOLUME 37 (Pages 2921-3026)

R.J. REYNOLDS TOBACCO COMPANY,
individually and as successor by
merger to BROWN & WILLIAMSON TOBACCO
CORPORATION, individually and as
successor by merger to THE AMERICAN
TOBACCO COMPANY, a foreign corporation;
PHILIP MORRIS USA, INC., a foreign
corporation; LORILLARD TOBACCO COMPANY,
a foreign corporation; LIGGETT GROUP,
LLC (f/k/a LIGGETT GROUP, INC., f/k/a
LIGGETT & MYERS TOBACCO COMPANY); and
VECTOR GROUP, LTD., INC. (f/k/a BROOKE
GROUP, LTD.) a foreign corporation,

Defendants.

_____/

Jury Trial and proceedings before The
Honorable Stanley H. Griffis, III, Circuit Judge, in the
above-entitled action, on Friday, March 18, 2011, at
8:30 a.m. at the Alachua County Family and Civil Justice
Center, 201 East University Avenue, Gainesville,
Florida, before Marjie M. Kline, CSR-3545, RPR, and a
Notary Public in and for the State of Florida at Large.

1 In order to be regarded as a legal cause of
2 injury, it need not be the only cause. It may be a
3 legal cause of injury even though it operates in
4 combination with the act of another, some natural
5 cause, or some other cause if it contributes
6 substantially to producing such loss.

7 If the greater weight of the evidence supports
8 plaintiff's claim against R.J. Reynolds Tobacco
9 Company, then your verdict on this claim should be
10 for the plaintiff. If the greater weight of the
11 evidence does not support plaintiff's claim on this
12 issue, then your verdict should be for R.J. Reynolds
13 Tobacco Company on this claim.

14 CONSPIRACY

15 The Court has instructed you that R.J. Reynolds
16 Tobacco Company agreed with other tobacco companies
17 and groups to conceal material information about the
18 health effects or addictive nature of cigarettes or
19 both.

20 The issue for your determination on plaintiff's
21 claim for conspiracy is whether this agreement to
22 conceal or omit material information was a legal
23 cause of Mr. Mack's injury. Conspiracy is the
24 agreement between two or more parties to do an
25 unlawfully act or to do a lawful act by unlawfully

1 means, while doing any overt act in furtherance of
2 the conspiracy. Each party to a conspiracy is
3 responsible for the acts or omissions of any other
4 party to the conspiracy so long as the abilities or
5 omissions were in furtherance of the conspiracy.

6 A material fact is one that is of such
7 importance that Mr. Mack would not have acted as he
8 did but for the concealment or omission of the fact
9 by one or more of the members of the conspiracy.
10 Additionally, to be a legal cause of Mr. Mack's
11 injury, the concealed or omitted facts must have
12 been unknown to Mr. Mack. Moreover, if those facts
13 were unknown, either they must have been not
14 otherwise available to Mr. Mack or Mr. Mack's
15 opportunity to learn them was less than that of R.J.
16 Reynolds Tobacco Company.

17 The concealment or omission of a material fact
18 is a legal cause of injury if it directly and in
19 natural and continuous sequence produces or
20 contributes substantially to producing the injury,
21 so that it can reasonably be said that, but for the
22 concealment or omission, the injury would not have
23 occurred.

24 In order to be regarded as a legal cause of
25 injury, it need not be the only cause. It may be a

1 legal cause of injury even though it operates in
2 combination with the acts of others, some natural
3 cause, or some other cause if it contributes
4 substantially to producing such loss.

5 If the greater weight of the evidence supports
6 plaintiff's claim against R.J. Reynolds Tobacco
7 Company, then your verdict on this claim should be
8 for plaintiff. If the greater weight of the
9 evidence does not support plaintiff's claim on this
10 issue, then your verdict should be for R.J. Reynolds
11 Tobacco Company on this claim.

12 If the greater weight of the evidence does not
13 support one or more of the plaintiff's claim then
14 your verdict should be for R.J. Reynolds Tobacco
15 Company on that claim.

16 If, however, the greater weight of the evidence
17 supports one or more of plaintiff's claim, then you
18 shall consider the defense raised by R.J. Reynolds
19 Tobacco Company.

20 The issue for you to decide is whether Mr. Mack
21 was himself negligent in his efforts to quit smoking
22 and if so, whether that negligence was a
23 contributing legal cause of his injury.

24 Plaintiff has admitted that Mr. Mack was
25 negligent in his efforts to quit smoking and that

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1 IN THE CIRCUIT COURT, EIGHTH
2 JUDICIAL CIRCUIT, IN AND FOR
3 ALACHUA COUNTY, FLORIDA
4 CASE NO.: 01-2007-CA-5192
5 DIVISION: J
6 VOLUME 35 (PAGES 2697 - 2785)
7

8 LUCILLE RUTH SOFFER, Personal
9 Representative of the Estate of
10 MAURICE BENSON SOFFER,
11 Plaintiff,
12 vs.
13 R.J. REYNOLDS TOBACCO CO., PHILIP
14 MORRIS-USA, INC., LORILLARD TOBACCO
15 CO., LORILLARD, INC.; LIGGETT GROUP,
16 LLC, (f/k/a Liggett Group, Inc., f/k/a
17 Liggett & Myers Tobacco Co.), and VECTOR
18 GROUP, LTD., INC., (f/k/a Brooke Group,
19 Ltd.),
20 Defendants.

21 Jury Trial and Proceedings before The
22 Honorable Robert E. Roundtree, Jr., at the Alachua
23 County Civil and Family Justice Center Courthouse, 201
24 East University Avenue, Gainesville, Florida, on
25 Thursday, June 16, 2011, at 2:37 p.m. Before Heidi
26 Hunter, RPR, UCSR, NVCRR, and Notary Public in and for
27 the State of Florida at Large

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1 APPEARANCES OF COUNSEL:
2 On behalf of Plaintiff:
3 RODNEY SMITH, Esquire
4 DAWN VALLEJOS-NICHOLS, Esquire
5 MARK AVERA, Esquire
6 Avera & Smith
7 2814 SW 13th Street
8 Gainesville, Florida 32608
9
10 On behalf of R.J. Reynolds:
11 GEOFFREY K. BEACH, Esquire
12 Jones Day
13 51 Louisiana Avenue, N.W.
14 Washington, D.C., 20001

23 contributes substantially to producing such loss.

24 If the greater weight of the evidence supports
25 Mrs. Soffer's claim against R.J. Reynolds Tobacco

2765

1 Company, then your verdict on this claim should be
2 for Mrs. Soffer. If the greater weight of the
3 evidence does not support Mrs. Soffer's claim on
4 this issue, then your verdict should be for R.J.
5 Reynolds Tobacco Company on this claim.

6 The court has instructed you that R.J.
7 Reynolds Tobacco Company agreed with the other
8 tobacco companies and groups to conceal material
9 information about the health effects or addictive
10 nature of cigarettes or both. The issue for your
11 determination on Mrs. Soffer's claim for conspiracy
12 is whether this agreement to conceal or omit
13 material information was the legal cause of
14 Mr. Soffer's death.

15 Conspiracy is the agreement between two or
16 more parties to do an unlawful act or do a lawful
17 act by unlawful means. While doing any overt act
18 in furtherance of the conspiracy. Each party to a
19 conspiracy is reasonable for the acts or omissions
20 of any other party to the conspiracy so long as the
21 acts or omissions were in furtherance of the
22 conspiracy.

23 A material fact is one that is of such
24 importance that Mr. Soffer would not have acted as
25 he did but for the concealment or omission of the

2766

1 fact by one or more of the members of the
2 conspiracy. Additionally, to be a legal cause of
3 Mr. Soffer's death, the concealed or omitted facts
4 must have been unknown to Mr. Soffer. Moreover, if
5 those facts were unknown, either they must have
6 been not otherwise available to Mr. Soffer or
7 Mr. Soffer's opportunity to learn them was less
8 than that of R.J. Reynolds Tobacco Company.

9 The concealment or omission of a material fact
10 is a legal cause of injury if it directly and in
11 natural and continuous sequence produces or
12 contributes substantially to producing the injury
13 so that it can reasonably be said that but for the
14 concealment or omission, the injury would not have
15 occurred. In order to be regarded as a legal cause
16 of injury, it need not be the only cause. It may
17 be a legal cause of injury even though it operates
18 in combination with the act of another, some

19 natural cause, or some other cause if it
20 contributes substantially to producing such loss.

21 If the greater weight of the evidence supports
22 Mrs. Soffer's claim against R.J. Reynolds Tobacco
23 Company, then your verdict on this claim should be
24 for Mrs. Soffer. If the greater weight of the
25 evidence does not support Mrs. Soffer's claim on

2767
1 these issues, then your verdict should be for R.J.
2 Reynolds Tobacco Company on this claim.

3 If the greater weight of the evidence does not
4 support one or more of Mrs. Soffer's claims, your
5 verdict should be for R.J. Reynolds Tobacco Company
6 on that claim. If, however, the greater weight of
7 the evidence supports one or more of Mrs. Soffer's
8 claims, then you shall consider the defenses raised
9 by R.J. Reynolds.

10 Mrs. Soffer has admitted that Mr. Soffer was
11 negligent in his efforts to quit smoking and that
12 his negligence was a partial cause of his death in
13 combination with the acts and omissions of R.J.
14 Reynolds Tobacco Company. The issue for you to
15 decide is the percentage of negligence you
16 attribute to each party.

17 Negligence is the failure to use reasonable
18 care, which is the care that a reasonably careful
19 person would use under like circumstances.

20 Negligence is doing something that a reasonably
21 careful person would not do under like
22 circumstances or failing to do something that a
23 reasonably careful person would do under like
24 circumstances.

25 If the greater weight of the evidence shows

2768
1 that the conduct of both Mr. Soffer and R.J.
2 Reynolds Tobacco Company contributed as a legal
3 cause to Mr. Soffer's death, you should decide and
4 write on the verdict form the percentage of fault
5 on the part of Mr. Soffer and R.J. Reynolds Tobacco
6 Company. If your verdict is for R.J. Reynolds
7 Tobacco Company on all counts, you will not
8 consider the matter of damages. But if the greater
9 weight of the evidence supports any of
10 Mrs. Soffer's claims, you should determine and
11 write on the verdict form in dollars the total
12 amount of damages which the greater weight of the
13 evidence shows Mr. Soffer's survivors sustained as
14 a result of Mr. Soffer's death, including any

JURY INSTRUCTIONS

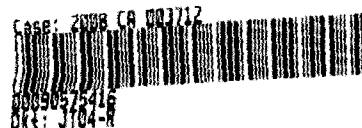
COX V. R.J. REYNOLDS

Case No.: 01-08-CA-003712

FILED IN OPEN COURT

12-16, 204
D.C.

[Signature] D.C.



A224

INSTRUCTION NO. 9

The Court has instructed you that Reynolds, B&W, and American agreed with other tobacco companies and corporations to conceal material information about the health effects or addictive nature of cigarettes or both. The issue for your determination on Plaintiff's claim for conspiracy is whether this agreement to conceal or omit material information was a legal cause of Mr. Cox's death.

Conspiracy is the agreement between two or more parties to do an unlawful act or to do a lawful act by unlawful means, while doing an overt act in furtherance of the conspiracy. Each party to a conspiracy is responsible for the acts or omissions of any other party to the conspiracy so long as the acts or omissions were in furtherance of the conspiracy.

A material fact is one that is of such importance that Mr. Cox would not have acted as he did but for the concealment or omission of the fact by one or more of the members of the conspiracy. Additionally, to be a legal cause of Mr. Cox's injury, the concealed or omitted facts must have been unknown to Mr. Cox. Moreover, if those facts were unknown, either they must have been not otherwise available to Mr. Cox or Mr. Cox's opportunity to learn them was less than that of Reynolds, B&W or American.

The concealment or omission of material fact is a legal cause of death if it directly and in natural and continuance sequence produces or contributes substantially to producing death, so that it can be reasonably be said that, but for the concealment or omission, the death would not have occurred.

In order to be regarded as a legal cause of death, the concealment or omission of a material fact need not be the only cause. It may be a legal cause of death even though it operates in combination with the act of another, some natural cause, or some other cause if it contributes substantially to producing such loss.

1 IN THE CIRCUIT COURT, FOURTH
2 JUDICIAL CIRCUIT, IN AND FOR
3 DUVAL COUNTY, FLORIDA
4 VOLUME 43 (Pages 3656-3743)

5 IN RE:
6 ENGLE PROGENY CASES CASE NO.: 2008-CA-15000
7 TOBACCO LITIGATION DIVISION: TOBACCO

8 Pertains to: JANICE L. SIKES as
9 Personal Representative of the
10 Estate of Jimmie Wayne Sikes
11 Case No: 16-2007-CA-11654-KXXX-MA

12 Jury Trial and proceedings before the
13 Honorable Russell Healey, County Judge, in the
14 above-entitled action, on Wednesday, September 19, 2012,
15 at 3:10 p.m., at the Duval County Courthouse, 3490 Beach
16 Boulevard, Courtroom B-5, Jacksonville, Florida, before
17 Marjie M. Kline, CSR-3545, RPR, and a Notary Public in
18 and for the State of Florida at Large.
19
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21
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23
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3657

1 APPEARANCES OF COUNSEL
2 On behalf of the Plaintiff:
3 DOFFERMYRE, SHIELDS, CANFIELD & KNOWLES, LLC
4 BY: ROBERT SHIELDS, ESQUIRE
5 LESLIE J. BRYAN, ESQUIRE
6 1355 Peachtree Street
7 Suite 1600
8 Atlanta, GA 30309
9 (404) 881-8900

10 LAW OFFICES OF JOHN S. KALIL, P.A.
BY: JOHN S. KALIL, ESQUIRE
6817 Southpoint Parkway, Suite 1402
Jacksonville, FL 32216
(904) 355-3311

On behalf of Defendant R.J. Reynolds Tobacco Company:

25 dangerous cigarettes that R.J. Reynolds manufactured

3707

1 and that James Sikes smoked were a legal cause of
2 James Sikes' death. A defective and unreasonably
3 dangerous condition is a product -- excuse me, in a
4 product is a legal cause of loss, injury, or damage
5 if it directly and in natural and continuous
6 sequence produces or contributes substantially to
7 producing such loss, injury or damage, so that it
8 can reasonably be said that, but for the defect or
9 unreasonably dangerous condition, the loss, injury,
10 or damage would not have occurred.

11 The next issue for your determination is
12 whether R.J. Reynolds' concealment or omission of
13 material information concerning the health risks or
14 addictive nature of cigarette smoking was a legal
15 cause of the death of James Sikes. James Sikes'
16 reliance on the concealment or omission of material
17 information to his detriment is a legal cause of
18 loss, injury, or damage if it directly and in
19 natural and continuous sequence produces or
20 contributes substantially to producing his loss,
21 injury, or damage, so that it can reasonably be said
22 that, but for James Sikes' reliance, his loss,
23 injury, or damage would not have occurred.

24 Material information is information that is of
25 such importance that James Sikes would have

3708

1 considered it significant in his decision-making
2 process.

3 The next issue for your determination is
4 whether the conspiracy to withhold health
5 information or information regarding addiction and
6 the acts proven in furtherance of that conspiracy
7 were a legal cause of the death of James Sikes. In
8 order to be a legal cause of death, Plaintiff must
9 show that James Sikes relied on concealment or
10 omission of health information or information
11 regarding addiction by R.J. Reynolds or any of the
12 other companies involved in the conspiracy that
13 omitted material information concerning the health
14 effects of cigarettes or their addictive nature or
15 both made at any time during or after December 1953.

16 I hereby instruct you that the Plaintiff has
17 made no claim for conspiracy to conceal information
18 regarding smoking and health or addiction before
19 December 1953.

20 If you determine that the greater weight of the

21 evidence supports the Plaintiff's claims, then you
22 shall consider R.J. Reynolds' defense of comparative
23 fault. R.J. Reynolds bears the burden of proving
24 its defense by a greater weight of the evidence. If
25 you determine that R.J. Reynolds' conduct was a

3709

1 legal cause of James Sikes' death, then you must
2 decide whether R.J. Reynolds' conduct was the sole
3 cause of James Sikes' death or whether it was a
4 contributing cause. If you determine that R.J.
5 Reynolds' conduct was the sole cause of James Sikes'
6 death, then you will not allocate any fault to James
7 Sikes. If you determine that R.J. Reynolds' conduct
8 was a contributing cause to James Sikes' death, and
9 that James Sikes' actions were also a contributing
10 cause, then you will allocate fault between the two.

11 I will -- I now instruct you that after 1969,
12 the warning labels that R.J. Reynolds and other
13 Engle Defendants placed on cigarette packs complied
14 with Federal law and R.J. Reynolds and other Engle
15 Defendants had no legal obligation to make any
16 additional warnings. Plaintiff has made no claim
17 for failure to warn after 1969.

18 If your verdict is for the Defendant R.J.
19 Reynolds on all claims, you will not need to
20 consider the matter of damages. But if your verdict
21 is for the Plaintiff on one or more of the claims
22 against R.J. Reynolds, you should determine and
23 write on the Verdict Form, in dollars, the total
24 amount of damages which the greater weight of the
25 evidence shows that Janice Sikes, as James Sikes'

3710

1 survivor, sustained as a result of James Sikes'
2 death, including any such damages that she is
3 reasonably certain to incur or experience in the
4 future. In that regard, you should consider Janice
5 Sikes' mental pain and suffering as a result of her
6 husband's injury and death, and loss of her
7 husband's protection and companionship. There is no
8 exact standard for fixing the compensation to be
9 awarded. Any such award should be fair and just in
10 light of the evidence.

11 In determining the duration of the losses, you
12 may consider the joint life expectancy of James
13 Sikes and Janice Sikes together with other evidence
14 in the case.

15 You should also determine and write on the
16 Verdict Form, in dollars, the total amount of

ORIGINAL

Page 5416

IN THE CIRCUIT COURT OF THE
2ND JUDICIAL CIRCUIT IN AND
FOR LEON COUNTY, FLORIDA
CASE NO. 2007 CA 3565

NAN KATHRYN BUCHANAN, as Personal
Representative of the Estate of
MITCHELL IVAN BUCHANAN,

Plaintiff,

vs.

PHILIP MORRIS USA, INC., LIGGETT
GROUP, LLC, (f/k/a Liggett Group, Inc.,
f/k/a/ Liggett & Myers Tobacco Company)
and VECTOR GROUP, LTD., INC. (f/k/a
Brook Group , Ltd.,

Defendants.

FILED

9/13/2013

Bob Inzer
Clerk, of Circuit Court
Leon County, FL

VOLUME 40 - Pages 5416 - 5584

The above-styled cause came on for Jury
Trial before the Honorable JACKIE FULFORD, Judge of
the above-styled court, at the Leon County
Courthouse, 301 S. Monroe Street, Tallahassee,
Florida, on December 6, 2012, commencing at 7:38 a.m.

1 contributes substantially to producing cancer and
2 death, so that it can reasonably be said that, but
3 for such fraud by concealment or omission, the
4 cancer and death would not have occurred.

5 In order to be regarded as a legal cause
6 of cancer and death, such fraud by concealment or
7 omission need not be the only cause. Such fraud
8 by concealment or omission may be a legal cause of
9 cancer and death even though it operates in
10 combination with the act of another or some other
11 cause, if such fraud by concealment or omission
12 contributes substantially to producing such cancer
13 and death.

14 A material fact is one that is of such
15 importance that Mr. Buchanan would not have acted
16 as he did but for the concealment or omission of
17 that fact.

18 The Court has instructed you that the
19 Defendants, Philip Morris USA, Inc. and Liggett
20 Group, LLC, agreed with other corporations to
21 conceal or omit material information regarding the
22 health effects of cigarettes or their addictive
23 natures with the intention that smokers and
24 members of the public would rely on this
25 information to their detriment. The issue for

1 your determination on the Plaintiff's claim for
2 conspiracy to commit fraud by concealment is
3 whether the agreement to conceal or omit this
4 information was a legal cause of cancer and death.

5 Conspiracy is the agreement between two or
6 more parties to do an unlawful act or to do a
7 lawful act by unlawful means while doing an overt
8 act in furtherance of the agreement. Each party
9 to such an agreement is responsible for the acts
10 or omissions of any other party to the agreement,
11 so long as the acts or omission were in
12 furtherance of the agreement.

13 An agreement to conceal or omit material
14 information or failure to disclose a material fact
15 concerning or proving the health effects and/or
16 addictive nature of smoking cigarettes is a legal
17 cause of cancer and death if it directly and in a
18 natural and continuous sequence produces or
19 contributes substantially to producing cancer and
20 death, so that it can be reasonably be said that,
21 but for such agreement to conceal or omit, the
22 cancer and death would not have occurred.

23 In order to be regarded as a legal cause
24 of cancer and death, such agreement to conceal or
25 omit need not be the only cause. Such agreement

1 to conceal or omit may be a legal cause of cancer
2 and death even though it operates in combination
3 with the act of another or some other cause, if
4 such agreement to conceal or omit contributes
5 substantially to producing such cancer and death.

6 Nan Kathryn Buchanan has admitted that the
7 acts of Mitchell Ivan Buchanan relating to the
8 duration and frequency of his efforts to stop
9 smoking were a partial legal cause of Mitchell
10 Ivan Buchanan's cancer and death.

11 In that regard, you should determine the
12 extent to which Mitchell Ivan Buchanan was himself
13 negligent in the use of the Defendants' cigarettes
14 and the extent to which such negligence was also a
15 contributing legal cause of his cancer and death.
16 You should then determine and write on the verdict
17 form what percentage of the total fault of which
18 is chargeable to Mitchell Ivan Buchanan and what
19 percentage, if any, of the total fault is
20 chargeable to each of the Defendants, Philip
21 Morris USA, Inc. and Liggett Group, LLC.

22 Negligence is the failure to use
23 reasonable care, which is the care that a
24 reasonably careful person would use under like
25 circumstances. Negligence is doing something that

IN THE CIRCUIT COURT OF THE THIRTEENTH JUDICIAL CIRCUIT
OF THE STATE OF FLORIDA IN AND FOR HILLSBOROUGH COUNTY
CIVIL DIVISION

IN RE: ENGLE PROGENY CASES
TOBACCO LITIGATION

Case No. 08-CA-9154

Pertains to:

Division H

Cindy Evers, as Personal
Representative of the Estate of
Jacqueline Loyd.
_____ /

TRIAL PROCEEDINGS BEFORE
THE HONORABLE BERNARD C. SILVER,
and a jury

DATE: February 11, 2013

TIME: 8:37 a.m. to 12:50 p.m.

PLACE: Hillsborough County Courthouse
800 E. Twiggs Street
Courtroom 501
Tampa, Florida

REPORTED BY: Aaron T. Perkins, RPR
Nathan F. Perkins, RDR
Notaries Public, State of
Florida at Large

Volume 49
Pages 7471 to 7655

1 concealment or omission of the fact.

2 If the greater weight of the evidence does
3 not support plaintiff's claim on this issue, then
4 your verdict should be for R.J. Reynolds Tobacco
5 Company and Lorillard Tobacco Company on that
6 claim. However, if the greater weight of the
7 evidence supports plaintiff's claim against
8 R.J. Reynolds Tobacco Company and Lorillard
9 Tobacco Company, then you should so indicate in
10 the appropriate designated place on the verdict
11 form.

12 The Court has instructed you that
13 R.J. Reynolds Tobacco -- R.J. Reynolds Tobacco
14 Company and Lorillard Tobacco Company agreed with
15 other companies and industry organizations to
16 conceal or omit material information about the
17 health effects of cigarette smoking or the
18 addictive nature of cigarettes.

19 The issue for your determination on
20 plaintiff's claim for conspiracy is whether
21 defendants' agreement to conceal material
22 information about the health effects or addictive
23 nature of smoking cigarettes or both was a legal
24 cause of Jacqueline Loyd's death.

25 A material fact is one that is of such

1 importance that Jacqueline Loyd would not have
2 acted as she did but for either defendant's
3 agreement to conceal or omit the fact.

4 The agreement to conceal or omit a material
5 fact is a legal cause of death if it directly and
6 in natural and continuous sequence produces or
7 contributes substantially to producing the injury
8 so that it can reasonably be said that but for the
9 agreement, the death would not have occurred.

10 In order to be regarded as a legal cause of
11 death, it need not be the only cause. It may be a
12 legal cause of death even though it operates in
13 combination with the act of another, some natural
14 cause or some other cause if it contributes
15 substantially to producing the death.

16 If the greater weight of the evidence does
17 not support plaintiff's claim on this issue, then
18 your verdict should be for R.J. Reynolds Tobacco
19 Company and Lorillard Tobacco Company on that
20 claim. However, if the greater weight of the
21 evidence supports plaintiff's claim against
22 R.J. Reynolds Tobacco Company and Lorillard
23 Tobacco Company, then you should so indicate in
24 the appropriate designated place on the verdict
25 form.

IN THE CIRCUIT COURT OF THE TENTH JUDICIAL CIRCUIT
IN AND FOR POLK COUNTY, FLORIDA
CIVIL DIVISION

JOHN R. CAMPBELL, as Personal
Representative for the Estate
of JUDY W. CAMPBELL,

Plaintiff,

vs.

Case No.
2011-CA-005960

R.J. REYNOLDS TOBACCO COMPANY,
et al.,

Defendants.

_____/

TRIAL PROCEEDINGS BEFORE
THE HONORABLE STEVEN L. SELPH,
and a jury

DATE: May 22, 2013

TIME: 9:08 a.m. to 12:57 p.m.

PLACE: Polk County Courthouse
255 North Broadway Avenue
Courtroom 7C
Bartow, Florida

REPORTED BY: Nathan F. Perkins, RMR
Aaron T. Perkins, RPR
Notaries Public, State of
Florida at Large

Volume 29
Pages 4023 to 4176

1 Let me read that sentence again.

2 The fifth issue for your determination is the
3 plaintiff's claim for conspiracy to fraudulently
4 conceal. You must determine whether before or
5 after May 5, 1982, Judy Campbell reasonably relied
6 to her detriment on the concealment or omission by
7 one or both of the defendants or by any of the
8 other companies or industry organizations involved
9 in the conspiracy that omitted material
10 information concerning the health effects and/or
11 the addictive nature of cigarette smoking.

12 Plaintiff has admitted that the acts of Judy
13 Campbell relating to the duration and frequency of
14 the efforts to quit smoking --

15 Let me -- I misread that. Let me start
16 again.

17 Plaintiff has admitted that the acts of Judy
18 Campbell relating to the duration and frequency of
19 her efforts to quit smoking were a partial legal
20 cause of her death, in combination with the fault
21 of the defendants, R.J. Reynolds Tobacco Company
22 and Philip Morris USA.

23 The defendants contend that Judy Campbell was
24 completely at fault.

25 Accordingly, the next issue for your

3293

1 IN THE CIRCUIT COURT, EIGHTH
2 JUDICIAL CIRCUIT, IN AND FOR
3 ALACHUA COUNTY, FLORIDA
4 CASE NO.: 01-08-CA-003832
5 DIVISION K

6
7 Volume 39 (Pages 3293 - 3381)

8 CHRISTINA MELISSA HAUSNER, as Personal
9 Representative of the ESTATE OF CHARLES
10 EDWIN CLARK,
11 Plaintiff,
12 vs.
13 R.J. REYNOLDS TOBACCO COMPANY,
14 Defendant.

15
16 Jury trial and proceedings before The Honorable
17 Victor Hulslander, Alachua County Courthouse, Courtroom
18 3A, 201 East University Avenue, Gainesville, Florida, on
19 Monday, June 24, 2013, at 8:47 a.m. before Heidi Hunter,
20 RPR, FPR, and a Notary Public in and for the State of
21 Florida at Large.
22
23
24
25

3294

1 APPEARANCES OF COUNSEL

2 On behalf of Plaintiff:

3
4 JAMES W. GUSTAFSON, JR., ESQUIRE
5 CAMERON M. KENNEDY, ESQUIRE
6 Searcy Denney Scarola Barnhart & Shipley, P.A.
7 517 North Calhoun Street
8 Tallahassee, Florida 32301

9
10 RONALD E. CABANISS, ESQUIRE
11 The Cabaniss Law Firm, P.L.
12 596 Estates Place
Longwood, Florida 32779

On behalf of the Defendant R.J. Reynolds:

13 that of R.J. Reynolds'.

14 If the greater weight of the evidence does not
15 support the Plaintiff's claim on this issue, then
16 your verdict should be for R.J. Reynolds on this
17 claim.

18 The court has instructed you that
19 R.J. Reynolds Tobacco Company agreed with other
20 tobacco companies and groups to conceal or omit
21 material information about the health effects or
22 addictive nature of cigarettes or both.

23 The issue for your determination is whether
24 this agreement to conceal or omit material
25 information was a legal cause of the lung cancer

3317 1 and death of Charles Edwin Clark.

2 Conspiracy is the agreement between two or
3 more parties to do an unlawful act or to do a
4 lawful act by unlawful means while doing any overt
5 act in furtherance of the agreement.

6 Each party to a conspiracy is responsible for
7 the acts or omissions of any other party to the
8 conspiracy so long as the acts or omissions were in
9 furtherance of the conspiracy.

10 A material fact is one that is of such
11 importance that Mr. Clark would not have acted as
12 he did but for the concealment or omission of the
13 fact. Additionally, to be a legal cause of
14 Mr. Clark's injury, the concealed or omitted facts
15 must have been unknown to Mr. Clark.

16 Moreover, if those facts were unknown, either
17 they must have been not otherwise available to
18 Mr. Clark or Mr. Clark's opportunity to learn them
19 was less than that of R.J. Reynolds Tobacco
20 Company.

21 The agreement to conceal or omit material
22 information regarding the health effects of
23 cigarettes and their addictive nature is a legal
24 cause of death if it directly and in natural and
25 continuous sequence produces or contributes

3318 1 substantially to producing such death so that it
2 can reasonably be said that but for the agreement
3 the death would not have occurred.

4 In order to be regarded as a legal cause of
5 Charles Edwin Clark's death, the agreement to
6 conceal or omit material information regarding the
7 health effects of cigarettes and their addictive
8 nature need not be the only cause.

9 The agreement may be a legal cause of
10 Charles Edwin Clark's lung cancer and death even
11 though it operates in combination with the act of
12 another, some natural cause, or some other cause if
13 such other cause occurs at the same time as the
14 agreement, and the agreement contributed
15 substantially to producing such lung cancer and
16 death.

17 If the greater weight of the evidence does not
18 support the Plaintiff's claim on this issue, then
19 your verdict should be for R.J. Reynolds Tobacco
20 Company on this claim.

21 If the greater weight of the evidence supports
22 one or more of the Plaintiff's claims, then you
23 shall consider the defense raised by R.J. Reynolds.
24 The plaintiff has admitted that Mr. Clark was
25 negligent in his efforts to quit smoking and that

3319
1 this negligence was a contributing legal cause of
2 his death in combination with the acts and
3 omissions of R.J. Reynolds.

4 If the greater weight of the evidence shows
5 that the conduct of R.J. Reynolds Tobacco Company
6 contributed as a legal cause of Mr. Clark's death,
7 you should decide and write on the verdict form the
8 percentage of any fault on the part of Mr. Clark
9 and R.J. Reynolds.

10 Negligence is the failure to use reasonable
11 care which is the care that a reasonably careful
12 person would use under like circumstances.
13 Negligence is doing something that a reasonably
14 careful person would not do under like
15 circumstances or failing to do something that a
16 reasonably careful person would do under like
17 circumstances.

18 If your verdict is for R.J. Reynolds Tobacco
19 Company, you will not consider the matter of
20 damages. But if your verdict is for the Plaintiff
21 on one or more claims against R.J. Reynolds, you
22 should determine and write on the verdict form in
23 dollars the amount of loss, injury, or damage which
24 the greater weight of the evidence shows that
25 Mr. Clark's survivors, Christina Melissa Hausner,

3320
1 Deana Hagen, and Jody Clark sustained as a result
2 of Charles Edwin Clark's death including such
3 damages that they are reasonably certain to
4 experience in the future.

1 IN THE CIRCUIT COURT OF THE FIFTH JUDICIAL CIRCUIT
2 IN AND FOR HERNANDO COUNTY, STATE OF FLORIDA
3 CIVIL DIVISION

4 CASE NO. H-CA-2008-3318

5 LAUREN GREENE, as Trustee for the
6 Bankruptcy Estate of JOHN RIZZUTO, and
7 JOHN RIZZUTO, Individually,

8 Plaintiffs,

9 vs.

10 PHILIP MORRIS USA, INC.; and LIGGETT
11 GROUP LLC,

12 Defendants.

13 -----/

14 JURY TRIAL BEFORE
15 THE HONORABLE VICTOR J. MUSLEH, SENIOR JUDGE

16 (Volume 22)

17 Pages 3388 to 3582

18 Friday, August 23, 2013
19 8:37 a.m. - 12:28 p.m.

20 Hernando County Courthouse
21 20 North Main Street
22 Courtroom F, Fourth Floor
23 Brooksville, Florida

24 STENOGRAPHICALLY REPORTED BY:
25 NANCY E. PAULSEN, C.R.R., R.P.R., F.P.R.
 Certificate in Realtime Systems Administration
 Certified Realtime Reporter
 Registered Professional Reporter
 Florida Professional Reporter

1 defendant, then your verdict on this claim should
2 be for the plaintiff. If the greater weight of the
3 evidence does not support plaintiff's claim on this
4 issue, then your verdict should be for Philip
5 Morris or Liggett on this claim.

6 The Court has instructed you that defendants
7 agreed with other tobacco companies and groups to
8 conceal material information about the health
9 effects or addictive nature of cigarettes or both.

10 The issue for your determination on
11 plaintiff's claim for conspiracy is whether this
12 agreement to conceal or omit material information
13 was a legal cause of plaintiff's injury.

14 Conspiracy is an agreement between two or more
15 parties to do an unlawful act or to do a lawful act
16 by unlawful means while doing any overt act in
17 furtherance of the conspiracy. Each party to a
18 conspiracy is responsible for the acts or omissions
19 of any other parties to the conspiracy so long as
20 the acts or omissions were in furtherance of the
21 conspiracy.

22 A material fact is one that is of such
23 importance that Mr. -- that the plaintiff would not
24 have acted as he did but for the concealment or
25 omission of the fact by one or more of the members

1 of the conspiracy.

2 The concealment or omission of material fact
3 is a legal cause of injury if it directly and in
4 natural and continuous sequence produces or
5 contributes substantially to producing the injury
6 so that it can reasonably be said that but for the
7 concealment or omission, the injury would not have
8 occurred.

9 In order to be regarded the legal cause of
10 injury, it need not be the only cause. It may be a
11 legal cause of injury even though it operates in
12 combination with the act of another, some natural
13 cause, or some other cause if it contributes
14 substantially to producing such loss.

15 If the greater weight of the evidence -- if
16 the greater weight of the evidence supports
17 plaintiff's claim against Philip Morris or Liggett,
18 then your verdict on this claim should be for
19 plaintiff. If the greater weight of the evidence
20 does not support plaintiff's claim on this issue,
21 then your verdict should be for Philip Morris or
22 Liggett on this claim.

23 Plaintiff has admitted that the acts of
24 plaintiff relating to the duration and frequency of
25 his efforts to quit smoking were partial legal

3470

1 IN THE CIRCUIT COURT, FOURTH
2 JUDICIAL CIRCUIT, IN AND FOR
3 DUVAL COUNTY, FLORIDA
4 VOLUME 37 (PAGES 3470 - 3560)

5 IN RE: ENGLE PROGENY CASES CASE NO.: 2008-CA-15000
6 TOBACCO LITIGATION DIVISION: Tobacco

7 Pertains to: Mary Brown, as Personal Representative of the
8 Estate of Rayfield Brown
9 Case No.: 16-2007-CA-011175-BXXX-MA

10

11 Jury Trial and Proceedings before The Honorable
12 Harvey L. Jay, III, Circuit Court Judge, in the
13 above-entitled action, in Courtroom 603 at the Duval County
14 Courthouse, 501 West Adams Street, Jacksonville, Florida, on
15 Thursday, September 12, 2013, at 8:29 a.m., before Terrie L.
16 Cook, RPR, CRR, FPR, and a Notary Public in and for the
17 State of Florida at Large.

18

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3471

1 APPEARANCES OF COUNSEL

2 On behalf of the Plaintiff:
3 ROBERT E. SHIELDS, Esquire
4 LESLIE J. BRYAN, Esquire
5 Doffermyre Shields Canfield & Knowles, LLC
6 1355 Peachtree Street, Suite 1600
7 Atlanta, Georgia 30309

8

9 JOHN S. KALIL, Esquire
10 MICHAEL A. KALIL, Esquire
11 Law Office of John S. Kalil, P.A.
12 6817 Southpoint Parkway, Suite 1402
13 Jacksonville, Florida 32216

14

15 On behalf of Defendant Philip Morris USA, Inc.:
16 KENNETH J. REILLY, Esquire
17 HASSIA T. DILOMBI, Esquire
18 Shook, Hardy & Bacon L.L.P.

19

20

21

Vol 37, 9-12-13, Jury charge, RES closing, pgs 3470-3560.txt
2 and the public would rely on this information to their
3 detriment.

4 Finding 6 is that Philip Morris was negligent.

5 However, notwithstanding the foregoing, these
6 findings will not be applicable to plaintiff's claims
7 against Philip Morris if you find by the greater weight
8 of the evidence that Rayfield Brown was not a member of
9 the Engle class.

10 Not withstanding the above findings, which are
11 binding on you and the Court, the liability of Philip
12 Morris to the plaintiff must still be proved by the
13 plaintiff in accordance with the instructions I will
14 give you hereafter on each specific claim.

15 If you find that Rayfield Brown was a member of
16 the Engle class, then plaintiff has proven all the
17 elements of her claims that Philip Morris was negligent
18 and that Philip Morris manufactured and distributed
19 cigarettes that were defective and unreasonably
20 dangerous.

21 The next issue for your determination is whether
22 Philip Morris's concealment or omission of material
23 information concerning the health risks or addictive
24 nature of cigarette smoking was a legal cause of the
25 death of Rayfield Brown. The only remaining manner --

3487

1 matter for your determination on this issue is whether
2 Rayfield Brown relied to his detriment on Philip
3 Morris's concealment or omission of material information
4 concerning the health effects or addictive nature of
5 cigarette smoking.

6 Reliance on Philip Morris's concealment or
7 omission of material information concerning the health
8 risks or the addictive nature of cigarette smoking is a
9 legal cause of loss, injury or damage when it directly
10 and in the natural and continuous sequence produces or
11 contributes substantially to producing the alleged loss,
12 injury or damage so that it can be reasonably be said
13 that but for such reliance, the loss, injury or damage
14 would not have occurred.

15 Material information is information that is of
16 such importance that Rayfield Brown would have
17 considered it significant in his decision-making
18 process.

19 The next issue for your determination is whether
20 the conspiracy to withhold health information or
21 information regarding addiction and the acts proven in
22 furtherance of that conspiracy were a legal cause of the
23 death of Rayfield Brown. The only remaining matter for

Vol 37, 9-12-13, Jury charge, RES closing, pgs 3470-3560.txt
you to determine on that issue is whether Rayfield Brown
relied on the concealment or omission of health

information or information regarding addiction by Philip
Morris or any of the other companies involved in the
conspiracy that omitted material information concerning
the health effects of cigarettes or their addictive
nature.

Plaintiff has not made a claim for conspiracy to
conceal information regarding smoking and health or
addiction before December 1953.

As I told you earlier, if you find out -- if you
find that Rayfield Brown was a member of the Engle
class, then plaintiff has proven all of the elements of
her claims that Philip Morris was negligent and that
Philip Morris manufactured and distributed cigarettes
that were defective and unreasonably dangerous. With
respect to those claims, you must consider Philip
Morris's defense of comparative fault.

Philip Morris bears a burden, by a greater weight
of the evidence, of proving its defense. You must
decide whether Philip Morris's negligence or manufacture
and distribution of a defective product was the sole
cause of Rayfield Brown's death or whether it was a
contributing cause.

If you determine that Philip Morris's conduct was
the sole cause of Rayfield Brown's injury and death,
then you will not allocate any fault to Rayfield Brown.

If you determine that Philip Morris's conduct was
a contributing cause of Rayfield Brown's injury and
death and that Rayfield Brown's actions were also a
contributing cause, then you will allocate fault between
the two.

I instruct you that after 1969, the warning labels
that Philip Morris and other Engle defendants -- I think
that should be placed -- placed on cigarette packs
complied with federal law, and Philip Morris and the
other Engle defendants had no legal obligation to make
any additional warnings.

Plaintiff has made no claim for failure to warn
after 1969.

If your verdict is for Philip Morris on all
claims, you will not consider the matter of damages, but
if your verdict is for plaintiff on one or more claims
against Philip Morris, you should determine and write on
the verdict form, in dollars, the total amount of
damages which the greater weight of the evidence shows

2726

1 IN THE CIRCUIT COURT, FOURTH
2 JUDICIAL CIRCUIT, IN AND FOR
3 DUVAL COUNTY, FLORIDA
4 VOLUME 24 (Pages 2726 - 2856)

5 IN RE: ENGLE PROGENY CASES CASE NO.: 2008-CA-15000
6 TOBACCO LITIGATION DIVISION: Tobacco
7 Pertains to: Gloria Clayton, as Personal
Representative of the Estate of David Clayton

8 Case No.: 16-2007-CA-11175-CXXX-MA
9

10 Jury Trial before The Honorable W. Gregg
11 McCaulie, Circuit Court Judge, in the above-entitled
12 action, in Courtroom 612 at the Duval County Courthouse,
13 501 West Adams Street, Jacksonville, Florida, on
14 Thursday, March 13, 2014, at 12:46 p.m., before
15 Terrie L. Cook, RPR, CRR, FPR, and a Notary Public in
16 and for the State of Florida at Large.
17

18
19 - - -
20

21
22
23
24
25
2727

1 APPEARANCES OF COUNSEL

2
3 Attorneys for Plaintiff
4 MICHAEL KALIL, Esquire
Law Offices of John S. Kalil, P.A.
5 6817 Southpoint Parkway, Suite 1402
Jacksonville, Florida 32216
6
7 LAURA M. SHAMP, Esquire
Laura M. Shamp, LLC
1718 Peachtree Street, N.W., Suite 498
8 Atlanta, Georgia 30309
9 LESLIE J. BRYAN, Esquire
Doffermeyre Shields Canfield & Knowles, LLC,
10 1355 Peachtree Street, N.E.
Suite 1600
11 Atlanta, Georgia 30309

ol 24, 3-13-14, various motions, defense rests, jury charge, LMS closing arguments, CLAYTON, Gloria.tx

15 However, notwithstanding the foregoing, these
16 findings will not be applicable to the plaintiff's
17 claim against R. J. Reynolds if you find by the
18 greater weight of the evidence that David Clayton
19 was not a member of the Engle class.

20 Notwithstanding the above findings, which are
21 binding upon you and the Court, the liability of
22 R. J. Reynolds to the plaintiff must still be
23 proved by the plaintiff in accordance with the
24 instructions I will give you hereafter on each
25 specific claim.

2796

1 If you find that David Clayton was a member of
2 the Engle class, then the plaintiff has proven all
3 the elements of her claims that R. J. Reynolds was
4 negligent and that R. J. Reynolds manufactured and
5 distributed cigarettes that were defective and
6 unreasonably dangerous.

7 The next issue for your determination is
8 whether R. J. Reynolds' fraudulent concealment or
9 omission of material information concerning health
10 risks or addictive nature of cigarette smoking was a
11 legal cause of the death of David Clayton.

12 David Clayton's reliance on R. J. Reynolds'
13 fraudulent concealment or omission of material
14 information concerning the health risks -- risks for
15 the addictive nature of cigarette smoking is a cause
16 of loss, injury or damage when it directly and in
17 natural and continuous sequence produces or
18 contributes substantially to producing the loss,
19 injury or damage so that it can reasonably be said
20 that but for such reliance, the loss, injury or
21 damage would not have occurred.

22 Material information is information that is of
23 such importance that a reasonable person would
24 have -- would have considered it significant in his
25 or her decision-making process.

2797

1 The next issue for your determination is
2 R. J. Reynolds Tobacco Company's conspiracy to
3 fraudulently conceal or omit material information
4 concerning the health risks or addictive nature of
5 cigarette smoking was a legal cause of death of
6 David Clayton.

7 David Clayton's reliance on R. J. Reynolds'
8 conspiracy to fraudulently conceal or omit material
9 information concerning the health risks or the
10 addictive nature of cigarette smoking is a legal

ol 24, 3-13-14, various motions, defense rests, jury charge, LMS closing arguments, CLAYTON, Gloria.tx

11 cause of loss, injury or damage when it directly and
12 in natural or continuous sequence produces or
13 contributes substantially to producing the loss,
14 injury or damage so that it can reasonably be said
15 that but for such reliance, the loss, injury or
16 damage would not have occurred.

17 Material information is information that is of
18 such importance that a reasonable person would have
19 considered it in his or her decision-making process.

20 As to each of the plaintiff's claims of
21 concealment and conspiracy to conceal, I hereby
22 instruct you that you may consider all of the
23 evidence in the case in determining whether or not
24 the plaintiff has satisfied the reliance
25 requirements of those claims.

2798

1 As I told you earlier, if you find that David
2 Clayton's addiction to smoking R. J. Reynolds
3 cigarettes was a legal cause of his death, then the
4 plaintiff has proven all the elements of her claim
5 that R. J. Reynolds was negligent and that
6 R. J. Reynolds manufactured and distributed
7 cigarettes that were defective and unreasonably
8 dangerous.

9 With respect to those claims, you must consider
10 R. J. Reynolds' defense of comparative fault. If
11 the greater weight of the evidence does not support
12 R. J. Reynolds' defense and the greater weight of
13 the evidence does support David Clayton's claim,
14 then your verdict should be for Gloria Clayton in
15 the total amount of her damages.

16 If, however, the greater weight of the evidence
17 shows that both David Clayton and R. J. Reynolds
18 were at fault, you should decide and write on the
19 verdict form what percentage of the total fault that
20 you charge to each of them.

21 As to each of the plaintiff's claims, the
22 conduct of R. J. Reynolds need not be the only
23 cause. The conduct of R. J. Reynolds may be a legal
24 cause of death even though it operates in
25 combination with the act of another or some other

2799

1 cause, if such other cause occurs at the same time
2 as the conduct and the conduct contributes
3 substantially to produce such death.

4 I instruct you that after 1969, the warning
5 labels of R. J. Reynolds and other Engle defendants
6 placed on cigarette packs complied with federal law,

original

**IN THE CIRCUIT COURT OF THE THIRTEENTH JUDICIAL CIRCUIT
HILLSBOROUGH COUNTY, FLORIDA
CIVIL DIVISION**

**IN RE *ENGLE* PROGENY CASES
TOBACCO LITIGATION**

***Pertains to: DORIS W. BRYANT,
As Personal Representative for the Estate of
HAYWARD BRYANT, SR.***

**CASE NO.: 10-CA-007251
DIVISION: TD1**

FILED
CLERK OF CIRCUIT COURT
2014 SEP 26 PM 4:57
HILLSBOROUGH COUNTY, FL
DORIS W. BRYANT

FINAL INSTRUCTIONS

FINAL INSTRUCTION NO. 9.

The next issue for your determination on Plaintiff's claim for conspiracy is whether Defendant, R.J. Reynolds Tobacco Company's agreement with other companies and industry organizations to conceal material information about the health effects or addictive nature of smoking cigarettes or both was a legal cause of Hayward Bryant Sr.'s lung cancer and death. The Court has instructed you that Defendant, R.J. Reynolds Tobacco Company agreed with other companies and industry organizations to conceal or omit material information about the health effects of cigarette smoking or the addictive nature of cigarettes.

A material fact is one that is of such importance that Hayward Bryant, Sr. would not have acted as he did but for the Defendant's concealment or omission of the facts.

The agreement to conceal or omit a material fact is a legal cause of death if it directly and in natural and continuous sequence produces or contributes substantially to producing the injury, so that it can be reasonably said that, but for the agreement to conceal or omit, the death would not have occurred.

In order to be regarded as a legal cause of death, it need not be the only cause. It may be a legal cause of death even though it operates in combination

with the act of another, some natural cause, or some other cause if it contributes substantially to producing death.

If the greater weight of the evidence does not support Plaintiff's claim on this issue, the your verdict should be for Defendant, R.J. Reynolds Tobacco Company on this claim. However, if the greater weight of the evidence supports Plaintiff's claim against Defendant, R.J. Reynolds Tobacco Company, then you should so indicate in the appropriate designated place on the verdict form.