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IN THE SUPREME COURT OF FLORIDA

JOAN SCHOEFF, as Personal
Representative of the Estate of
JAMES SCHOEFF,

Petitioner,

v.

R.J. REYNOLDS TOBACCO CO.,

Respondent.
_____/

Case No. SC15-2233
L.T. No. 4D13-1765

ENGLE PLAINTIFF AMICI'S REQUEST FOR JUDICIAL NOTICE

The *Engle* Plaintiff Amici request this Court to take judicial notice of the following documents and as grounds therefore states:

1. This appeal arises from a final judgment entered in an *Engle*[1] progeny case following a jury verdict in Petitioner's favor.

2. The *Engle* Plaintiff Amici asks this Court to take judicial notice of the briefs filed in *R.J. Reynolds Tobacco Company v. Crawford*, Case No. 3D13-2909 (Fla. 3d DCA) (attached as **Exhibits A, B,** and **C**) (*see* pp. 19-28, 36-44 of Exh. A; pp. 23-32, 39-44 of Exh. B; pp. 4-6, 10-14 of Exh. C).

3. Judicial notice is governed by section 90.202(6), Florida Statutes, which permits the Court to take judicial notice of the "records of any court of this state or any court of record of the United States . . . ." The rule applies to

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

appellate as well as trial courts. *See* Charles W. Ehrhardt, 1 Fla. Prac. Evidence § 207.2 (2012).

4. These documents are relevant to the Amici's arguments made in section II of the Amici's brief.

WHEREFORE, the *Engle* Plaintiff Amici, respectfully request this Court to take judicial notice of the above-mentioned documents.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by email to John S. Mills (jmills@mills-appeals.com; service@mills-appeals.com) and Courtney Brewer (cbrewer@mills-appeals.com), The Mills Firm, P.A., 203 N. Gadsden Street, Suite 1A, Tallahassee, Florida 32301; Alex Alvarez (alex@integrityforjustice.com), The Alvarez Law Firm, 355 Palermo Avenue, Coral Gables, Florida 33134; Gary M. Paige (garyp216@aol.com), Gordon & Doner, 10650 W. SR 84, Suite 210, Davie, Florida 33324; Laurie Briggs (tobacco@searcylaw.com) and T. Hardee Bass, III, Searcy Denney Scarola Barnhart & Shipley, P.A., 2139 Palm Beach Lakes Blvd., West Palm Beach, Florida 33409; Robert S. Glazier (glazier@fla-law.com), Law Office of Robert S. Glazier, 54 Brickell Key Dr., Suite C-1, Miami, Florida 33131; Gordon James, III (Gordon.james@sedgwicklaw.com; Johnathan.thomas@sedgwicklaw.com), Eric L. Lundt (eric.lundt@sedgwicklaw.com), and Robert C. Weill

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Case No. 3D13-2909
L.T. Case No. 11-14352-CA-20

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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STATEMENT OF THE CASE AND FACTS

William Crawford sued R.J. Reynolds Tobacco Company for laryngeal cancer that he alleged was caused by smoking. *See* R.III:532.[1] Mr. Crawford raised claims for strict liability, negligence, fraudulent concealment, and conspiracy to conceal. *See* R.III:533-36. To establish the conduct elements of his claims, Mr. Crawford sought to rely on the asserted preclusive effect of findings made by the jury in *Engle v. Liggett Group, Inc.*, 945 So. 2d 1246 (Fla. 2006).

A. Phase I

The trial proceeded in two phases. Phase I addressed class membership, liability, comparative fault, compensatory damages, and entitlement to punitive damages.

1. Mr. Crawford Introduced Evidence Entirely Unconnected To the Conduct That Allegedly Harmed Him

The trial court allowed Mr. Crawford's expert historian, Dr. Robert Proctor, to testify extensively about purported misconduct that neither harmed Mr. Crawford nor bore any similarity to conduct that could have harmed him. In particular, the court admitted extensive evidence of alleged youth marketing, despite Mr. Crawford's admission that his decision to begin smoking as a youth

[1] References to the Record will be designated: "R.[volume to record on appeal]:[page(s)]." For ease of reference, the trial transcripts (Volumes I-XXI) will be referred to by the volume number on the cover of each transcript volume: "T.[volume on cover page]:[page(s)]."

was driven solely by his brother's influence. *See* T.XIII:1737-38.[2] Such evidence was entirely irrelevant to the questions at issue in Mr. Crawford's individual case—and obviously highly inflammatory given the nature of the allegations. *See also* T.VI:584-85 (objecting to introduction of youth marketing evidence because Mr. Crawford "doesn't claim any advertisement caused him to smoke or" to continue to smoke).

Even worse, the trial court admitted youth-marketing evidence from years before Mr. Crawford's birth and decades after he became an adult, even though it had granted Reynolds's pretrial motion *in limine* in part and ordered the exclusion of youth-marketing evidence that occurred after Mr. Crawford reached adulthood. *See* R.XIV:3877. The court allowed Dr. Proctor to testify about "youth marketing by cigarette companies" as early as "the 1920s," *see* T.VII:794-95, even though Mr. Crawford was born in 1935, *see* T.XIII:1694; did not start smoking until the 1940s, *see* T.XIII:1697; and did not become a regular smoker until the 1950s, *see* T.XIII:1700-01. Over Reynolds's objection, *see* T.VI:585; T.VII:792, 795, Dr. Proctor also testified about internal Reynolds documents from 1927 and

[2] The trial court also allowed Mr. Crawford to introduce evidence related to programs that never resulted in any commercially available tobacco product, *see, e.g.*, T.VIII:968-70 (admission and discussion of color-change filter proposal that was never implemented), and evidence related to products that he never smoked and that were manufactured by Reynolds's competitors, *see, e.g.*, T.VIII:964 (discussing Kent advertisements).

1928—some seven years before Mr. Crawford was born, thirteen years before he smoked his first cigarette, and twenty-three years before he became a regular smoker. *See* T.VII:792-95. Those documents said "[s]chool days are here, and that means big tobacco business for somebody," and they encouraged Reynolds to "[g]et your men intensely interested in lining up these students." T.VII:793-94. And over Reynolds's objection, *see* T.VII:758-59, Dr. Proctor also testified about alleged youth-marketing from years after Mr. Crawford had become an adult, including a Flintstones television commercial that aired when Mr. Crawford was in his mid-twenties, *see* T.VIII:922-23, and an internal Reynolds document purportedly discussing youth marketing in 1984, when Mr. Crawford was almost fifty years old, *see* T.VII:796-99. Finally, Dr. Proctor recounted the allegedly misleading congressional testimony of tobacco-company executives in 1994. *See* T.IX:1095-1100. That was five years after Mr. Crawford quit smoking, *see* T.XIII:1715, and two years after he developed his illness, *see* T.XIII:1721.

2. Mr. Crawford Did Not Rely On Any Allegedly Misleading Tobacco-Company Statements Or Omissions

In his trial testimony, Mr. Crawford admitted that cigarette advertising had little effect on his smoking decisions—and no effect on his decision to begin smoking at a youth. He specifically agreed that "the only person that was responsible for [him] starting to smoke was [his] brother Henry." T.XIII:1737-38.

He also acknowledged that his choice of brands was unrelated to cigarette advertising:

> Q: So the reason you were smoking Camels and Luckys and Raleighs as a young kid, that wasn't because of advertising, right? That's because that's what your friends could supply you with?
>
> A: What they brought to school and had.
>
> Q: Any you would have smoked whatever brand they could find, correct?
>
> A: Probably.
>
> Q: And the reason that you started smoking Kools was because that's the brand your mother picked, right?
>
> A: Yes.
>
> Q: And you don't have any idea why you started smoking Kools other than that, correct? . . .
>
> A: That is correct. . . .
>
> Q. . . . . [W]hen you were smoking Camels, you're not saying that when you were 19 in the service and you smoked Camels, that you were smoking Camels because of some sort of advertisement that you had seen years ago, are you?
>
> A. I don't recall. . . .
>
> 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.

T.XIII:1743-45, 1751; *see also* T.XII:1525, 1548 (Mr. Crawford's daughter testifying that she could not remember Mr. Crawford ever telling her that "he

chose a cigarette brand based on the brand advertising," or ever mentioning or discussing with her "an advertisement for a particular brand of cigarettes that appeared in a newspaper, magazine, . . . billboard," or "on television").

In fact, Mr. Crawford could not recall any statement made by any tobacco company. T.XIII:1757-58.. Before he filed suit, he had never even heard of the Tobacco Institute, the Council for Tobacco Research or the Tobacco Industry Research Committee. *See* T.XIII:1758-59. He also did not "remember ever seeing anything called 'a [F]rank [S]tatement to cigarette smokers,'" and he expressly disclaimed any suggestion that the "[F]rank [S]tatement . . . caused [him] to continue smoking." T.XIII:1754-55; *see also* T.XII:1546-49 (Mr. Crawford's daughter testifying that Mr. Crawford never mentioned TI, CTR, or TIRC). And despite his lengthy testimony about cigarette advertising, Dr. Proctor had no opinion regarding Mr. Crawford's knowledge or reliance. *See* T.IX:1122 ("Q: . . [I]f I wrote out the question on that board—Did Mr. Crawford rely on a statement from a tobacco company—you don't have an opinion on that in this case; that's not your testimony, correct? . . . A: [T]hat's correct.").

Mr. Crawford did testify that advertising influenced his decision to smoke filtered cigarettes. *See, e.g.*, T.XIII:1707. But he could not remember "which statement" he saw, or in "which newspaper or which magazine or which TV show" he saw it. T.XIII:1709. Nor could he remember any advertisement for

filtered cigarettes that "used the word 'safe' and said this filter is safe to smoke." T.XIII:1752. He also explained that, while he smoked filtered cigarettes, he was nonetheless "aware" of the health warnings about smoking from the Surgeon General and others, T.XIII:1752, and that "even if filters weren't around," he "probably would" have "continued smoking the unfiltered brands [he] liked." T.XIII:1748-49.

3. Mr. Crawford Knew The Health Risks Of Smoking

Mr. Crawford's testimony also makes clear that for decades—and certainly before May 5, 1982—he knew that smoking causes illness, including cancer. Mr. Crawford admitted that, "as far back as the 1950s," he had "heard there was bad stuff in cigarette smoke." T.XIII:1753. Mr. Crawford also knew that the Surgeon General since the 1960s had warned that smoking causes cancer. T.XIII:1752, 1783. Since 1966, every package of cigarettes that Mr. Crawford smoked contained a federally mandated warning, *see* 15 U.S.C. § 1331 *et seq*., and Mr. Crawford testified that he saw these warnings. *See* T.XIII:1783-84 ("Q: You've told us you saw [the 1966] warning label, correct? A: Yes. . . . Q: And you saw this warning on the packs? A: Yes."). For her part, Mr. Crawford's daughter testified that the warning labels did not tell her father "anything he didn't already know." T.XII:1542.

Mr. Crawford further admitted that, in the 1960s and 1970s, he "saw the warning," he "believed the warning[]," and he "tried to quit because of the warning." T.XIII:1785-86; *see also* T.XIII:1784 ("Q: And you're telling us that in 1970, that information that smoking is dangerous, you knew that, and that is a reason that you say you made an effort to stop smoking? A: Several times, yes."). By the 1970s, he "probably" thought that he "personally . . . could get cancer from smoking." T.XIII:1790. Consistent with that belief, Mr. Crawford and his wife purchased a "special" "cancer insurance policy in 1974" that was "marketed . . . to smokers like [him] who were concerned that they might get cancer." T.XIII:1790-91.

4. Jury Instructions, Closing Argument, And Verdict

Before closing arguments, the trial court, over Reynolds's objections, instructed the jury that "[i]f the greater weight of the evidence supports the claim that William Crawford was a member of the *Engle* class, he is entitled to the benefit of the jury finding against Reynolds in the *Engle* class-action trial." T.XVII:2181-82. As a result, the court did not require—or even permit—the jury to adjudicate the conduct elements of Mr. Crawford's claims. *See* T.XVII:2183.

The trial court also refused to give Reynolds's proposed instruction on the statute of repose, *see* T.XIV:1829-58, which would have informed the jury that "[r]eliance on statements prior to [May 5, 1982] cannot by law be a basis of

liability" for concealment or conspiracy. R.XVII:3413-14.[3] Instead, over Reynolds's objection, the trial court adopted a verdict form that asked the jury to make a finding of reliance and then separately asked the jury whether any such reliance occurred after May 5, 1982. *See* R.XIV:3819-20. But the jury was not instructed that it could award punitive damages only for conduct that occurred after May 5, 1982, nor asked whether it had done so.

In closing argument, Mr. Crawford's counsel highlighted the youth-marketing evidence that had no connection to Mr. Crawford. Despite Mr. Crawford's admission that he began smoking for reasons entirely unrelated to cigarette advertising, his counsel asked the jury to impose liability and punitive damages based on the 1927 and 1928 "School Days" documents, both of which were written years before Mr. Crawford was even born. T.XVII:2242.

The jury decided that Mr. Crawford was a member of the *Engle* class and found in his favor on the claims for strict liability, negligence, concealment, and conspiracy. *See* T.XIX:2399-2401; R.XIV:3818-20. The jury allocated 30% of

---

[3] *See also* R.17:3399-3401 (for concealment claim, requiring jury determination "whether Reynolds made a statement, *after May 5, 1982*, that intentionally concealed or omitted a material fact concerning the health effects or addictive nature of smoking" (emphasis added)); R.17:3406-08 (for conspiracy claim, requiring jury determination "whether one of the parties to the agreement made a statement in furtherance of the agreement, *after May 5, 1982*, that concealed or omitted a material fact concerning the health effects or addictive nature of smoking" (emphasis added)).

the fault to Mr. Crawford and 70% to Reynolds. *See* T.XIX:2400; R.XIV:3819. The jury awarded $9 million in non-economic compensatory damages for Mr. Crawford's "pain, suffering, disability, physical impairment, disfigurement, mental anguish, inconvenience, and loss of capacity for the enjoyment of life." T.XIX:2401; R.XIV:3820. Finally, the jury found that punitive damages were warranted. T.XIX:2401-02; R.XIV:3820.

B. Phase II

Phase II addressed the amount of punitive damages. The trial court correctly instructed the jury that "[a]ny award of punitive damages is solely for the injury caused to William Crawford and should not include punishment for harm suffered by other smokers." T.XXI:2596. Despite this instruction, Mr. Crawford's counsel invited the jury to consider various alleged misconduct that could not have harmed Mr. Crawford, including actions that allegedly took place more than ten years after Mr. Crawford had quit smoking in 1989, and more than seven years after his cancer diagnosis in 1992. *See* T.XXI:2601 ("And that's the whole purpose behind that scheme, that conspiracy that lasted until the *year 2000*.") (emphasis added). Mr. Crawford's counsel also referred to a letter that Reynolds had allegedly sent to a middle school principal "*in 1990*," when Mr. Crawford was in his mid-fifties and had already quit smoking. T.XXI:2601-01 (emphasis added). Additionally, he again highlighted Dr. Proctor's Phase I

testimony. T.XXI:2598-99 ("I think you know what this case is about. I think I don't have to convince you of anything. You have seen the compelling evidence in this case, ..."). As explained above, that testimony included allegations of youth marketing from the 1920s (years before Mr. Crawford was even born) and from 1984 (when Mr. Crawford was almost 50), as well as allegations of misleading Congress in 1994 (years after Mr. Crawford had quit smoking and developed his illness).

All told, Mr. Crawford urged the jury to award punitive damages for various far-flung allegations entirely unrelated to anything that could have harmed him, including even a *contemporary* youth-marketing allegation that if Reynolds "get[s] our kids hooked, they will have them as lifelong customers." T.XXI:2601.

C. The Phase II Verdict And Final Judgment

At the end of Phase II, the jury awarded $1 million in punitive damages. *See* T.XXI:2633; R.XIV:3879. Reynolds filed various motions for directed verdict, new trial, and remittitur. Reynolds also opposed Mr. Crawford's proposed final judgment, which failed to reduce the compensatory award to reflect the jury's allocation of comparative fault. *See* R.XX:3912-33; *see also* R.XXII:4218. Without addressing Reynolds's arguments on this point, the trial court declined to reduce the compensatory award, and then entered a final judgment for $10 million.

SUMMARY OF THE ARGUMENT

I. A new trial is necessary because the trial court allowed Mr. Crawford to introduce evidence of alleged misconduct wholly unrelated to anything that may have harmed him. The U.S. Supreme Court has held that punitive damages may be imposed only for conduct that harmed the plaintiff and that, even in evaluating the reprehensibility of such conduct, dissimilar acts may not be considered. *See State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 422-23 (2003). The trial court's failure to abide by that rule infected both phases of the trial. Accordingly, a new trial on all issues is warranted.

II. The concealment and conspiracy verdicts fail as a matter of law. Accordingly, the punitive award must be set aside, and any new trial should be limited to the claims for strict liability and negligence.

A. Mr. Crawford failed to prove that he detrimentally relied on any misleading statement or omission by any *Engle* defendant. In fact, he admitted that his decisions to start and continue smoking were unaffected by any tobacco company statement.

B. Mr. Crawford also failed to prove that any purported reliance was reasonable. As a matter of law, a person cannot reasonably rely on the concealment of facts already known to him. In this case, it is undisputed that Mr. Crawford knew that smoking was hazardous as early as the 1950s.

C. For three independent reasons, the First District's decision in *R.J. Reynolds Tobacco Company v. Martin*, 53 So. 3d 1060 (Fla. 1st DCA 2010), cannot salvage the fraud and conspiracy claims. First, the permissive inference of reliance approved in *Martin* may be overcome by direct evidence of non-reliance, such as Mr. Crawford's own admissions in this case. Second, *Martin* does not undermine the settled rule that a party cannot reasonably rely on the concealment of facts already known to him. Third, *Martin* is inconsistent with the law of this District, under which reliance in a fraud case cannot be inferred from the mere pervasiveness of the defendant's advertising.

III. The $9 million compensatory award must be reduced for two reasons.

A. The compensatory award is excessive: it is out-of-step with awards upheld in similar cases; it is unsupported by the evidence; and it reflects the passion of a jury inflamed by the introduction of misconduct evidence unrelated to the claims in this case. The court should set aside the award and remand for either a remittitur or a new trial on compensatory damages.

B. Any compensatory award also must be reduced to reflect the jury's allocation of comparative fault. Comparative fault applies because this action, considered as a whole, is a "products liability action" governed by the

comparative-fault statute, despite the presence of individual claims for concealment and conspiracy.

IV. The trial court erred in refusing to instruct the jury on the statute of repose, particularly given the extensive evidence that Mr. Crawford introduced of alleged misconduct prior to May 5, 1982.

V. Federal due process does not allow Mr. Crawford to use the *Engle* jury findings to establish elements of his individual claims.

ARGUMENT

I. THE COURT ERRED IN ADMITTING MISCONDUCT EVIDENCE UNCONNECTED TO MR. CRAWFORD

The trial court erred in allowing Mr. Crawford to introduce extensive evidence of alleged misconduct—particularly youth marketing—that had no connection to Mr. Crawford's individual case. Much of that evidence was admitted during, and thus infected, Phase I of the trial. And in both phases of the trial, Mr. Crawford highlighted this evidence in inviting the jury to punish Reynolds for being an unsavory business. These errors warrant a new trial.[4]

A. The United States Supreme Court has held that "the Constitution's Due Process Clause forbids a State to use a punitive damages award to punish a defendant for injury that it inflicts upon nonparties." *Philip Morris USA v.*

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[4] Appellate courts apply an "[e]xacting" and "*de novo*" standard of review to the constitutionality of a punitive-damages awards. *See State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 418 (2003).

Williams, 549 U.S. 346, 353 (2007). To be sure, evidence of harm to nonparties may be relevant to show that "the conduct that harmed the plaintiff" was reprehensible, *id.* at 355, but the question of reprehensibility does not permit consideration of any-and-all allegations of misconduct—no matter how unrelated to the "conduct that harmed the plaintiff." To the contrary, any determination of reprehensibility must be constrained by the principles set forth in *State Farm Mutual Auto Insurance v. Campbell*, 538 U.S. 408 (2003).

In *State Farm*, the Supreme Court squarely held that a defendant's "dissimilar acts, independent from the acts upon which liability was premised," cannot be considered as part of the reprehensibility analysis. *Id*. at 422. Instead, any conduct considered in assessing reprehensibility must "have a nexus to the specific harm suffered by the plaintiff"; in other words, it must "replicate[] the prior transgressions." *Id*. at 423. This is both because "[d]ue process does not permit courts, in the calculation of punitive damages, to adjudicate the merits of other parties' hypothetical claims against a defendant under the guise of the reprehensibility analysis," and because "[t]he reprehensibility guidepost does not permit courts to expand the scope of the case so that a defendant may be punished for any malfeasance" occurring over the course of several decades, *id.* at 423-24. And in no event may the defendant be punished "for being an unsavory individual or business." *Id.* at 423.

Under these rules, a plaintiff must prove that acts introduced to show reprehensibility are similar—"factually as well as legally"—to those that harmed the plaintiff. *Williams v. ConAgra Poultry Co.*, 378 F.3d 790, 797 (8th Cir. 2004). Moreover, "[i]n determining what constitutes a previous example of the same conduct, . . . we must be careful not to let the exception swallow the rule." *Id.* Other-acts evidence must be "closely related" when examined at a "low level of generality"; otherwise, virtually any acts could be considered, and *State Farm* would be rendered a dead letter:

> In determining what constitutes a previous example of the same conduct, however, we must be careful not to let the exception swallow the rule. By defining his or her harm at a sufficiently high level of abstraction, a plaintiff can make virtually any prior bad acts of the defendant into evidence of recidivism.
>
> * * * *
>
> The Supreme Court [in *State Farm*] has therefore emphasized that the *relevant behavior must be defined at a low level of generality*. "Evidence of other acts need not be identical to have relevance in the calculation of punitive damages," . . . but the *conduct must be closely related*.

Id. (emphases added) (citing *State Farm*, 538 U.S. at 423).[5]

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[5] Many courts have applied and enforced these principles. *See, e.g.*, *Holdgrafer v. Unocal Corp.*, 160 Cal. App. 4th 907, 911-12 (2008) (reversing a punitive award because the jury considered evidence of misconduct that was contemporaneous with, but insufficiently related to, the conduct that harmed the plaintiff); *Stogsdill v. Healthmark Partners, L.L.C.*, 377 F.3d 827, 832 (8th Cir. 2004) (reducing a punitive award because certain evidence was "not relevant" to the plaintiff's case, thus potentially causing the jury to punish the defendant for "being an unsavory individual or business").

B. In this case, the trial court allowed Mr. Crawford to introduce a wide array of evidence that bore no relation to the conduct that allegedly harmed him. Most obviously, the introduction of extensive youth-marketing evidence was improper given Mr. Crawford's admission that any youth marketing played no role in his decision to begin smoking: "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. Even worse, the trial court admitted evidence of youth marketing that allegedly occurred either years before Mr. Crawford was born or decades after he became an adult. For example, the court allowed Dr. Proctor to testify about the "importance of marketing to youth" in "the 1920s," T.VII:794-95—even though Mr. Crawford was born in 1935, did not begin smoking until the 1940s, and did not become a regular smoker until the 1950s, T.XIII:1694, 1697, 1700-01. Dr. Proctor also discussed documents from 1927 and 1928—twenty-three years before Mr. Crawford became a regular smoker, T.XIII:1700-01—that said "[s]chool days are here, and that means big tobacco business for somebody." T.VII:793-94. Dr. Proctor also discussed alleged youth-marketing that occurred years after Mr. Crawford became an adult, including a commercial that ran when he was in his mid-twenties, *see* T.VIII:922-23, and a corporate document written in 1984, when he was nearly fifty years old, *see* T.VII:796-99. Finally, Dr. Proctor rehashed allegations that tobacco-company

executives misled Congress in 1994, *see* T.IX:1095-1100—five years after Mr. Crawford quit smoking and two years after he contracted laryngeal cancer.

By introducing such highly inflammatory evidence with no conceivable connection to his own injury, Mr. Crawford invited the jury to punish Reynolds for being an "unsavory business." Moreover, during Phase I closing arguments, his counsel aggravated the prejudice by explicitly urging the jury to do just that:

> So they targeted the kids. These are our replacement smokers. These are the ones we want for the next 30, 40, years. When they're done with them, we'll keep marketing to the young people. That was the scheme. That was the conspiracy. That's why this case is so egregious.
>
> Young adult smokers are the only source of replacement smokers. Line up these students as consumers. School days are here. Line up the most popular students. There is no doubt from their own internal documents that they were targeting kids as the replacement smokers for the future. That's wrong, and *they should be punished for that*.

T.XVII:2241-42 (emphasis added).

This improper line of argument continued unabated in Phase II. Despite the Court's instruction that any award of punitive damages to Mr. Crawford "should not include punishment for harm suffered by other smokers," T.XXI:2596, his counsel continued to focus on conduct entirely unrelated to Mr. Crawford, highlighting not only youth marketing, *see* T.XXI:2601 ("And if they get our kids hooked, they will have them as lifelong customers."), but also other alleged misconduct that occurred more than a decade after Mr. Crawford quit smoking.

See T.XXI:2601 ("And that's the whole purpose behind that scheme, that conspiracy that lasted until the *year 2000*.") (emphasis added); *id*. ("*This is 2013*, and they still can't admit that addiction causes disease.") (emphasis added).[6]

C. Because Mr. Crawford improperly incited the jury to punish Reynolds for being an unsavory business, a new trial is necessary. The new trial must obviously address punitive entitlement and punitive amount, as Mr. Crawford expressly sought punishment for acts entirely unrelated to his individual claims and injuries. Moreover, as explained above, much of the improper evidence and argument occurred during—and thereby infected—Phase I of the trial. In fact, the jury's extravagant compensatory award of $9 million, which bears no logical nexus to the evidence presented at trial, *see infra* at 34, confirms that the improper evidence and argument had its intended effect not only of generating an award of punitive damages, but also of inflaming the jury against Reynolds more generally. For these reasons, the new trial must encompass all Phase I issues as well as questions of punitive entitlement and amount.

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[6] Counsel also referred to a letter that Reynolds allegedly sent to a middle school principal "in 1990," decades after Mr. Crawford became an adult, T.XXI:2600-01, and again invited the jury to consider Dr. Proctor's Phase I testimony, T.XXI:2598-99.

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

misrepresentation is not justified in relying upon its truth if he knows that it is false or its falsity is obvious to him." *Restatement (Second) of Torts* § 541 (1977). This has been settled Florida law for over 60 years.

In *McDonald v. Rose*, 50 So. 2d 878 (Fla. 1951), the Florida Supreme Court held that actual knowledge of misstated or concealed facts precludes reasonable reliance as a matter of law. In that case, buyers claimed that their purchase had been induced by various fraudulent misrepresentations. *Id.* at 879. The Florida Supreme Court held that this claim failed as a matter of law because undisputed evidence "show[ed] that the plaintiffs not only should have known but did actually know that the original representations . . . were incorrect and, having such knowledge, they cannot claim that they were deceived into relying upon the original representations." *Id.* at 880; *see also Street v. Bartow Growers Processing Corp.*, 67 So. 2d 228, 231 (Fla. 1953) ("The undisputed evidence in this case shows that the appellees not only should have known, but did actually know, of any claimed inaccuracies or omissions in the financial statement and 'having such knowledge, they cannot claim they were deceived in relying upon the representations . . . .'" (quoting *McDonald*, 50 So. 2d at 879)).

More recently, the Florida Supreme Court reaffirmed this principle in *M/I Schottenstein Homes, Inc. v. Azam*, 813 So. 2d 91 (Fla. 2002). There, the Court embraced the Restatement rule that "[t]he recipient of a fraudulent

misrepresentation is not justified in relying upon its truth if he knows that it is false or its falsity is obvious to him." *Id.* at 95 (quoting *Besett v. Basnett*, 389 So. 2d 995, 997 (Fla. 1980) (in turn quoting Restatement)). The Court thus confirmed that, if the plaintiff actually knew of the concealed facts, "reliance is not justified and a cause of action will not exist." *Id.*; *see also Rose v. ADT Security Services, Inc.*, 989 So. 2d 1244 (Fla. 1st DCA 2008) (if the recipient of an alleged misrepresentation "'knows that it is false or its falsity is obvious to him, his reliance is improper, and there can be no cause of action for fraudulent misrepresentation.'" *Id.* at 1247 (quoting *M/I Schottenstein Homes*, 813 So. 2d at 94-95 (alteration in original)).[8]

2. Under these standards, Mr. Crawford could not have justifiably relied on any misleading statement or omission about the health risks of smoking, because he knew about those risks throughout his life. Mr. Crawford admitted that, "as far back as the 1950s," he "heard there was bad stuff in cigarette smoke." T.XIII:1783. Mr. Crawford also knew that the Surgeon General since the 1960s had warned that smoking could cause cancer. T.XIII:1752, 1783. Moreover, since 1966, every package of cigarettes that Mr. Crawford smoked contained a

[8] The same conclusion follows from the basic rule that, in order to show reliance on an alleged concealment, the plaintiff must "establish that but for the alleged . . . nondisclosure, the party would not have entered the transaction." *Humana*, 728 So. 2d at 265. That cannot be true where, as here, the plaintiff knew the concealed information, but nonetheless chose to buy the product.

federally mandated warning, *see* 15 U.S.C. § 1331 *et seq*., and Mr. Crawford admitted that he saw those warnings. *See* T.XIII:1783 ("Q: You've told us you saw [the 1966] warning label, correct? A: Yes. . . . Q: And you saw this warning on the packs? A: Yes."). For her part, Mr. Crawford's daughter testified that the 1966 warning labels did not tell her father "anything he didn't already know." T.XII:1542.

Mr. Crawford further admitted that, in the 1960s and 1970s, he "saw the warning," he "believed the warning[]," and he "tried to quit because of the warning." T.XIII:1785-86; *see also* T.XIII:1784-85 ("Q: And you're telling us that in 1970, that information that smoking is dangerous, you knew that, and that is a reason that you say you made an effort to stop smoking? A: Several times, yes."). By the 1970s, he "probably" thought that he "personally . . . could get cancer from smoking." T.XIII:1790. Consistent with that belief, Mr. Crawford and his wife purchased a "cancer insurance policy in 1974" that was "marketed . . . to smokers like [him] who were concerned that they might get cancer." T.XIII:1790-91.

Because Mr. Crawford undisputedly knew the significant health risks allegedly concealed by tobacco companies, any reliance was unreasonable. For that additional reason, Reynolds is entitled to judgment on the concealment and conspiracy claims.

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.

III. THE $9 MILLION COMPENSATORY AWARD CANNOT STAND

Even if liability had been properly established, the $9 million compensatory award must be reduced for two different reasons: it is excessive, and it does not reflect the jury's own allocation of comparative fault.

A. The Compensatory Award Is Excessive

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 "is indicative of prejudice, passion, or corruption"; (b) whether the jury "ignored the evidence"; (c) whether the jury "took improper elements of damages into account"; (d) whether the award "bears a reasonable relation to the amount of damages proved and the injury suffered"; and (e) whether the award "is supported by the evidence." *Id.* § 768.74(5). In addition, courts reviewing for excessiveness also consider "the philosophy and general trend of decisions in comparable cases." *R.J. Reynolds Tobacco Co. v. Webb*, 93 So. 3d 331, 337 (Fla. 1st DCA 2012); *see*, *e.g.*, *Ails v. Boemi*, 41 So.3d 1022, 1028 (Fla. 2d DCA 2010); *Gresham v. Courson*, 177 So. 2d 33, 39-40 (Fla. 1st DCA 1965); *Bravo v. United States*, 532 F.3d 1154, 1166-67 (11th Cir. 2008). For excessiveness determinations, the

overall "intention of the Legislature" is "that awards of damages be subject to close scrutiny by the courts." § 768.74(3), Fla. Stat.[9]

The $9 million compensatory award in this case exceeds awards upheld in similar cases, bears no relationship to the evidence, and was driven by passion and prejudice. Accordingly, this Court should set aside that award and remand either for a new trial on compensatory damages or a remittitur.

1. The Award Bears No Relationship To Other Awards For Comparable Injuries

The $9 million award is well above the range of awards that courts have upheld in other cases involving laryngeal cancer. *See*, *e.g.*, *Shepard v. Grand Trunk W. R.R.*, 2010-Ohio-1853 (Ohio Ct. App. Apr. 29, 2010) (affirming $125,000 verdict for laryngeal cancer in FELA case); *Kapsis v. Port Authority of New York and New Jersey*, 313 N.J. Super. 395, 406-07 (N.J. Super. Ct. App. Div. 1998) (affirming $3,000,000 pain-and-suffering award for combined effect of asbestosis and laryngeal cancer in FELA case); *Rafter v. Raymark Indus.*, 429 Pa. Super. 360, 372 (Pa. Super. Ct. 1993) (affirming $605,000 award for throat cancer). And in cases where plaintiffs seek to recover for other types of cancer, the award dwarfs those where the plaintiff's suffering was far more substantial

[9] A trial court's decision denying a new trial or remittitur is reviewed for abuse of discretion. *See*, *e.g.*, *Glabman v. De La Cruz*, 945 So. 2d 60, 62 (Fla. 3d DCA 2007) (per curiam). 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.

than Mr. Crawford's. *See*, *e.g.*, *Sanchez v. Lessner*, No. 02- 2862 CA 21, 2002 WL 32128221, 03FJVR 2-41 (Fla. Cir. Ct 2002), *app. vol. dism.*, *Lessner v. Sanchez*, 849 So. 2d 313 (Fla. 3d DCA 2003) ($1 million for past and future pain and suffering for thirty-six year-old who developed cancer that spread to his lungs, brain, liver, and bones, and who underwent several chemotherapy sessions and brain surgery); *Kerr v. Contrucci*, No. 02-018755 (12), 2007 WL 4523057 (Fla. Cir. Ct Jun 8, 2007) ($3.5 million for past and future pain and suffering for 51-year-old who developed cancer and had a significant portion of his tongue removed, resulting in dramatic impairment of speech, loss of ability to swallow, significant scarring, restriction of movement of neck, and permanent dependency on stomach tube), *aff'd*, *Construed v. Kerr*, 4 So. 3d 1248 (Fla. 4th DCA 2009). There is no basis for Mr. Crawford to receive an award many times greater than those suffered from the same—or from more severe—injuries that he did.

Outside of *Engle*-progeny cases, Florida courts have routinely held that awards for personal-injury claims smaller than Mr. Crawford's award are excessive. For example, in *Aills*, the Second District affirmed the trial court's remittitur of a noneconomic compensatory award from $8 million to $2.5 million, despite evidence that medical malpractice resulted in "a number of painful procedures" and left the twenty-eight-year-old plaintiff with "significant scarring and misshaping" of her breasts. 41 So. 3d at 1024. When courts have affirmed

awards in the $2.5 million range to living plaintiffs, they have included overwhelming evidence of pain and suffering which, as discussed below, does not exist here. *See Oakes v. Pittsburgh Corning Corp.*, 546 So. 2d 427, 430 n.2 (Fla. 3d DCA 1989) (reinstating $2.5 million noneconomic damages award, but only because of the extensive evidence of the plaintiff's suffering, which demonstrated he was "a pulmonary cripple" unable to handle any activities—even bathing, eating, and shaving—on his own).

The First District's per curiam affirmance in *R.J. Reynolds Tobacco Co. v. Smith*, 131 So. 3d 18 (Fla. 1st DCA 2013), further demonstrates why the $9 million compensatory award in this case cannot stand. In *Smith*, the majority of the Panel correctly concluded that the $10 million awarded for a personal injury claim was grossly excessive. In fact, Judge Wetherell, in a special concurrence, described the award as "conscience-shocking," and he opined that it "grossly overcompensate[d] the plaintiff for the consequences of his poor choice to smoke cigarettes for much of his life." *Id.* at *3 (Wetherell, J., specially concurring). In a separate concurrence, Judge Makar stated that "[t]he record evidence . . . would not meet the statutory criteria that the award is 'supported by the evidence' and that it bear 'a reasonable relationship' to the harm proven." *Id.* at *7-8 (Makar, J., concurring).

Both judges, however, mistakenly concluded that they were bound by *R.J. Reynolds Tobacco Co. v. Townsend*, 90 So. 3d 307 (Fla. 1st DCA 2012), where the First District upheld a $10.8 million compensatory in a wrongful-death action. *Id*. at 311-12. But *Townsend* itself confirms that any damages award must rest on "a proper evidentiary basis," *id.* at 312, and the evidentiary basis for a compensatory award in a wrongful death case, where the jury must "place a dollar value on a human life, measured by the loss and grief of a loved one," *id.* at 311 (quoting *Citrus County v. McQuillin*, 840 So. 2d 343, 348 (Fla. 5th DCA 2003)), differs markedly from the evidentiary basis for a personal injury claim where, as here, the jury must instead place a dollar value on physical "pain, suffering, disability, physical impairment, disfigurement, mental anguish, inconvenience, and loss of capacity for the enjoyment of life." T.XIX:2401; R.XIV:3820.

For these reasons, the Court should agree with Judge Wetherell and Judge Makar that $10 million in non-compensatory damages for a living smoker is "conscience-shocking" and "outrageously large," 131 So. 3d at *3 (Wetherell, J. specially concurring), and it should reach the same conclusion regarding the $9 million compensatory award in this case.[10]

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[10] Moreover, this case is factually distinguishable from *Smith*, where the First District concluded that was "no evidence apart from the sheer size of the verdict of a jury run amok." *Smith*, 131 So. 3d at *3. But here, as discussed above, *supra* at 13-18, and below, *infra* at 35-36, the introduction of irrelevant and inflammatory evidence without a sufficient nexus to the conduct that harmed

2. The Award Is Unsupported By The Evidence

As with all damages awards, non-economic damages must have a "'logical nexus in deduction or analogy' to the amount of pain and suffering incurred." *Werneck v. Worrall*, 918 So. 2d 383, 388 (Fla. 5th DCA 2006) (quoting *Wright & Ford Millworks, Inc. v. Long*, 412 So. 2d 892, 893 (Fla. 5th DCA 1982)).

Mr. Crawford was diagnosed with laryngeal cancer in early 1992. *See* T.XIII:1721. He received treatment almost immediately, and by 1993 was entirely cured of cancer. *See* T.XII:1611. The treatments he received—which included radiation therapy, an initial, less invasive surgery, and then a complete larynegectomy—which included radiation therapy, a partial larynegectomy, and then a complete larynegectomy—were not inconsequential, the surgeries were not without complications, *see* T.XIII:1722, and the lingering effects, including his stoma and his use of an electrolarynx to communicate, are not insignificant.

But the fact remains: after Mr. Crawford's diagnosis, he was treated, and he was cured. And while he indisputably suffered—and continues to experience the effects of his surgery—his experience simply does not justify an award several times greater than awards affirmed in other laryngeal cancer cases, and in cases where individuals have suffered as much—or more—than he has. For these reasons, the compensatory award cannot stand.

Mr. Crawford demonstrates that the $9 million compensatory damages award was the product of an impassioned jury.

3. The Award Is The Product Of Passion And Prejudice

In Florida, "[a] plaintiff . . . is not entitled to recover compensatory damages in excess of the amount which represents the loss actually inflicted by the action of the defendant," because "the purpose of compensatory damages is to compensate, not to punish defendants or to bestow a windfall on plaintiffs." *MCI Worldcom Network Servs., Inc. v. Mastec, Inc.*, 995 So. 2d 221, 223-24 (Fla. 2008) (per curiam) (internal quotation marks and citations omitted). As shown above, Mr. Crawford's evidence and argument were short on harms that he himself suffered, and long on alleged misconduct entirely unrelated to his own injuries. Without even a colorable contention that Mr. Crawford was affected by any youth marketing, the extensive evidence and argument introduced on that subject could have served no possible purpose other than to inflame the jury. These improper incitements were particularly damaging against a large tobacco company because, as this Court has recognized, "prejudice against the tobacco companies, a present-day popular villain, [can] interfere[] with the jury's ability to assess the damages based on a reasonable view of the evidence." *Philip Morris, Inc. v. French*, 897 So. 2d 480 (Fla. 3d DCA 2004) (affirming remittitur of $5.5 million compensatory award to $500,000).

Finally, the sheer magnitude of the award itself further confirms that it "could only have been a product of passion and emotion." *Glabman v. De La*

Cruz, 954 So. 2d 60, 63 (Fla. 3d DCA 2007); *see Webb*, 93 So. 3d at 339 (large "amount of the compensatory damages suggests an award that is the product of passion"). On this record, the compensatory award of nearly $9 million to a living smoker, entirely for non-economic damages, cannot fairly be understood as a dispassionate assessment of the evidence, rather than as a result of youth-marketing and other entirely irrelevant evidence and argument that achieved their intended purpose of inflaming the jury.

* * * *

Because Mr. Crawford's compensatory award is excessive, the Court must set it aside and remand for a new trial on compensatory damages or a remittitur.[11]

B. The Compensatory Award Must Be Reduced To Reflect The Jury's Allocation Of Comparative Fault

Apart from its excessiveness, the compensatory award must also must be reduced to reflect the jury's finding that Mr. Crawford was 30% responsible for his injury. By its terms, the Florida comparative-fault statute provides that judgments in any "products liability action" must be reduced for comparative

[11] Once the trial court proposes a remitted judgment, both parties must be given the option of rejecting the remittitur and electing a new trial on damages. *See*, *e.g.*, *Waste Management Inc. v. Mora*, 940 So. 2d 1105, 1107-08 (Fla. 2006); *R.J. Reynolds Tobacco Co. v. Webb*, 130 So. 2d 262, 263-64 (Fla. 1st DCA 2013); *Philip Morris USA, Inc. v. Naugle*, 103 So. 3d 944, 948-49 (Fla. 4th DCA 2012).

fault, and this case plainly qualifies as such a "products liability action."[12] It does not matter, therefore, that Mr. Crawford here prevailed on individual claims for concealment and conspiracy.

1. Comparative Fault Applies to "Products Liability Actions"

a. Florida's comparative-fault statute provides that, "[i]n a negligence action, the court shall enter judgment against each party liable on the basis of such party's percentage of fault." § 786.81(3), Fla. Stat.[13] The statute defines "negligence action" as "a civil action for damages based upon a theory of negligence, strict liability, products liability, professional malpractice whether couched in terms of contract or tort, or breach of warranty and like theories." § 768.81(1)(c). In turn, it further defines "products liability action" as "a civil action based upon a theory of strict liability, negligence, breach of warranty, nuisance, or similar theories for damages caused by the manufacture, construction, design, formulation, installation, preparation, or assembly of a product." § 768.81(1)(d). Finally, the statute "does not apply to any action brought by any person to recover actual economic damages resulting from pollution, to any action based upon an intentional tort, or to any cause of action as to which application of

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[12] This Court reviews questions of statutory interpretation de novo. *See, e.g.*, *Fla. Dep't of Children & Family Servs. v. P.E.*, 14 So. 3d 228, 234 (Fla. 2009).

[13] Unless otherwise noted, all citations are to the 2011 version of the statute, which the Florida Legislature made expressly retroactive. *See* 2011 Fla. Sess. Law Serv. Ch. 2011-215 §§ 2, 3 (West).

the doctrine of joint and several liability is specifically provided" by statute. § 768.81(4).

The applicability of this statute turns on the nature of the overall case, rather than individual claims in the case. On their face, all of the operative statutory terms—"negligence action," "products liability action," and "action based upon an intentional tort"—focus on the nature of the overall "action," rather than on individual claims or separate counts. More generally, section 768.81 focuses relentlessly on the nature of the overall "action"—a term the statute uses no fewer than nineteen times. For example, the statute provides that "[t]he substance of an action, not conclusory terms used by a party, determines whether an action is a negligence action," § 768.81(1)(c), and similarly that "[t]he substance of an action, not the conclusory terms used by a party, determines whether an action is a products liability action," § 768.81(1)(d). In striking contrast, words such as "claim" or "count" nowhere appear in the statute. Moreover, the solitary exception to this pattern—the exclusion for "any cause of action" for which other statutes require joint-and-several liability—simply confirms that the legislature knew how to distinguish between terms keyed to the overall case ("action") and those keyed to individual claims within the case ("cause of action").

b. Not surprisingly, the Florida Supreme Court has authoritatively construed the statute to require an analysis of the overall case, rather than individual claims within the case. In *Merrill Crossings Associates v. McDonald*, 705 So. 2d 560, 563 (Fla. 1997), the court specifically approved the result and "the reasoning" of *Slawson v. Fast Food Enterprises*, 671 So. 2d 255, 258 (Fla. 4th DCA 1996). In *Slawson*, the Fourth District confirmed that the intentional-tort exception does not apply simply because a case "*includ*[*es*] an intentional tort." *Id.* at 258 (emphasis added). The court observed that the drafters of that provision "did not say *including* an intentional tort; or *alleging* an intentional tort; or *against parties charged with* an intentional tort." *Id*. Rather, "[t]he words chosen, 'based upon an intentional tort,' imply to us the necessity to inquire whether the *entire action* . . . is founded or constructed on an intentional tort." *Id.* (emphasis added). In other words, "the issue is whether an action comprehending one or more negligent torts has *at its core* an intentional tort." *Id.* (emphasis added).

Under this rule, the intentional-tort exception does not automatically apply whenever an intentional-tort claim is present. For example, in *Burns International Security Services, Inc. v. Philadelphia Indem. Insurance Co.*, 899 So. 2d 361 (Fla. 4th DCA 2005), the Fourth District affirmed a judgment applying the comparative-fault statute even though the loss of the plaintiff tenant had been caused by "intentional criminal acts of unknown persons," because the case was

based on "the negligent manner in which [the defendant landlord] conducted its security responsibilities." *Id.* at 366. Likewise, in *NationsBank, N.A. v. KPMG Peat Marwick LLP*, 813 So. 2d 964 (Fla. 4th DCA 2004), the Fourth District held that the action in question was not based on an intentional tort even though some intentional misconduct may have contributed to the plaintiff's injury. *See id.* at 970. The fact that a suit involves some intentional-tort *claims* does not by itself ensure that the overall "*action*" has an intentional tort "at its core." *Slawson*, 671 So. 2d at 258.

2. *Engle*-Progeny Cases Are "Products Liability Actions"

As noted above, the statute broadly defines a "products liability action" as "a civil action based upon a theory of strict liability, negligence, breach of warranty, nuisance, or similar theories for damages caused by the manufacture, construction, design, formulation, installation, preparation, or assembly of a product." § 768.81(1)(d), Fla. Stat. In *Engle*-progeny litigation, strict-liability and negligence claims rest on the core allegation that cigarettes are defective "because they are addictive and cause disease." *Walker v. R.J. Reynolds Tobacco Co.*, 734 F.3d 1278, 1281 (11th Cir. 2013). Moreover, concealment and conspiracy claims rest on allegations that the smoker was harmed because the defendant cigarette manufacturer concealed information about that very defect. *See Engle*, 945 So. 2d at 1257 n.4 (noting jury findings that defendants

"concealed" information "concerning the health effects or addictive nature of cigarettes" and "agreed to conceal" information "regarding the health effects of cigarettes or their addictive nature"). *Engle*-progeny cases thus necessarily involve allegations that the plaintiff was harmed by the "manufacture, construction, design, [or] formulation" of cigarettes. Such cases are expressly defined to be "products liability actions."

The Florida Supreme Court's decision in *Philip Morris USA, Inc. v. Douglas*, 110 So. 3d 419 (Fla. 2013), further confirms that *Engle*-progeny cases are negligence actions at their core. *Douglas* held that membership in the *Engle* class—which is a prerequisite to any *Engle*-progeny claim—itself establishes liability on claims for strict liability and negligence. *See Douglas*, 110 So. 3d 429-30. Therefore, a progeny plaintiff cannot pursue a concealment or conspiracy claim without first establishing a claim for negligence.

3. Statutory Context Reinforces This Conclusion

Prior to its 2011 amendments, the comparative-fault statute required apportionment for "products liability" cases, but left that term undefined. *See* § 768.81, Fla. Stat. (2006). Accordingly, the term "products liability" would have been construed in accordance with its ordinary meaning. *See*, *e.g.*, *Koile v. State*, 934 So. 2d 1226, 1230-31 (Fla. 2006). And under that ordinary meaning, it would have been clear that *Engle*-progeny cases are "products liability" actions—despite

the presence of concealment and conspiracy claims—because at their core they involve allegations that the plaintiff was harmed by the defendant's product.

For example, in *Sharp v. Leichus*, No. 2004-CA-643, 2006 WL 515532, at *1 (Fla. 2d Cir. Ct. Feb. 17, 2006), *aff'd per curiam*, 952 So. 2d 555 (Fla. 1st DCA 2007), the plaintiff argued that certain product manufacturers had "misrepresented the true risks" of the product, and that "the withholding or misrepresenting of such information" had harmed the plaintiff. Despite these claims for fraudulent misrepresentation and concealment, the court found it "abundantly clear that the Plaintiff's case is, in fact, a products liability case." *Id.* The court explained that the plaintiff had "sustained her physical injuries as a result of her ingestion of" a product, and reasoned that "[t]he warnings and representations at issue here *are only relevant to the extent that they pertain to the dangers of the underlying product*." *Id.* (emphasis in original); *see also, e.g.*, *Palmas*, 881 So. 2d at 569 (characterizing action as a "products liability case" even though it included misrepresentation and concealment claims); *Laschke v. Brown & Williamson Tobacco Corp.*, 766 So. 2d 1076, 1077 (Fla. 2d DCA 2000) ("All of the counts of [smoker's] second amended complaint are based on product liability theories [including] . . . conspiracy to commit fraud, including allegations of both misrepresentation of material facts and concealment of material facts.").

The definition of "products liability action" in the 2011 amendments obviously did not narrow that prior definition. For one thing, the statutory codification must be presumed to incorporate the prior understanding of what constitutes a "products liability" case. *See Scott v. Williams*, 107 So. 3d 379, 387 (Fla. 2013) ("In order to ascertain the Legislature's intent in enacting that provision, we examined the case law in effect prior to its enactment."); *Fla. Dep't of Envtl. Protection v. ContractPoint Fla. Parks, LLC*, 986 So. 2d 1260, 1269-70 (Fla. 2008) ("[T]he legislature is presumed to have adopted prior judicial constructions of a law unless a contrary intention is *expressed* in the new version." (quotation omitted)).

Moreover, the 2011 amendments were designed to *expand* the availability of comparative-fault offsets. In particular, the newly codified definition of "products liability action" was intended to overrule *D'Amario v. Ford Motor Co.*, 806 So. 2d 424 (Fla. 2001), which had held that comparative-fault offsets were unavailable in "crashworthiness" or enhanced-injury cases. *See* 2011 Fla. Sess. Law Serv. Ch. 2011-215 § 2 (West); *see also* § 768.82(1)(d), Fla. Stat. ("The term ['products liability action'] includes an action alleging that injuries received by a claimant in an accident were greater than the injuries the claimant would have received but for a defective product."). More generally, the Florida Legislature sought to avoid what it regarded as the "inequitable and unfair results" of

requiring the defendant to pay all of the compensatory damages, regardless of its share of the fault. *See* 2011 Fla. Sess. Law Serv. Ch. 2011-215 § 2 (West); *see also id.* ("The Legislature finds that, in a products liability action as defined in this act, fault should be apportioned among all responsible persons."). Given this background and legislative purpose, it is inconceivable that the legislature would have artificially *narrowed* the definition of a "products liability action."

4. Mr. Crawford's Complaint And Argument Confirm That This Is A Products Liability Case

Reynolds's products, together with the public statements that Reynolds allegedly made about those products, permeate every aspect of this action. Mr. Crawford's complaint alleges that he developed laryngeal cancer because he "smoked cigarettes manufactured by" Reynolds. R.III:535-36 (counts for fraudulent concealment and conspiracy). Likewise, at trial, Mr. Crawford sought to impose liability and punishment on Reynolds for injuries allegedly caused by its products. *E.g.*, T.VI:611 ("The tobacco industry spent a lot of effort, resources, marketing their product."); T.VI:634 ("How much were they spending to sell this product and convince people that smoking wasn't bad?"); T.VI:636 ("Corporations can't place a product on the market that is defective and unreasonably dangerous."); T.XVII:2237 ("Their product sustained his addiction); T.XXI:2601 ("They had one thing, and one thing in mind is to peddle

their product, addict as many people as possible so they can make more profits.”). In sum, Mr. Crawford pleaded and argued his case as a products-liability action.

5. *Sury* Was Wrongly Decided

In *R.J. Reynolds Tobacco Co. v. Sury*, 118 So. 3d 849 (Fla. 1st DCA 2013), the First District upheld a determination that an *Engle*-progeny case was an intentional-tort action rather than a “products liability action.” The court correctly recognized that the applicability of the comparative-fault statute turns on a single determination regarding the nature of the case “‘at its core.’” 118 So. 3d at 852 (quoting *Merrill Crossings*, 705 So. 2d at 563). In making that determination, however, the First District did not address the controlling “products liability” prong of the statute. Instead, the court reasoned that the comparative-fault analysis is governed by *Mazzilli v. Doud*, 485 So. 2d 477 (Fla. 3d DCA 1986). *See Sury*, 118 So. 3d at 852-53.

This reasoning was wrong, for *Mazzilli* is not even arguably relevant to the question presented. For one thing, that case was decided on March 25, 1986—before the comparative-fault statute was even enacted. The court in *Mazzilli* thus did not consider, and could not consider, any question regarding the interpretation of section 768.81. Moreover, *Mazzilli* did not involve anything remotely akin to a products-liability action; to the contrary, the case arose out of a police officer shooting two unarmed suspects. *See* 485 So. 2d at 478-79. The court’s refusal to

offset the compensatory awards in that case was entirely unremarkable, and it says nothing about whether an offset would have been appropriate for a products-liability case in March 1986, much less about whether an offset is appropriate for *Engle*-progeny cases under a statutory definition of "products liability action" enacted some 25 years after *Mazzilli* was decided.

6. At A Minimum, This Court Should Remand For The Trial Court To Exercise Its Discretion

Even if this Court were to follow *Sury*, a remand still would be necessary. The First District in *Sury* held that a trial court has discretion in deciding whether an action falls within the exception to the comparative-fault statute. *See* 118 So. 3d at 852. Here though, the trial court simply entered final judgment as Mr. Crawford requested, and gave no indication that it had exercised any discretion to determine the nature of Mr. Crawford's action "'at its core.'" *Id.* at 852 (quoting *Merrill Crossings*, 705 So. 2d at 563). Accordingly, if this Court were to follow *Sury* (which it should not), a remand would be necessary for the trial court to exercise its discretion. *See, e.g., Burdick v. State*, 594 So. 2d 267, 271 (Fla. 1992) ("[B]ecause the trial court in this case did not indicate whether it believed it could in fact decline to impose a life sentence, we remand for the trial court to reconsider the sentence as within its discretion.").

IV. THE TRIAL COURT ERRED IN REFUSING TO INSTRUCT THE JURY ON THE STATUTE OF REPOSE

The trial court denied Reynolds's request for a jury instruction on the statute of repose—*i.e.*, an instruction that Reynolds could not be liable for concealment or conspiracy unless the jury found that Mr. Crawford relied on acts of concealment done after May 5, 1982.[14] We recognize that this Court has held that a repose defense is unavailable 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). *Frazier* conflicts with many decisions of the Fourth District, and the Florida Supreme Court has accepted jurisdiction to resolve that conflict. *See Russo*, *supra*; *Hess v. Philip Morris USA, Inc.*, No. SC12-2153 (Fla. Jun. 3, 2013). *Russo* and *Hess* are now fully briefed in the Florida Supreme Court, and set for oral argument on April 30, 2014.

Given the pendency of *Russo* and *Hess* in the Florida Supreme Court, Reynolds wishes to preserve the repose point for further review. If this Court

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[14] 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*, 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).

should decide this appeal prior to a decision by the Florida Supreme Court in *Russo* and *Hess*, it should at least certify a conflict with *Hess*. *See* art. V, § 3, Fla. Const.; Fla. R. App. P. 9.030(a)(2)(A)(v). That would ensure that the Florida Supreme Court would have discretionary jurisdiction in this case, so that this case could ultimately be resolved consistent with *Russo* and *Hess*.

The jury's finding that Mr. Crawford relied on post-1982 conduct does not render the repose error harmless. At a minimum, the trial court's refusal to instruct on the statute of repose would require a new trial on punitive damages. Because Mr. Crawford introduced evidence of alleged misconduct prior to 1982—indeed extending back even to the 1920s—there is no way to determine whether, or the extent to which, the punitive award was based on conduct that occurred before or after the repose date of May 5, 1982.

V. USE OF THE *ENGLE* FINDINGS TO ESTABLISH ELEMENTS OF MR. CRAWFORD'S CLAIMS VIOLATED DUE PROCESS

Reynolds submits that it violates federal due process to allow progeny plaintiffs to use the *Engle* findings to establish the conduct elements of their individual claims.[15] The Florida Supreme Court rejected this argument in *Douglas*, but Reynolds wishes to preserve it for further review.

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[15] Questions of federal due process are legal ones subject to review de novo. *See*, *e.g.*, *State v. Myers*, 814 So. 2d 1200, 1201 (Fla. 1st DCA 2002).

The Florida Supreme Court's application of claim preclusion in *Douglas* is precisely the type of "extreme application[] of the doctrine of res judicata" that violates federal due process, *Richards v. Jefferson Cnty., Ala.*, 517 U.S. 793, 797 (1996) (citation omitted), because "claim preclusion" has never been applied to permit a *plaintiff* to establish *issues* in ongoing litigation—instead, it applies only defensively, and only to claims that have been reduced to a final judgment. *See, e.g.*, *G. & C. Merriam Co. v. Saalfield*, 241 U.S. 22, 28 (1916). To properly establish liability, Mr. Crawford should have been required either to prove all of the elements of his individual claims, or to show that the *Engle* jury actually decided in his favor the specific allegations underlying his individual claims. *See Fayerweather v. Ritch*, 195 U.S. 276, 307 (1904).

CONCLUSION

For the reasons set forth above, Reynolds is entitled to judgment on the concealment and conspiracy claims (and the associated demand for punitive damages) and to a new trial on all other issues. At a minimum, the compensatory award must be remitted and further reduced to reflect the jury's allocation of comparative fault.

Respectfully submitted,

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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:

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CERTIFICATE OF COMPLIANCE

Pursuant to Florida Rule of Appellate Procedure 9.210(2), counsel for Reynolds hereby certifies that the foregoing brief complies with the applicable font requirements because it is written in 14-point Times New Roman font.

DATED: March 31, 2014

s/ Alina Alonso Rodriguez
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IN THE DISTRICT COURT OF APPEAL
THIRD DISTRICT OF FLORIDA

R.J. REYNOLDS TOBACCO COMPANY,

Appellant, Case No. 3D13-2909

v. L.T. No. 11-14352-CA-20

WILLIAM CRAWFORD,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT IN AND FOR MIAMI-DADE COUNTY, FLORIDA

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STATEMENT OF THE CASE AND FACTS

In this appeal, Appellant, R.J. Reynolds Tobacco Company ("RJR"), seeks to overturn a jury verdict in favor of William Crawford.[1] Mr. Crawford, a lifelong smoker of RJR cigarettes, began smoking in the early 1940s, at the age of seven. His addiction to RJR cigarettes ultimately led to a diagnosis of cancer almost fifty years later, at the age of 56. After a two-week trial, conducted pursuant to the procedures established by the Florida Supreme Court in *Engle v. Liggett Group, Inc.*, 945 So. 2d 1246 (Fla. 2006), the jury found that RJR caused Mr. Crawford's cancer, awarded him compensatory damages, and imposed punitive damages against RJR. RJR now attacks that judgment.

RJR does not contest that Mr. Crawford qualified as an *Engle*-class member, that he was addicted to its product, or that this addiction caused his cancer. Instead, RJR once again challenges the procedures established by the Florida Supreme Court in *Engle*, and followed by the trial court below. This Court, however, has already affirmed the same procedures in other *Engle* progeny cases, *see, e.g.*, *Frazier v. Philip Morris USA Inc.*, 89 So. 3d 937, 939 (Fla. 3d DCA 2012), and the Florida Supreme Court has itself recently reaffirmed the procedures it announced in *Engle*. *Philip Morris USA, Inc. v. Douglas*, 110 So. 3d 419 (Fla.), *cert. denied*,

[1] RJR is successor in interest of two other companies, American Tobacco and Brown & Williamson Tobacco Corp. ("B&W"), and the parties stipulated that RJR is liable for the conduct of those companies. (T 2179-80). For convenience, our reference to RJR refers to all three cigarette manufacturers.

134 S. Ct. 332 (2013).

Among its many other issues and sub-issues, RJR asserts two abuses of discretion by the trial court. As to the jury's compensatory award, below we demonstrate that the trial court did not abuse its discretion by refusing to second-guess the jury's verdict on compensatory damages. Likewise, the trial court did not abuse its discretion by admitting evidence that RJR's fifty-year concealment conspiracy included a misleading marketing campaign directed at children. As we explain below, RJR's argument fails because it mischaracterizes the relevance of the evidence. It also ignores jurisprudence from other District Courts of Appeal rejecting RJR's underlying legal argument regarding the relevance of this evidence.

As with its evidentiary challenge, RJR's argument for directed verdict on two of Mr. Crawford's counts ignores conflicting evidence, and again mistates the applicable rule of law. Another misstatement of the applicable law is RJR's request to apportion the compensatory damages, despite long-standing Florida law which provides that an intentional tortfeasor is not entitled to a reduction of the damages to account for the negligence of its victim.

As to its statute of repose argument, RJR does recognize controlling adverse authority. However, RJR fails to acknowledge that its view of the repose defense

was presented to the jury for determination nonetheless, thereby obviating its request for certification to the Florida Supreme Court.

As we demonstrate below, this Court should affirm the judgment entered upon the jury's verdict in this case.

RJR's Cigarettes

For more than 40 years, RJR (and the entire cigarette industry) has dedicated itself to researching how to engineer cigarettes to make them more and more addictive. (T. 779-80; 1016-24; 1031-38; 1342-45). The result was thousands of design features that worked together to addict smokers to the nicotine drug found in tobacco leaves. (T. 779-80; 1016-24; 1031-38; 1342-45; 1442-46). Modern-day cigarettes have little in common with tobacco that grows naturally and is hand-rolled. (T. 778-80; 1016-24). Cigarettes are purposefully designed so that a person can easily inhale them, and get smoke into the lungs as quickly as possible so that the nicotine immediately reaches a person's brain. (T. 1016-24; 1448). This rapid delivery nicotine system ensures nicotine addiction. (T. 1440-46; 1448).

An expert for Plaintiff explained that, when nicotine is ingested on a regular basis, it changes a person's brain by causing it to grow nicotine receptors. (T. 1436-41). The nicotine then mimics a naturally occurring chemical in the body, which causes the release of dopamine, which in turn makes a person feel relaxed and generally good. (T. 1436-41). This is a permanent neural pathway change

which prevents a person from feeling normal unless the receptors are filled with nicotine. (T. 1438-41). When the brain is denied nicotine, a person can feel a variety of uncomfortable feelings, like being irritable, tired, unfocused, or depressed. (T. 1438-41). Sadly, a child who is exposed to nicotine will develop substantially more of these nicotine receptors. (T.·2353). As a result, the younger the child is, the more difficult it is for them to quit smoking as an adult. (T. 1086-88, 2078). In Mr. Crawford's case, he was only 7 years old. (T. 1697).

RJR spent billions of dollars designing its cigarettes to be more addictive, including manipulating a smoker's absorption of nicotine to fine-tune the sweet spot for administering the addictive drug, nicotine. (T 779-80; 1016-24; 1031-38; 1342-45). RJR also adopted hundreds of design modifications to make cigarettes easier to inhale (and, thereby, more addictive), including varying the tobacco blends, controlling the pH levels, using menthol, and adding various additives and flavors. (T. 779-80; 1016-24; 1031-38; 1342-45). The cigarette industry also adds hundreds of additives to increase the addictive effect of nicotine. For example, cigarettes contain ammonia. (T. 1342-45). This is because ammonia causes the nicotine to partially freebase, which intensifies the drug so it is substantially easier for it reach the brain and the waiting nicotine receptors. (T. 1032-33). Internal documents by RJR make clear that RJR viewed itself and the entire tobacco industry as being in the business of selling nicotine. (T. 1018-19; 1066; PT 1820).

For example: "In a sense, the tobacco industry may be thought of as being a specialized, highly ritualized and stylized segment of the pharmaceutical industry. Tobacco products uniquely contain and deliver nicotine, a potent drug, with the variety of physiological effects." (T. 1018-19; PT4791).[2]

A result of the highly engineered cigarette is that it contains thousands of chemicals, including a long list of various carcinogens (are chemicals that cause cancer and other illnesses). (T. 856; 1582). It is the cumulative effect of all the carcinogens inhaled over decades of smoking that causes people, like Mr. Crawford, to develop cancer. (T. 1434-35; 1507; 1582; 1589-90). The nicotine and carcinogens in cigarette smoke work together to create a perfect storm. While the carcinogens found in one cigarette or even in a pack of cigarettes would not cause cancer, the repeated and constant exposure to carcinogens is what causes a human body to develop cancer. (T. 1507). Nicotine ensures that this repeated and constant exposure occurs. (T. 1434-35). The more doses of nicotine, the more carcinogens a person brings into their lungs and the more likely they are to develop cancer or some other smoking-related illness. (T. 1434-35; 1507; 1582; 1589-90). Addiction to nicotine is the key to the illness taking root. (T. 1434-35).

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[2] The exhibits presented at trial were returned to counsel and not included in the record. We are moving to supplement the record with some of Plaintiff's exhibits and have included them in the appendix. We have referenced the exhibits as their exhibit number.

This point was powerfully made by an expert witness for Plaintiff, when he testified about the stark increase in the prevalence of lung cancer that accompanied America's shift to smoking cigarettes. (T. 785-86, 846-48; PT991; PT1002). In the late 1800s and early 1900s (when tobacco consumption consisted of snuff, chew tobacco, cigars and pipe tobacco), lung cancer was one of the rarest of human diseases. (T. 785). That all changed in the 1920s and 1930s, which was about 10 to 15 years after manufactured cigarettes became the predominant form of tobacco consumption. (T. 785-86). Once Americans began deeply inhaling tobacco smoke into their lungs for the intended rapid absorption of nicotine, the toxins in the smoke took hold, resulting in an epidemic of lung cancer. (T. 785-86; 846-48; PT991; PT1002).

RJR and the entire cigarette industry knew about this back in the 1950s and earlier, and could have removed nicotine from cigarettes to make them non-addictive. (T 1016-21, 1036, 1064-67; PT1820; PT4791). They even could have made the pH level higher so people do not inhale them. (T. 1024). Instead, the cigarette industry decided to highly engineer cigarettes to *promote* addiction to nicotine so that a smoker will buy more cigarettes. (T. 779-80; 1016-24; 1031-38; 1342-45). That is because, not only is nicotine addiction the key to illness taking root, it is the key to RJR's profits. (T 1016-21, 1036, 1064-67; PT1820; PT4791).

RJR's Concealment Conspiracy

Worse yet, RJR and the entire cigarette industry began a conspiracy to conceal and misrepresent information about the addictiveness of nicotine, and about the serious health risks caused by smoking nicotine cigarettes. (T. 862-67; 873-87). As evidence from the first scientific studies began to emerge on the risks of smoking, the industry saw the first-ever dip in cigarette consumption. (T. 862). The industry's response was immediate. (T. 862-67; 873-87). Its top executives, including executives from RJR, met at the Plaza Hotel in New York City and hatched a plan to conceal the health risks and addictive nature of smoking. (T. 862-67; 873-87). They agreed to attack the sources of these health warnings and to cast doubt on the connection between smoking and disease (T. 862-67; 873-87).

At the same time, however, the industry pledged the opposite to the public (T. 887-92; PT307). An important aspect of this campaign (which RJR's brief ignores) is that the cigarette industry understood that people were learning about the possibility of health risks (like cancer). (T. 857-61; 883-87; 928-29). The industry's intent was not just to hide the truth, it was to create doubt. (T. 883-87; 928-29). And, it went to great lengths to do so. (T 857-61; 883-1045; 1060-1100). For example, it funded false scientific research to support its public position. (T. 884-85; 893-94; 992-98). It also created industry organizations, like the Tobacco Industry Research Committee and the Tobacco Institute, and represented that those entities were researching the addictiveness and harmfulness of cigarettes. (T. 875-

77). The entire tobacco industry pretended to be on a crusade to confirm the safety of its product and promised the American public that it would report back if it discovered anything. (T. 887-904; PT307). If there were any toxic substances in its product, the industry promised repeatedly to take them out (T. 887-904; 953-956;). RJR participated in all of this.

The cigarette industry even attacked contrary reports from the Surgeon General. (T. 948-56; 987-89; 1091; PT3100; PT2510). For example, when the Surgeon General finally determined what RJR and its co-conspirators had long known, that smoking can cause cancer, they all attacked the Surgeon General. (T. 948-56). For example, RJR called the Surgeon General irresponsible, saying: "The claim that cigarette smoking is a drug addiction similar to cocaine and heroin or alcohol use is irresponsible." (T. 1091, 2241; PT2510).

Notably, RJR's efforts also included design features that worked to undermine a smoker's motivation and ability to quit smoking, and one particular design was wildly successful, providing millions of Americans with a psychological crutch not to quit. (T. 950-53; PT1933). In the 1950s, RJR introduced its first filtered cigarettes in response to increasing concerns about the harmful health effects of cigarettes, and it promoted them as being safer than their unfiltered counterparts because of the "snow fresh filter." (T. 904; 963-67). The response of the American public to this message was overwhelming. (T 964; 970).

Filtered cigarettes grew from less than two percent of the market in the 1950s to ninety-eight percent of the market today. (T. 964; 970).

Unfortunately, RJR concealed from Mr. Crawford and the rest of the public that smokers of filtered cigarettes actually ingest more tar and other carcinogens than those who smoke unfiltered cigarettes. (T. 905-08; PT4993). Not only that, RJR concealed the fact that it intentionally designed filtered cigarettes this way to increase the dose of nicotine, which in turn promoted addictiveness cigarettes. (T. 905-08; 1037-38). Indeed, internal industry documents referred to the "illusion of filtration," virtually admitting that filters were simply a marketing gimmick. (T. 972-73; PT3678). The reason was the same as it always was—selling more cigarettes by making them more addictive. (T 1018-21, 1064-67; PT4791).

A report by the Federal Trade Commission makes clear that no one escaped this decades-long campaign of disinformation. That report states:

> [C]igarette advertising reaches virtually all Americans who can either read or understand the spoken word. So pervasive is cigarette advertising that it is virtually impossible for Americans of almost any age to avoid cigarette advertising. Many of the daytime and evening television programs are sponsored by cigarette manufacturers. And numerous magazines and newspapers read by the whole family contain cigarette advertising.

(T 980-86; PT3870). The purpose was to create a controversy regarding both the safety and addictiveness of cigarettes to give those Americans already addicted to the nicotine drug the psychological crutch they needed to keep buying and

smoking more cigarettes. (T. 951-52). On the one hand, healthcare officials were slowly getting the message out that smoking may be dangerous. (T 948-56; 987-89; 1091). But, on the other hand, the maker of the product was spending billions of dollars marketing and telling the smoker that no danger has been proven and, just in case, a cigarette filter will ensure that cigarettes are safe. (T. 1006-07). All told, between 1940 and 2005, the entire tobacco industry spent $250 billion selling this product and convincing people that it was not harmful. (T 1006-07). The reason why RJR and its co-conspirators spent such an enormous amount of money on this concealment campaign is that they knew that, when faced with competing messages, addicted smokers often accepted the cigarette industry's message so they could keep smoking. (T 951-53; 1080-83).

The cigarette industry (including RJR) did not limit its campaign to adults. It also marketed to children in order to ensure that new customers would be in line to take the place of the customers who inevitably died from using the industry's product. (T. 797-98; PT3400). As with the adults, the marketing campaign down-played the possibility of any health risk. (T. 828-30). From the 1940s (before Mr. Crawford even picked up his first cigarette at the age of seven) until 1971, cigarettes were the number one advertiser on television, including popular shows that were completely sponsored by a tobacco company. (T 984-85; PT2606; PT3165).

This effort worked. Even as late as 1981 (which was about 40 years into Mr. Crawford's history of smoking), a significant percentage of the American public did not know that smoking could cause cancer. (T 1041-42; PT2077; PT3165). Of course, RJR now admits that smoking nicotine cigarettes is addictive and causes cancer. (T 2449). But, RJR never made such admissions publicly until after Mr. Crawford was diagnosed with cancer. (T. 1095-1100; 1721). As late as 1994, the top executives of the seven major cigarette manufacturers (including RJR) denied, under oath before Congress, that cigarettes were addictive. (T. 1095-1100). At the same time, they argued, as they had for 40 years, that there was no proven connection between smoking cigarettes and lung cancer. (T. 1095-1100). Mr. Crawford believed them until 1988. (T. 1710).

William Crawford

William Crawford, born in 1935, had his first cigarette in 1942, when he was only seven years old. (T. 1695-97). Mr. Crawford grew up in Alabama, at a time when cigarette smoking and cigarette advertising were ubiquitous. (T. 1695; 1699-1700). At the time, "everyone smoked," even grade-school children. (T 1697-98). When his twelve-year-old brother offered him a cigarette, he naturally accepted. (T. 1697). At first, he would smoked only a few cigarettes a day. (T. 1698). By the time he was 16 years old, he had progressed to smoking a pack-a-day. (T. 1701-03). All told, Mr. Crawford smoked for 47 years, at least 38 of which he smoked a

pack-and-a-half every day. (T. 1697; 1701-03; 1715).

The evidence made clear that Mr. Crawford was powerfully addicted to nicotine. (T. 1538; 1712-21). He smoked first thing when he woke up, within the first two minutes. (T. 1714). And, it was the last thing he did at night before going to bed. (T. 1719). Mr. Crawford smoked everywhere—at home, at work, and in his car. (T. 1712-19). The only place he did not smoke was church. (T 1714-18). But, even then, he smoked immediately before walking in and right after church got out. (T. 1714). Mr. Crawford even smoked when he was sick in bed. (T. 1718).

Nowhere in its brief does RJR state that Mr. Crawford knew that cigarettes were powerfully addictive or that RJR intentionally designed them to be so. Instead, RJR focuses on what Mr. Crawford may have known about the harm caused by smoking. Even then, RJR wholly omits any contrary evidence (despite having lost this factual dispute at trial). For example, Mr. Crawford specifically testified that he believed the industry's assurance of safety for decades, including the industry's filtered-cigarette marketing campaign that promised to protect him on the off chance cigarette smoke contained anything harmful. (T. 1707-10; 1812). It was not until 1988 that he realized it was all a lie. (T. 1710). Even then, it took him almost 14 months of hard work to quit. (T. 1710; 1715). He tried quitting cold turkey, he tried chewing gum, he tried eating candy, and he tried Nicorette. (T. 1715-16). He attended smoking cessation classes offered by the American

Cancer Society. (T. 1716). Every time he tried, he experienced powerful, strong withdrawal symptoms—the kind experienced by a smoker who starts at such a young age. (T 1717). After many, many relapses, he finally quit. (T. 1715-17; 1807). Sadly, because of the length of his addiction, it was too late to prevent his cancer. (T. 1721-26).

The Jury's Phase I Verdict

The jury determined that Mr. Crawford was a member of the *Engle* class because he was addicted to RJR's cigarettes and that his addiction caused his laryngeal cancer, and further found for Mr. Crawford on all four counts. (R19 3818-20). The jury was also asked to determine how much Mr. Crawford was himself responsible for his injury. (R19 3819). Mr. Crawford had pled in his complaint that he was negligent because he did not try hard enough to break his addiction. (R4 532 ¶27). In closing argument, Mr. Crawford's counsel asked the jury to assign only 5% of the fault to Mr. Crawford. (T. 2243-44). But, the jury disagreed, allocating 30% to him instead. (R19 3819).

As for compensatory damages, the jury rejected Plaintiff's counsel's suggestion again. Plaintiff's counsel suggested $15 million, but the jury returned $9 million. (T. 2263; R19 3820). The pattern continued with the punitive damage imposed on RJR. Plaintiff's counsel suggested treble damages (three times the compensatory damages) for a total of $27 million. (T. 2603). RJR opposed by

suggesting $1 million. (T. 2630). The jury agreed with RJR and set punitive damages at $1 million. (R20 3879). This timely appeal followed.[3]

SUMMARY OF THE ARGUMENT

In this appeal, RJR, seeks to overturn the jury's verdict in favor of Mr. Crawford. RJR does not contest that Mr. Crawford qualified as an *Engle*-class member, that he was addicted to its product, or that this addiction caused his cancer. Instead, RJR once again challenges the procedures established by the Florida Supreme Court in *Engle*, and followed by the trial court below. This Court, however, has already affirmed the same procedures in other *Engle* progeny cases, *see, e.g.*, *Frazier v. Philip Morris USA Inc.*, 89 So. 3d 937, 939 (Fla. 3d DCA 2012), and the Florida Supreme Court has itself recently reaffirmed the procedures it announced in *Engle*. *Philip Morris USA, Inc. v. Douglas*, 110 So. 3d 419 (Fla.), *cert. denied*, 134 S. Ct. 332 (2013).

Among its many other issues and sub-issues, RJR asserts two abuses of discretion by the trial court. As to the jury's compensatory award, below we demonstrate that the trial court did not abuse its discretion by refusing to second-guess the jury's verdict on compensatory damages. Likewise, the trial court did

[3] The second verdict was returned on September 30, 2013, and RJR timely served post-trial motions on October 7 and 10, 2013. (R20 3879; R21 3934; R22 4209; R23 4419, 4506). *See* Fla. R. Civ. P. 1.530(b). The final judgment was entered on October 2, 2013, and the order denying RJR's post-trial motions was filed on October 17, 2013. (R23 4599; R24 4655). RJR timely filed its notice of appeal on November 14, 2013. (R24 4646). *See* Fla. R. App. P. 9.020(h), 9.110(b).

not abuse its discretion by admitting evidence that RJR's fifty-year concealment conspiracy included a misleading marketing campaign directed at children. As we explain below, RJR's argument fails because it mischaracterizes the relevance of the evidence. It also ignores jurisprudence from other District Courts of Appeal rejecting RJR's underlying legal argument regarding the relevance of the evidence.

As with its evidentiary challenge, RJR's argument for directed verdict on two of Mr. Crawford's counts ignores conflicting evidence, and again misstates the applicable rule of law. Another misstatement of the applicable law is RJR's request to apportion the compensatory damages, despite long-standing Florida law which provides that an intentional tortfeasor is not entitled to a reduction of the damages to account for the negligence of its victim.

As to its statute of repose argument, RJR does recognize controlling adverse authority. However, RJR fails to acknowledge that its view of the repose defense was presented to the jury for determination nonetheless, thereby obviating its request for certification to the Florida Supreme Court. As we demonstrate here, this Court should affirm the judgment entered upon the jury's verdict in this case.

ARGUMENT

I. The admission of evidence of youth marketing and co-conspirator conduct was proper and certainly did not amount to an abuse of discretion, let alone reversible error.

RJR claims that the jury awarded punitive damages based on evidence that

had nothing to do with Mr. Crawford. However, RJR neglects to inform this Court that this trial court gave instructions requested by RJR that expressly told the jury not to consider harm to others for either question: (1) whether RJR's conduct is reprehensible enough to warrant punitive damages; and (2) the amount of punitive damages. (T 2192-95). These instructions render RJR's argument moot. Equally important, RJR neglicts to mention that this precise argument was raised before this Court in *Lorillard Tobacco Co. v. Alexander*, 123 So. 3d 67, 79-81 (Fla. 3d DCA 2013), and to the First District Court of Appeal in *R.J. Reynolds Tobacco Co. v. Townsend*, 90 So. 3d 307, 312-13 n.6, 7 (Fla. 1st DCA 2012), *review denied* 110 So. 3d 441 (Fla. 2013). Both courts rejected it. *Id.*

A. Evidence of youth marketing and co-conspirator conduct was relevant.

RJR also ignores the facts. RJR argues that youth marketing could not have harmed Mr. Crawford, and thus evidence of youth marketing was "dissimilar" and, therefore, irrelevant (IB, pp. 16-17). RJR's ***only*** argument is to cite Mr. Crawford's answer "I do," in response to a question posed by RJR on cross-examination—"[Y]ou personally believe that the only person that was responsible for you starting to smoke was your brother, Henry; is that correct?" (IB, p. 16). This was the same factual argument that RJR made at trial, and it lost because the jury accepted testimony that RJR did not quote or mention in its brief. On re-direct, Mr. Crawford made clear that he does not blame his older brother for his smoking

addiction. (T. 1808). He was just the one who handed Mr. Crawford his first cigarette. (T. 1808).

Of course, this makes sense in light of the substantial evidence presented at trial establishing that, by marketing to the American public before Mr. Crawford was even born, RJR created a culture in which smoking was the norm, and it was not perceived as bad for you. (T 800-01; 812-41; 1006-07; 1698-1700). Back then, at least 50 percent of all American males smoked. (T 1118; PT3869). There were no laws limiting where people could smoke. (T 799-800). You could smoke in hospitals, schools, airplanes and courthouses. (T. 799-800). The majority of doctors smoked, and RJR used that fact in its marketing. (T. 816-18). Marketing strategies were developed for children too, touting smoking as sexy, stylish, and mature. (T. 792-99; 827-28; PT4013; PT4014; PT3400). This is the world into which Mr. Crawford and his older brother were born, and which impacted their decision to smoke. (T. 1698-1700). In short, there was substantial evidence from which the jury could infer that Mr. Crawford was a victim of RJR's youth marketing that created the atmosphere into which he was born and that continued to influence the American public when he was a child.

RJR also complains about evidence of RJR's reprehensible youth marketing after Mr. Crawford was a child. At its core, RJR's argument is that evidence of conduct that has harmed others is admissible only if it is precisely the same

conduct that harmed Mr. Crawford. Under this rationale, RJR maintains that the youth marketing aspect of the millions it spent on its concealment campaign is different conduct when it comes to determining RJR's reprehensibility. RJR bases this argument on language referencing a "nexus" in *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 423 (2003).

What it does not acknowledge is that its argument is contrary to the United States Supreme Court's decision in a tobacco case three years later—*Philip Morris USA v. Williams*, 549 U.S. 346 (2007). In that case, the court made clear that evidence that the cigarette manufacturer engaged in the same general kind of misconduct that resulted in harm to others is relevant and permissible to "help show that the conduct that harmed the plaintiff also posed a substantial risk of harm to the general public, and so was particularly reprehensible" for purposes of awarding punitive damages." *Id.* at 355. And, contrary to RJR's interpretation of the "nexus" language in the earlier *Campbell* decision, the *Williams* Court did not limit evidence to the very same conduct that harmed the plaintiff; it was the defendant's deceitful marketing of its cigarettes as a whole, with no regard for the people it was injuring and killing. *Id.* That's the evidence of reprehensibility.

This is the case that the First District relied upon in *Townsend* when it held that "youth marketing not seen or relied upon by Mr. Townsend," was nonetheless admissible to show the extent of reprehensibility. *Townsend*, 90 So. 3d at 312-313

n.6, 7 ("The record of this case, like the record in *Martin*, . . ., is replete with evidence of the decades-long, wanton and intentional conduct by RJR in vigorously, persuasively marketing to the public (including young people) a product the company knew was addictive; willfully concealing the serious health hazards posed by cigarette smoking; affirmatively deceiving the public into believing that cigarettes may not be harmful; . . ."). As we stated above, RJR did not acknowledge or address the *Townsend* decision in its brief. RJR also did not acknowledge or address this Court's decision in *Alexander* which disposed of its second argument—that evidence of conduct by other cigarette manufacturer was admissible. As this Court explained, evidence of co-conspirator conduct was certainly admissible where, as here, the complaint includes claims for conspiracy to conceal. *Alexander*, 123 So. 3d at 79-81.

Therefore, all of this evidence was relevant to the jury's task of assessing the reprehensibility of RJR's conduct. In considering punishment and deterrence, the jury also had to determine whether RJR had learned from its past misconduct and turned over a new leaf. Indeed, RJR recognized this. During the second phase of the trial, RJR spent much of its argument presenting testimony that it was now a kinder and gentler company and, thus, there was no need for punishment or deterrence. (T. 2432-2481; 2486-524; 2576-87). But, if RJR's mitigation evidence was relevant, equally relevant is evidence that RJR had learned nothing from the

past 50 years. *See Johns-Manville Sales Cop. v. Janssens*, 463 So. 2d 242, 256 (Fla. 1st DCA 1984) (continued course of intentional conduct relevant to punitive damages). The jury was allowed to see the full picture of the current conduct of RJR to weigh the need for deterrence and punishment. *See id.; see also Owens-Corning Fiberglas Corp. v. Ballard*, 749 So. 2d 483, 486 (Fla. 1999) (purpose of punitive damages is to punish, to deter the defendant, and to deter similar misconduct); *Celotex Corp. v. Pickett*, 490 So. 2d 35, 38 (Fla. 1986) (same); *Campbell v. Government Employees Ins. Co.*, 306 So. 2d 525, 531 (Fla. 1974) (punitive damages are designed to correct evil doing).

B. In any event, RJR failed to establish any resulting harm that would justify vacating the result of the two-week-long trial.

Even if this Court were to disagree with the First District's conclusion regarding the relevance of the aspect of marketing directed at youth, the evidence does not require a reversal of this particular verdict because youth marketing evidence was not a feature of this trial. In the *Campbell* case upon which RJR relies, the evidence of the insurance company's handling of other people's insurance claims was such a feature of the trial that the United States Supreme Court viewed the insured's insurance bad faith case as a "platform to expose, and punish, the perceived deficiencies of State Farm's operations throughout the country." Not so here. While RJR represents that Mr. Crawford introduced "a wide array of evidence," that is just not correct. Out of 1837 pages of trial

transcript, this topic amounted to only 8 pages of trial testimony and less than 3 pages of closing argument during a two-week-long trial. (T. 550, 2387).

Not only that, RJR omitted the trial exhibits from the appellate record. As the appellant, it was RJR's obligation to present this Court with a full appellate record in order to evaluate its arguments for reversal. *See Applegate v. Barnett Bank of Tallahassee*, 377 So. 2d 1150, 1152 (Fla. 1979) (failure to submit an adequate record will result in affirmance). The trial exhibits are essential for this Court to consider whether the evidentiary error (if there was one) was harmful enough to require reversal.[4] This deficiency alone prevents RJR from establishing the type of harm requiring reversal, and RJR cannot now do so for the first time in its reply brief. *Gen. Mortg. Assoc., Inc. v. Campolo Realty & Mortg. Corp.*, 678 So. 2d 431, 431 (Fla. 3d DCA 1996). Nonetheless, we note that the clerk's memoranda that are in the file establish that there were ***over 400 exhibits*** introduced during this trial. Only ***three*** of those documents relate to youth marketing. (T. 792-99; 827-28; PT4013; PT4014; PT3400; R20 3884, 3895). Therefore, even if RJR had created a sufficient appellate record and addressed this argument, it would have failed to establish harm requiring reversal.

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[4] We recognize that this case was unusual in that the trial court clerk returned the trial exhibits to the parties. However, as the appellant, it was RJR's obligation to correct this omission from the appellate record in order to establish its argument for reversible error. *See* Fla. R. Fla. App. 9.200(f)(1); *Stuyvesant Inc. Co. v. State*, 375 So. 2d 620, 620 (Fla. 3d DCA 1979).

Finally, we note that RJR attempts to establish the requisite harm by pointing to the amount of the compensatory damages. This argument fails because RJR ignores two key facts. First, RJR (and all the *Engle* defendants) always substantiate this argument by pointing to size of the punitive damage award, because that is the relevant issue. In *Townsend*, for example, the punitive damage award was almost 4 times the compensatory award. 90 So. 3d 307, 312-16. But here, the punitive damage award is substantially ***smaller*** than the compensatory award. So, if RJR is right that a large punitive damage award is proof positive of harm resulting from inadmissible evidence, then the converse must be true.

Second, and equally compelling, is that the jury awarded the punitive damage amount suggested by RJR. Plaintiff's counsel asked the jury to impose treble damages (three times the compensatory damages). (T. 2603). RJR responded that "another million dollars" was more appropriate. (T. 2630). The jury did as RJR asked, and returned a verdict of $1 million. (R20 3879). That is hardly the conduct of a jury whose passions have been inflamed by inadmissible evidence.

Simply put, the jury heard precisely the evidence it needed to determine the reprehensibility of RJR's conduct and to consider the important purposes of deterrence and punishment in awarding punitive damages. Plus, the jury was instructed to consider only conduct that harmed Mr. Crawford, when deciding whether and how much to award, as requested by RJR. The evidence was relevant,

the jury was instructed as requested by RJR, and there is no basis to surmise that the jury ignored those instructions. The jury's verdict should be affirmed.

II. The circumstantial evidence presented during this trial was more than sufficient for the jury to infer that Mr. Crawford relied upon RJR's fraudulent concealment of the addictiveness and fatal health effects of cigarettes.

A. RJR's argument ignores the difficult standard for directed verdict.

Mr. Crawford agrees that the standard of review of a trial court's ruling on a motion for directed verdict is *de novo* in which the appellate court applies the same test used by the trial court in ruling on the motion. *Maggolc, Inc. v. Roberson*, 116 So. 3d 556, 558 (Fla. 3d DCA 2013). However, RJR again presents a one-sided view of the evidence, ignoring Mr. Crawford's evidence altogether. That is wrong.

Directed verdict is appropriate only if this Court concludes that there is simply no pretence of any evidence supporting Mr. Crawford's case, after construing every possible inference in his favor. *De La Torre v. Crete Carrier Corp.*, 786 So. 2d 1202, 1203 (Fla. 3d DCA 2001). The standard is so stringent and difficult because it is intended to minimize interference with the jury's function and protect a party's right to trial by a jury. *See Gravette v. Turner*, 81 So. 476, 314-15 (Fla. 1919); *Robison By and Through Bugera v. Faine*, 525 So. 2d 903, 905 (Fla. 3d DCA 1987). The overarching concern of an appellate court reviewing a directed verdict motion is ensuring that the constitutional right to a jury trial has not been infringed upon. *Id.*; *see generally* 75A Am. Jur. 2d Trial § 863 Effect on

Right to Jury Trial ("The principal consideration in reviewing a trial court's granting or denying of a motion for a directed verdict is the recognition that interference with the jury function must be minimized so that the erosion of a litigant's right to trial by jury is not effected.").

No matter how remote RJR believes the possibility of Mr. Crawford's recovery might be, it cannot be said that Mr. Crawford's evidence was so slight and inconsequential that no reasonable jury could conclude that RJR's conduct (which has not been challenged on appeal) could have caused Mr. Crawford's addiction to nicotine and, thereby, his cancer 49 years after his first cigarette. The causation element is such an inherently fact-specific inquiry that directed verdict in the face of Mr. Crawford's evidence would be improper as a matter of law. *SeeCuervo v. Mercy Hosp., Inc.*, 694 So. 2d 98, 100 (Fla. 3d DCA 1997).

RJR argues that Mr. Crawford failed to establish causation for concealment and concealment conspiracy counts because he "undisputedly knew the significant health risks allegedly concealed by tobacco companies." (IB, p. 25).[5] There are three fundamental flaws in RJR's argument. First, RJR represents that Mr. Crawford testified that he did not rely on its fraudulent conduct or that of its co-conspirators. While the few excerpts cited by RJR supported it making that

[5] It is remarkable that RJR still refers to an "alleged" concealment conspiracy in the face of overwhelming evidence of the tobacco industry's 50-year conspiracy. *See generally United States v. Philip Morris USA, Inc.*, 449 F. Supp. 3d 1 (D.D.C. 2006) (summarizing the 50-year conspiracy).

argument to the jury, Mr. Crawford presented opposing evidence. For example, Mr. Crawford specifically testified that he believed the industry's assurance that filter tips would protect him on the off chance cigarette smoke contained anything harmful. (T 1707-10; 1812). *See Alexander*, 123 So. 3d at 75 (recognizing similar testimony as supporting claim that concealment campaign caused smoker's addiction and injury). Likewise, as we explained above, Mr. Crawford specifically testified that he did not blame his older brother for his smoking addiction. Therefore, RJR's isolated citations to the record fall far short of meeting the directed verdict standard.

Second, RJR's argument ignores that there were two facts that it concealed, not one. One is the significant health risks caused by ingesting the carcinogens found in cigarette smoke, which RJR addresses. The other is the extreme addictiveness of nicotine ***and*** the fact that RJR purposefully and intentionally engineered cigarettes to promote that addictiveness. Nowhere in its answer brief has RJR addressed the concealment of this important information. For that reason alone, its argument for a directed verdict fails. RJR's failure to assert this basis for a directed verdict bars it from doing so for the first time in its reply brief. *Gen. Mortg. Associates*, 678 So. 2d at 431.

Third, RJR points to evidence suggesting that Mr. Crawford knew that cigarettes were harmful. Again, RJR presents a one-sided view of the evidence,

which is not appropriate argument in support of a directed verdict. For example, RJR claims that Mr. Crawford admitted that, in the 1970s, he purchased a health insurance policy to cover cancer because he was concerned he might get cancer from smoking. That's not what Mr. Crawford testified at all; he specifically testified that he did ***not*** purchase the cancer policy for this reason. (T. 1813-14). Instead, his wife decided to purchase this for them both because so many of her family members had suffered from cancer. (T. 1813-14) None of those family members were smokers. (T. 1813-14). But, even if Mr. Crawford had a general knowledge that smoking might be bad for you, that is a far cry from knowing that smoking is addictive and that starting to smoke would lead to addiction and death—facts that RJR purposefully hid from smokers like Mr. Crawford.

RJR also points to Mr. Crawford's growing awareness over his decades of smoking that it was more harmful than RJR had let on. But, by this time, Mr. Crawford had already been smoking for decades and he was already profoundly hooked. Plaintiff's experts testified extensively about how the power of this addiction constrains the smoker's "choices" (T. 1420-21), and how few smokers are able to quit—approximately 95 percent of smokers who attempt to quit each year are unsuccessful. (T. 1449-50). They testified about how particularly powerful the addiction is when it begins at a young age, and the changes in the brain that occur in young smokers. (T. 1086-88, 1436-41, 2078). They also described how

the tobacco companies' campaign of disinformation in the face of the growing evidence of health risks successfully provided the psychological crutch for addicted smokers to put off the pain of withdrawal. (T. 950-53; PT1933).

Despite their claim to the contrary, RJR's evidence is not direct evidence and it does not rebut the inferences drawn from Mr. Crawford's circumstantial evidence. Instead, both parties presented opposing circumstantial evidence and both asked the jury to draw inferences in their favor. The jury did so, and RJR has failed to meet its extremely difficult burden of establishing that the trial court had no choice but to direct a verdict on these two actions.

B. RJR overstates Mr. Crawford's burden of proof.

RJR's fallback argument is to assert that, as a matter of law, a jury cannot infer reliance on fraudulent concealment from circumstantial evidence.[6] Initially, we point out that in this case, like the *Alexander* decision from this Court, there was direct evidence of reliance—Mr. Crawford specifically testified that he believed the industry's assurance that filter tips would protect him on the off chance cigarette smoke contained anything harmful. 123 So. 3d at 75.

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[6] "Reliance" is awkward phraseology when RJR has concealed rather than misrepresented information. But, we have always agreed that we had to prove a connection between the concealment and Mr. Crawford's decision to begin and continue smoking and this jury found that Mr. Crawford had demonstrated "reliance."

In the event this Court addresses this legal argument nonetheless, we explain here why RJR's analysis is flawed and, therefore, does not require this Court to enter a directed verdict. RJR asserts that *Humana Inc. v. Castillo*, 728 So. 2d 261 (Fla. 2d DCA 1999), applies here to preclude an *Engle* progeny defendant from inferring causation from circumstantial evidence, including the pervasive and misleading advertising campaigns perpetuated by the *Engle* defendants. The *Engle* defendants have argued *Humana* in every *Engle* progeny case, including the *Hallgren* case before the District Court that issued *Humana*. *See Philip Morris USA, Inc. v. Hallgren*, 124 So. 3d 350, 353 (Fla. 2d DCA 2013). Not one reported appellate decision has adopted RJR's argument that *Humana* precludes proof of reliance based on circumstantial evidence.

Plainly stated, the question is what sort of evidence is sufficient to support a jury verdict of reliance. We begin with a point that is not disputed. Under Florida law, jury verdicts, including jury verdicts on fraud, are often supported entirely by circumstantial evidence. *See, e.g.*, *Bacon & Bacon Mfg. Co., Inc. v. Bonsey Partners*, 62 So. 3d 1285, 1287-88 (Fla. 2d DCA 2011) (court should be hesitant to grant directed verdicts in a fraud case based on circumstantial evidence case); *Thor Bear, Inc. v. Crocker Mizner Park, Inc.*, 648 So. 2d 168, 173 (Fla. 4th DCA 1995) (circumstantial evidence on fraud and reliance create fact issues for the jury); *Pinzl v. Lapointe*, 426 So. 2d 65, 66 (Fla. 5th DCA 1983) (reliance is a question of fact);

State Farm Mut. Auto. Ins. Co. v. Weiss, 410 F. Supp. 2d 1146, 1159 (M.D. Fla. 2006) (issues of fraud, including reliance, should be decided by juries because they are factual determinations "often based on circumstantial evidence").

In *R.J. Reynolds Tobacco Co. v. Martin*, 53 So. 3d 1060, 1069-70 (Fla. 1st DCA 2010) (emphasis supplied), the First District simply applied this well established law to hold that there was "*abundant evidence from which the jury could infer Mr. Martin's reliance* on pervasive misleading advertising campaigns . . . for cigarettes in general, and on the false controversy created by the tobacco industry." *Martin* breaks no new ground in its holding that reliance can be proven by circumstantial evidence and remains good law.[7]

Equally important, the Second District's decision in *Humana* says nothing about how plaintiffs must prove reliance. *Humana* was before the court on class certification and the court was considering the plaintiff's argument that it had no obligation to prove reliance at all. *Humana*, 728 So. 2d at 263. According to the plaintiff in *Humana*, reliance could be *assumed* in every case, as to every member of the putative class (regardless of the facts relevant to that plaintiff), merely by proving fraudulent concealment. *Id.* The court merely reached the unremarkable conclusion that reliance must be proven plaintiff-by-plaintiff, and cannot be

[7] The Florida Supreme Court's *Douglas* decision cites *Martin* favorably throughout its analysis on other causation issues, although the reliance issue was not before the Court. *Philip Morris USA, Inc. v Douglas*, 110 So. 3d 419, 429-30, 432-33 (Fla. 2013).

assumed as to every member of the class without individual proof. *Id.* at 264-65. Significantly, the court said nothing about the quality of proof necessary to demonstrate reliance. It merely held that reliance was required. *Id.*

Mr. Crawford has never argued that he did not have to prove reliance nor has he suggested that *Martin* relieved him of that burden. As *Engle* and *Martin* recognized, reliance must be proven by every plaintiff in every case. But, what *Martin* held, in accordance with the Florida law discussed above, is that Mr. Crawford need not prove that he saw a specific advertisement or specific statement to prove reliance. The question is whether Mr. Crawford presented enough circumstantial evidence from which a jury could properly infer that Mr. Crawford acted in reliance upon RJR's scheme of concealment and conspiracy. *Martin*, 53 So. 3d at 1069-70.

Contrary to RJR's argument, Mr. Crawford did not ask the jury to "assume" anything. *See Humana*, 728 So. 2d at 265 (reliance cannot be established by assumptions). The assumption referred to by *Humana* was the erroneous assumption that every plaintiff, regardless of facts, could assume reliance without further proof. By contrast, Mr. Crawford here presented two weeks of evidence focused on Mr. Crawford and RJR, and asked the jury to determine whether he had established a connection between RJR's concealment and Mr. Crawford's reliance. This was a classic jury question, and the jury answered it in Mr. Crawford's favor.

In short, RJR's argument based on *Humana* confuses an "assumption," a conclusion without an evidentiary basis, with an inference, which is a conclusion based on circumstantial evidence.[8] Florida law is clear that cases are not decided on assumptions, but they may properly be based on circumstantial evidence. Another *Engle* progeny decision supports this distinction. *Naugle*, like *Martin* and *Humana*, reaffirms that every plaintiff must prove reliance. *Philip Morris USA, Inc. v. Naugle*, 103 So. 3d 944, 947 (Fla. 4th DCA 2012). But, like *Martin*, it also confirms that reliance does not require direct evidence that the smoker saw or heard a particular advertisement or statement. *Naugle*, 103 So. 3d at 947 ("*it is not necessary that a direct statement be made to the representee* in order to give rise to the right to rely upon the statement") (emphasis supplied). Indeed, based on the same sort of evidence presented by Mr. Crawford in this case and the plaintiff in *Martin*, the Fourth District in *Naugle* affirmed the trial court's denial of directed verdict on reliance, finding the jury's findings to be supported by competent, substantial evidence. *Id.* at 948; *see also Philip Morris USA, Inc. v. Putney*, 117 So. 3d 798, 801 (Fla. 4th DCA 2013) (plaintiff need not identify a particular advertisement or statement to prevail on her concealment or conspiracy claim); *Philip Morris USA, Inc. v. Kayton*, 104 So. 3d 1145, 1149 (Fla. 4th DCA 2012)

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[8] *See* www.Merriam-Webster.com (an "assumption" is a fact or statement taken for granted, or merely assumed to be true; an "inference" is a "conclusion or opinion that is formed because of known facts or evidence").

(same); *R.J. Reynolds Tobacco Co. v. Webb*, 93 So. 3d 331, 333 (Fla. 1st DCA 2012) (citing *Martin* for holding that jury may infer reliance on pervasive misleading advertising campaign and on the false controversy created by the tobacco industry).

Another argument made by RJR below was that Plaintiff was impermissibly stacking inferences. As shown in Section II.A. above, the inference of reliance is based upon *facts* established by this record. In response to these facts, RJR argued that "everyone knew" that smoking was bad for you and that this anti-smoking message was equally ubiquitous. RJR then asked the jury to infer from the existence of such anti-smoking messages that Mr. Crawford did not rely on RJR's campaign of deception and misinformation. Thus, the classic jury question was which inference to draw from these facts—the inference that RJR's billions of dollars was successful in influencing Mr. Crawford's behavior, or the inference that he would have smoked even if RJR had told the complete truth from the beginning. It was for the jury to draw this inference, and it decided that RJR's campaign of concealment and conspiracy caused Mr. Crawford's injury.

III. RJR's arguments to reduce Mr. Crawford's compensatory award fail as well.

In addition to attacking the jury's punitive damages award in issue one, RJR attacks the jury's determination of Mr. Crawford's compensatory damages. This argument fails because RJR has not established that the trial court abused its

discretion when it refused to second guess the jury's determination. RJR also failed to establish that the trial court was obligated to reduce the damages based on Mr. Crawford's comparative fault despite the fact that the jury found that RJR had committed two intentional torts against him.

A. The trial court did not abuse its discretion by refusing to second guess the jury's compensatory damages award.

RJR argues that $9 million is too high a value to place on the pain and suffering that Mr. Crawford experienced for over twenty-one years as a result of his laryngeal cancer and for the pain and suffering he will continue to experience for the remainder of his life. There is no absolute dollar value that can be placed on personal suffering. The best our legal system can do is place this issue in the hands of a jury. Given that responsibility, the jury weighed the evidence carefully and rendered a verdict consistent with other similar cases. RJR cannot meet its high burden of proving that the trial judge abused his discretion.

Initially, RJR's true intention is not a remittitur. If this Court reverses and remands for the trial court to remit the damages award, RJR will assert that it has an absolute right to a new trial of the entire case instead. *See, e.g.*, *Lorillard Tobacco Co. v. Alexander*, 123 So. 3d 67, 77 (Fla. 3d DCA 2013); *R.J. Reynolds Tobacco Co. v. Townsend*, 118 So. 3d 844, 845-46 (Fla. 1st DCA 2013); *Philip Morris USA, Inc. v. Naugle*, 103 So. 3d 944, 948 (Fla. 4th DCA 2012).

Turning to RJR's argument now, Florida law is unequivocal that judges

should rarely vacate the amount that a jury awards. As the Florida Supreme Court emphasized in one of the controlling decisions on this issue, "The trial judge does not sit as a seventh juror with veto power . . . not every verdict which raises a judicial eyebrow should shock the judicial conscience." *Laskey v. Smith*, 239 So. 2d 13, 14 (Fla. 1970). The same is true for appellate judges. *Id.* This is because judges are in no better a position than juries to weigh the facts and value a life:

> Jurors know the nature of pain, embarrassment and inconvenience, and they also know the nature of money. Their problem of equating the two to afford reasonable and just compensation calls for a high order of human judgment, and the law has provided no better yardstick for their guidance than their enlightened conscience. Their problem is not one of mathematical calculation but involves an exercise of their sound judgment of what is fair and right.

Angrand v. Key, 657 So. 2d 1146, 1149 (Fla. 1995) (quoting *Braddock v. Seaboard Air Line R. Co.*, 80 So. 2d 662, 668 (Fla. 1955)).

So, all that remains is the simplistic argument that the verdict is too large. But, a large damage verdict by itself does not indicate excessiveness or impropriety. *Citrus County v. McQuillin*, 840 So. 2d 343, 347 (Fla. 5th DCA 2003); *Zambrano v. Devanesan*, 484 So. 2d 603, 607 (Fla. 4th DCA 1986). As the Florida Supreme Court observed in *Bould v. Touchette*, 349 So. 2d 1181, 1184-85 (Fla. 1977):

> [T]ort cases damages are to be measured by the jury's discretion. The court should never declare a verdict excessive merely because it is above the amount which the court itself considers the jury should have allowed. The verdict should not be disturbed unless it is so

> inordinately large as obviously to exceed the maximum limit of a reasonable range within which the jury may properly operate.

For this reason, more than ordinary discretion is permitted juries in assessing non-economic damages. *Id.* at 1185. In short, there are no "fixed rules" by which to measure the correctness of a pain and suffering damages verdict. *Id.* at 1184.

RJR's response is to direct this court to a dissenting opinion from a First District in *R.J. Reynolds Tobacco Co. v. Smith*, 131 So. 3d 18 (Fla. 1st DCA 2013). However, RJR lost this argument in *Smith*, based on the First District's earlier decision in *Townsend*, 90 So. 3d 307, which relied on the same Florida Supreme Court jurisprudence we summarize here. In *Townsend*, the First District explained: "Although the $10.8 million compensatory damage award in this case is higher than the non-economic damage awards affirmed by this Court in the other *Engle* progeny cases that we have reviewed to date, we cannot say that the award obviously exceeds the 'reasonable range within which the jury may operate.'" *Id.* at 312. Since then, *Engle* Defendants have lost this same argument in this Court and in the Fourth District. *Lorillard Tobacco Co. v. Alexander*, 123 So. 3d 67, 78-79 (Fla. 3d DCA 2013); *Philip Morris USA, Inc. v. Naugle*, 126 So. 3d 1155, 1162-63 (Fla. 4th DCA 2012).

The same is true here as well. At the time of the trial, Mr. Crawford had lived almost a quarter of a century without his voice. The only way he could talk with his wife or anyone was to use an electric device which sounded more like a

robot than a man or a husband. He also demonstrated for the jury how difficult the electronic voice is to understand or to even hear. For this reason, Mr. Crawford rarely visits restaurants or other noisy environments because he simply cannot be heard. The surgery that removed is voice box also permanently deformed his face by leaving a permanent hole in his throat for him to breathe. Is this any less traumatic than any other facial deformity, like a burn scars or a facial fracture? Mr. Crawford described to the jury how people stare at him—at the hole in his throat. It is a sight that is particular repulsive when he has to cough up mucus through the hole, which does multiple times a day, every day. The jury had the opportunity to see this (and feel the repulsion) during the trial. RJR left Mr. Crawford part of a man, without is voice and with a facial deformity. Together, our faces and our voices make up a person's identify, and Mr. Crawford testified that he has struggled for more than twenty years with depression because he has lost his.

During the past two-plus decades, Mr. Crawford has also had to battle real medical issues, like recurrent infections. The hole in his throat deprives his lungs of the natural protections the human anatomy guarantees, causing multiple illness over the years past and inevitably causing more infections as he ages. And, of course, Mr. Crawford lives with the constant fear of the other shoe dropping. One of the findings from Engle is that smoking cigarettes for decades causes multiple

cancers and illness, like lung cancer, bladder cancer, cervical cancer, kidney cancer, pancreatic cancer, stomach cancer, heart attacks and so on. *Engle*, 945 So. 2d 1246, 1277. Even a brief review of the appellate decisions issued in *Engle* progeny cases reveals that many of these smokers are the victims of multiple cancers and diseases. How much is living like this for over twenty years and for living out the rest of a life like this worth? That was a decision for the jury to make, and it cannot be said on this evidence that the jury's verdict is so "inordinately large as obviously to exceed the maximum limit of a reasonable range within which the jury may properly operate." *Bould*, 349 So. 2d at 1184-85.

More to the point, RJR already made this argument to the trial court in a remittitur motion and the trial judge who heard and saw the same evidence that the jury did rejected this argument. RJR has not established why that judge got it wrong. And, to the extent that RJR tried to shore up its argument by pointing to other verdicts, none were truly comparable, being from other jurisdictions, from decades past, or not involving the ongoing fear of another cigarette-related disease.

RJR's only other argument for proving an excessive verdict is the claim that the verdict was the "product of passion and prejudice." (IB, p. 35). In support, RJR cites cases like *Philip Morris, Inc. v. French*, 897 So. 2d 480, 487 (Fla. 3d DCA 2004), in which the trial court granted remittitur because the jury viewed tobacco companies as "a present-day popular villain" and this "interfered with the jury's

ability to assess damages based on a reasonable view of the evidence." But here, there is evidence directly to the contrary.

Most obviously, the jury rejected the fault apportionment and damage awards suggested by the Plaintiff. Mr. Crawford's counsel asked the jury to assign only 5% of the fault to Mr. Crawford. (T 2243-44). But, the jury disagreed. The jury determined that Mr. Crawford's responsibility was much more significant, imposing 30% of the responsibility on him. (R19 3818-3820). The jury also determined that the damages were much lower than suggested by Mr. Crawford's counsel. Plaintiff's counsel requested $15 million to compensate Mr. Crawford. (T 2263). The jury returned less, fixing his past and future damages at $9 million. (R19 3818-3820). The pattern continued during Phase 2 of the trial. Plaintiff's counsel asked the jury to impose treble damages (three times the compensatory damages). (T. 2603). RJR responded that "another million dollars" was more appropriate. (T. 2630). The jury did as RJR asked, and returned a verdict of $1 million. (R20 3879). This is hardly the conduct of a jury who sees RJR as "a present-day popular villain" or who is motivated by passion for Mr. Crawford.

Another fact that undercuts RJR's claim of passion and prejudice is that this was not a swift verdict. This jury deliberated for more than 8 hours, even returning a second day to continue those deliberations. (T. 2387, 2399). If the jury was

carried away by passion and prejudice, as RJR claims, how does it explain that this clear evidence of careful deliberation?

B. The trial court correctly refused to reduce the damages based on Mr. Crawford's comparative fault after the jury found that RJR had committed two intentional torts against him.

The jury found that Mr. Crawford was entitled to a verdict based on RJR's concealment and RJR's conspiracy to conceal. By its plain terms, the comparative fault statute does not apply "to any action based upon an intentional tort." §768.81(4), Fla. Stat. As one appellate court explained in the clearest of terms, "comparative fault principles simply do not apply to intentional torts under Florida law." *Barton Protective Servs., Inc. v. Faber*, 745 So. 2d 968, 976 (Fla. 4th DCA 1999). Other Florida courts agree. *See R.J. Reynolds Tobacco Co. v. Sury*, 118 So. 3d 849, 852-53 (Fla. 1st DCA 2014); *see also Hennis v. City Tropics Bistro, Inc.*, 1 So. 3d 1152, 1153-54 (Fla. 5th DCA 2009); *cf. Meyer v. Thompson,* 861 So. 2d 1256, 1257-58 (Fla. 4th DCA 2003) (reversing trial court's reduction of damages because the comparative fault statute does not apply to fraudulent concealment claim); *Allerton v. State Dep't of Ins.*, 635 So. 2d 36, 39 (Fla. 1st DCA 1994) (noting that conspiracy to defraud is an intentional tort). RJR's arguments to the contrary present a question of law which is subject to *de novo* review.

Attempting to distinguish itself from this precedent, RJR constructs an elaborate argument that this case is a products liability case and that products

liability cases are different. But, no case supports RJR's conclusion that the classification of the case as a products liability case makes any difference on apportionment. In fact, RJR cannot cite to a single Florida case where an appellate court has apportioned fault in a products liability case where the jury has found for the plaintiff on an intentional tort. This is because it has long been settled that, when, as in this case, a jury finds both negligence and an intentional tort, plaintiff's comparative negligence will not reduce the damages award. *Mazzilli v. Doud*, 485 So. 2d 477, 480 (Fla. 3d DCA 1996). This distinction in the application of comparative fault principles is justified because intentional wrongs "differ from simple negligence 'not merely in degree but in the kind of fault . . . and in the social condemnation attached to it.'" *Merrill Crossings Assocs. v. McDonald*, 705 So. 2d 560, 562 (Fla. 1997) (quoting *Wal-Mart Stores Inc. v. McDonald*, 676 So. 2d 12, 21 (Fla. 1st DCA 1996) (in turn, quoting *Prosser and Keeton on the Law of Torts*, § 65 at 462 (5th ed. 1984))).

The intentional tort exception to comparative fault apportionment is based on the legislative policy "that intentional tortfeasors should be required to pay damages as a means of deterring them from future wrongdoing, regardless of whether a plaintiff had been partially negligent." *Dep't of Corr. v. McGhee*, 653 So. 2d 1091, 1101 (Fla. 1st DCA 1995) (Ervin, J., concurring in part, dissenting in part) (citing *Blazovic v. Andrich*, 590 A.2d 222 (N.J. 1991)); R. David De Armis &

Edward L. White, III, *Judge Ervin's Step in the Right Direction: Apportioning Fault Between the Negligent and Intentional Tortfeasor*, 69 Fla. B.J. 92, 93-94 (Oct. 1995) ("This is a sound public policy precept: A person who intentionally harms another should not benefit from the allocation of fault or receive contribution from joint tortfeasors. That person should be held jointly and severally liable for his or her culpable acts, without regard to the negligence of others."). As the Illinois Supreme Court explained after reviewing decisions around the country,

> Because of the qualitative difference between simple negligence and willful and wanton conduct, and because willful and wanton conduct carries a degree of opprobrium not found in merely negligent behavior, we hold that a plaintiff's negligence cannot be compared with a defendant's willful and wanton conduct.

Burke v. 12 Rothschild's Liquor Mart, Inc., 593 N.E.2d 522, 523 (Ill. 1992).

RJR does not cite a single appellate opinion applying comparative fault to an intentional tort. Instead, it relies on inapposite cases that refused to reduce a recovery on a negligence claim by the fault of an intentional tortfeasor. Neither *Merrill Crossings* nor *Slawson v. Fast Food Enters.*, 671 So. 2d 255, 257 (Fla. 4th DCA 1996), addressed the issue of whether an intentional tortfeasor is entitled to have his liability reduced by the negligence of others. They address the exact opposite issue and merely hold that a negligent tortfeasor's liability will not be reduced by the fault of intentional tortfeasors.

RJR also cites cases that generally characterize actions as "products liability

cases," even though they include intentional tort claims. (IB, p. 39). But, none of those cases has anything to do with the comparative fault statute. Instead, their only possible relevance here is that they note that fraud claims are sometimes included in "products liability" cases. None of them suggest in any fashion that the legal rules applying to fraud claims and intentional torts disappear when the claims are brought in a products liability case.

We note that RJR made a similar argument regarding Florida law on civil conspiracy, arguing for a products liability exception to civil conspiracy liability and, again, providing no cases on point. That argument was rejected by this Court in *Rey v. Philip Morris, Inc.*, 75 So. 3d 378, 383 (Fla. 3d DCA 2011), *review denied*, 99 So. 3d 944 (Fla. 2012). The Fifth District relied on *Rey* to reach the same conclusion in thirteen appeals, *see, e.g.*, *Blake v. Lorillard Tobacco Co.*, 81 So. 3d 637, 637-38 (Fla. 5th DCA 2012), *review denied*, 117 So. 3d 411 (Fla. 2013), and the Florida Supreme Court denied review of all of these decisions. RJR's argument here is subject to the same fate. Indeed, the only other decision to address RJR's argument in another *Engle* progeny case has rejected it for the same reasons we argue here. *R.J. Reynolds Tobacco Co. v. Sury*, 118 So. 3d 849, 852-53 (Fla. 1st DCA 2013). In sum, RJR fails to cite to a single case involving an intentional tort in which an appellate court approved the reduction of damages for comparative fault. There is no reason for this case to be the first.

We cannot help but note that RJR understood that the compensatory damages would not be apportioned when it presented argument to the jury in Phase 2 of the trial, which addressed the amount of the jury's punitive damages assessment against RJR. RJR repeatedly emphasized to the jury throughout closing arguments in the punitive damages phase of the trial that the full value of the compensatory damages would be imposed and that the punitive damages were in addition to that. For example:

- But when you decide whether any punitive damages are awarded on top of the $9 million that Mr. Crawford already has, . . .
- So in other words, you have already reached your determination that the full amount of compensation for his injuries is $9 million. Now, $9 million is a lot of money to anyone.
- Now, is it necessary to give Mr. Crawford more money than the $9 million, . . ?
- [Y]ou've already given him $9 million.
- He's already received $9 million.

(T. 2607, 2611, 2614, 2627, 2630). In the context of asking the jury to limit the amount of punitive damages, RJR's position was that Mr. Crawford would receive the full value of the compensatory award. Now, to reduce that award, RJR argues that the damages award is really less than that. RJR can't have it both ways.

Finally, RJR closes its argument by asserting that the trial court failed to consider its discretionary argument that, under the particular facts presented at this

trial, this was not an intentional tort finding. RJR offers no evidentiary support for this supposition, identifies no legal authority requiring a trial court to announce the particular basis of its ruling, and cites no legal basis for its claim that this Court must remand for the trial court to consider this argument again. If RJR believes that the trial court abused its discretion here, it was its obligation to make that argument in its initial brief. Having failed to do that, the argument is waived for appeal now. *See Gen. Mortg. Assoc*, 678 So. 2d at 431.

IV. The denial of RJR's repose instruction was not error and, even if the Florida Supreme Court adopts the Fourth District's minority view of the repose defense, no reversible error occurred here because RJR's repose defense was presented to the jury nonetheless to preserve the issue.

RJR's discussion on this issue is brief and misleading. The only point RJR asserts is that the trial court refused to give its requested repose instruction which would have told the jury that "Reynolds could not be liable for concealment or conspiracy unless the jury found that Mr. Crawford relied on acts of concealment done after May 5, 1982."[9] (IB, p. 47). As RJR concedes, this Court has already rejected RJR's analysis of the repose defense. *Frazier v. Philip Morris USA Inc. and R.J. Reynolds Tobacco Co.*, 89 So. 3d 937, 947-48 (Fla. 3d DCA 2012). But, there's another dispositive fact that RJR does not address—RJR failed to establish or even argue that the denial of the repose instruction was an abuse of discretion, as it must to prevail in this appeal. *See H&H Elec., Inc. v. Lopez*, 967 So. 2d 345,

[9] RJR raised the statute of repose in its second affirmative defense. (R9 749).

348 (Fla. 3d DCA 2007) ("Decisions regarding jury instructions are within the sound discretion of the trial court and absent error, shall not be disturbed on appeal."). In fact, such an attempt would have failed because RJR's view of the repose defense was presented to the jury for determination on the verdict form, and it was done with RJR's express agreement to preserve the issue.

Although RJR recognizes now that *Frazier* forecloses its argument on the interpretation of the statute of repose, that is not what RJR argued to the trial court. Instead, RJR represented that this Court had receded from *Frazier* in a subsequent decision, *Lorillard Tobacco Co. v. Alexander*, 123 So. 3d 67 (Fla. 3d DCA 2013):

> [DEFENSE COUNSEL]: In [*Frazier*], they held that the jury did not need to be instructed on the repose issue. That issue, I would submit, is no longer the best controlling authority in this –
>
> THE COURT: It's my controlling authority, isn't it?
>
> [DEFENSE COUNSEL]: It would have been, but for the Alexander decision. The Alexander decision talks about how the jury has to decide the statute of repose, has to make a determination of whether the smoker relied on a statement made after 1982. If that were not an issue for the jury to decide, then the Alexander court, the Third District Court of Appeal from earlier this month, would not have and could not have written their opinion that evidence should have been admitted on the issue of the statute of repose.

(T. 1836-37). Defense counsel continued urging the trial court to follow *Alexander*, instead of *Frazier*:

> Alexander is the latest thing that the Third DCA has said about the statute of repose, not Frazier. Frazier is five cases ago.

(T. 1843). RJR further represented that "at least four different district courts of appeal have decided that the statute of repose is an issue in these cases." (T. 1836). Then, as now, RJR did not acknowledge that, in fact, the First and Second District Courts of Appeal have agreed with this Court's conclusion in *Frazier* that the statute of repose is not an issue in these cases because the focus of the repose statute is on RJR's conduct, not the plaintiff's actions, and because the undisputed evidence in these cases is that the conspiracy continued long past the repose date. *Philip Morris USA, Inc. and R.J. Reynolds Tobacco Co. v. Hallgren*, 124 So. 3d 350, 353 (Fla. 2d DCA 2013); *R.J. Reynolds Tobacco Co. v. Webb*, 93 So. 3d 331, 333 (Fla. 1st DCA 2012); *see also Laschke v. Brown & Williamson Tobacco Corp.*, 766 So. 2d 1076, 1078-79 (Fla. 2d DCA 2000) (which was relied upon by this Court in *Frazier*, the First District in *Webb* and the Second District in *Hallgren*).

Despite this Court's clear holding in *Frazier*, the lack of a contrary holding in this Court's *Alexander* decision, and the weight of district court authority adopting this Court's decision in *Frazier*, Plaintiff's counsel volunteered to include two extra questions (for both the fraudulent concealment count and the conspiracy count) that asked the jury to answer the precise repose question sought by RJR so that the case does not have to be retried if the Florida Supreme Court adopts the minority view of the Fourth District in *Philip Morris USA, Inc. v. Hess*, 95 So. 3d 254, 261 (Fla. 4th DCA 2012). (T. 1846-50, 1854). Conversely, RJR's only

concern was that it would be able to enforce a finding in its favor if the Florida Supreme Court adopts its repose argument. Everyone agreed that preservation was the purpose of adding these two questions. (T. 1846-50, 1854, 1856-58). So, RJR specifically agreed to put its view of the repose defense to the jury in this fashion, and drafted the exact language that the jury was asked:

- Was any statement referred to in Question 5, on which William Crawford reasonably relied to his detriment, made after May 5, 1982?
- Did any act referred to in Question 7, on which William Crawford reasonably relied to his detriment, occur after May 5, 1982?

(T. 1850-51, 1854-58; R19 3819-20). Accordingly, the denial of RJR's specific repose instruction was not an abuse of discretion because RJR's view of the repose defense was presented to the jury for determination on the verdict form, and it was done with RJR's express agreement to preserve the issue.

RJR does not address any of this in its initial brief. Instead, it misrepresents in its statement of facts that the verdict form was "over objection," but then provides no citation to the trial transcript. (IB, p. 8). Having failed to assert the verdict form (as opposed to the denial of its jury instruction) as the basis for reversal and having failed to argue that the denial of its jury instruction was an abuse of discretion (choosing instead to focus on the question of law), RJR is barred from making any of these arguments in its reply brief. *See Gen. Mortg. Assoc.*, 678 So. 2d at 431. And, as the above discussion makes clear, both

arguments would fail in any event.

Perhaps anticipating our response here (and realizing its inability to defend against these points), RJR adds a harmless error argument in its third (and final) paragraph on this issue, claiming that harm resulted because "there is no way to determine whether, or the extent to which, the punitive award was based on conduct that occurred before or after the repose date of May 5, 1982." (IB, p. 48). But, this one-sentence argument ignores a fundamental point—RJR could not establish resulting harm regardless because the punitive damages request was presented as one question. RJR did not (and has never in any *Engle* progeny action) requested separate punitive damages questions for each of the four causes of action. (R17 3454).[10] Therefore, RJR cannot establish that an error (if one had occurred) as to some of those actions, but not the others, necessarily infected the punitive damages determination. *See Morton v. Gardner*, 513 So. 2d 725, 731 n.15 (Fla. 3d DCA 1987) (finding waiver where appellant does not request that "damages be separately decided in the verdict form").

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[10] Pursuant to section 90.202(6), Florida Statutes (2013), Plaintiff asks this Court to take judicial notice of RJR's proposed verdict forms in *R.J. Reynolds Tobacco Co. v. Ballard*, Case No. 3D13-2597, *R.J. Reynolds Tobacco Co. v. Williams*, Case No. 3D13-2099, *Philip Morris USA Inc. v. Cuculino*, Case No. 3D14-823, *R.J. Reynolds Tobacco Co. v. Reese*, Case No. 3D11-2417, *Frazier v. Philip Morris USA Inc.*, Case No. 3D11-580, and *Ojeda v. R.J. Reynolds Tobacco Co.*, Case No. 3D12-2624.

Finally, in an abundance of caution, we briefly summarize the arguments supporting the conclusions of this Court and both the First and Second District Courts and their applicability to this case: the repose issue was resolved in *Engle*; the repose defense is based on the conduct of the defendant, not the plaintiff;[11] the statute of repose is not a defense to the conspiracy claim;[12] the instructions requested by RJR were not proper statements of the law (R17 3399, 3406, 3409, 3413, 3422); the statute of repose cannot be used to extinguish a cause of action before it accrues except in the medical malpractice context;[13] and application of the statute of repose here would violate Mr. Crawford's right to access to the courts.[14]

In sum, reversal is not required because, as RJR concedes, this Court has rejected RJR's legal argument regarding the statute of repose. In addition, even if the Florida Supreme Court was to adopt RJR's argument in another decision currently pending review at that court, reversal still would not be required in this case because RJR's repose defense was presented to the jury nonetheless to preserve the issue. Therefore, not only is reversal not required, certifying this case

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[11] *Kush v. Lloyd*, 616 So. 2d 415, 418 (Fla. 1992); *see also Nehme v. Smithkline Beecham Clinical Laboratories, Inc.*, 863 So. 2d 201, 209 (Fla. 2003).

[12] *Laschke v. Brown & Williamson Tobacco Corp.*, 766 So. 2d 1076, 1079 (Fla. 2d DCA 2000); *see also McLeod v. Barber*, 764 So. 2d 790, 792 (Fla. 5th DCA 2000) (holding that the statute of repose did not bar an action that was premised on fraudulent conduct that began before but continued into the 12-year period before the complaint was filed).

[13] *Pulmosan Safety Equipment Corp. v. Barnes*, 752 So. 2d 556, 558-59 (Fla. 2000); *Diamond v. E.R. Squibb & Sons*, 397 So. 2d 671, 672 (Fla. 1981).

[14] *Id.*; Fla. Const. Art. 1, § 21.

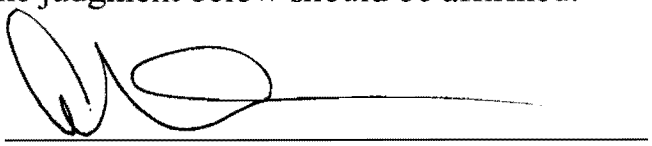
for Florida Supreme Court review would be improper. RJR's real complaint is that the jury found against it on the repose defense, which is not a valid argument for reversing a jury's verdict.

V. *Engle* Does Not Violate Federal Due Process.

As RJR concedes, this argument has been rejected by *Philip Morris USA Inc. v. Douglas*, 110 So. 3d 419, 436 (Fla. 2013). Plus, the United States Supreme Court has now denied review of *Douglas* and every other *Engle* progeny case presenting this issue for review. *See Douglas*, 110 So. 3d 419, *cert. denied*, 134 S. Ct. 332 (2013); *R.J. Reynolds Tobacco Co. v. Clay*, 84 So. 3d 1069 (Fla. 1st DCA 2012), *cert. denied*, 133 S. Ct. 650 (2012); *Liggett Group LLC v. Campbell*, 60 So. 3d 1078 (Fla. 1st DCA 2011), *review denied*, 67 So. 3d 1050 (Fla. 2011), *cert. denied*, 132 S. Ct. 1794 (2012), 132 S. Ct. 1795 (2012); *R.J. Reynolds Tobacco Co. v. Hall*, 70 So. 3d 642 (Fla. 1st DCA 2011), *cert. denied*, 132 S. Ct. 1795 (2012); *R.J. Reynolds Tobacco Co. v. Gray*, 63 So. 3d 902 (Fla. 1st DCA 2011), *review denied*, 67 So. 3d 1050 (Fla. 2011), *cert. denied*, 132 S. Ct. 1810 (2012); *R.J. Reynolds Tobacco Co. v. Martin*, 53 So. 3d 1060 (Fla. 1st DCA 2010), *review denied*, 67 So. 3d 1050 (Fla. 2011), *cert. denied*, 132 S. Ct. 1794 (2012). Even before *Douglas*, this Court also recognized the preclusive effect of the Phase I findings in *Engle*. *See, e.g.*, *Frazier*, 89 So. 3d at 947; *Rey v. Philip Morris, Inc.*, 75 So. 3d 378, 380-82 (Fla. 3d DCA 2011).

CONCLUSION

For all the foregoing reasons, the judgment below should be affirmed.



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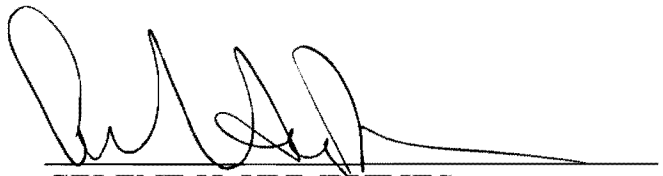

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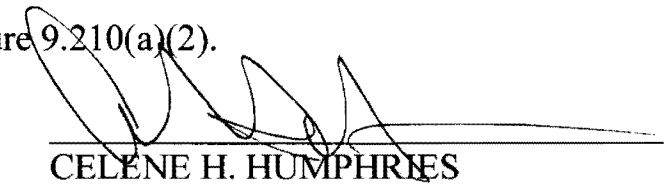
CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief complies with the font requirements of Florida Rules of Appellate Procedure 9.210(a)(2).



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Case No. 3D13-2909
L.T. Case No. 11-14352-CA-20

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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ARGUMENT

I. THE COURT ERRONEOUSLY ADMITTED MISCONDUCT EVIDENCE UNCONNECTED TO MR. CRAWFORD

Mr. Crawford concedes that, under *Philip Morris USA v. Williams*, 549 U.S. 346 (2007), and *State Farm Mutual Automobile Insurance Co. v. Campbell*, 538 U.S. 408 (2003), he could introduce evidence of harm to others only to prove reprehensibility, and only if it involved the "same general kind of misconduct" that harmed him. *See* Answer Brief ("AB") at 18. But at trial, he introduced various evidence unrelated to his "specific harm" (*State Farm*, 538 U.S. at 422). Because the court failed to limit the evidence to "conduct related to [his] claim," a new trial is necessary. *See Williams v. ConAgra Poultry Co.*, 378 F.3d 790, 797 (8th Cir. 2004).

A. The most striking violation was Mr. Crawford's introduction of extensive youth-marketing evidence. Because he testified that his brother was "the only person that was responsible for [his] starting to smoke," *see* .XIII:1737-38, and that, as a youth, his choice of brands had nothing to do with advertising, *see* T.XIII:1743-45, youth marketing bore no connection to any conduct that may have harmed him. Compounding the problem, the youth-marketing evidence addressed conduct from decades before Mr. Crawford began smoking and decades after he reached adulthood. Initial Brief ("IB") at 16-17. This decades-long attack exceeds any permissible reprehensibility analysis. *See State Farm*, 538

U.S. at 424 ("The reprehensibility guidepost does not permit courts to expand the scope of the case so that a defendant may be punished for any malfeasance, which in this case extended for a 20-year period.").[1]

Equally improper was evidence about the 1994 congressional testimony in which tobacco-company executives denied that smoking was addictive. *See* T.IX:1095-1100; SR.4. Because Mr. Crawford had *quit* smoking five years before that testimony, *see* T.XIII:1715, that testimony is not remotely related to anything that may have harmed him.

B. Mr. Crawford suggests that youth marketing was properly considered because the jury could have inferred that it affected him. *See* AB at 17. But no such inference is possible where, as here, there is "direct, uncontradicted, reasonable and unimpeached testimony" to the contrary. *See Paniello v. Smith*, 606 So. 2d 626, 627 (Fla. 3d DCA 1992). Even in his brief, Mr. Crawford contends only that youth marketing affected "the American public"—*not* that it affected *him*. AB at 17.

Mr. Crawford relies on *R.J. Reynolds Tobacco Co. v. Townsend*, 90 So. 3d 307 (Fla. 1st DCA 2012), but that decision did not, and could not, establish a *per*

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[1] Because of various legal and other changes over time, advertising from the 1980s (IB at 16) would bear little resemblance to advertising from Mr. Crawford's childhood in the 1940s and early 1950s. *See*, *e.g.*, 15 U.S.C. § 1335 (banning cigarette advertising on television after January 1, 1971).

se rule that youth-marketing evidence is always fair game—no matter how unrelated to the claims and injuries of the individual smoker. To the contrary, *Townsend* simply rejected, "without further comment," the specific challenge to the evidence in that case. *See id.* at 312 n.6. For all that appears on the face of the opinion, the decision could have rested on the ground that there was sufficient evidence to infer that the deceased smoker in that case had been harmed by youth marketing. *Townsend* thus has no applicability to cases where, as here, a live smoker testifies that youth marketing had nothing to do with his own smoking.[2]

C. Mr. Crawford's other arguments are meritless. He attempts to minimize the amount of youth-marketing evidence introduced in this case, but he ignores the central role it played in his punitive-damage arguments. For example, he argued in Phase I closing that "marketing to the young people" is "why this case is so egregious," and that Reynolds "should be punished" for "targeting kids as the replacement smokers." T.XVII:2241-42. And again in Phase II closing, he asked the jury to punish Reynolds for targeting "12- to 17-year-old kids" and for sending letter to a middle school principal in 1990. *See* T.XXI:2600-01; SR.2-3.[3]

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[2] Mr. Crawford's reliance on *Lorillard Tobacco Co. v. Alexander*, 123 So. 3d 67, 79-81 (Fla. 3d DCA 2013), is misplaced. Reynolds does not argue that the trial court erred by admitting "evidence of co-conspirator conduct" (AB at 19).

[3] Mr. Crawford contends that the Court should affirm because Reynolds failed to include in the record some 400 exhibits that do *not* address youth marketing. AB at 21. But "[n]o proceeding shall be determined, because of an incomplete record,

Further, the jury's rejection of Mr. Crawford's request for $27 million in punitive damages (AB at 22) does not show harmlessness. The excessive compensatory award—which itself likely contains a "punitive element," *see State Farm*, 538 U.S. at 426—confirms the prejudice, and Mr. Crawford's request for an excessive punitive award cannot insulate the evidentiary errors from review. Finally, Reynolds does not challenge the jury instructions on punitive damages (AB at 16, 22-23), but rather the unrelated evidence that was improperly admitted.

II. MR. CRAWFORD FAILED TO PROVE RELIANCE

This is not, as Mr. Crawford would have it, a case where both parties relied on "circumstantial evidence" regarding reliance. AB at 27. Here, Mr. Crawford's own direct testimony shows that he failed to carry his burden. Thus, the concealment and conspiracy verdicts fail, as well as the associated punitive award.

A. As we have shown (IB at 20-22, 24-25), Mr. Crawford believed that his brother was solely responsible for his starting to smoke, T.XIII:1737-38; admitted that cigarette advertising had no effect on his decision to smoke, T.XIII:1743-45, 1751; and knew, since the 1950s, that smoking was hazardous, T.XIII:1783. Mr. Crawford fails to blunt these dispositive admissions.

First, the only "opposing evidence" that Mr. Crawford cites is his purported

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until an opportunity to supplement the record has been given." Fla. R. App. P. 9.200(f)(2). Moreover, Mr. Crawford has already supplemented the record with whatever exhibits he thinks may be relevant for context.

belief that filtered cigarettes were safer. AB at 25, 27. But he admitted that "even if filters weren't around," he "probably would" have "continued smoking the unfiltered brands [he] liked," T.XIII:1749. Moreover, he did not try to show that filtered cigarettes were actually *more* dangerous than unfiltered ones; to the contrary, his expert testified that "the filter has nothing to do with whether it's safer or not safer." T.VIII:906. Thus, Mr. Crawford's switch to filtered cigarettes cannot be a "but-for" cause of his injury. *See* IB at 21-22. In any event, the jury was not asked whether his change from unfiltered to filtered cigarettes harmed him; it was only asked whether "smoking cigarettes" did. *See* R.XIV:3818.

Second, Mr. Crawford asserts that Reynolds concealed not only health risks known to him, but also addiction risks unknown to him. *See* AB at 25. But if his own longstanding knowledge of *health* risks made no difference, it is hard to see why any further knowledge of *addiction* risks would have made any difference. No evidence suggests that it would have made any difference, and Mr. Crawford does not even suggest otherwise. *See id.*

Third, Mr. Crawford does not dispute the settled rule that a party cannot reasonably rely on the concealment of facts already known to him. *See* IB at 22-24. Instead, he tries to minimize the extent of his knowledge. But it did not take "decades of smoking" (AB at 26) until he realized that cigarettes were dangerous—he recognized it as far back "as the 1950s," T.XIII:1783. Nor was his

awareness limited to a "general knowledge that smoking might be bad" (AB at 26). By the 1960s, he knew that smoking could cause cancer, *see* T.XIII:1783, and by the 1970s, he "probably" thought that he "personally" "could get cancer from smoking," T.XIII:1789-90.

B. Mr. Crawford relies heavily on *R.J. Reynolds Tobacco Co. v. Martin*, 53 So. 3d 1060, 1069 (Fla. 1st DCA 2010), which held that a jury may infer reliance from the "pervasive" nature of cigarette advertising. However, that permissive inference is unreasonable in the face of direct and uncontradicted evidence of non-reliance, *see Paniello*, 606 So. 2d at 627, which there was here. Moreover, *Martin* does not disturb the settled rule that a party may not *reasonably* rely on the concealment of facts already known to him.

Finally, and most fundamentally, *Martin* is inconsistent with the settled law of this District, under which reliance *cannot* be inferred merely from the scope of the fraud itself. In *Palmas Y Bambu, S.A. v. E.I. DuPont de Nemours & Co.*, 881 So. 2d 565 (Fla. 3d DCA 2004), this Court held that reliance may not be inferred from "'a defendant's subjection of 'the whole market' to deceptive advertising.'" *Id*. at 573 (citation omitted). Mr. Crawford discusses various decisions from the First and Fourth Districts, but he entirely ignores this dispositive precedent.

III. THE $9 MILLION COMPENSATORY AWARD CANNOT STAND

A. The Compensatory Award Is Excessive

Mr. Crawford asserts that "judges should rarely vacate" excessive awards. AB at 33-34. But he relies mostly on cases decided prior to the Tort Reform and Insurance Act of 1986, which amended Florida's remittitur statute to reflect "the intention of the Legislature that awards of damages be subject to *close scrutiny* by the courts and that all such awards be adequate and not excessive." § 768.74(3), Fla. Stat. (emphasis added). In *Engle*-progeny cases as elsewhere, the DCAs thus have not hesitated to set aside excessive damages awards.[4]

1. Mr. Crawford agrees that comparable cases should inform the excessiveness determination. AB at 37. But two of his four principal authorities—*Townsend* and *Alexander*—were wrongful-death cases, which shed no light on the appropriate measure of damages for a living smoker. His third principal authority is the original panel opinion in *Naugle*, which upheld a large award, but he fails to mention that the court reversed itself on that point on rehearing. *Philip Morris USA, Inc. v. Naugle*, 103 So. 3d 944, 948-49 (Fla. 4th DCA 2012). That leaves only *R.J. Reynolds Tobacco Co. v. Smith*, 131 So. 3d 18

[4] *See, e.g*, *Philip Morris USA, Inc. v. Putney*, 117 So. 3d 798, 803 (Fla. 4th DCA 2013) (compensatory award); *Philip Morris USA, Inc. v. Naugle*, 103 So. 3d 944, 948-49 (Fla. 4th DCA 2012) (compensatory and punitive awards); *R.J. Reynolds Tobacco Co. v. Webb*, 93 So. 3d 331, 336-39 (Fla. 1st DCA 2012) (compensatory award); *R.J. Reynolds Tobacco Co. v. Townsend*, 90 So. 3d 307, 312-16 (Fla. 1st DCA 2012) (punitive award).

(Fla. 1st DCA 2013), where a majority concluded that a $10 million award to a living smoker was "conscience-shocking," bore no "'reasonable relationship' to the harm proven," and "grossly overcompensate[d] the plaintiff." *Id.* at 19 (Wetherell, J., specially concurring); *id.* at 20 (Makar, J., concurring). But for the panel's mistaken conclusion that they were bound by *Townsend*, a wrongful-death case, the $10 million award would not have survived.

Mr. Crawford fares no better in addressing Reynolds's authority. Our opening brief discussed seven decisions on the appropriate measure of damages for living cancer survivors and others with severe impairments, disfigurement, and the like from serious medical procedures. *See* IB at 30-32. Mr. Crawford tries to brush them all aside as not "truly comparable." AB at 37. But even a quick skim of these cases reveals plaintiffs with far greater injuries than Mr. Crawford receiving awards that are far lower (even when adjusted for inflation). Mr. Crawford provides no reasoned justification for allowing such an extreme departure from the this line of precedent.[5]

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[5] Jury verdicts in other personal-injury *Engle*-progeny cases involving laryngeal or throat cancer further confirm the extent to which the compensatory award in this case is an outlier. *See, e.g.*, R.XXII:4258-60 (*In re: Engle Progeny Cases Tobacco Litig. (Kirkland)*, Case No. 08-00673 (Fla. 13th Cir. Ct) ($100,000 award), *aff'd per curiam*, *R.J. Reynolds Tobacco Co. v. Kirkland*, 136 So. 3d 604 (Fla. 2d DCA 2013); R.XXII:4269-74 (*Reese v. R.J. Reynolds Tobacco Co.*, Case No. 07-30296-CA-24 (Fla. 11th Cir. Ct.) ($2,968,277 award for past damages for throat cancer), *aff'd per curiam*, *R.J. Reynolds Tobacco Co. v. Reese*, 3D11-2417, WL 627075 (Fla. 3d DCA Feb. 20, 2013)). So too does *Engle* itself, where named

2. The $9 million award also lacks a proper evidentiary basis. Mr. Crawford's entire damages case consisted of five pages of testimony that he speaks through a machine, breathes through a hole in his throat, coughs through the same hole, does not speak in restaurants, and is sometimes depressed at his condition. T.XIII:1721-25. These injuries are no more severe—and in many cases are much less severe—than those in the cases discussed in our opening brief.

Without any record citation, Mr. Crawford now claims to have an "ongoing fear of another cigarette-related disease." AB at 37. But at trial, he never made that claim.[6] And even if he had, damages for fear of a future disease may be recovered only if there is an objectively reasonable basis for the fear. *See D'Augustino v. Bristol-Myers Squibb Co.*, 980 F. Supp. 1452, 1454 (M.D. Fla. 1997).[7] No such showing would be possible here. According to his own expert, when a smoker quits smoking, his or her risk of developing cancer decreases over time. *See* T.XII:1663. Mr. Crawford quit smoking in 1989, *see* T.XIII:1715, and

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plaintiff Frank Amodeo recovered approximately $3.7 million for his case of throat cancer, and named plaintiff Mary Farnan recovered only $1.6 million for her case of lung cancer. Pursuant to section 90.202(6), Florida Statutes (2013), Reynolds has concurrently filed a motion, asking this Court to take judicial notice of the Phase II-A verdict forms in the *Engle* trial.

[6] Nor did he testify about any "recurrent infections." AB at 36.

[7] *See also Coca-Cola Bottling Co. v. Hagan*, 813 So. 2d 167, 169 (Fla. 5th DCA 2002) ("The fear of AIDS cases in which recovery has been permitted for negligent infliction of emotional distress and upset alone, require as a threshold, a showing by the plaintiff that the fear is reasonable.").

"has been cancer free" since "late 1992," *see* T.XII:1611.

3. Finally, the sheer amount of the compensatory damages suggests that the award was the product of passion. *See Glabman v. De La Cruz*, 954 So. 2d 60, 63 (3d DCA 2007). So too does Mr. Crawford's repeated improper argument that Reynolds "should be punished" for "targeting kids as the replacement smokers." T.XVII:2242; *see supra* § I.C. Mr. Crawford attempts to portray the verdict as measured because the jury failed to award the entire $42 million that he had requested. AB at 38. But as noted above, a party cannot insulate an excessive award from review merely by having requested ones that are even more excessive.

B. Comparative Fault Applies

Mr. Crawford does not seriously dispute that the comparative-fault statute turns on the overall nature of an "entire action," not on whether the action happens to "includ[e]" any intentional-tort claims. *See, e.g.*, *Merrill Crossings Assocs. v. McDonald*, 705 So. 2d 560, 563 (Fla. 1997); *Slawson v. Fast Food Enters.*, 671 So. 2d 255, 258 (Fla. 4th DCA 1996). And he all but concedes that "this case is a products liability case." *See* AB at 39-40. That alone should be dispositive—while he disputes that "the classification of the case as a products liability case makes any difference on apportionment," *id.* at 40, the comparative-fault statute *expressly defines* a "products liability action" as a "negligence action" fully subject to apportionment. *See* § 768.81(1)(c)-(d), Fla. Stat. Although the offset

issue turns directly on that provision, Mr. Crawford never even mentions it.

1. As to precedent, Mr. Crawford argues that Reynolds "cannot cite to a single Florida case where an appellate court has apportioned fault in a products liability case where the jury has found for the plaintiff on an intentional tort." AB at 40. But the only published appellate decision to address that question is *R.J. Reynolds Tobacco Co. v. Sury*, 118 So. 3d 849 (Fla. 1st DCA 2013), which was wrongly decided for various reasons explained at length in our opening brief, including its failure even to mention the controlling "products liability" prong of the statute. *See* IB at 45-46. Mr. Crawford further cites *Mazzilli v. Doud*, 485 So. 2d 477 (Fla. 3d DCA 1986), a case involving a battery that occurred before the apportionment statute was even enacted. As we have shown (IB at 45-46), *Mazzilli* is obviously inapposite here. So too is *Rey v. Philip Morris, Inc.*, 75 So. 3d 378 (Fla. 3d DCA 2011), which had nothing to do with comparative fault. And so too are the handful of other cases cited by Mr. Crawford, none of which involved products-liability actions.[8]

2. Mr. Crawford also argues that the intentional-tort exception is based on a

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[8] Mr. Crawford's remaining cases are also inapposite for other reasons as well. *Meyer v. Thompson*, 861 So. 2d 1256, 1258 (Fla. 4th DCA 2003), and *Barton Protective Services, Inc. v. Faber*, 745 So. 2d 968, 975 (Fla. 4th DCA 1999), both involved *solely* intentional-tort claims. *Hennis v. City Tropics Bistro, Inc.*, 1 So. 3d 1152, 1153 (Fla. 5th DCA 2009), affirmed a reduction for comparative fault. And *Allerton v. State Department of Insurance*, 635 So. 2d 36, 39 (Fla. 1st DCA 1994), simply confirms that conspiracy is an intentional tort.

policy that intentional tortfeasors should pay damages "regardless of whether a plaintiff had been partially negligent." AB at 40-41. He quotes the concurrence in *Department of Corrections v. McGhee*, 653 So. 2d 1091, 1101 (Fla. 1st DCA 1995) (Ervin, J., concurring in part and dissenting in part), but fails to explain that the quoted passage appears in a discussion of "early cases" that Judge Ervin did *not* find persuasive. *See id*. To the contrary, Judge Ervin was "greatly persuaded" by the *opposite* argument—that "the more just result was to allow comparative negligence as to both negligent and intentional tortfeasors." *Id*.

Ultimately, however, the only policy judgment that matters is that of the Florida legislature. In *its* most recent pronouncement on the topic, the legislature characterized un-apportioned liability as "inequitable and unfair," and it specifically concluded that, "*in a products liability action* as defined in this act, *fault should be apportioned among all responsible persons*." 2011 Fla. Sess. Law Serv. Ch. 2011-215 § 2 (West) (emphases added).

3. Mr. Crawford hints that Reynolds waived its comparative-fault argument by suggesting to the jury during Phase II closing argument that he would receive the full $9 million compensatory award. *See* AB at 43. However, Mr. Crawford never argued waiver below; instead, he sought an unreduced judgment solely on the ground that the comparative-fault statute did not apply. *See* SR.1. Even as appellee, Mr. Crawford cannot raise entirely new arguments for the first time on

appeal. *See Riverwood Condo. Ass'n v. Litecrete, Inc.*, 69 So. 3d 983, 985-96 (Fla. 3d DCA 2011). In any event, Mr. Crawford's waiver argument is wrong because, in context, Reynolds's discussion of "the $9 million that Mr. Crawford already has" (T.XXI:2607) was simply a reference to the compensatory award. *See, e.g.*, T.XXI:2610 ("You decided that Mr. Crawford's injuries deserved $9 million in compensatory damages."); T.XXI:2611 ("[T]he full amount of compensation for his injuries is $9 million."); T.XXI:2614 ("$9 million of full compensation"). Moreover, Reynolds specifically reminded the jury that Mr. Crawford "already admitted that, in this case, his actions were a partial proximate cause" of his own injury. T.XXI:2607. None of this mislead the jury.[9]

4. If this Court were to adopt *Sury*, a remand would be necessary for the trial court to exercise its discretion to determine the nature of Mr. Crawford's action. *See* 118 So. 3d at 852. Here, the trial court immediately entered the unreduced judgment in response to a letter from Mr. Crawford, which erroneously cited *Sury* as holding "that the plaintiff's comparative fault *may not be reduced* if the defendant is found responsible for an intentional tort." SR.1 (emphasis

[9] Moreover, all of this followed the Phase I closing, in which Mr. Crawford himself, in seeking to lower his own share of comparative fault, expressly invited the jury to consider concealment and conspiracy in apportioning fault. *See* T.XVII:2243 ("So a lie is not the same thing. When you compare a lie to what he should have done, it's two different things. So the large majority of fault in this case belongs to the defendant, not to Mr. Crawford.").

added). Because the court thus failed to recognize its discretion under *Sury*, a remand would be necessary if this Court were to follow that decision. *See, e.g.*, *Burdick v. State*, 594 So. 2d 267, 271 (Fla. 1992).

IV. THE TRIAL COURT FAILED TO INSTRUCT ON REPOSE

Mr. Crawford acknowledges the conflict in authority implicated by the trial court's failure to instruct on the fraud statute of repose. *See* AB at 46. Accordingly, this Court should either hold the case pending resolution of *Hess v. Philip Morris USA, Inc.*, SC12-2153, and *Philip Morris USA, Inc. v. Russo*, SC12-1401, or else certify a conflict. Mr. Crawford's contrary arguments are meritless.

First, Mr. Crawford contends that the denial of a repose instruction was harmless because the verdict form asked the jury to determine whether he relied on post-1982 acts of concealment or conspiracy. AB at 44-45. However, neither the questions posed, nor the jury's affirmative answer to them, indicate whether (or the extent to which) the jury based punitive damages on pre-1982 conduct. At least some of the punitive award may have rested on pre-1982 conduct, given Mr. Crawford's exhortation to punish Reynolds for youth marketing in the late 1920s and early 1960s. Imposing punishment for that conduct would be improper if Reynolds's position were to prevail in *Hess* and *Russo*.

Second, Mr. Crawford contends that Reynolds effectively withdrew its request for a repose instruction by consenting to the verdict form. AB at 46-47.

That is incorrect. The verdict-form questions were framed by Mr. Crawford, and they reflect *his* view of what was necessary to avoid a re-trial if the defendants were to prevail in *Hess* and *Russo*. *See* T.XIV:1848 (Mr. Crawford's counsel proposing questions "[b]ecause I don't want to have to retry this"). In failing to object to the verdict-form questions, Reynolds never withdrew its broader, antecedent objection to the failure to instruct on repose.

Finally, Mr. Crawford contends that the instructions requested by Reynolds would not have helped Reynolds because they did not address punitive damages claim-by-claim. AB at 48. That too is incorrect. The instructions given correctly informed that jury that it could punish only for harms to Mr. Crawford "caused by Reynolds' punishable conduct," T.XVII:2194, and only for "the specific conduct" that formed the basis of liability "on [the] claims involving concealment or conspiracy to conceal," T.XXI:2594. Thus, had the court given the repose instruction sought by Reynolds, the jury could not have considered pre-1982 conduct in assessing punitive damages.

CONCLUSION

Reynolds is entitled to judgment on the concealment and conspiracy claims (and the associated demand for punitive damages) and to a new trial on all other issues. At a minimum, the compensatory award should be remitted and further reduced to reflect the jury's allocation of comparative fault.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served through the Florida Courts E-Filing Portal and via e-mail on counsel listed below this 30th day of June, 2014.

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CERTIFICATE OF COMPLIANCE

Pursuant to Florida Rule of Appellate Procedure 9.210(2), counsel for Reynolds hereby certifies that the foregoing brief complies with the applicable font requirements because it is written in 14-point Times New Roman font.

DATED: June 30, 2014

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