IN THE SUPREME COURT OF FLORIDA

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

Petitioner,

Case No. SC20-291

vs.

L.T. Case Nos. 1D17-210
R.J. REYNOLDS TOBACCO COMPANY, 2007-CA-11551

Respondent.

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

PETITIONER'S INITIAL BRIEF ON MERITS

GREGORY D. PRYSOCK
Florida Bar No. 0062420
KATHERINE M. MASSA
Florida Bar No. 0078316
ANTONIO LUCIANO
Florida Bar No. 105342
MORGAN & MORGAN, P.A.
76 S. Laura Street, Suite 1100
Jacksonville, FL 33202
Tel: (904) 398-2722
gprysock@forthepeople.com
kmassa@forthepeople.com
tluciano@forthepeople.com

KEITH R. MITNIK
Florida Bar No. 0436127

CELENE H. HUMPHRIES
Florida Bar No. 884881
THOMAS J. SEIDER
Florida Bar No. 86238
SHEA T. MOXON
Florida Bar No. 12564
BRANNOCK HUMPHRIES &
BERMAN
1111 W. Cass Street, Suite 200
Tampa, FL 33606
Tel: (813) 223-4300
tobacco@bhappeals.com

Counsel for Petitioner

MORGAN & MORGAN, P.A.
P.O. Box 7979
Orlando, FL 32808
Tel: (407) 849-2383
kmitnik@forthepeople.com

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INTRODUCTION

This case stems from a class-action lawsuit brought against cigarette manufacturers[1] and cigarette industry organizations.[2] *Engle v. Liggett Group, Inc.*, 945 So. 2d 1246, 1255 (Fla. 2006). In 2006, this Court partially decertified the class action, holding that the individual class members could initiate individual trials to address the issues of causation and damages, and that the common core findings as to the class defendants' conduct would have *res judicata* effect in those trials. *Id.* at 1269-70, 1277. The class action is often referred to as the *Engle* class, and cases like this one are called *Engle* progeny cases.

As to some of the actions tried to the class jury, this Court accepted the *Engle* defendants' argument that the jury's findings were inadequate to allow subsequent juries to consider the individual questions of reliance and legal cause. *Id.* at 1255, 1269-70, 1277. That included the fraudulent misrepresentation and misrepresentation conspiracy counts. The *Engle* defendants had argued that it would be a violation of their due process rights to ask new juries to decide causation because there is no knowing which specific statements that the class

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[1] The cigarette companies are: R.J. Reynolds Tobacco Company; RJR Nabisco, Inc.; Philip Morris Incorporated (Philip Morris USA); Philip Morris Companies, Inc.; Lorillard Tobacco Company; Lorillard, Inc.; Brown & Williamson Tobacco Corporation, individually and as successor by merger to The American Tobacco Company; Liggett Group Inc.; Brooke Group Holding Inc., and Dosal Tobacco Corp. *Engle*, 945 So. 2d at 1256 n.3.

[2] The cigarette industry organizations are: The Council for Tobacco Research—USA, Inc., and The Tobacco Institute, Inc. *Id.*

action jury had found to be fraudulent. (Brief on the Merits of All Respondents Other than Liggett and Brooke, *Engle*, 2004 WL 1671058, at *2-3, 10, 27-29 (A89-90)). This Court agreed. *Engle*, 945 So. 2d at 1255, 1269-70.

The *Engle* defendants attempted a similar argument against the other fraud actions—fraudulent concealment and conspiracy to conceal. The *Engle* defendants recognized that the concealment findings were not premised on specific statements, but claimed the concealment findings were equally imprecise. (Brief on the Merits, *Engle*, 2004 WL 1671058, at *10, 27; A87-92). This Court disagreed. *Engle*, 945 So. 2d at 1255, 1269-70, 1277. The findings on fraudulent concealment and concealment conspiracy were given *res judicata* effect, and the fraudulent misrepresentation and misrepresentation conspiracy findings were not. *Id.*

Over a decade (and 364 trials) later, the First District Court of Appeal has rewritten the fraudulent concealment and concealment conspiracy actions to require reliance on a specific statement. In this case, *R.J. Reynolds v. Prentice*, 290 So. 3d 963, 965 (Fla. 1st DCA 2019), the First District reversed the concealment conspiracy verdict for the Petitioner because the jury instruction did not require proof that the decedent, Mr. Price, "relied to his detriment on a statement." Citing its recent decision, *R.J. Reynolds v. Whitmire*, 260 So. 3d 536 (Fla. 1st DCA 2018), the First District held that the concealment actions require reliance on "false statements." *Id.* at 966.

The Second, Third, and Fourth District Courts of Appeal disagree. Here, we ask the Court to quash the decision of the First District, and to approve the decisions of the other district courts of appeal. At a minimum, the decision should be quashed because the jury instructions here adequately addressed the applicable legal standard. Alternatively, we ask this Court to quash the First District's decision in part because it erroneously granted a new trial on all actions and claims, not just the concealment and conspiracy actions, particularly since the Respondent did not make such a broad request.

STATEMENT OF THE CASE AND OF THE FACTS

The *Engle* class action was brought on behalf of 700,000 smokers in 1994. The trial lasted two years, and was partially decertified by this Court in 2006.

This case originated twenty-six years ago as a class action of sick smokers and their survivors. *Engle*, 945 So. 2d at 1256. The class began at about 700,000 class members, and proceeded under a three-phase trial plan. *Id.* at 1256-58.

The first phase concerned the claims common to the entire class—the misconduct of the *Engle* defendants. *Id.* at 1256. After a year-long trial in which the jury heard from hundreds of witnesses and reviewed thousands of documents, the jury reached findings applicable to every member of the class concerning the conduct of the *Engle* defendants. *Id.*; Final Judgment and Amended Omnibus Order, *Engle v. R.J. Reynolds Tobacco*, (Fla. 11th Cir. Ct. Nov. 6, 2000), 2000 WL 33534572, at *1-2 (A9-11). Among other findings, the jury found that the *Engle*

defendants were negligent, sold an unreasonably dangerous product, and individually, and as part of a conspiracy, worked to hide the addictive nature and health risks of cigarettes. *Id.* at 1257 n.4.

The trial court then spent another year trying the issues of causation, comparative negligence, and damages as to the named class representatives, and the punitive damages claim of the class. (A9-10). The jury found in favor of the class representatives on most issues, awarded compensatory damages, and imposed punitive damages. *Engle*, 945 So. 2d at 1257. The trial court entered judgment, and the *Engle* defendants appealed. *Id.* at 1257-58.

The Third District Court of Appeal reversed, finding the original class certification to be in error. *Liggett Group, Inc. v. Engle*, 853 So. 2d 434, 442 (Fla. 3d DCA 2003). This Court reversed the Third District, holding that "the trial court did not abuse its discretion in certifying the class." *Engle*, 945 So. 2d at 1267.

This Court agreed, however, that the case could not proceed further as a class action because, going forward, individual issues such as legal causation, comparative negligence, and damages would predominate. *Id.* at 1267-69. This Court held that the individual class members could continue their cases by filing individual actions within a year of the *Engle* mandate. *Id*. at 1277.[3] This Court also

[3] Of the estimated 700,000, only about 8,000 people filed suit on time, less than 1 percent of the class. (A102-03). (https://www.sec.gov/Archives/edgar/data/1275283/000095014409001505/g17683e10vk.htm).

adopted a pragmatic solution to preserve the phase 1 findings made by the class action jury. *Id.* at 1269-70. This Court examined each phase 1 finding and, based on its review of the *Engle* trial record, gave *res judicata* effect in the individual trials to those findings that were applicable to the entire class. *Engle*, 945 So. 2d at 1255, 1269-70, 1277.

In the class action appeal, the *Engle* defendants repeatedly acknowledged that the fraudulent concealment counts do not require reliance on a statement.

In the class action appeal, the *Engle* defendants repeatedly recognized that, unlike the misrepresentation counts, the concealment counts are not premised on a statement being made by them.

A. The clearest instance is that they raised this as an issue on appeal.

The *Engle* defendants had moved for directed verdict, arguing that the trial court had improperly tried pure concealment actions because the class had failed to establish a duty to disclose. (A10-11). The court denied the motion, finding that a duty to disclose existed:

> Not only was there misinformation supplied by defendants, there was concealment of known information which affected the health of the public at large. Despite a duty not to deceive, and a duty to disclose, the defendants failed to reveal information they knew was contrary to that which they disseminated—information that the defendants had developed through their own research. The concept of duty to disclose and duty not to deceive can be stated in no clearer terms than the words of the Court in *Joiner v. McCullers*, 28 So. 2d 823 (Fla. 1947):
>
> > the rule that fraud cannot be predicated on a failure to disclose facts where the information is as accessible to one party as to the other, and the truth may be ascertained

> by the exercise of reasonable diligence, does not justify a resort to active deceit or fraud, and hence, does not apply where a party in addition to non-disclosure uses any artifice to throw the other party off his guard and to lull him into a false security. The concealment becomes a fraud where it is effected by misleading and deceptive talk, acts of conduct, or is accompanied by misrepresentations, or where in addition to a party's silence there is any statement, or act on his part which tends affirmatively to a suppression of the truth, or to a covering up or disguising of the truth, or to a withdrawal or distraction of a party's attention from the real facts; then the line is overstepped and the concealment becomes fraud.

(A11).

The *Engle* defendants appealed this issue to the Third District, arguing that the fraudulent concealment and concealment conspiracy actions "improperly allowed the jury to impose liability for a pure concealment of fact, unrelated to any affirmative statement." (Combined Initial Brief of All Defendants Other than Liggett and Brooke, *Liggett Group v. Engle*, 853 So. 2d 434 (Fla. 3d DCA 2003), 2001 WL 34136737, at Section II(B)(3) (A45); *see also* A80-82). They repeated their argument: "Florida law does not recognize a claim for a pure concealment of fact, except in cases involving a sale of residential real estate, a fiduciary duty to disclose, or other circumstances not present here." (A45). The class plaintiffs disagreed on the merits, and pointed out that the *Engle* defendants had failed to preserve the argument. (A55-57).

The *Engle* defendants renewed the argument to this Court, referring to the

fraudulent concealment and concealment conspiracy actions as "nondisclosure" claims because they did not require reliance on a statement. (A91-92; *see also* Brief on the Merits, *Engle*, 2004 WL 1671058, at *50 n.35; Motion for Rehearing and/or Clarification, *Engle* (A99 n.1)). The *Engle* defendants lost, and this Court afforded *res judicata* effect to the concealment findings. *Engle*, 945 So. 2d at 1255, 1269-70, 1277.

B. The *Engle* defendants' argument on another appellate issue also recognized that the fraudulent concealment counts do not require reliance on a statement.

Another appellate issue was the *Engle* defendants' due process argument against the three-phase trial plan. In their appeal, the *Engle* defendants argued that later juries could not decide causation because the phase 1 findings were too generalized to identify the conduct found to be wrongful. (A40-44). Phase 2 of the class trial addressed the causation issue for the class representatives. *Engle*, 945 So. 2d at 1257. In the event their judgment was affirmed, the class plan required a phase 3 trial to determine causation for the remaining individual class members. (A40).

On the concealment claims, the *Engle* defendants argued that the phase 3 juries would never know which ***concealment or omission*** the phase 1 jury had found to be unlawful. (Brief on the Merits, *Engle*, 2004 WL 1671058, at *10, 27; Answer Brief on the Merits of Respondents Liggett Group Inc. and Brooke Group Holding, Inc., *Engle*, 2003 WL 23678664, at *1; A41 n.11; Combined Reply Brief

of all Appellants other than Liggett and Brooke, *Engle* (A78, 83-84)). Contrast the arguments directed at the fraudulent misrepresentation claims—that the later juries would never know which ***statements*** had been found to be unlawful. (Brief on the Merits, *Engle*, 2004 WL 1671058, at *10, 27; Liggett Answer Brief, *Engle*, 2003 WL 23678664, at *1; A38, 41-43; A65-66, 69-70, 72, 76 n.24, 78).

When this Court partially decertified the class, it adopted the *Engle* defendants' argument as to the fraudulent misrepresentation finding, holding that the finding is "'inadequate to allow a subsequent jury to consider individual questions of reliance and legal cause.'" (A87). The misrepresentation finding is that "the defendants made a false or misleading statement of material fact with the intention of misleading smokers." *Engle*, 945 So. 2d at 1257 n.4.

On rehearing to this Court, the *Engle* defendants argued that the two concealment findings are just as inadequate as the misrepresentation finding. (A87-92, 99 n.1). The fraudulent concealment finding is that "the defendants concealed or omitted material information not otherwise known or available knowing that the material was false or misleading or failed to disclose a material fact concerning the health effects or addictive nature of smoking cigarettes or both." *Engle*, 945 So. 2d at 1257 n.4. The concealment conspiracy finding is that "the defendants agreed to conceal or omit information regarding the health effects of cigarettes or their addictive nature with the intention that smokers and the public would rely on this

information to their detriment." *Id.*

Significant to the issue on review here, the *Engle* defendants never contended that the concealment findings are premised on statements. Although their rehearing motion mentioned "misstatements," the *Engle* defendants were addressing the misrepresentation conspiracy finding (A89-90), and this Court amended its decision to deny *res judicata* effect to the misrepresentation conspiracy finding as well. *Engle*, 945 So. 2d at 1255.

As to the concealment counts, though, the *Engle* defendants repeatedly acknowledged that they were premised only on concealments and omissions, and even pointed to the phase 2 verdict form which confirmed that fact. (A88-90). Like the progeny trials, phase 2 of the class action addressed causation as to the class representatives. *Engle*, 945 So. 2d at 1257.

In phase 2, the class action jury was instructed: "[I]n your earlier verdict you found that each of the defendants concealed or omitted material information . . . . The issue in Phase II as to the three class representatives is whether these concealments or omissions were a legal cause of injury [to the three individuals]." (A91 n.9). And the phase 2 verdict form repeated the phase 1 finding: "each of the Defendants concealed or omitted material information," and then asked the jury to decide whether each *Engle* defendant's "concealment or omission" was "a legal cause of injury to [that class representative]." (A91 n.10).

This Court did not change its position on the concealment counts. The findings on fraudulent concealment and concealment conspiracy were given *res judicata* effect; the fraudulent misrepresentation and misrepresentation conspiracy findings were not. *Engle*, 945 So. 2d at 1255, 1269-70, 1277.

The *Engle* defendants challenged that decision in the United States Supreme Court and again recognized that the concealment and conspiracy to conceal actions were not tethered to statements, but were instead premised on concealments and omissions. Petition for a Writ of Certiorari, *R.J. Reynolds v. Engle*, 522 U.S. 1056 (2007), 2007 WL 1494692, at *16.

There have been 364 trials conducted since this Court's 2006 decision. None included counts for misrepresentation and the corresponding conspiracy. The only fraud actions tried are for concealment and conspiracy to conceal.

The *Engle* defendants pivoted, arguing that the concealment counts required reliance on a specific statement.

Having blocked the misrepresentation actions, the *Engle* defendants pivoted—arguing that the concealment counts require the same individualized proof that had been the basis of their due process challenge to the misrepresentation counts—reliance on a statement.

The first was *R.J. Reynolds v. Martin*, 53 So. 3d 1060 (Fla. 1st DCA 2010). RJR argued that the concealment counts required proof that the smoker "relied on statements that fraudulently omitted material information." Reply Brief of

Appellant, *Martin*, 2010 WL 11184851, at *12; *see also* Amended Initial Brief of Appellant, *Martin*, 2010 WL 11692461, at *37-38. The First District Court of Appeal rejected the argument, holding: "[T]he record contains abundant evidence from which the jury could infer Mr. Martin's reliance on pervasive misleading advertising campaigns for the Lucky Strike brand in particular and for cigarettes in general, and on the false controversy created by the tobacco industry during the years he smoked aimed at creating doubt among smokers that cigarettes were hazardous to health." *Martin*, 53 So. 3d at 1069.

In its United States Supreme Court petition in *Martin*, RJR repeated its argument that the concealment counts require reliance on a specific statement: "On the concealment and conspiracy claims, the court refused to ask the jury whether any statements about cigarettes smoked by Mr. Martin fraudulently omitted information. Instead, the jury was asked to determine only whether his death was caused by 'the conspiracy' or by 'acts proven in furtherance of that conspiracy.'" Petition for Writ of Certiorari, *Martin*, 2011 WL 6370532, at *16.

Because of the *Engle* defendants' argument in later cases, we point out four other early cases where the *Engle* defendants just as clearly argued that the concealment actions require reliance on a statement. (Initial Brief of Appellant, *R.J. Reynolds v. Townsend*, 90 So. 3d 307 (Fla. 1st DCA 2012) (A107-12); Initial Brief of Appellant, *R.J. Reynolds v. Alexander*, 90 So. 3d 306 (Fla. 1st DCA 2012)

(A116-19); Initial Brief of Appellant, *R.J. Reynolds v. Clay*, 84 So. 3d 1069 (Fla. 1st DCA 2012) (A124-27); Initial Brief of Appellants, *Philip Morris v. Cohen*, 102 So. 3d 11 (Fla. 4th DCA 2012), 2011 WL 2256576, at *30-33). They lost all four appeals, and the courts cited *Martin. Cohen*, 102 So. 3d at 14; *Townsend*, 90 So. 3d at 310; *Alexander*, 90 So. 3d at 307; *Clay*, 84 So. 3d at 1069.

The *Engle* defendants continued unchecked, arguing that the progeny plaintiffs had to identify the specific statements that the smoker relied on. Many of the *Engle* defendants' briefs are now available on Westlaw's database of appellate briefs.[4] We were able to find some of the others.[5]

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[4] Initial Brief of Appellants, *Philip Morris v. Buchanan*, 155 So. 3d 1156 (Fla. 1st DCA 2014), 2013 WL 10509602, at *15, 17-18; Appellant R.J. Reynolds Tobacco Company's Initial Brief, *R.J. Reynolds v. Sikes*, 191 So. 3d 491 (Fla. 1st DCA 2016), 2013 WL 12158375, at *27-28; Defendants/Appellants' Initial Brief on Appeal, *Searcy v. R.J. Reynolds*, 902 F.3d 1342 (11th Cir.), 2014 WL 671629, at *26-29; Reply Brief of Appellants, *Buchanan*, 2014 WL 8662587, at *5-7 & n.3; Initial Brief of Appellants Philip Morris USA Inc. and R.J. Reynolds Tobacco Company, *Philip Morris v. Duignan*, 243 So. 3d 426 (Fla. 2d DCA 2017), 2016 WL 2931462, at *25-31; Initial Brief of Appellants, *Philip Morris v. Barbose*, 228 So. 3d 702 (Fla. 2d DCA 2017), 2016 WL 4949827, at *7, 24-30, 33-34, 36; Appellant R.J. Reynolds Tobacco Company's Initial Brief, *R.J. Reynolds v. Evers*, 232 So. 3d 457 (Fla. 2d DCA 2017), 2016 WL 5140599, at *47-48; Initial Brief of Appellants R.J. Reynolds Tobacco Company and Philip Morris USA Incorporated, *R.J. Reynolds v. Ahrens*, 221 So. 3d 799 (Fla. 2d DCA 2017), 2016 WL 4954069, at *7, 15-18; Initial Brief of Appellant R.J. Reynolds Tobacco Company, *R.J. Reynolds v. Nally*, 253 So. 3d 576 (Fla. 2d DCA 2018), 2017 WL 2062755, at *23-32; Appellant R.J. Reynolds Tobacco Company's Initial Brief, *Prentice*, 2017 WL 5126130, at *36-42; Appellant's Reply Brief/Answer Brief on Cross-Appeal, *Cote v. R.J. Reynolds*, 909 F.3d 1094 (11th Cir.), 2017 WL 6379883, at *2-4, 18-19, 23; Appellant R.J. Reynolds Tobacco Company's Amended Initial Brief, *R.J. Reynolds v. Whitmire*, 260 So. 3d 536 (Fla. 1st DCA 2018), 2018 WL 1043446, at *13-14,

A. The *Engle* defendants never acknowledged that *Martin* rejected their argument.

After the United States Supreme Court denied review of *Martin*, 566 U.S. 905 (2012), the *Engle* defendants never again acknowledged the argument they had lost in *Martin*. In dozens of briefs where they argue that the concealment actions require reliance on statements, references to *Martin* instead:

23-30; Initial Brief of Appellants, *Philip Morris v. Brown*, 278 So. 3d 604 (Fla. 2d DCA 2018), 2018 WL 1366282, at *29-30; Appellant R.J. Reynolds Tobacco Company's Reply Brief and Answer Brief on Cross Appeal, *Prentice*, 2018 WL 1256380, at *11; Initial Brief of Appellants, *R.J. Reynolds v. Theis*, 291 So. 3d 927 (Fla. 2d DCA 2019), 2019 WL 488071, at *24-27, 38-42; Initial Brief of Appellant R.J. Reynolds Tobacco Co., *R.J. Reynolds v. Graffeo*, 288 So. 3d 21 (Fla. 2d DCA 2019), 2019 WL 1179004, at *29-31; Initial Brief of Appellant R.J. Reynolds Tobacco Company, *R.J. Reynolds v. Burgess*, 294 So. 3d 910 (Fla. 4th DCA 2020), 2019 WL 1782725, at *26-47; Initial Brief of Appellant Philip Morris USA Inc., *Brown v. Philip Morris*, No. 15-13160, 2019 WL 1894506, at *31-36; Initial Brief of Appellant Philip Morris USA Inc., *Philip Morris v. Chadwell*, --- So. 3d ---, 2020 WL 2892407 (Fla. 3d DCA June 3, 2020), 2019 WL 3061730, at *27-38, 41-49; Initial Brief of Appellant, *Philip Morris v. Holliman*, No. 3D19-1739, 2020 WL 1189170, at *15-17; R.J. Reynolds Tobacco Co.'s Answer Brief/Initial Brief on Cross-Appeal, *Robinson v. R.J. Reynolds*, No. 1D19-2893, 2020 WL 3669159, at *20-21.

[5] Initial Brief of R.J. Reynolds Tobacco Company, *R.J. Reynolds v. Reese*, 139 So. 3d 900 (Fla. 3d DCA 2013) (A139-141, 143); Initial Brief for Appellants Philip Morris USA Inc. and R.J. Reynolds Tobacco Company, *Philip Morris v. Hallgren*, 124 So. 3d 350 (Fla. 2d DCA 2013) (A155-56); Initial Brief of Appellant R.J. Reynolds Tobacco Company, *R.J. Reynolds v. Williams*, 183 So. 3d 408 (Fla. 3d DCA 2014) (A163-68); Initial Brief of R.J. Reynolds Tobacco Co., *Schlenther v. R.J. Reynolds*, 155 So. 3d 353 (Fla. 2d DCA 2014) (A174-75); Appellant R.J. Reynolds Tobacco Company's Initial Brief, *R.J. Reynolds v. Ballard*, 163 So. 3d 541 (Fla. 3d DCA 2015) (A180-83); Initial Brief of Appellant R.J. Reynolds Tobacco Company, *R.J. Reynolds v. Crawford*, 150 So. 3d 1159, (Fla. 3d DCA 2014) (A188-94); Reply Brief of Appellants R.J. Reynolds Tobacco Company and Philip Morris USA Incorporated, *Ahrens*, (A198-200).

- Only generally reference causation.[6]
- Claim that *Martin* supports their argument that the concealment actions require proof that the smoker relied on statements. *See*, *e.g.*, A151; *see also* A155-56 ("[T]hose findings included that . . . each defendant . . . made unspecified statements that 'concealed or omitted' information regarding the health effects or addictiveness of smoking, and entered into an 'agree[ment]' of unspecified extent and duration 'to conceal or omit information' regarding the health effects or addictiveness of smoking. [*Martin*, 53 So. 3d at 1064].").
- Claim that *Martin* implicitly agreed with their argument because the *Martin* court had "quoted with approval an instruction that, to establish liability for concealment or conspiracy, an Engle-progeny plaintiff 'must show that [the smoker] relied on statements by either [the defendant] or any of the other companies involved in the conspiracy that omitted material information.' [*Martin*, 53 So. 3d] at 1065." Initial Brief, *Barbose*, 2016 WL 4949827, at *29-30; *see also* Initial Brief, *Ahrens*, 2016 WL 4954069, at *18; A151, 155-56; Initial Brief, *Prentice*, 2017 WL 5126130, at *41; Amended Initial Brief, *Whitmire*, 2018 WL 1043446, at *28; Reply Brief, *Prentice*, 2018 WL 1256380, at *11.

B. To prove their point, the *Engle* defendants sometimes misrepresented the jury instructions given in the progeny trials.

Sometimes, the *Engle* defendants stretched even further. For example, they claimed that trial judges across the state had consistently required reliance on statements for concealment: "Thus, as Florida courts have ***consistently instructed***, liability in *Engle* progeny cases must be predicated on a finding that the plaintiff detrimentally relied on ***statements*** misleading due to omissions." Reply Brief, *Buchanan*, 2014 WL 8662587, at *15 n.3 (emphasis added).

[6] A132-33; A143; Initial Brief, *Buchanan*, 2013 WL 10509602, at *17-18; Initial Brief, *Sikes*, 2013 WL 12158375, at *28; A163-64, 166-68; Reply Brief, *Buchanan*, 2014 WL 8662587, at *5; A175; A182-83; A192-94; Initial Brief, *Barbose*, 2016 WL 4949827, at *33-34, 36; Initial Brief, *Burgess*, 2019 WL 1782725, at *29-30; Initial Brief, *Chadwell*, 2019 WL 3061730, at *34-38.

That was not accurate. "Consistently" means always.[7] But, we found some of the early jury instructions that had been given, and at least 16 juries were not required to find reliance on statements. (A201-53). One of those trials is a case that was appealed to this Court, *Soffer v. R.J. Reynolds*, 187 So. 3d 1219 (Fla. 2016). On the concealment actions, the *Soffer* jury was instructed to determine "whether this agreement to conceal or omit material information was the legal cause of Mr. Soffer's death," and whether the "concealment or omission of a material fact is a legal cause of injury." (A222).

C. The *Engle* defendants also never disclosed that, in the class action proceedings, they had acknowledged that the concealment counts do not require reliance on a statement.

The *Engle* defendants never disclosed in any of the progeny appeals that, in the appellate proceedings from the class action judgment, they had repeatedly acknowledged that the concealment actions are not premised on statements. And that this distinction is why this Court blocked the misrepresentation actions in the progeny trials, but not the concealment counts.

Worse, in 2016 (ten years after this Court decided *Engle*), the *Engle* defendants started recycling their unsuccessful argument that the concealment actions require reliance on a statement because the "only instances where fraud

[7] *See Consistently*, Macmillan Dictionary, https://www.macmillandictionary.com/us/dictionary/american/consistently ("steadily and in the same way for a period of time").

plaintiffs can establish their claims based ***solely*** on a failure to disclose information is where a fiduciary duty exists to make disclosure" and the "[p]laintiff has never alleged any such relationship, nor could he." Initial Brief, *Duignan*, 2016 WL 2931462, at *30; *see also* Reply Brief, *Buchanan*, 2014 WL 8662587, at *6 n.3; Initial Brief, *Barbose*, 2016 WL 4949827, at *25-27; Initial Brief, *Ahrens*, 2016 WL 4954069, at *16-17; Initial Brief, *Nally*, 2017 WL 2062755, at *24-26; Initial Brief, *Prentice*, 2017 WL 5126130, at *37-40; Amended Initial Brief, *Whitmire*, 2018 WL 1043446, at *24-25, 29; Initial Brief, *Brown*, 2018 WL 1366282, at *29; Initial Brief, *Theis*, 2019 WL 488071, at *24-27; Initial Brief *Graffeo*, 2019 WL 1179004, at *29-31; Initial Brief, *Burgess*, 2019 WL 1782725, at *38-44; Initial Brief, *Chadwell*, 2019 WL 3061730, at *42-43; Initial Brief of Appellant, *R.J. Reynolds v. Dixon*, No. 1D19-1995, 2019 WL 7496444, at *20.

Sometimes, the *Engle* defendants even claimed that the class representatives had agreed in the trial court that the *Engle* defendants had no duty to disclose and, therefore, had voluntarily recast the concealment actions to require reliance on a statement. *See, e.g.*, Initial Brief, *Barbose*, 2016 WL 4949827, at *28; Initial Brief, *Ahrens*, 2016 WL 4954069, at *17; A200; Initial Brief, *Nally*, 2017 WL 2062755, at *26-28; Amended Initial Brief, *Whitmire*, 2018 WL 1043446, at *25-27; Reply Brief, *Prentice*, 2018 WL 1256380, at *11; Initial Brief, *Theis*, 2019 WL 488071, at *26; Initial Brief, *Burgess*, 2019 WL 1782725, at *40-41, 43; Initial Brief,

Chadwell, 2019 WL 3061730, at *44-45.

RJR stretched even further in a recent brief, arguing that the progeny juries were required to determine the existence of the *Engle* defendants' duty to disclose before deciding causation. According to RJR: "Given that the trial court did not instruct the jury that it had to find reliance based on an affirmative statement by Defendants, it should have instructed the jury that it needed to find that Defendants also had a duty to disclose the information concealed." Initial Brief, *Theis*, 2019 WL 488071, at *27.

D. The appellate courts uniformly rejected the *Engle* defendants' argument that the concealment claims require reliance on a statement.

Since the beginning, appellate "courts have refused to hold that an *Engle* progeny plaintiff must identify specific statements that he read or heard and relied upon in making a decision regarding cigarette smoking in order to prevail." *Duignan*, 243 So. 3d at 441-42; *see also Cote*, 909 F.3d at 1098 ("Florida courts have consistently held that *Engle*-progeny plaintiffs are not required to show reliance on a statement."); *Chadwell*, 2020 WL 2892407, at *5 ("Florida courts have consistently held that *Engle*-progeny plaintiffs are not required to show reliance on a specific statement"); *Burgess*, 294 So. 3d at 912-14 ("Following *Martin*, this court and others have concluded that a jury in an *Engle*-progeny case may infer reliance . . . without the necessity of proving that the smoker relied on any specific statement.").

The appellate courts uniformly rejected the *Engle* defendants' argument that the concealment claims require reliance on statements. *See, e.g.*, *Kerrivan v. R.J. Reynolds*, 953 F.3d 1196, 1211 (11th Cir. 2020); *R.J. Reynolds v. Rouse*, --- So. 3d ---, 2020 WL 3980749, at *3 (Fla. 3d DCA July 15, 2020); *R.J. Reynolds v. Calloway*, 201 So. 3d 753, 766 (Fla. 4th DCA 2016); *Philip Morris v. Putney*, 199 So. 3d 465, 470 (Fla. 4th DCA 2016); *Evers v. R.J. Reynolds*, 195 So. 3d 1139, 1141 (Fla. 2d DCA 2015); *Buchanan*, 155 So. 3d at 1158; *Hallgren*, 124 So. 3d at 353; *Lorillard Tobacco Co. v. Alexander*, 123 So. 3d 67, 81 (Fla. 3d DCA 2013); *Philip Morris USA, Inc. v. Kayton*, 104 So. 3d 1145, 1149 (Fla. 4th DCA 2012); *Philip Morris USA, Inc. v. Naugle*, 103 So. 3d 944, 946-48 (Fla. 4th DCA 2012); *Cohen*, 102 So. 3d at 14 n.2; *R.J. Reynolds v. Webb*, 93 So. 3d 331, 333 (Fla. 1st DCA 2012); *Townsend*, 90 So. 3d at 310.

Many times, appellate courts silently rejected the repetitive argument.[8] *See, e.g.*, *Theis*, 291 So. 3d at 927; *Graffeo*, 288 So. 3d at 21; *Brown*, 278 So. 3d at 604; *Nally*, 253 So. 3d at 576; *Barbose*, 228 So. 3d at 702; *Ahrens*, 221 So. 3d at 799; *Williams*, 183 So. 3d at 408; *Ballard*, 163 So. 3d at 543; *Schlenther*, 155 So. 3d at 353; *Crawford*, 150 So. 3d at 1159; *Reese*, 139 So. 3d at 900; *Clay*, 84 So. 3d at 1069: *R.J. Reynolds v. Hall*, 70 So. 3d 642 (Fla. 1st DCA 2011); *R.J. Reynolds v.*

[8] We have included *Martin* citation affirmances, as well as per curiam affirmances and citations without comment for the *Engle* defendants' briefs that we cited above.

Gray, 63 So. 3d 902 (Fla. 1st DCA 2011).

The *Engle* cigarette companies conspired for decades to conceal that they intentionally design cigarettes to be addictive despite knowing that addictive smoking causes many deadly diseases.

Although tobacco smoking has been common for hundreds of years, lung cancer was extremely rare before the development of the modern cigarette in the early 20th Century. (R3:2887). Smoking tobacco in its natural, unprocessed form is harsh and unpleasant, making it difficult to inhale. (R3:2529-30). The cigarette companies spent billions of dollars to highly engineer the modern cigarette sold to the *Engle* class to allow tobacco smoke to be inhaled deep into the lungs, making the smoke milder by blending tobaccos and adding ingredients. (R3:2533-36, 2551-52); *Philip Morris v. Boatright*, 217 So. 3d 166, 169 (Fla. 2d DCA 2017); *Whitney v. R.J. Reynolds*, 157 So. 3d 309, 311 (Fla. 1st DCA 2014).

This modern, inhalable cigarette had two dangerous consequences. First, by making it easy for its customers to draw smoke deeply into their lungs, the industry enhanced the delivery and physiological impact of the nicotine. (R3:2530-35); *Whitney*, 157 So. 3d at 311. This made smoking more pleasurable, but extraordinarily more addictive. (R3:2532-36); *Philip Morris v. Douglas*, 110 So. 3d 419, 423 (Fla. 2013); *Whitney*, 157 So. 3d at 311. Second, this inhalable cigarette causes carcinogens and other toxic substances to deposit themselves deep in the lungs. (R3:3180-83); *Whitney*, 157 So. 3d at 311. These dangerous

substances turn lethal with the repeated exposures caused by addictive smoking. (R3:3181-82); *Graham v. R.J. Reynolds*, 857 F.3d 1169, 1175 (11th Cir. 2017); *Whitney*, 157 So. 3d at 311. Nearly half a million people die from cigarettes every year. (R3:2526). Since 1964, more than 20 million people have died. (R3:2526).

This modern, inhalable and extraordinarily addictive cigarette was no accident. The cigarette companies' cigarettes are engineered to be addictive. (R3:2452, 2455-56). One of the many secret industry documents described the cigarette as "a vehicle for [the] delivery of nicotine designed to deliver the nicotine in a generally acceptable and attractive form." (R2:4578). Although the *Engle* defendants can eliminate nicotine from cigarettes, they choose not to. (R3:2488-89); *Graham*, 857 F.3d at 1176. To the contrary, they studied addiction extensively, and carefully monitored nicotine levels to ensure that they delivered precisely the nicotine dose to best achieve the desired impact on their customer base. (R3:2455-56). The reason is obvious—absent nicotine, no one would buy their cigarettes. (R3:2464-65).

The story of the cigarette companies' conspiracy was succinctly summarized in *Boatright*, 217 So. 3d at 169:

> [T]he tobacco industry . . . engaged in a conspiracy to conceal and misrepresent information about the addictiveness of nicotine and the serious health risks caused by smoking nicotine cigarettes. Industry executives agreed to attack the sources of health warnings and to cast doubt on the connection between smoking and disease. . . . But at the same time, the 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. The industry's intent was not just to hide the truth; it was to create doubt to give addicted smokers an excuse to keep smoking.
>
> The industry's efforts also included design features, such as filtered cigarettes, that worked to undermine a smoker's motivation and ability to quit smoking. In the 1950s, the *Engle* defendants began marketing filtered cigarettes to the public as a safer alternative. . . . The tobacco industry concealed from the public that smokers of filtered cigarettes ingest more tar and other carcinogens than those who smoke unfiltered cigarettes. The *Engle* defendants all concealed the fact that they intentionally designed their filtered cigarettes to increase the dose of nicotine, thereby enhancing addictiveness to cigarettes and resulting in greater sales.

There is no dispute about these facts. Multiple *Engle* progeny appellate decisions have recounted the same events. *See, e.g.*, *Hess v. Philip Morris*, 175 So. 3d 687, 690-91 (Fla. 2015); *Cote*, 909 F.3d at 1101, 1108; *Burgess*, 294 So. 3d at 912; *Putney*, 199 So. 3d at 470; *Duignan*, 243 So. 3d at 431; *Alexander*, 123 So. 3d at 80-81; *Martin*, 53 So. 3d at 1068. And, the same evidence was presented in this case. (R3:2385-88, 2449-63, 2569-98, 2600, 2610, 2659-63, 2701-03, 2815-18, 2841-42, 3257-89, 3650-71).

Over a decade after this Court's *Engle* decision, the First District Court of Appeal issued two split decisions, adopting the *Engle* defendants' argument that the concealment counts are premised on a specific statement heard by the smoker.

This case was briefed in the First District at the same time as *Whitmire*, was argued to the same panel (on consecutive days), and was appealed for the same reason—the *Engle* defendants' argument that the fraudulent concealment actions

require proof that the smoker heard and relied on a statement.

Whitmire, a 2-1 decision, was issued first; it held that the trial court should have granted RJR a directed verdict on the fraud claims because the plaintiff had not proven that Mrs. Whitmire detrimentally relied on specific fraudulent statements. 260 So. 3d at 537-41.

Judge Makar issued a dissenting opinion in *Whitmire,* concluding that, under the First District's precedent in *Martin,* the plaintiff had presented sufficient evidence for the jury to infer that Mrs. Whitmire "reasonably relied to her detriment on" RJR's concealment of material information. *Id*. at 541-43 (Makar, J., dissenting). Judge Makar also addressed, in a footnote, RJR's position "that the jury instructions must include a requirement that a plaintiff have relied on a specific statement." *Id*. at 543. Judge Makar disagreed, noting:

> this position was rejected in *Philip Morris USA, Inc. v. Duignan*, 243 So. 3d 426, 443 (Fla. 2d DCA 2017), which explains convincingly why that is the correct result; *see also Cote v. R.J. Reynolds Tobacco Co.*, 909 F.3d 1094, 1107, 2018 WL 6167395, at *8 (11th Cir. 2018) (noting *Duignan*'s "comprehensive review" of Florida fraudulent concealment law in the *Engle* context and concluding that "Florida courts have consistently held that *Engle*-progeny plaintiffs are not required to show reliance on a specific statement.").

Id. The plaintiff in *Whitmire* did not seek this Court's review.[9]

[9] That is not unusual in progeny cases, in part because the plaintiffs (and their spouses and family members) are elderly. The *Engle* litigation commenced more than 25 years ago, *Engle*, 945 So. 2d at 1256, and is based on cigarette use that started during the first half of the 20th Century. *Hess*, 175 So. 3d at 690.

The decision in this case—also decided by a 2-1 vote—was issued eight months after *Whitmire*. The panel majority reversed on RJR's jury-instruction issue and held that, under *Whitmire*, an *Engle* plaintiff must prove reliance on a specific statement to prevail on a concealment-based claim. *Prentice*, 290 So. 3d at 965. The First District held that the trial court should have given RJR's proposed conspiracy instruction which defined reliance as "whether Mr. Price reasonably relied to his detriment ***on a statement that concealed or omitted material information*** regarding the health effects of smoking cigarettes or their addictive nature, and that was made in furtherance of Defendant's agreement to conceal health information or information regarding addiction and, if so, whether such reliance was a legal cause of Mr. Price's COPD and death." (R1:7523) (emphasis added).

Judge Makar again dissented, explaining that *Whitmire* and *Prentice* have reversed nearly a decade of settled law by holding erroneously that fraud claims sounding in concealment (not misrepresentation) require reliance on a specific statement:

> Notably, this is not a case where a tobacco company was "silent" and failed to make actionable misleading statements that concealed information; instead, as in *Martin*, it involves the same "abundant evidence" of "pervasive misleading advertising campaigns" presented in tobacco tort cases by which reliance can be inferred. *Martin*, 53 So. 3d at 1069. In contrast to *Martin*, however, *Whitmire* appears to require proof that a plaintiff-smoker detrimentally relied on a specific false *statement* to prevail on a fraudulent concealment theory versus

> proof of detrimental reliance on inaccurate representations *that withheld or concealed material information*. On this point, *Martin* and *Whitmire*—like dysfunctional family members—appear to be hopelessly in conflict; and *Whitmire* is an outlier statewide on whether reliance on a specific statement is required.

Prentice, 290 So. 3d at 970-71 (Makar, J. dissenting).

Three district courts of appeal disagree with *Whitmire* and *Prentice.*

In the short time after the First District issued *Whitmire*, the *Engle* defendants asked three other district courts of appeal to fall in step. They all refused. The Third District and the Fourth District both wrote to reaffirm that fraudulent concealment actions do not require reliance on a specific statement. *Chadwell*, 2020 WL 2892407 at *6-7; *Burgess*, 294 So. 3d at 912-14. Both courts identified *Whitmire* and *Prentice* as aberrations, and certified the conflict for this Court's review. *Id.* The *Engle* defendants made the same request to the Second District three times,[10] and all were denied without comment. *Theis*, 291 So. 3d at 927; *Graffeo*, 288 So. 3d at 21; *Brown*, 278 So. 3d at 604.

The same issue is currently pending in at least four cases. Initial Brief, *Brown*, 2019 WL 1894506, at *31-36; Initial Brief, *Dixon*, 2019 WL 7496444, at *19-23; Initial Brief, *Holliman*, 2020 WL 1189170, at *15-17; Answer Brief, *Robinson*, 2020 WL 3669159, at *20-21.

[10] Appellants' Motion for a Written Opinion, Citation, and Certification of Conflict, *Brown*, 2019 WL 6652001, at *2-3; Initial Brief, *Theis*, 2019 WL 488071, at *39-42; Initial Brief, *Graffeo*, 2019 WL 1179004, at *29-32

On issue two for review, the First District ordered a new trial as to all counts.

In *Whitmire,* the First District remanded for the trial court to direct a verdict for RJR on the fraud claims, and affirmed the remaining product claims (negligence and strict liability). 260 So. 3d at 541. In *Prentice*, however, the First District reversed the entire verdict. 290 So. 3d at 968-69.

Judge Makar's dissent in *Prentice* disagreed with the relief granted for two reasons. *Id*. at 971. First, as a matter of common sense, a reversal on the conspiracy claim would not entitle RJR "to a new trial on the negligence and strict liability claims, which are each a separate and independent basis for liability." *Id*. Second, in its brief, "RJR ***didn't even ask*** for the scope of relief granted on appeal," and had failed to cite any "case for the proposition that it gets a retrial on the negligence and strict liability counts." *Id*.

SUMMARY OF THE ARGUMENT

The *Engle* defendants have argued for more than a decade in dozens of appeals that the actions for fraudulent concealment and concealment conspiracy require proof that the smoker heard and relied upon statements made by the *Engle* defendants. This argument was repeatedly unsuccessful, until the First District issued two split decisions. This is one of those cases, *Prentice*.

Three other district courts of appeal have rejected the First District's new decisions, and two of those courts certified conflict to this Court. This Court should

quash *Prentice*, and approve the decisions of the other appellate courts, because: (1) *Prentice* transformed the concealment actions into the impermissible misrepresentation actions; (2) *Prentice* violated *res judicata* by reconsidering the issue of the *Engle* defendants' duty to disclose; (3) *Prentice* conflated the *Engle* class jury's misrepresentation and concealment findings to reach its conclusion; and (4) *Prentice* ignores the unique nature of the *Engle* concealment conspiracy.

At a minimum, *Prentice* should be quashed because the jury instruction given here was not an abuse of discretion; it adequately addressed the applicable legal standard.

Alternatively, we ask this Court to quash the First District's decision in part because it erroneously held that an improper jury instruction on the conspiracy count is not a basis for disturbing a jury's verdict on other counts that provide an independent basis for the same measure of damages. Here, there are two such counts, negligence and strict liability. And, significantly, RJR did not even ask for the relief granted by the majority. In fact, RJR ***conceded*** at oral argument that a reversal on its instructional issue would not affect the negligence and strict liability counts. At most, RJR is entitled to a new trial on Petitioner's conspiracy count.

That count is worth retrying only so far as comparative fault is concerned. The negligence and strict liability counts fall within the ambit of the comparative-fault statute; the conspiracy count does not. So, if RJR were to win the new trial on

conspiracy, it could then move to reduce the verdict by comparative fault. But, as we will show, RJR has waived its right to seek a comparative-fault reduction, and so a new trial would serve no purpose. Thus, this Court should reinstate the entire $6.4 million compensatory verdict.

ARGUMENT

I. The First District's decision in *Prentice* must be quashed because it erroneously requires *Engle* progeny plaintiffs to prove the concealment actions by proving that the smoker relied on specific statements made by the *Engle* defendants.

Standard of Review: Whether the *Engle* concealment actions require proof of reliance on statements presents a pure issue of law that is reviewed *de novo*. *Rippy v. Shepard*, 80 So. 3d 305, 306 (Fla. 2012). But a trial court's phrasing of jury instructions is reviewed for an abuse of discretion. *Chacon v. Philip Morris*, 254 So. 3d 1172, 1175 (Fla. 3d DCA 2018).

Over a decade after this Court's *Engle* decision, the First District held that the concealment actions require reliance on a statement. These decisions, *Whitmire* and *Prentice*, are aberrations, having transformed the concealment actions into impermissible misrepresentation actions. This was the result of two significant errors. The First District violated *res judicata* by reconsidering the *Engle* defendants' duty to disclose, and conflated the *Engle* class' misrepresentation and concealment findings. As three other appellate courts recognize, because of the unique nature of the concealment conspiracy by the *Engle* defendants, the progeny

plaintiffs are not required to prove that they relied upon any specific misleading statements to establish their fraud-based claims. Rather, it is sufficient that the smoker was misled by the *Engle* defendants' concealment of what they knew about the dangers and addictiveness of their product.

A. The First District has transformed the concealment actions into impermissible misrepresentation actions.

For years, the *Engle* defendants have attempted to recast the concealment claims as a series of alternate fraud claims based on different misrepresentations. But those were the fraudulent misrepresentation claims that the class had asserted, which this Court refused to approve in *Engle*. Specifically, this Court declined to give *res judicata* effect to the *Engle* jury's findings on the class misrepresentation actions because they depended on which statements each individual class member heard. *Douglas*, 110 So. 3d at 424-25 (noting that the court approved *res judicata* effect for the concealment findings but not the misrepresentation findings because the latter "were 'inadequate to allow a subsequent jury to consider individual questions of reliance'") (quoting *Engle*, 945 So. 2d at 1255); *Id.* at 428-29 (explaining this dichotomy in terms of the approved findings being sufficiently specific to be common to the entire class while the disapproved findings on misrepresentation were "nonspecific" as they failed to identify specific conduct common to the class).

Conversely, the very reason this Court gave *res judicata* effect to the

concealment and conspiracy to conceal findings is that they do not depend on discrete statements. Indeed, that is exactly how the *Engle* defendants had distinguished the two types of fraud actions in their arguments to the Court. The clear distinction this Court drew in approving the concealment findings for *res judicata* effect was a patent rejection of the notion that those claims depended on class members hearing any particular statements. As this Court has emphasized, it determined that each of the approved findings were "common to all class members and will not change from case to case." *Douglas*, 110 So. 3d at 428. The only way the concealment findings can be common to all class members and not change from case to case depending on which statements each smoker heard and relied upon is if they depended not on statements, but on a duty to disclose.

The point of the concealment and conspiracy to conceal findings is that the *Engle* defendants undertook a duty to disclose what they knew about the dangers of smoking. For *Engle* concealment and conspiracy claims, therefore, the plaintiff's burden on causation is to prove reliance on silence. In other words, the plaintiff must prove that the defendants' failure to disclose was a substantial contributing cause of the plaintiff's injury. The *Prentice* decision must be quashed because there is no reconciling its definition of the concealment claims as requiring proof of statements with this Court's decision that the claims premised on statements may not be tried in the progeny actions.

B. The First District violated *res judicata* by reconsidering the *Engle* defendants' duty to disclose.

Since 2016, the *Engle* defendants have attempted to twist the reliance element into a vehicle for re-litigating their duty to disclose. That was the argument upon which *Whitmire* and *Prentice* relied to impose a specific-statement requirement. In the First District's view, "[l]iability for fraudulent concealment cannot be shown without reliance on a false statement, absent a fiduciary relationship that would create a duty to disclose." *Whitmire*, 260 So. 3d at 538. *Whitmire* therefore concluded that, without a specific statement, "no duty to disclose information would be imposed on the companies in this transaction between a tobacco company and a consumer who purchased cigarettes." *Id*. at 539.

But, the issue of duty is "legally and factually distinct from the question of whether a plaintiff relied on a nondisclosure." *Duignan*, 243 So. 3d at 442. Instead, duty relates to the defendants' conduct. *Id.* In the *Engle* litigation, all conduct elements of the *Engle* defendants' torts, including duty and breach, are established by the approved findings from the *Engle* phase 1 trial. *See Douglas*, 110 So. 3d at 431-32. The only elements remaining to be decided in the progeny trials are individual causation and damages. *See Engle*, 945 So. 2d at 1267-68, 1277; *Martin*, 53 So. 3d at 1068-69. For the concealment counts, the findings are that the *Engle* defendants concealed the health effects and addictive nature of cigarettes, and that they conspired with each other to conceal this information. *Engle*, 945 So. 2d at

1276-77. Such a finding is inherently dependent on a duty to disclose.

The *Engle* defendants may not relitigate duty now. As this Court explained in *Douglas*, the *Engle* decision is conclusive as to every matter that was or could have been litigated by the parties in *Engle*. *Douglas*, 110 So. 3d at 431-33; *see also Philip Morris v. Lourie*, 198 So. 3d 975, 976 (Fla. 2d DCA 2016). If that were not so, *Engle*'s common liability findings "would serve no purpose and would in fact be obliterated if the *Engle* defendants were permitted to relitigate matters pertaining to their conduct." *Douglas*, 110 So. 3d at 429. As the statement of case and facts makes clear, the issue of the *Engle* defendants' duty to disclose was litigated and resolved in the *Engle* proceedings. This Court reviewed the Phase 1 record from a year-long trial including testimony from hundreds of witnesses and thousands of documents, and determined that a duty to disclose existed. Having been conclusively established in the *Engle* class proceedings, the *Engle* defendants' duty is a matter of *res judicata* and cannot be relitigated.

Accordingly, the *Prentice* decision must be quashed because it violated *res judicata* by reconsidering the *Engle* defendants' duty to disclose.

C. The First District's holding is premised on a misunderstanding of the *Engle* findings.

Another error carried over from *Whitmire*. In reaching its conclusion that the concealment actions require reliance on a statement, *Whitmire* appears to have conflated the *Engle* class's misrepresentation and concealment claims.

Specifically, the *Whitmire* majority also based its holding on this point: "While the *Engle* findings generally establish that Appellant made misleading statements and concealed material information, the supreme court in *Engle* specifically found that the trial court's Phase I findings on fraud should not be retained, as they involved highly individualized determinations." *Id*. at 540 (citation omitted).

Not so. The accepted *Engle* findings do not establish anything about false or misleading statements, which were part of the rejected ***misrepresentation*** findings. *See Engle*, 945 So. 2d at 1255 (stating that jury finding (4) on fraudulent misrepresentation "cannot stand"); *see also id*. at 1257 n.4 (listing all the *Engle* findings by number). The concealment findings, in contrast, were very much "retained." *Id*. (retaining finding (4)(a) on concealment). Those findings include:

> that the defendants concealed or omitted material information not otherwise known or available knowing that the material was false or misleading or failed to disclose a material fact concerning the health effects or addictive nature of smoking cigarettes or both, [and] agreed to conceal or omit information regarding the health effects of cigarettes or their addictive nature with the intention that smokers and the public would rely on this information to their detriment.

Engle, 945 So. 2d at 1277. The *Prentice* decision must be quashed.

D. The First District ignored the unique nature of *Engle* concealment actions.

This is not a case about a false stock tip or bogus investment opportunity. Garden-variety fraud cases focus on the content of a small set of affirmative false statements, often a single false statement. Consequently, the reliance inquiry is

comparatively simple, asking whether or not the smoker heard the statement, and took action as a result.

The *Engle* litigation is not that sort of case. The *Engle* defendants fraudulently concealed material information about its products for ***decades***. This is not a case about a single statement or even a few statements, but a decades-long fraudulent conspiracy, a campaign of doubt unprecedented in American history.

The *Engle* defendants conspired to perpetuate the idea that a "controversy" existed in the scientific community over whether smoking was addictive and dangerous. (R3:2842-46, 2875-76). The conspirators knew full well there was no controversy, but still they attacked accurate health warnings—like those coming from the Surgeon General of the United States—and told the public that there was, in fact, an "open debate" about whether cigarettes were addictive and cancer-causing. (R3:2595-96, 2658-67, 2824-28, 2842-49, 2865-70, 3289-3301).

The conspirators created this false controversy by pointing to supposedly objective research that was, in reality, coming from organizations that were (in the conspirators' own words) "set up to serve as an industry shield." (R3:2400-01, 2440-41, 2462, 2597-2603, 2764-65, 2846-62, 2852). The conspirators spent well over a billion dollars in funding the false research organizations. (R3:2591-92). These organizations solicited only friendly research, and they ventriloquized the conspirators' controversy message to the American public. (R3:2457, 2602-08,

2705-06, 2712-13, 2849-62). Meanwhile, in secret, the conspirators would share studies that confirmed there was no controversy at all. (R3:2458-59).

Addicted smokers were particularly vulnerable to this type of "controversy" counter-messaging, which provided a rationalization for the decision to keep smoking. (R3:3206-07, 3209, 3212-13, 3275-76, 3279). The conspirators knew this. (R3:3206-07); (R3:2847) ("[D]oubt is our product since it is the best means of competing with the 'body of fact' that exists in the mind of the general public.").

The conspiracy lasted into the late 1990s, with the conspirators going so far as to lie to the United States Congress on national television. (R3:2443, 2490-94). In 1994, top tobacco executives, including RJR CEO, were subpoenaed to testify before Congress. (R3:2443, 2490-92). Each executive swore to tell the truth, and then testified that it was still unknown whether nicotine was addictive and whether cigarettes caused cancer. (R3:2443, 2494). It was not until 2000 that RJR admitted what it had known for nearly half a century: that nicotine is addictive and that cigarettes cause cancer. (R3:2449-52, 2463, 2596-97, 3647).

That the *Engle* defendants' misconduct was of unprecedented scope does not immunize them from liability. Because the tobacco industry's campaign of disinformation and concealment was so long-lasting and pervasive, it is impossible and unnecessary to allege the precise details of every concealment of material fact that the industry used to create a false controversy regarding the health risks and

addictiveness of smoking. Florida law is not blind to these facts and holds that, although progeny plaintiffs must prove detrimental reliance, they are not required to prove that they relied upon any specific misleading statements to establish their fraud-based claims—rather, it is sufficient that the smoker generally relied on the false controversy that the tobacco companies created. *See*, *e.g.*, *Burgess*, 294 So. 3d at 912-14; *Duignan*, 243 So. 3d at 439-40; *Putney*, 199 So. 3d at 469-70; *Evers*, 195 So. 3d at 1141; *Hallgren*, 124 So. 3d at 353; *Martin*, 53 So. 3d at 1069-70. Florida law permits the jury "to infer reliance based on evidence that the plaintiff was exposed to the [*Engle* defendants'] disinformation campaign and harbored a misapprehension about the health effects and/or addictive nature of smoking." *Cote*, 909 F.3d at 1108; *see also Chadwell*, 2020 WL 2892407, at *5; *Duignan*, 243 So. 3d at 443.

The thrust of this principle, as aptly illustrated in *Duignan*, is that "the type of evidence required to prove detrimental reliance necessarily depends on the facts underlying a fraud claim." *Cote*, 909 F.3d at 1107 (citing *Duignan*, 243 So. 3d at 440). Where fraudulent conduct "involves omitted or concealed information and 'the use of an artifice to throw the other party off his guard and lull him into a false sense of security,' the link between the defendant's conduct and the plaintiff's misapprehension is less direct" than in cases of affirmative representation, "and does not necessarily depend upon reliance on a statement." *Id*. (citing *Duignan*,

243 So. 3d at 439-40). In those cases, "the decisive question is: whether the plaintiff would have behaved the same way had she known the true facts." *Id*. (citing *Duignan*, 243 So. 3d at 439).

E. The trial court did not abuse its discretion.

Regardless of this Court's decision on the legal issue, the First District's decision should be quashed nonetheless because it failed to defer to the trial court's discretion in drafting the jury instruction. *Goldschmidt v. Holman*, 571 So. 2d 422, 425 (Fla. 1990) ("[d]ecisions regarding jury instructions are within the sound discretion of the trial court and should not be disturbed on appeal absent prejudicial error."). There is no abuse of discretion when "the instructions given adequately address the applicable legal standards," *Stephens v. State*, 787 So. 2d 747, 755 (Fla. 2001), and there is no "reasonable possibility that the jury could have been misled." *Golian v. Wollschlager*, 893 So. 2d 666, 667 (Fla. 1st DCA 2005). Even as framed by the *Engle* defendants, the issue is whether the concealment was a legal cause of Mr. Price's death. The jury was asked that—"whether the conspiracy to withhold health information or information regarding addiction and any acts proven in furtherance of that conspiracy were relied upon by John Price to his detriment and were a legal cause of John Price's death." (R3:5234). The *Engle* defendants concealed what they knew about nicotine addiction and cancer until 2000. Every single public statement on these subjects failed to include what the

conspirators had known since the 1950s. There is no reasonable possibility that the omission of the word "statement" could have affected the jury's verdict.

II. Alternatively, the First District erred in granting a new trial on all issues—relief that RJR was not entitled to, and that RJR did not even ask for.

Standard of Review: The First District's holding as to the appellate remedy is a question of pure law, so it is reviewed *de novo*. *Bosem v. Musa Holdings, Inc.*, 46 So. 3d 42, 44 (Fla. 2010) (stating pure issues of law are reviewed de novo).

Petitioner brought four counts in this case: negligence, strict liability, fraudulent concealment, and conspiracy to commit fraudulent concealment. The panel majority misunderstood the nature of these counts. In walking through the jury instructions given at the trial court, the majority stated that "if the jury found that [Mr.] Price was a member of the *Engle* class, it next had to consider two theories of strict liability." *Prentice*, 290 So. 3d at 968.

The panel majority was mistaken. Petitioner had one strict liability claim. And it, along with Petitioner's negligence claim, was conclusively decided when the jury found that Mr. Price was a member of the *Engle* class. (R2:5114); *see Sowers v. R.J. Reynolds*, 2020 WL 5523203, at *15 (11th Cir. Sept. 15, 2020); *Douglas*, 110 So. 3d at 429-30. After deciding class membership, the jury next had to consider two theories of ***fraud***. (R2:5114-15). The jury found for RJR on concealment but for Petitioner on conspiracy to conceal. (R2:5114-15). All told, Petitioner won three counts: negligence, strict liability, and conspiracy.

On appeal, the panel majority held that the trial court had erred in instructing the jury on Petitioner's conspiracy count. But the majority granted relief extending far beyond that count. The majority ordered a new trial on *all* issues—"on the negligence and conspiracy claims, and on compensatory damages, comparative fault, and punitive damages." *Prentice*, 290 So. 3d at 969. This was error.

A. A reversal on RJR's conspiracy count should not have affected the jury's verdict on the negligence and strict liability counts.

Nearly all *Engle* cases involve the same four counts alleged in this case. *Engle* plaintiffs bring two products-based counts—negligence and strict liability, and two intentional-tort counts—concealment and conspiracy to conceal. These counts involve different conduct elements. But they all lead to the same injury: a cigarette-caused disease, and often death. Thus, as this Court has recognized, each count in an *Engle* case gives rise to the same measure of damages, because the "the same injuries—a smoker's illness or death and survivors' damages—are the result of both negligence and intentional torts." *Schoeff v. R.J. Reynolds*, 232 So. 3d 294, 302 (Fla. 2017).

This case is no exception. For all four counts, Petitioner alleged that the tortious conduct caused Mr. Price's COPD and wrongful death. Accordingly, it was Mr. Price's wrongful death that provided the measure of damages; the jury was instructed that, if Petitioner prevailed on "one or more" of her counts, she could recover "the total amount of loss, injury, or damage [Mrs. Price] sustained as

a result of John Price's COPD and death." (R3:5236-37).

As far as damages are concerned, then, the ultimate cause of Mr. Price's death was immaterial. Mrs. Price's loss was the same regardless of whether it was RJR's conspiracy, RJR's defective product, or RJR's negligence that ultimately killed him. That is why the verdict form provided a single line for damages (R2:5114-15), and that is why the jury was instructed to answer the damages question if it answered yes on any one of her counts (R3:5236). Thus, the panel majority's reversal on the conspiracy count should not have resulted in a new trial on all issues, because the jury's damages award was fully supported by two independent, unaffected counts (negligence and strict liability).

Florida's two-issue rule forbids this exact result. Under that rule, if a single basis for damages exists, "an appellate claim of error raised by the defendant as to one cause of action cannot be the basis for reversal where two or more . . . causes of action . . . were presented to the jury." *Barth v. Khubani*, 748 So. 2d 260, 261 (Fla. 1999) (citing *Whitman v. Castlewood Int'l Corp.*, 383 So. 2d 618, 619 (Fla. 1980); *Colonial Stores, Inc. v. Scarbrough*, 355 So. 2d 1181, 1186 (Fla. 1977)); *see also, e.g.*, *Marriott Int'l, Inc. v. Perez-Melendez*, 855 So. 2d 624, 627 (Fla. 5th DCA 2003) (holding that error on one theory of liability not a basis for reversal if plaintiff can recover "the same measure of damages under other theories").

In *First Interstate Development Corp. v. Ablanedo*, 511 So. 2d 536, 538

(Fla. 1987), this Court used a products-liability action as a quintessential example of when the two-issue rule would apply. A plaintiff in this type of action can bring both negligence and warranty claims that are aimed at the same injury. *Id*. But an error as to one claim would not be a basis for reversal, because under either claim "the measure of damages for the resulting personal injury is the same." *Id*.

So too here. In truth, the facts here make this case even more clear-cut. Normally, the two-issue rule is applied when a jury is asked a single question on liability. For example, in *Perez-Melendez*, the plaintiff alleged four different theories of negligence against the defendant, but the verdict form asked only whether the defendant had been negligent. 855 So. 2d at 627. *Perez-Melendez* held that, under these circumstances, an error as to one theory of negligence was not enough to warrant reversal, because it was possible that the jury's damages award was supported by an unaffected theory. *Id*.

Here, in contrast, it is not just possible this occurred. Indeed, we ***know*** that the jury's damages award is supported by an unaffected claim, because the verdict form asked separate questions on conspiracy and on negligence and strict liability.

Thus, the panel was wrong to take away the jury's verdict on the strict liability and negligence counts. The jury's verdict on those counts should have remained intact, along with the jury's damages award. The "conspiracy claim against RJR would have no effect on, and provide no basis for negating, the

negligence and strict liability claims against RJR for which the jury found liability and damages[.]" *Prentice*, 290 So. 3d at 971 (Makar, J., dissenting); *see Liggett Group, Inc. v. Davis*, 973 So. 2d 467, 469 (Fla. 4th DCA 2007) (reversing negligence claim on preemption grounds but concluding that "the jury's verdict of damages may be sustained on the strict liability claim"); *accord Whitmire*, 260 So. 3d at 541 (reversing directed verdict on fraud counts but upholding compensatory awards because there was no error on negligence and strict liability findings).

The majority concluded otherwise, ordering a new trial on all issues because the conspiracy count was "intertwined" with the jury's other findings. *Prentice*, 290 So. 3d at 967-68. The panel explained:

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

Id. at 968.

There are a number of problems with this reasoning. As a primary matter, it would not have been proper—or even possible—for the verdict form here to "separate out the amount of fault assigned to each claim." *Id*. Comparative fault is not claim-dependent. It is an affirmative defense that is "focused entirely on

whether, and to what extent, the *plaintiff's* conduct was a legal cause of his own injuries." *Sowers*, 2020 WL 5523203, at *16. That was the focus of the jury's determination here; it was asked to decide to what extent Mr. Price contributed to his COPD and death. (R2:5115).

Significantly, the jury's answer to that question did not implicate the conspiracy verdict. This is true as a matter of common sense: the extent to which Mr. Price caused his own injuries did not depend, at all, on RJR's fraudulent conduct. It is also true as a matter of law. Conspiracy is an intentional tort. And in Florida, comparative fault does not apply to intentional torts. *Schoeff*, 232 So. 3d at 304-06.

As a result, the jury's finding of comparative fault could not have "reflected" the jury's finding that RJR was liable for conspiracy. And a second jury considering the conspiracy claim could not, as a matter of law, "apportion fault between RJR and [Mr.] Price." *Prentice*, 290 So. 3d at 969. In fact, comparative fault would not factor into the second trial at all. The only question for a second jury would be whether RJR was liable for conspiracy.

In short, the conspiracy count was not "intertwined" with the jury's finding of comparative fault. That finding applied only to the negligence and strict liability counts. But neither count was affected by the instructional error at issue here. The panel was therefore wrong to order a new trial on all issues.

B. The panel granted relief that RJR did not ask for, and that RJR was not entitled to.

In its initial brief at the First District, RJR asked for a reversal on the trial court's conspiracy jury instruction. RJR did not say, however, what relief it thought the First District should grant. *Prentice*, 290 So. 3d at 971 (Makar, J., dissenting). Petitioner, for her part, argued "that the jury's verdict on the negligence and strict-liability counts are not implicated at all by the conspiracy instruction. No matter what, then, these counts still stand." *Id*. (quoting Petitioner's answer brief). In the reply brief, RJR did not dispute, or even address, this argument. *Id*.

This should have decided the matter. "Basic principles of due process—to say nothing of professionalism and a long appellate tradition—suggest that courts . . . ought not consider arguments outside the scope of the briefing process." *Bainter v. League of Women Voters of Florida*, 150 So. 3d 1115, 1126 (Fla. 2014) (citation and quotations omitted); *see Coolen v. State*, 696 So. 2d 738, 742 n.2 (Fla. 1997) (noting that the "failure to fully brief and argue" a point "constitutes a waiver"); *D.H. v. Adept Cmty. Services, Inc.*, 271 So. 3d 870, 888 (Fla. 2018) (Canady, C.J., dissenting) ("This requirement of specific argument and briefing is one of the most important concepts of the appellate process. Indeed, it is not the role of the appellate court to act as standby counsel for the parties.").

Accordingly, the panel should not have remanded for a new trial on all

issues "where no legal argument or briefing by RJR was made in this Court seeking such relief." *Prentice*, 290 So. 3d at 971 (Makar, J., dissenting); *see also Polyglycoat Corp. v. Hirsch Distributors, Inc.*, 442 So. 2d 958, 960 (Fla. 4th DCA 1983) ("When points, positions, facts and supporting authorities are omitted from the brief, a court is entitled to believe that such are waived, abandoned, or deemed by counsel to be unworthy.").

RJR's waiver did not stop at the briefing, however. At oral argument, RJR went a step further and affirmatively conceded that the correct remedy would be a new trial on the conspiracy count only. The oral argument panel asked RJR what relief was being sought. RJR's counsel answered that RJR was asking for a new trial on just the conspiracy count, and that Petitioner's verdict on the negligence and strict liability counts would remain undisturbed. This was still a victory worth claiming, explained RJR's counsel, because the negligence and strict liability counts, unlike the conspiracy count, would be subject to reduction by the jury's comparative fault finding. So, if RJR won the new trial on conspiracy, the jury's verdict would be reduced (from $6.4 million to $2.56 million).

RJR's concessions were made at 11:22-15:05 of the oral argument video—which can be found at https://www.youtube.com/watch?v=wCcNqNLFti4 1—and begin after the panel asked, "If we don't agree with you on the other issues requiring reversal on the negligence counts but we agree that the fraud and the

intentional torts have to be reversed because of the faulty instruction…?" The entire exchange shows that RJR was only asking for a new trial on its conspiracy count, with the ultimate goal of applying the jury's comparative-fault finding to the awarded damages. The following excerpt, however, is more than enough to show that RJR conceded the issue (starting at 14:12 of the video; emphasis added):

> **Thomas, J.**: I guess that's my question. If we agree with you on the jury instruction, is that in of itself then grounds for reversal on the comparative fault application?
>
> **RJR's counsel**: It wouldn't be in and of itself because as Your Honor noted, there would need to be a new trial on the…. Instructional errors generally require a new trial.
>
> **Thomas, J**.: ***I know, but only on the intentional torts.***
>
> **RJR's counsel**: ***Correct.*** But it's the intentional torts that are…absent waiver. So we've argued that they've waived regardless of the finding on conspiracy and concealment. But…putting waiver aside, ***if after a new trial Plaintiff were to lose the conspiracy…they've already lost concealment, lose the conspiracy finding, then the 60% apportionment finding by the jury would have to be applied to reduce the judgment.***

This exchange should have cleared up any doubt surrounding the appropriate scope of relief. Concessions made at oral argument are binding. *See*, *e.g.*, *Pasha v. State*, 225 So. 3d 688, 703 (Fla. 2017); *Card v. State*, 992 So. 2d 810, 814 n.2 (Fla. 2008); *Bell v. State*, 642 So. 2d 1113, 1114 (Fla. 1st DCA 1994). It was error for the panel to ignore RJR's concession. RJR is entitled to the relief it asked for, and nothing more than that.

C. This Court should reinstate the full awarded damages.

The First District's reversal on the conspiracy count should have, at most, resulted in a new trial on that count only. The remand jury's decision on the conspiracy count would be significant here, because conspiracy to commit fraudulent concealment is an intentional tort and, as a result, is not subject to Florida's comparative-fault statute. §768.81, Fla. Stat. (1992); *Schoeff*, 232 So. 3d at 301-05. So, if a remand jury returned a verdict for Petitioner on the conspiracy count, Petitioner would be able to recover the entirety of her $6.4 million compensatory award. *Accord Whitmire*, 260 So. 3d at 541 (reversing denial of directed verdict on fraud counts and ordering the trial court to "reduc[e] the compensatory damage award to deduct the decedent's comparative fault").

But a new trial is not necessary here, because RJR—by virtue of its conduct during phase 2 of trial (the punitive damages phase)—waived its ability to seek apportionment under the comparative-fault statute. "It is a general rule that parties will be held to the theories upon which they secure action by the court, and in pursuance of the rule that a party may not take inconsistent positions in a litigation." *Federated Mut. Implement & Hardware Ins. Co. v. Griffin*, 237 So. 2d 38, 41 (Fla. 1st DCA 1970). At trial, RJR took the position that the jury's compensatory award should be reduced by any finding of comparative fault. (R3:7508-09). RJR took the same position after trial, arguing that the 60% comparative-fault finding meant that RJR was responsible for only $2.5 million of

the $6.4 million awarded by the jury. (R2:5458-59, 5510).

The jury would have been surprised to hear this. Indeed, RJR's message to the jury had been altogether different. RJR's counsel began phase 2 by informing the jury that "we respect your verdict," and that, in particular, RJR respected the jury's award of $6.4 million in damages—"a very powerful, strong message." (R3:6214-16). Counsel's point in making these statements was obvious: RJR was accepting responsibility for the jury's entire $6.4 million verdict.

RJR was more overt during phase 2 closings. Counsel reminded the jury that it had "already awarded" $6.4 million, and he argued that forcing RJR to pay money "over and above" that amount would not serve the goals of punishment and deterrence. (R3:6217). Leaving nothing to chance, RJR made the same argument a few times more:

- "[W]e are at a point right now already where you've awarded $6.4 million, and you've got to decide whether…more money over and above that can accomplish something[.]" (R3:6222-23).
- Counsel says phase 2 is about "whether there is a purpose, a reason, something that will be served by an award over and above the $6.4 million you've already awarded." (R3:6218).
- "[I]f you're concerned that the company is somehow not being held accountable for things that happened in the past, you heard about that evidence too. Over and above the $6.4 million you already came to…" (R3:6224).
- "[Y]ou came to a compensatory damage award of $6.4 million. Now in this phase of the trial you have to consider whether more money should be awarded." (R3:6227).

At one point, RJR's counsel went even further, outright telling the jury that

its verdict might not be reduced even though "you wrote on the form that Mr. Price was 60 percent responsible." (R3:6218). The trial court would later conclude, in a written order, that the "implication" of counsel's arguments was that the jury's full award "would or may be the amount in the judgment." (R2:8480).

RJR's conduct here is very similar to its conduct in *Philip Morris v. Marchese*, 231 So. 3d 473 (Fla. 4th DCA 2017). There, during phase 2, "counsel for Reynolds suggested the jury had already fully compensated [appellee] with [an] award of $1 million[,] and implied she would receive all of it by stating that [the jury] sent a loud and clear message with that reward." *Id*. at 475-76. After trial, however, RJR convinced the trial court to reduce the verdict to reflect the apportionment of fault (in accordance with the then-binding *R.J. Reynolds v. Schoeff*, 178 So. 3d 487 (Fla. 4th DCA 2015)).

Subsequently, the Fourth District reversed, finding that RJR and its co-defendant had waived the right to seek a comparative-fault reduction:

> [Defendants] always intended to seek a reduction based on comparative fault. But as we have previously stated, they cannot have it both ways. [Defendants'] repeated suggestions to the jury that there would be no reduction of the compensatory damages award were made in hopes of minimizing the amount of punitive damages awarded. At no point did [Defendants'] counsel inform the jury of their intent to seek a reduction of the compensatory damages award based on comparative fault, nor did they remain silent on the issue. Instead, [defendants] affirmatively represented that [plaintiff] would be fully compensated as a "shield" against the potential imposition of a large punitive damages award, all the while intending to use the comparative fault statute as a "sword" to reduce the amount awarded.

Marchese, 231 So. 3d at 478 (internal citations omitted).

The same reasoning applies with equal force here. Despite knowing it would seek a post-trial reduction of comparative fault, RJR still used the jury's ***full*** compensatory award to shield against the jury awarding more in punitive damages.

Plus, RJR did not need to reference a specific number; counsel's we've-been-punished-enough argument could have been made without mentioning $6.4 million. Counsel chose, however, to use the full weight of that number to persuade the jury to not award punitive damages. This strategy worked: the jury, despite having found that RJR's conduct was so reprehensible to justify a second phase of trial, nevertheless awarded ***nothing*** in punitive damages. (R2:5130).

But RJR "cannot have it both ways." *Id*. Counsel made an intentional choice to convince this jury that Petitioner was going to receive every penny of $6.4 million. RJR may not take an inconsistent position now. "Whether it be in politics or trial strategy, 'elections have consequences.'" *Id*. This Court should reinstate the jury's entire $6.4 million compensatory verdict.

CONCLUSION

Accordingly, we ask the Court to quash the decision of the First District in *Prentice*, and to approve the decisions in *Chadwell* and *Burgess*. At a minimum, *Prentice* should be quashed because the jury instruction given here was not an abuse of discretion; it adequately addressed the applicable legal standard.

Alternatively, we ask this Court to quash the First District's decision in part because it erroneously granted a new trial on all actions and claims, not just the concealment and conspiracy actions, particularly since the Respondent did not even make such a broad request.

GREGORY D. PRYSOCK
Florida Bar No. 0062420
KATHERINE M. MASSA
Florida Bar No. 0078316
ANTONIO LUCIANO
Florida Bar No. 105342
MORGAN & MORGAN, P.A.
76 S. Laura Street, Suite 1100
Jacksonville, FL 33202
Tel: (904) 398-2722
gprysock@forthepeople.com
kmassa@forthepeople.com
tluciano@forthepeople.com

KEITH R. MITNIK
Florida Bar No. 0436127
MORGAN & MORGAN, P.A.
P.O. Box 7979
Orlando, FL 32808
Tel: (407) 849-2383
kmitnik@forthepeople.com

/s/Celene H. Humphries
CELENE H. HUMPHRIES
Florida Bar No. 884881
THOMAS J. SEIDER
Florida Bar No. 86238
SHEA T. MOXON
Florida Bar No. 12564
BRANNOCK HUMPHRIES & BERMAN
1111 W. Cass Street, Suite 200
Tampa, FL 33606
Tel: (813) 223-4300
tobacco@bhappeals.com

Counsel for Petitioner

CERTIFICATE OF SERVICE

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

SERVICE LIST

Counsel for Respondent:

Jason T. Burnette
Jones Day
1420 Peachtree St., N.E., Suite 800
Atlanta, GA 30309
jtburnette@JonesDay.com
Secondary: ecbaker@jonesday.com
Secondary: emcarter@jonesday.com

Charles R.A. Morse
Jones Day
250 Vesey Street
New York, NY 10281
cramorse@jonesday.com

Troy A. Fuhrman
Marie A. Borland
Hill Ward Henderson
101 E. Kennedy Blvd., Suite 3700
Tampa, FL 33602
troy.fuhrman@hwhlaw.com
marie.borland@hwhlaw.com
Secondary: reynolds@hwhlaw.com

Amicus Counsel for Philip Morris USA:

Jesse Pannuccio
Boies Schiller Flexner LLP
401 E. Las Olas Blvd., Suite 1200
Ft. Lauderdale, FL 33301
jpanuccio@bsfllp.com

Geoffrey J. Michael
Arnold & Porter Kaye Scholer LLP
601 Massachusetts Ave. N.W.
Washington, DC 20001
geoffrey.michael@arnoldporter.com

/s/Celene H. Humphries
CELENE H. HUMPHRIES
Florida Bar No. 884881

CERTIFICATE OF COMPLIANCE

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

/s/Celene H. Humphries
CELENE H. HUMPHRIES
Florida Bar No. 884881