No. A-

IN THE

Supreme Court of the United States

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

Petitioner,

v.

ANDY R. ALLEN SR., as personal representative of the Estate of
PATRICIA ALLEN,

Respondent.

OPPOSITION TO APPLICATION FOR EXTENSION OF TIME
TO FILE PETITION FOR A WRIT OF CERTIORARI OR, IN THE ALTERNATIVE,
MOTION TO RECONSIDER ORDER GRANTING EXTENSION

TO THE HONORABLE CLARENCE THOMAS, ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES AND CIRCUIT JUSTICE FOR THE ELEVENTH CIRCUIT:

Respondent Andy R. Allen Sr. opposes the application for an extension of time to file a petition for writ of certiorari (or, alternatively, seeks reconsideration of an order granting an extension) because Petitioners R.J. Reynolds Tobacco Co. and Philip Morris USA Inc. did not and cannot establish the requisite "good case" for the extension. Petitioners fail to advise the Court that they have already filed ***24 petitions*** from Florida's *Engle*[1] Tobacco litigation arguing this very issue, and that this Court has consistently denied review. Worse yet, Petitioners' claim that an anticipated decision from the Eleventh Circuit Court of Appeals could be significant ignores that Petitioners have taken the opposite position in this Court, just recently.

[1] *Engle v. Liggett Group, LLC*, 945 So. 2d 1246 (Fla. 2006), *cert. denied*, 552 U.S. 941 (2007).

The reality is that Petitioners have serially sought extensions of the petition deadline in order to postpone finality of individual cases in Florida's *Engle* litigation. In addition to the 24 petitions they filed, they have sought a 60-day extension in at least another 16 cases, where they never filed a petition for writ of certiorari. The reason? A Florida statute allows them to turn a profit on the 60-day extension.

No reasonable likelihood of review: This Court has denied review 24 times before.

Petitioners fail to advise the Court that they have already filed 24 petitions arguing this very issue, and that this Court has consistently denied review.[2] The Petitioners first sought review from the Florida Supreme Court's 2006 decision in *Engle*. *R.J. Reynolds Tobacco Co. v. Engle*, 552 U.S. 941 (2007). Eleven years later, they advise this Court that they plan to file their ***twenty-fifth*** duplicative, successive petition for certiorari review. There is no legitimate basis for this pretense of optimism.

[2] *R.J. Reynolds Tobacco Co. v. Graham*, 138 S. Ct. 646 (2018); *R.J. Reynolds Tobacco Co. v. Grossman*, 138 S. Ct. 748 (2018); *Philip Morris USA Inc. v. Naugle*, 138 S. Ct. 735 (2018); *R.J. Reynolds Tobacco Co. v. Turner*, 138 S. Ct. 736 (2018); *R.J. Reynolds Tobacco Co. v. Block*, 138 S. Ct. 733 (2018); *R.J. Reynolds Tobacco Co. v. Monroe*, 138 S. Ct. 923 (2018); *R.J. Reynolds Tobacco Co. v. Lewis*, 138 S. Ct. 923 (2018); *Philip Morris USA Inc. v. Lourie*, 138 S. Ct. 923 (2018); *R.J. Reynolds Tobacco Co. v. Walker*, 134 S. Ct. 2727 (2014); *Philip Morris USA, Inc. v. Barbanell*, 134 S. Ct. 2726 (2014); *R.J. Reynolds Tobacco Co. v. Brown*, 134 S. Ct. 2726 (2014); *R.J. Reynolds Tobacco Co. v. Kirkland*, 134 S. Ct. 2726 (2014); *R.J. Reynolds Tobacco Co. v. Mack*, 134 S. Ct. 2726 (2014); *Lorillard Tobacco Co. v. Mrozek*, 134 S. Ct. 2726 (2014); *R.J. Reynolds Tobacco Co. v. Koballa*, 134 S. Ct. 2727 (2014); *R.J. Reynolds Tobacco Co. v. Smith*, 134 S. Ct. 2727 (2014); *R.J. Reynolds Tobacco Co. v. Sury*, 134 S. Ct. 2727 (2014); *R.J. Reynolds Tobacco Co. v. Townsend*, 134 S. Ct. 2727 (2014); *Philip Morris USA, Inc. v. Douglas*, 134 S. Ct. 332 (2013); *R.J. Reynolds Tobacco Co. v. Clay*, 133 S. Ct. 650 (2012); *R.J. Reynolds Tobacco Co. v. Gray*, 132 S. Ct. 1810 (2012); *R.J. Reynolds Tobacco Co. v. Hall*, 132 S. Ct. 1795 (2012); *R.J. Reynolds Tobacco Co. v. Campbell*, 132 S. Ct. 1795 (2012); *R.J. Reynolds Tobacco Co. v. Martin*, 132 S. Ct. 1794 (2012); *R.J. Reynolds Tobacco Co. v. Engle*, 552 U.S. 941 (2007).

No reasonable likelihood of review: RJR misrepresents the impact of the pending Eleventh Circuit cases.

The best Petitioners can do is point to two cases pending in the Eleventh Circuit. Implicitly, Petitioners are claiming that they will win those cases in the Eleventh Circuit, and this Court should wait another 60 days for that to happen. Initially, Petitioners cite no authority or explanation for why this is a viable basis for establishing the good-cause requirement for postponing their petition deadline. In fact, this Court has held the opposite. In *Boumediene v. Bush*, 550 U.S. 1301, 550 S. Ct. 1725, 1727 (2007), when considering such an argument on rehearing, the Court held that "the filing of motions and possible court action [in another case] . . . hardly provide a basis for believing that this Court would reverse course and grant certiorari."

More to the point, Petitioners themselves previously recognized that the Eleventh Circuit has already definitively rejected the federal due process argument. So, there is nothing to wait for.

Last year, the Eleventh Circuit issued an *en banc* opinion rejecting Petitioners' federal due process argument in *Graham v. R.J. Reynolds Tobacco Co.*, 857 F.3d 1169 (11th Cir. 2017). Petitioners filed their customary petition for a writ of certiorari and this Court, once again, denied review. Petitioners' extension application in this case recognizes this, but claims that *Graham* was limited to the actions asserting negligence and strict liability. According to Petitioners, their federal due process argument is still an open issue in the Eleventh Circuit as to the fraud actions.

But, Petitioners fail to disclose that they have already told this Court in multiple certiorari petitions that they believe that the Eleventh Circuit's *Graham* decision applies to the fraud counts as well. When Petitioners sought this Court's review of *Graham*, they filed eight petitions for writ of certiorari, arguing the federal due process issue.[3] Significantly, four of these petitions came out of cases where the plaintiffs—like Mr. Allen here—had prevailed on the fraud counts too. Pet. for Writ of Cert., *Philip Morris USA Inc. v. Naugle*, 2017 WL 4117832 (Sept. 15, 2017); Pet. for Writ of Cert., *R.J. Reynolds Tobacco Co. v. Turner*, 2017 WL 5041485 (Oct. 30, 2017); Pet. for Writ of Cert., *R.J. Reynolds Tobacco Co. v. Block*, 2017 WL 4280572 (Sept. 25, 2017); Pet. for Writ of Cert., *R.J. Reynolds Tobacco Co. v. Grossman*, 2017 WL 5899997 (Nov. 28, 2017). But nowhere in these fraud-specific petitions did Petitioners mention their belief that *Graham* left their fraud-based due-process challenges alive and well.

In fact, Petitioners said precisely the opposite. They asked this Court to hold their petitions in abeyance pending the resolution of *Graham* "[b]ecause this case raises *the same due-process question* presented in *Graham*." Pet. for Writ of Cert., *Grossman*, 2017 WL 5899997, at *15 (emphasis added). In each petition, Petitioners explained that "[i]f this Court grants certiorari in *Graham* and rules that due process prohibits *Engle* progeny plaintiffs from relying on the Phase I findings to establish elements of their claims, then it would be fundamentally unfair to permit the constitutionally infirm judgment in this case to stand." *Id.*

Thus, they acknowledged that their challenge to the constitutionality of the fraud findings would rise and fall with *Graham*. That is why, when this Court denied the *Graham* petition, Petitioners agreed that their pending fraud-specific petitions should be dismissed as well. *See R.J. Reynolds Tobacco Co. v. Grossman*, 138 S. Ct. 748 (2018); *Philip Morris USA Inc. v.*

[3] In addition to *Graham* and the other four cases identified, Petitioners also filed petitions in *R.J. Reynolds Tobacco Co. v. Monroe*, 2017 WL 7361185 (Nov. 7, 2017), *R.J. Reynolds Tobacco Co. v. Lewis*, 2017 WL 7047315 (Sept. 29, 2017), and *Philip Morris USA Inc. v. Lourie*, 2017 WL 4117833 (Sept. 15, 2017).

Naugle, 138 S. Ct. 735 (2018); *R.J. Reynolds Tobacco Co. v. Turner*, 138 S. Ct. 736 (2018); *R.J. Reynolds Tobacco Co. v. Block*, 138 S. Ct. 733 (2018).[4]

Now, Petitioners are trying to wriggle free from *Graham*. But, they fail to disclose their earlier assurances that *Graham* decided *all* of the due-process challenges. This Court should not condone Petitioners' transparent attempt to "change positions according to the exigencies of the moment." *Cf. Slater v. United States Steel Corp.*, 871 F.3d 1174, 1180-81 (11th Cir. 2017) ("[T]he doctrine of judicial estoppel rests on the principle that "absent any good explanation, a party should not be allowed to gain an advantage by litigation on one theory, and then seek an inconsistent advantage by pursuing an incompatible theory.").

Tellingly, Petitioners never actually say that they believe they will win these two cases at the Eleventh Circuit. How could they? The Florida Supreme Court has rejected these arguments twice. *Philip Morris USA, Inc. v. Douglas*, 110 So. 3d 419 (Fla. 2013), *cert. denied*, 134 S. Ct. 332 (2013); *Engle v. Liggett Group*, 945 So. 2d 1246, *cert. denied*, 552 U.S. 941 (2007). And, the Eleventh Circuit has rejected them three times now, **one of which was *en banc*.** *Burkhart v. R.J. Reynolds Tobacco Co.*, 884 F. 3d 1068 (11th Cir. 2018); *Graham v. R.J. Reynolds Tobacco Co.*, 857 F.3d 1169 (11th Cir. 2017) (en banc), *cert. denied*, 138 S. Ct. 646 (2018); *Walker v. R.J. Reynolds Tobacco Co.*, 734 F.3d 1278 (11th Cir. 2013), *cert. denied*, 134 S. Ct. 2727 (2014). The Eleventh Circuit knows that this Court has already denied 24 petitions for a writ of certiorari as to this very issue, including from the Eleventh Circuit's two final opinions (*Graham* and *Walker*). And, to be clear, the Eleventh Circuit's most recent decision (*Burkhart* issued on March 7) specifically rejects the due process arguments as to the fraud counts for all the reasons explained earlier in *Graham* and *Walker*.

[4] This Court dismissed these four petitions "pursuant to Rule 46.1 of the Rules of this Court," which addresses the Clerk's entry of *agreed* orders of dismissal.

The fact that Petitioners' argument is still pending at the Eleventh Circuit (Petitioners' recently filed rehearing motion in *Burkart,* and the merits briefs in a fourth Eleventh Circuit case) is more readily explained by the practical reality that judicial resources are limited.

Abuse of the extension process

"An application to extend the time to file a petition for a writ of certiorari is not favored." Supreme Court Rule 14.5. When a litigant abuses the extension process (as is the case here), such a request surely must be denied. Petitioners have serially sought extensions of the petition deadline in order to postpone finality of individual cases in Florida's *Engle* litigation. In addition to the 24 petitions they did file, Petitioners have sought and received an additional 60 days to file their petition for writ of certiorari in at least 16 more cases in which they ***never*** filed a certiorari petition.[5]

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[5] The *Engle* defendants received extensions in the following cases where the companies never ultimately filed a petition: (1) *Philip Morris USA, Inc. v. Merino*, No. 16A763 (extension from February 7, 2017, through April 8, 2017); (2) *R.J. Reynolds Tobacco Co. v. Buonomo*, No. 16A72 (extension from January 25, 2017, through March 26, 2017); (3) *Philip Morris USA, Inc. v. Bowden*, No. 15A1101 (extension from May 2, 2016, through July 1, 2016); (4) *Philip Morris USA Inc. v. Buchanan*, No. 15A1100 (extension from May 2, 2016, through July 1, 2016); (5) *Philip Morris USA Inc. v. Kayton*, No. 15A1099 (extension from May 1, 2016, through June 30, 2016); (6) *R.J. Reynolds Tobacco Co. v. Sikes*, No. 15A1098 (extension from May 2, 2016, through July 1, 2016); (7) *R.J. Reynolds Tobacco Co. v. Thibault*, No. 15A1097 (extension from May 2, 2016 through July 1, 2016); (8)*R.J. Reynolds Tobacco Co. v. Hiott*, No. 15A1096 (extension from May 2, 2016, though July 1, 2016); (9) *Philip Morris USA Inc. v. Cohen*, No. 15A1066 (extension from April 28, 2016, through June 27, 2016); (10) *Philip Morris USA, Inc. v. Hess*, No. 15A640 (extension from, December 24, 2015, through February 22, 2016); (11) *R.J. Reynolds Tobacco Co. v. Ballard*, No. 15A622 (extension from December 23, 2015, through February 19, 2016); (12) *Philip Morris USA Inc. v. Greene*, No. 15A601 (extension from December 17, 2015, through February 15, 2016); (13) *R.J. Reynolds Tobacco Co. v. Reese*, No. 12A1091 (extension from May 21, 2013 through July 19, 2013); (14) *Philip Morris USA, Inc. v. Hatziyannakis*, No. 12A953 (extension from April 16, 2013, through June 15, 2013); (15) *R.J. Reynolds Tobacco Co. v. Bowman*, No. 12A749 (extension from February 6, 2013, through April 5, 2013); (16) *Philip Morris USA Inc. v. Piendle*, No. 12A227 (extension from September 8, 2012, through November 17, 2012).

The reason? A Florida statute allows them to turn a profit on the 60-day extension. Florida adopted a statute that specifically addresses a plaintiff's ability to collect money judgments against Petitioners. Florida Statutes section 569.23(3)(b)1 precludes plaintiffs, like Mr. Allen, from executing a money judgment until after the time for a petition for writ of certiorari in this Court expires, even when Petitioners do not intend to actually file a petition. *R.J. Reynolds Tobacco Co. v. Sikes*, 191 So. 3d 491 (Fla. Dist. Ct. App. 2016).

Postponing payment of the judgment is a significant cost center for Petitioners. While another Florida statute requires them to pay the plaintiff interest on the judgment during this time, the rate of return on the invested capital ("ROIC") for Petitioners is much greater. Under current law, Mr. Allen's judgment is accruing interest at 5.53%. But, for example, R.J. Reynolds Tobacco Company's parent company, Reynolds American Inc., enjoyed a 18.6% return in 2014.[6]

This abuse of the extension practice will not end until this Court puts an end to it. The undersigned counsel is aware of one extension application filed Friday,[7] and of one case with an approaching certiorari petition deadline.[8] If asked, Petitioners can identify the others.

Finally, Petitioners mention 8,000 class members, although not at all relevant. Petitioners neglect to mention though that a small percentage of these people has made it to trial, primarily because many of the elderly plaintiffs in this 24-year-old class died waiting and because of Florida's congested court dockets. Also omitted is that the plaintiffs win less than half of the cases that go trial. Those who win are subject to the type of appellate strategies described in this response.

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[6] Penny Morgan, *Reynolds American: An Inside-Out Breakdown of a Tobacco Giant*, available at http://marketrealist.com/2015/10/reynolds-american-inside-breakdown-tobacco-giant/ (last visited Ap. 30, 2018).

[7] *R.J. Reynolds Tobacco Co v. O'Hara*, 228 So. 3d 1168 (Fla. Dist. Ct. App. 2017).

[8] *Tognoli v. Philip Morris USA Inc.*, --- So. 3d ---, 2018 WL 1357455 (Fla. Mar. 16, 2018).

Alternative request for reconsideration

In the event this Court has already granted the extension application, Respondent respectfully asks this Court to reconsider that order. The members of the Eleventh Circuit bar, including the undersigned, are quite thankful that our Circuit Justice has a generous view of the grounds for an extension. And, we all recognize that our Circuit Justice routinely grants extension applications before an opposition can be filed.

But, Petitioners seek to push that generosity too far and to replace the "good cause" standard with a rubber stamp that essentially grants 150 days to seek certiorari by any party fortunate enough to have counsel familiar with this dynamic. Worse yet, looking at the previous 41 *Engle* cases in this Court, there is a disturbing pattern of Petitioners ensuring that the plaintiffs cannot respond before the extension order is entered.

For example, in *Philip Morris USA Inc. v. Greene*, No. 15A601, one of the law firms listed in the application here (Gibson, Dunn & Crutcher LLP) waited until after hours to serve the extension application on the undersigned counsel. **(Exhibit A)**. The undersigned counsel filed an opposition the next day. **(Exhibit B)**. But, this Court had already granted the extension application. Gibson, Dunn & Crutcher LLP, on behalf of Philip Morris, let the full 60 days run, and never filed a certiorari petition.

In this case, Petitioners (including the same Philip Morris counsel) took the time to hand-deliver their extension application to the Court at 3:42pm, but then waited until after the Court was closed to serve Respondent (at 5:11pm). In the attached email exchange, Petitioners offer no justification for the one-and-a-half-hour delay, and never explain how this complies with Rule 29.3, which requires that "service on a party must be by a manner at least as expeditious as the manner used to file the document with the Court." **(Exhibit C)**. To avoid the pattern, we are filing our opposition after hours (instead of waiting until the morning). In the event we are still too late, we ask the Court to reconsider its previous order granting the requested extension, and enter a new order denying the extension request.

Respectfully submitted,

/s/Celene H. Humphries
Celene H. Humphries
Counsel of Record
BRANNOCK & HUMPHRIES
1111 W. Cass Street, Suite 200
Tampa, Florida 33606
(813) 223-4300
tobacco@bhappeals.com

April 30, 2018

Counsel for Respondent

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the forgoing was sent by email this 30th day of April 2018, and by U.S. Mail on the 1st day of May 2018, to Michael Carvin (macarvin@jonesday.com), Jones Day, 51 Louisiana Ave., N.W., Washington, DC 20001, and Miguel Estrada (MEstrada@gibsondunn.com) and Amir Tayrani (ATayrani@gibsondunn.com), Gibson, Dunn & Crutcher LLP, 1050 Connecticut Ave., N.W., Washington, DC 20036.

/s/Celene H. Humphries
Celene H. Humphries
BRANNOCK & HUMPHRIES

No. A-

IN THE

Supreme Court of the United States

PHILIP MORRIS USA INC.,

Petitioner,

v.

LAUREN GREENE, AS TRUSTEE FOR THE BANKRUPTCY ESTATE OF JOHN J. RIZZUTO, AND ON BEHALF OF JOHN J. RIZZUTO, INDIVIDUALLY,

Respondent.

APPLICATION FOR AN EXTENSION OF TIME WITHIN WHICH TO FILE A PETITION FOR A WRIT OF CERTIORARI TO THE FLORIDA FIFTH DISTRICT COURT OF APPEAL

TO THE HONORABLE CLARENCE THOMAS, ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES AND CIRCUIT JUSTICE FOR THE ELEVENTH CIRCUIT:

Pursuant to this Court's Rule 13.5, Philip Morris USA Inc. ("PM USA") respectfully requests a 60-day extension of time, to and including February 15, 2016, within which to file a petition for a writ of certiorari to the Florida Fifth District Court of Appeal.*

The Fifth District Court of Appeal issued an opinion on July 31, 2015, affirming in part and reversing in part the judgment below. *Philip Morris USA Inc. v. Greene*, 175 So.

* Pursuant to this Court's Rule 29.6, undersigned counsel state that PM USA is a wholly owned subsidiary of Altria Group, Inc. Altria Group, Inc. is the only publicly held company that owns 10% or more of PM USA's stock. No publicly held company owns 10% or more of Altria Group, Inc.'s stock.

Exhibit A

3d 312 (Fla. Dist. Ct. App. 2015). The Fifth District denied PM USA's timely motion for rehearing on September 18, 2015. PM USA is not able to seek review in the Florida Supreme Court because the Fifth District's opinion does not contain analysis or a citation to any other decision with respect to the issues that it decided against PM USA. *See Fla. Star v. B.J.F.*, 530 So. 2d 286, 288 n.3 (Fla. 1988). Accordingly, this Court has jurisdiction to review the Fifth District's decision under 28 U.S.C. § 1257(a) because the Fifth District was "the highest court of [the] State in which a decision could be had." *See, e.g., KPMG LLP v. Cocchi*, 132 S. Ct. 23, 24 (2011) (per curiam). Unless extended, the time within which to file a petition for a writ of certiorari will expire on December 17, 2015.

A copy of the Fifth District's decision is attached hereto as Exhibit A; the order denying PM USA's motion for rehearing is attached as Exhibit B.

1. This case is one of approximately 8,000 individual personal injury suits filed in the wake of the Florida Supreme Court's decision in *Engle v. Liggett Group, Inc.*, 945 So. 2d 1246 (Fla. 2006) (per curiam), which prospectively decertified a sprawling class action against the major domestic cigarette manufacturers filed on behalf of "[a]ll [Florida] citizens and residents, and their survivors, who have suffered, presently suffer or who have died from diseases and medical conditions caused by their addiction to cigarettes that contain nicotine." *Id.* at 1256 (internal quotation marks omitted). When it decertified the class, however, the Florida Supreme Court preserved several highly generalized jury findings from the first phase of the *Engle* class-action proceedings—for example, that each defendant "placed cigarettes on the market that were defective and unreasonably dangerous" in some unspecified manner and at some unspecified time over a 50-year period. *Id.* at 1257

n.4. The Florida Supreme Court stated that those findings would have "res judicata effect" in subsequent cases filed by individual class members. *Id.* at 1269.

In each of the thousands of follow-on "*Engle* progeny" cases filed in state and federal courts across Florida, the plaintiffs have asserted that the generalized *Engle* findings relieve them of the burden of proving the tortious conduct elements of their individual claims against the defendants—for example, on a claim for strict liability, that the particular cigarettes smoked by the class member contained a defect that was the legal cause of the class member's injury. The Florida Supreme Court has held that affording such broad preclusive effect to the generalized *Engle* findings is consistent with federal due process. *See Philip Morris USA, Inc. v. Douglas*, 110 So. 3d 419, 436 (Fla.) ("That certain elements of the prima facie case are established by the Phase I findings does not violate the *Engle* defendants' due process rights . . . ."), *cert. denied*, 134 S. Ct. 332 (2013).

Pursuant to the procedures established in the Florida Supreme Court's *Engle* decision, respondent Lauren Greene, as trustee for the bankruptcy estate of John J. Rizzuto, brought this personal-injury action against PM USA and Liggett Group LLC ("Liggett") to recover damages that Mr. Rizzuto allegedly incurred as a result of developing chronic obstructive pulmonary disease caused by smoking defendants' cigarettes. Respondent brought claims for strict liability, negligence, fraudulent concealment, and conspiracy to fraudulently conceal. The trial court ruled that, upon proving that Mr. Rizzuto was a member of the *Engle* class, respondent would be permitted to rely on the "res judicata effect" of the *Engle* findings to establish the conduct elements of her claims and would not be required to prove those elements at trial.

The jury concluded that Mr. Rizzuto was a member of the *Engle* class, found in respondent's favor on all of her claims, and awarded $2.55 million in economic damages and $10 million in non-economic compensatory damages; the jury allocated 55% of the fault to PM USA, 25% to Liggett, and 20% to Mr. Rizzuto. The trial court thereafter remitted the economic damages to $1.13 million, and entered a final judgment in the amount of $11,132,337. The trial court denied defendants' request to reduce the final judgment based on the jury's allocation of comparative fault.

On appeal to the Fifth District, PM USA raised several challenges to the judgment, including that the trial court had erred by failing to reduce the damages award based on the fault that the jury allocated to Mr. Rizzuto. PM USA also expressly preserved its position that the trial court violated federal due process by permitting respondent to rely on the *Engle* findings to establish the tortious conduct elements of her claims, but acknowledged that the Florida Supreme Court had already rejected that argument in *Douglas*.[1]

After Liggett entered into a settlement with respondent—leaving PM USA as the lone defendant on appeal—the Fifth District issued a decision that affirmed in part and reversed in part. In a written opinion, the court concluded that the trial court had erred by

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[1] *See* PM USA Initial Br. 5 ("For purposes of preservation, we assert that giving this preclusive effect to *any* of the *Engle* findings—both those related to the intentional tort claims and those related to the strict liability and negligence claims—violated federal due process, which requires a proponent of preclusion to establish that the specific issue relevant to his case was actually decided in his favor in the prior litigation. *See Fayerweather v. Ritch*, 195 U.S. 276, 298-99, 307 (1904). But we recognize that this argument was rejected by the Florida Supreme Court in *Douglas*, and that *Douglas* is binding here. *See* 110 So. 3d at 430-36.").

failing to reduce the compensatory damages award based on the jury's allocation of comparative fault; it otherwise affirmed the judgment, rejecting PM USA's other arguments without comment. 175 So. 3d at 313. The Fifth District "remand[ed] with directions for the trial court to enter an amended final judgment against each party liable on the basis of such party's percentage of fault and not on the basis of joint and several liability." *Id.* at 316. The court thereafter denied PM USA's timely motion for rehearing.[2]

2. This Court's review would be sought on the ground that the Fifth District's decision—which adhered to the Florida Supreme Court's controlling decision in *Douglas*—conflicts with this Court's due process precedent by depriving PM USA of its property without any assurance that any jury actually found that PM USA committed tortious conduct that was the legal cause of Mr. Rizzuto's injuries. For example, on the strict-liability and negligence claims, respondent was permitted to invoke the *Engle* jury's generalized findings that PM USA sold unspecified cigarettes at unspecified times that contained an unspecified defect to establish conclusively that the particular cigarettes smoked by Mr. Rizzuto were defective. The Fifth District Court of Appeal upheld that result even though respondent did not attempt to show that the *Engle* jury actually decided this issue in her favor. Nor could respondent conceivably have made such a showing: In

[2] Although the Fifth District remanded the case for the trial court to enter an amended judgment that reflects the jury's allocation of comparative fault, the Fifth District's judgment is final for purposes of this Court's review. *See, e.g.*, *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 907 n.42 (1982) ("Although the Mississippi Supreme Court remanded for a recomputation of damages, its judgment is final for purposes of our jurisdiction.").

the *Engle* proceedings, the class presented many alternative theories of defect, several of which applied only to particular designs or brands of cigarettes, rather than to every design and brand, and it is impossible to determine from the *Engle* findings or the *Engle* record which of those theories the *Engle* jury actually accepted. It is possible, for example, that the defect found by the *Engle* jury was a flaw in the filters of a brand of PM USA's cigarettes that Mr. Rizzuto never smoked, or the use of certain additives in that brand—and that the jury found that the cigarettes that Mr. Rizzuto did smoke were *not* defective.

Likewise, to support the class's fraudulent concealment and conspiracy claims, the *Engle* jury was presented with numerous distinct categories of allegedly fraudulent statements by PM USA and other tobacco companies, and the jury returned only generalized findings that the *Engle* defendants "concealed or omitted" information about "the health effects" or "addictive nature of smoking cigarettes." *Engle*, 945 So. 2d at 1277. The *Engle* jury's verdict does not indicate which statements were the basis for its findings; whether those findings rested on statements about the health effects of smoking, the addictive nature of smoking, or both; or which types of statements were or were not found to have been in furtherance of the agreement to conceal that the jury found.

In these circumstances, allowing respondent to invoke the *Engle* findings to establish conclusively that the particular cigarettes smoked by Mr. Rizzuto were defective, and that the statements he saw and read from PM USA and other tobacco companies were fraudulent, violates due process. *See, e.g., Fayerweather v. Ritch*, 195 U.S. 276, 299, 307 (1904) (holding, as a matter of federal due process, that where preclusion is sought based on a jury verdict that may rest on any of two or more alternative grounds, and it cannot be determined with certainty which alternative was actually the basis for the jury's finding, "the plea of *res judicata* must fail"); *Richards v. Jefferson County*, 517 U.S. 793, 797 (1996) ("We have long held . . . that extreme applications of the doctrine of res judicata may be inconsistent with a federal right that is fundamental in character.") (internal quotation marks omitted); *Honda Motor Co. v. Oberg*, 512 U.S. 415, 430 (1994) ("[A State's] abrogation of a well-established common-law protection against arbitrary deprivations of property raises a presumption that its procedures violate the Due Process Clause."). That manifest due process violation is being repeated in the thousands of pending *Engle* progeny cases in Florida and threatens to subject PM USA to billions of dollars in potential liability.

3. Additional time is necessary to permit counsel to evaluate whether to file a petition for a writ of certiorari in this case. In particular, the Eleventh Circuit Court of Appeals heard argument in *Searcy v. R.J. Reynolds Tobacco Co.*, No. 13-15258, on October 17, 2014, where one of the issues presented is whether it is consistent with federal due process to permit *Engle* progeny plaintiffs to establish the conduct elements of their fraudulent concealment and conspiracy claims by relying on the *Engle* findings. In addition, the Eleventh Circuit held earlier this year in *Graham v. R.J. Reynolds Tobacco Co.*, 782 F.3d 1261 (11th Cir. 2015), that *Engle*-progeny strict-liability and negligence claims are impliedly preempted by federal law because they "amount to the bare assertion that cigarettes are inherently defective" as a result of their addictive and disease-causing characteristics, which is a theory of liability that would "contravene[ ] the intent of Congress . . . that cigarettes and smokeless tobacco will continue to be sold in the United States." *Id.*

at 1278, 1281 (internal quotation marks omitted). The plaintiff's petition for rehearing in *Graham* has been pending since April.

While this Court has denied several previous petitions raising the same due process issue, the outcomes of *Searcy* and *Graham* may materially alter the landscape and bring the Fifth District's decision in this case—and the Florida Supreme Court's decision in *Douglas* on which it was based—into conflict with decisions of the Eleventh Circuit. Given that *Searcy* was argued more than a year ago and that *Graham* has been pending on rehearing for more than seven months, there is a reasonable possibility that there will be further activity in those cases within the next 60 days. An extension of that length could therefore benefit the Court and the parties by potentially permitting PM USA to file a petition that accounts for both *Searcy* and *Graham*. This extension would not prejudice respondent, who continues to accrue interest on her judgment at a rate that is higher than the rates available from commercial institutions.

Accordingly, PM USA respectfully requests that an order be entered extending the time to file a petition for a writ of certiorari by 60 days, to and including February 15, 2016.

Respectfully submitted.

Miguel A. Estrada /ACT

ANDREW L. FREY
LAUREN R. GOLDMAN
MAYER BROWN LLP
1675 Broadway
New York, NY 10025
(212) 506-2500

MIGUEL A. ESTRADA
Counsel of Record
AMIR C. TAYRANI
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500
mestrada@gibsondunn.com

Counsel for Petitioner

December 7, 2015

EXHIBIT A

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT

NOT FINAL UNTIL TIME EXPIRES TO
FILE MOTION FOR REHEARING AND
DISPOSITION THEREOF IF FILED

PHILIP MORRIS USA, INC.,

Appellant,

v. Case No. 5D13-3758

LAUREN GREEN, AS TRUSTEE,
ETC., ET AL.,

Appellees.

_________________________________/

Opinion filed July 31, 2015

Appeal from the Circuit Court
for Hernando County,
Victor J. Musleh, Senior Judge.

Joseph H. Lang, Jr., of Carlton & Fields, Jorden Burt, P.A., Tampa, M. Sean Laane, of Arnold & Porter LLP, Washington, DC, William Geraghty, and Rachel Canfield, of Shook, Hardy & Bacon L.L.P, Miami, Appellant.

Celene Humphries, Steven L. Brannock, Maegen Peek Luka, and Tyler K. Pitchford, of Brannock & Humphries, Tampa, Brent R. Bigger, of Bigger Law, Tampa, Hendrik Uiterwyk, of Abrahamson & Uiterwyk, Tampa, Hutch Pinder, of The Whittemore Law Group, P.A., St. Petersburg, for Appellees.

EDWARDS, J.

Philip Morris USA, Inc. ("Appellant") appeals the judgment entered against it following a jury trial of an *Engle*-progeny case.[1] Of the several points raised by Appellant, the only one that merits discussion is whether the trial court erred in entering final judgment without application of comparative fault. Under the circumstances of this case, the damages should have been apportioned among the parties based upon comparative fault. We reverse as to that issue only, and remand the case for entry of an amended final judgment awarding damages against the liable parties on the basis of each party's percentage of fault.

Lauren Greene ("Appellee"), trustee for the bankruptcy estate of John J. Rizzuto, brought this lawsuit on Mr. Rizzuto's behalf against Appellant and Liggett Group, Inc. (collectively "defendants"). From 1961 until 2000, Mr. Rizzuto was a smoker of cigarette brands manufactured by Appellant and other brands manufactured by co-defendant, Liggett Group, Inc.[2] According to Mr. Rizzuto, he made several unsuccessful attempts to quit smoking in the 1970s, 1980s, and 1990s. As a result of smoking, he contracted chronic obstructive pulmonary disease ("COPD"), which was formally diagnosed in 1994. Mr. Rizzuto successfully quit smoking after he was subsequently hospitalized for treatment of bronchial spasms, a condition related to his COPD.

The trial proceeded in accordance with the Florida Supreme Court's holding that the *Engle* jury's findings as to the following facts would have res judicata effect in the individual class members' cases: (1) smoking causes several serious diseases,

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

[2] A settlement was reached between Liggett Group, LLC and Appellee during this appeal. Thus, Liggett Group is no longer a party to the appeal.

including COPD; (2) the nicotine in cigarettes is addictive; (3) all defendants in the *Engle* class action, including Appellant, placed cigarettes on the market that were defective and unreasonably dangerous; (4) all defendants in the *Engle* case concealed information known or available about the adverse health effects, and/or the addictive nature of smoking; (5) the *Engle* defendants concealed this information with the intention that the public would rely on the non-disclosure to their detriment, (6) all *Engle* defendants sold defective cigarettes; (7) all *Engle* defendants sold cigarettes that did not comply with the representations of fact they made; and (8) all *Engle* defendants were negligent. *Engle*, 945 So. 2d at 1256.

The case went to trial based upon Appellee's fourth amended complaint, which asserted claims of strict products liability, negligence, fraud by concealment, and conspiracy to commit fraud by concealment. Because Mr. Rizzuto was an *Engle* class member, Appellee was not required to prove all of the elements of strict liability or negligence. The verdict form used in this case did not require the jury to respond to any questions regarding strict liability or negligence, but included two questions as to whether the defendants concealed and conspired to conceal information from Mr. Rizzuto. The jury, in its verdict, found that Mr. Rizzuto was a member of the *Engle* class and that both defendants concealed and conspired to conceal information from Mr. Rizzuto regarding the risks, consequences, and addictive nature of smoking cigarettes.

In its verdict, the jury apportioned fault for causing Mr. Rizzuto's COPD as follows: fifty-five percent to Appellant, twenty-five percent to Liggett Group, LLC, and twenty percent to Mr. Rizzuto. Despite Appellant's timely and repeated requests, the trial court refused to apportion damages based upon each party's fault, instead entering judgment in the full amount of Mr. Rizzuto's damages, jointly and severally, against defendants.

During both the opening statement and closing arguments, Appellee repeatedly referenced Mr. Rizzuto's acceptance of his portion of responsibility for his COPD. [3, 4] Such statements were invitations by Appellee to the jury to find Mr. Rizzuto partially at fault. Appellee framed the statements to the jury in terms of Mr. Rizzuto wanting to do what is fair by a determination of what portion of the shared responsibility belonged to him and what portion of the shared responsibility belonged to each defendant. These repeated statements from Appellee that Mr. Rizzuto's "accepts his fault, and wants a fair portion of the responsibility" were made with regard to all the claims he pursued, including specifically the claims of concealment and conspiracy to conceal information regarding the risks and addictive nature of cigarettes. Appellant correctly argues that

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[3] Examples in Appellee's opening statement include: "Was John Rizzuto impacted by the tobacco industry's 50-year conspiracy to conceal? . . . And I think there was some talk about relieving responsibility. No one is looking to relieve any responsibility. In this case, Mr. Rizzuto accepted his responsibility. He's asking you specifically to put responsibility on him. Our position is that it's partial, it's not all his fault, it's not all his responsibility. And the evidence will show you why it's a shared responsibility in a case like this, in this case." "You know, John Rizzuto accepts his fault, and he wants a fair portion of the responsibility. We would be disingenuous to come in here and say it's all their fault. That's not the case; it's shared. There is no doubt about it. The only question is what portion belongs on the tobacco companies who created and designed nicotine delivery devices, they marketed them to ensnare teens into the addiction cycle, and then concealed the health consequences and the addictiveness, those things from the findings, what is their portion of responsibility."

[4] Examples in Appellee's closing arguments include: "So looking at [question] number 4 [on the verdict form], we've told you this already, that Mr. Rizzuto accepts his fault and [Defense objection; overruled] [a]ccepts his fault and wants a fair portion of the responsibility." "The only question the evidence has shown is what portion belongs on the tobacco companies who created and designed nicotine delivery devices, marketed to ensnare teens into the addiction cycle, and then made them customers for life, what is their fair share of responsibility?"

Appellee cannot take the position with the jury that responsibility will be shared, and then argue against apportioned damages in the final judgment. As the cases discussed below demonstrate, whether labeled "estoppel" or "waiver," taking two such diametrically opposed positions in the same case is misleading, unfair, and unacceptable.

"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). "One who assumes a particular position or theory in a case is judicially estopped in a later phase of that same case, or in another case, from asserting any other or inconsistent position toward the same parties and subject matter." *In re Adoption of D.P.P.*, 158 So. 3d 633, 639 (Fla. 5th DCA 2014) (citing *Griffin* with approval 237 So. 2d at 41-42). "In general, the doctrine of estoppel prevents a person from unfairly asserting inconsistent positions." *Id.* at 638-39. "In its final analysis, the foregoing rule of estoppel is founded upon legal and equitable concepts of justice under the law, or perhaps on such popular expressions as 'you can't blow both hot and cold at the same time' or 'you can't have your cake and eat it, too.' The quintessence, however of this estoppel rule is probably the integrity of our system of justice." *Griffin,* 237 So. 2d at 42.

Appellee's repeated statements, inviting the jury to find shared responsibility, could not have left the jury with any other impression than that Appellee was accepting some measure of fault with respect to each of her claims. In *Foreline Security Corp. v. Scott*, 871 So. 2d 906, 911 (Fla. 5th DCA 2004), we found that the trial court erred when it did not apply the comparative negligence statute when the jury was "misled . . . into believing that it was allocating fault fifty-fifty between Foreline and USB." *Id.* at 911. This was reversible error because "[t]he jury may have reached a different verdict on damages had it known that Foreline would bear the entire amount." *Id.* The jury in this case was likewise misled by Appellee's counsel.

In *R.J. Reynolds Tobacco Co. v. Hiott*, 129 So. 3d 473 (Fla. 1st DCA 2014), the First District Court of Appeal found the reasoning of *Foreline* specifically applicable to an *Engle*-progeny case. "Hiott in fact encouraged the jury from *voir dire* through closing argument, that she accepted that her deceased husband was partially at fault for his smoking-related illness and death. Thus, she expected the jury to allocate some fault to her late husband." *Id.* at 481. "As Reynolds notes, Hiott used the admission that Mr. Hiott was partly at fault as a tactic to secure an advantage with the jury throughout the trial; she cannot now seek to have it both ways by avoiding comparative fault after the verdict." *Id.* (internal quotation marks omitted). The First District Court of Appeal agreed with Reynolds and upheld the trial court's finding of waiver by Mrs. Hiott. *Id.* at 481. In the instant case, Appellee's repeated, explicit, tactical directions encouraging the jury to find Mr. Rizzuto partially at fault and to determine what percentage of fault was to be shared by each of the parties will be given binding effect as to all claims.

Furthermore, Appellee's counsel directly assured the jury that comparative fault would be taken into account and explained how the court would do so: "Mr. Rizzuto accepts his fault and wants a fair portion of the responsibility. And you heard the instructions from the Court, I think it's instruction 10, I believe, but there will be an instruction that guides you on this. You put the percentages down, the Court handles the rest. You don't reduce the damages yourself. You don't take the numbers out and do the math yourself, the Court does that." For Appellee to now argue that there was no reasonable possibility that Appellee's tactics may have resulted in the jury inflating the damages to account for reduction due to application of comparative fault insults the intelligence of jurors and flies in the face of the burden to prove harmless error under *Special v. West Boca Medical Center*, 160 So. 3d 1251, 1257 (Fla. 2014).

Accordingly, under the circumstances of this case, we find the trial court erred by not applying comparative fault. We remand with directions for the trial court to enter an amended final judgment against each party liable on the basis of such party's percentage of fault and not on the basis of joint and several liability. In all other aspects, the final judgment is affirmed.

AFFIRMED IN PART, REVERSED IN PART AND REMANDED.

EVANDER, J. and MALTZ, H.M., Associate Judge, concur.

EXHIBIT B

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT

PHILIP MORRIS USA, INC. AND
LIGGETT GROUP, LLC,

Appellant,

v. CASE NO. 5D13-3758

LAUREN GREEN, AS
TRUSTEE, ETC., ET AL.,

Appellee.
________________________/

DATE: September 18, 2015

BY ORDER OF THE COURT:

ORDERED that Appellant's Motion for Rehearing or in the Alternative, for Citation, filed September 1, 2015, is denied.

I hereby certify that the foregoing is
(a true copy of) the original Court order.

Joanne P. Simmons
JOANNE P. SIMMONS, CLERK

DISTRICT COURT OF APPEAL FIFTH DISTRICT STATE OF FLORIDA

Authorized By: Judges

cc:

Steven L. Brannock
Karen H. Curtis
Celene Humphries
Brent Bigger
Rachel Ann Canfield
Leonard A. Feiwus
Hendrik Uiterwyk
William P. Geraghty
Kelly A. Luther
Frank Cruz-Alvarez
John Hutchins Pinder, Vi
Joseph H. Lang, Jr.
Maegen Luka
Tyler K. Pitchford
Wayne L. Thomas
M Sean Laane

No. A-

IN THE

Supreme Court of the United States

PHILIP MORRIS USA INC.,

Petitioner,

v.

LAUREN GREENE, AS TRUSTEE FOR THE BANKRUPTCY ESTATE OF JOHN J. RIZZUTO, AND ON BEHALF OF JOHN J. RIZZUTO, INDIVIDUALLY,

Respondent.

OPPOSITION TO APPLICATION FOR AN EXTENSION OF TIME WITHIN WHICH TO FILE A PETITION FOR A WRIT OF CERTIORARI TO THE FLORIDA FIFTH DISTRICT COURT OF APPEAL

TO THE HONORABLE CLARENCE THOMAS, ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES AND CIRCUIT JUSTICE FOR THE ELEVENTH CIRCUIT:

Respondent, John Rizzuto, opposes the application for an extension of time filed by Philip Morris USA Inc. ("PM") because there is no reasonable likelihood that this Court will grant review. PM did not preserve the federal issue it now plans to assert in a certiorari petition to this Court and, even if it did, this Court has previously and repeatedly denied review of the same issue. In addition, Mr. Rizzuto is elderly and very ill, and every extension that PM seeks in this case, which has been pending since 1994, increases the risk that he will not live to see the recovery awarded by the jury and affirmed by an appellate court.

Good cause does not exist because there is no reasonable likelihood of review.

Rule 13.5 requires PM to establish good cause to postpone the deadline for filing a petition for writ of certiorari. Here, there is no justification for delay because this Court in all

Exhibit B

likelihood will deny the petition. In its application, PM states that it will once again seek review of its due process challenge to the *Engle* litigation. However, contrary to PM's assertion, PM did not preserve this federal argument in the Florida appellate proceedings.

When PM appealed the verdict in Mr. Rizzuto's favor it raised only three issues, asserting that: (1) the jury's award was excessive; (2) the statute of repose barred the action; and (3) the jury's award should have been reduced according to a Florida statute. None of these issues even remotely implicates a federal issue, let alone the issue that PM now claims it will assert to this Court—federal due process.

The only time that PM addressed its federal due process argument to the Florida appellate court was the brief reference it quotes now in its application for an extension of time. However, that brief statement was found in the facts section of one of PM's briefs, and was never mentioned or analyzed again by PM. *See* Attachment A. Because PM never properly presented the federal issue to the Florida appellate court, there is no appellate issue for this Court to review now.

As explained in *Adams v. Robertson*, 520 U.S. 83, 86 (1997), this Court "will not consider a petitioner's federal claim unless it was either addressed by, or properly presented to, the state court that rendered the decision we have been asked to review." *See also Webb v. Webb*, 451 U.S. 493, 498-99 (1981). This means that a petitioner must show that the federal claim was raised at the "time and in the manner required by state law" in the state appeal. Under Florida law, PM was required to both specifically assert the argument as an issue on appeal, and present argument. *See Mendoza v. State*, 87 So. 3d 644, 663 n.16 (Fla. 2011) ("To the extent Mendoza seeks to incorporate by reference the other factual bases and arguments thereto raised in his motion to disqualify for purposes of appeal, having cited in his brief the record pages of the motion to disqualify and providing no argument, the rules of appellate procedure do not authorize that practice."); *Chamberlain v. State*, 881 So. 2d 1087, 1103 (Fla. 2004) ("[B]ecause Chamberlain fails to advance any argument to this Court regarding the jury instruction issue he raised at trial, we conclude that he has abandoned that issue."); *Shere v. State*, 742 So. 2d 215, 223 n.6 (Fla. 1999) (finding that issues raised in appellate brief which contain no argument are deemed abandoned). PM's one sentence in the factual allegations portion of an appellate brief was insufficient to raise the federal issue in the Florida appellate court.

Even if PM had properly presented its federal due process argument to the Florida appellate court, this Court has denied review of multiple petitions asserting this same argument, including a petition seeking review of the original Florida Supreme Court decision in *Engle v. Liggett Group, Inc.*, 945 So. 2d 1246 (Fla. 2006), *cert. denied*, 552 U.S. 941 (2007), petitions seeking review of at least seven verdicts entered pursuant to the *Engle* decision, and a petition seeking review of the Florida Supreme Court's decision that expressly addressed and rejected PM's due process argument, *Philip Morris USA, Inc. v. Douglas*, 110 So. 3d 419 (Fla.), *cert. denied*, 134 S. Ct. 332 (2013). This petition deserves the same fate.

Finally, in an abundance of caution, we note that PM's application for an extension of time mentions, almost as an aside, that it has asserted a different federal issue (federal preemption) in an appeal pending in the Eleventh Circuit Court of Appeals. To be clear, PM never mentioned federal preemption anywhere in either of its briefs to the Florida appellate court in this case. Therefore, the Florida appellate court did not review that federal question either, meaning that PM cannot seek this Court's review on that basis as well.

An extension would prejudice Mr. Rizzuto.

Mr. Rizzuto, who was the plaintiff in the trial court action below, suffers from chronic obstructive pulmonary disease (COPD), which was caused by decades of smoking cigarettes manufactured by PM. COPD is a fatal, incurable illness. Mr. Rizzuto, who is now 68 years old, must use medically provided oxygen to assist in breathing and is very ill. Time is clearly of the essence in ensuring that he sees this case to its rightful conclusion.

The *Engle* litigation of which Mr. Rizzuto's case is a part, has spanned more than two decades, including cases at every level of state and federal court. In 1994, a Florida trial court certified a group of smokers and their survivors as a nationwide class action. The Third District Court of Appeal subsequently affirmed the trial court's certification order, in 1996, but reduced the class to include only Florida smokers. *See R.J. Reynolds Tobacco Co. v. Engle*, 672 So. 2d 39 (Fla. 3d DCA 1996). A trial was held in 1999 and the trial court entered a final judgment in 2000, awarding $12.7 million in compensatory damages to three plaintiffs and $145 billion in punitive damages to the entire class.

The Third District reversed the final judgment in a lengthy 2003 opinion. *See Liggett Grp., Inc. v. Engle*, 853 So. 2d 434 (Fla. 3d DCA 2003). In 2006, that decision was approved in part and quashed in part by the Florida Supreme Court's groundbreaking opinion that permitted members of the *Engle* class, such as Mr. Rizzuto, to proceed individually with res judicata effect given to several findings reached by the *Engle* jury. *See Engle v. Liggett Grp., Inc.*, 945 So. 2d 1246 (Fla. 2006).

In the aftermath of the Florida Supreme Court's ruling, progeny cases like Mr. Rizzuto's have populated Florida courts. These cases are oftentimes time-consuming and complex, as the tobacco companies attempt at every step of the way to ensure that as much expense and effort as possible are expended before reaching the conclusion of the litigation. The result is that a class action that was certified in 1994, with a final judgment reached in 2000 and a Florida Supreme Court decision entered in 2006, remains ongoing in the trial courts as we near the end of 2015.

Mr. Rizzuto was only 47 when the *Engle* class action began. He was almost 60 years old by the time the Florida Supreme Court's decision was issued. Now that his case has finally been considered by a jury, he is 68. And his health, rendered frail from many years of smoking the defendants' cigarettes, is in dire straits. Every additional week, month, and year that Mr. Rizzuto's case continues without a final resolution is, sadly, one step closer we come to Mr. Rizzuto not living to see the end of it.

Accordingly, Mr. Rizzuto respectfully asks that PM's request for an extension of time to file a petition for a write of certiorari be denied.

Celene H. Humphries
Counsel of Record
Steven L. Brannock
BRANNOCK & HUMPHRIES
100 South Ashley Drive, Suite 1130
Tampa, Florida 33602
(813) 223-4300
tobacco@bhappeals.com

December 8, 2015 *Counsel for Respondent*

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was sent by email and U.S. Mail to Andrew L. Frey (afrey@mayerbrown.com) and Lauren R. Goldman (lrgoldman@mayerbrown.com), Mayer Brown LLP, 1675 Broadway, New York, NY 10025 and Miguel A. Estrada (mestrada@gibsondunn.com) and Amir C. Tayrani

(ATayrani@gibsondunn.com), Gibson, Dunn & Crutcher LLP, 1050 Connecticut Ave., N.W., Washington, D.C. 20036, this 8th day of December 2015.

Celene H. Humphries
BRANNOCK & HUMPHRIES

Case No. 5D13-3758

IN THE FLORIDA FIFTH DISTRICT COURT OF APPEAL

PHILIP MORRIS USA INC. AND LIGGETT GROUP LLC,

Defendants/Appellants,

v.

LAUREN GREENE, AS TRUSTEE FOR THE BANKRUPTCY ESTATE OF JOHN J. RIZZUTO, AND ON BEHALF OF JOHN J. RIZZUTO, INDIVIDUALLY,

Plaintiff/Appellee.

Appeal from the Circuit Court of the Fifth Judicial Circuit
In and for Hernando County, Florida
Case No. H27-CA-2008-003318

INITIAL BRIEF OF APPELLANT PHILIP MORRIS USA INC.

Joseph H. Lang, Jr.
Fla. Bar No. 59404
CARLTON FIELDS JORDEN BURT, P.A.
4221 W. Boy Scout Boulevard
Tampa, Florida 33607
Phone: (813) 229-4253
Fax: (813) 229-4133
Email: jlang@cfjblaw.com

Attorney for Philip Morris USA Inc.

April 9, 2014

Attachment A

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STATUTES

STATEMENT OF THE CASE AND FACTS[1]

Plaintiff brought this personal injury action alleging that John J. Rizzuto—a purported member of the *Engle* class whose bankruptcy estate plaintiff administers—contracted COPD as a result of smoking cigarettes manufactured by the defendants. Plaintiff asserted claims of strict liability, negligence, fraud by concealment, and conspiracy to commit fraud by concealment. After a trial, the jury returned a verdict in favor of plaintiff on all of her claims and awarded $2.55 million in economic damages (subsequently remitted to $1.13 million) and $10 million in noneconomic damages, but rejected her claim for punitive damages. The court refused to reduce the damages award based on the jury's finding of comparative fault because plaintiff had prevailed on her intentional tort claims.

Defendant Philip Morris USA Inc. ("PM USA") seeks reversal of the judgment on the following three grounds:

1. While COPD can be a serious disease, Mr. Rizzuto had an exceptionally mild form of it. The jury nevertheless awarded $10 million in noneconomic damages—which is twice the amount requested by plaintiff's counsel and is far out of line with typical awards to living *Engle* progeny plaintiffs

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[1] The trial transcript is cited herein as "T. [page number(s)]." Non-transcript portions of the record compiled by the trial court clerk are cited as "R. [volume number]: [page number(s)]." Copies of cited record items are included in an Appendix to this brief, which is cited as "App. Tab [letter]."

suffering substantially more serious lung illnesses. The award is grossly excessive and was motivated by passion or prejudice. The proper remedy under these circumstances is a new trial on both liability and compensatory damages, or, in the alternative, a new trial on compensatory damages. At a minimum, the Court should order a substantial remittitur of the noneconomic damages.

2. PM USA is entitled to judgment or a new trial on the fraudulent concealment and conspiracy claims by virtue of Florida's fraud statute of repose. A ruling in PM USA's favor on this issue would eliminate the premise for the trial court's refusal to apply comparative fault.

3. The trial court erred in any event by refusing to apply the jury's comparative fault finding to the verdict, because (a) the comparative-fault statute applies here despite the existence of intentional tort claims; and (b) plaintiff waived, or is estopped from making, any argument to the contrary.

A. John Rizzuto

Mr. Rizzuto was born on July 12, 1947. T. 1497 [App. Tab X]. He smoked cigarettes from 1961 until 2000. *Id.* at 2644, 2701, 2705. His primary brand between 1961 and 1963 was L&M, which was manufactured by defendant Liggett Group LLC ("Liggett"). *Id.* at 2647-48, 2664. From 1964 until 2000, his primary brand was Marlboro, which was manufactured by PM USA. *Id.* at 2649, 2664, 2681-82. Mr. Rizzuto made a number of unsuccessful attempts to quit smoking during the 1970s, 1980s, and 1990s. *Id.* at 2678, 2683-84, 2691-92. In 1994, he was diagnosed with COPD. *Id.* at 1715, 2707, 2715-16. He quit smoking for good on December 30, 2000, when he was hospitalized for spasms in his bronchial tubes. *Id.* at 66-67, 2701, 2704-05. As discussed below, although Mr. Rizzuto has experienced symptoms of his COPD, including occasional shortness of breath and difficulty walking, his condition has been largely stable since the 2000 hospitalization, and he has had no recent medical problems. *See* pp. 9-11 *infra*.

B. The Complaint And The *Engle* Litigation

Plaintiff Lauren Greene filed the operative complaint as trustee of Mr. Rizzuto's bankruptcy estate in the Fifth Judicial Circuit, Hernando County. *See* R. 18:3543-3599 [App. Tab A].[2] She sought compensatory and punitive damages based on claims of strict liability, negligence, fraud by concealment, and conspiracy to commit fraud by concealment. *Id.* at ¶¶ 17-33. Plaintiff alleged that Mr. Rizzuto was "a member of the *Engle* class" and that she was therefore entitled to rely (1) on the pendency of the *Engle* class action to obtain tolling of the statutes

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2 Originally, Mr. Rizzuto and five other individuals sued five defendants in the Thirteenth Judicial Circuit. Over the next five years, Mr. Rizzuto's claims were severed from those of the other original plaintiffs, the three defendants other than PM USA and Liggett were dismissed, the case was transferred to the Fifth Judicial Circuit, and Ms. Greene was substituted as plaintiff in her capacity as trustee. *See* R. 18:3543-3599 [App. Tab A].

of limitation applicable to her claims; and (2) on the *Engle* jury's findings to establish the wrongful-conduct elements of those claims. *Id.* at ¶¶ 1, 12, 16.

Engle was a class action brought on behalf of "[Florida] citizens and residents, and their survivors, who have suffered, presently suffer or have died from diseases and medical conditions caused by their addiction to cigarettes that contain nicotine." *R.J. Reynolds Tobacco Co. v. Engle*, 672 So. 2d 39, 40, 42 (Fla. 3d DCA 1996). In *Engle v. Liggett Group, Inc.*, 945 So. 2d 1246 (Fla. 2013), the Florida Supreme Court prospectively decertified the class. *Id.* at 1267-68. It further held that class members could pursue their own individual claims against the defendants within one year of the court's mandate and that certain findings made by the *Engle* jury were to receive "res judicata effect" in the individual trials. *Id.* at 1277. The court made clear that the *Engle* jury "did *not* determine whether the defendants were liable to anyone," and thus that subsequent juries would have to "consider individual questions of reliance and legal cause." *Id.* at 1255, 1263; *see generally Philip Morris USA Inc. v. Douglas*, 110 So. 3d 419 (Fla. 2013).

C. Trial

In August 2013, a jury trial was held before the Honorable Victor J. Musleh. The pertinent evidence and decisions are as follows.

1. Events at Trial Relating to the Statute of Repose

The trial court instructed the jury that if it found that Mr. Rizzuto was an *Engle* class member, it would be bound by two *Engle* jury findings related to plaintiff's fraudulent concealment and conspiracy claims: (1) "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 and/or addictive nature of smoking cigarettes"; and (2) that the defendants had "agreed . . . to conceal or omit" such information "with the intention that smokers and the public would rely on this information to their detriment." T. 3445 [App. Tab X]. For purposes of preservation, we assert that giving this preclusive effect to *any* of the *Engle* findings—both those related to the intentional tort claims and those related to the strict liability and negligence claims—violated federal due process, which requires a proponent of preclusion to establish that the specific issue relevant to his case was actually decided in his favor in the prior litigation. *See Fayerweather v. Ritch*, 195 U.S. 276, 298-99, 307 (1904). But we recognize that this argument was rejected by the Florida Supreme Court in *Douglas*, and that *Douglas* is binding here. *See* 110 So. 3d at 430-36.

It was undisputed, however, that plaintiff could prevail on her fraud-based claims only if she proved that Mr. Rizzuto *detrimentally relied* on an act of concealment by defendants or their co-conspirators. *See Engle*, 945 So. 2d at 1263 (reliance remains to be proven in *Engle* progeny cases); *Douglas*, 110 So. 3d at 425, 428 (noting that *Engle* "disapproved the use of the [jury's] conduct findings relating to . . . fraud and . . . civil conspiracy because they were 'inadequate to allow a subsequent jury to consider individual questions of reliance and legal cause'" (quoting *Engle*, 945 So. 2d at 1255)); *see also* T. 3447 [App. Tab X]. The defendants argued at trial that Florida's fraud statute of repose—which states that an action "founded upon fraud" must be filed within twelve years "after the date of the commission of the alleged fraud," § 95.031(2)(a), Fla. Stat.—required plaintiff to prove reliance on a fraudulent act or omission *after* May 5, 1982, twelve years before the filing of the *Engle* complaint. *See* R. 98:19508-19527 [App. Tab B].

Disagreeing with defendants' reading of the statute of repose, plaintiff relied heavily on evidence that in the *1960s*, around the time Mr. Rizzuto began smoking, he relied to his detriment on defendants' alleged concealment of the hazards and addictiveness of cigarettes. For example, Mr. Rizzuto testified that "it was a common thing to see [smoking] on TV" at that time. T. 2626 [App. Tab X]. He remembered seeing advertisements for various brands of cigarettes manufactured by defendants, and remembered actors smoking on television and in movies. *See, e.g.*, *id.* at 2634, 2652-58. He testified that the sponsorship of television shows by cigarette companies "confirmed to [him] that smoking was ok" and that "there wasn't anything wrong with smoking." *Id.* at 2642. Plaintiff also presented expert testimony that cigarette advertisements generally made smoking appear "acceptable and normal" to viewers. *Id.* at 1956.

There was evidence, however, supporting the conclusion that by the time Mr. Rizzuto was a young adult (at the latest), he understood the hazards of smoking. He testified that his older brother had warned him against smoking when he was 16 or 17 years old. *See id.* at 2674. His father cautioned him around the same time. *See id.* at 2675. He read and understood the Surgeon General's warning that was placed on every cigarette package in the country in 1966: "cigarette smoking may be hazardous to your health." *Id.* at 2780-82. His mother quit smoking in the late 1960s when she developed throat polyps (*id.* at 2790-91); his father quit around 1977 (*id.* at 2792); and Mr. Rizzuto himself attempted to quit in the 1970s (*id.* at 2678). He also testified that by 1970, he had heard the term "cancer stick" and understood that it referred to cigarettes. *Id.* at 2789.

Thus, there was evidence from which the jury could have concluded (1) that Mr. Rizzuto relied on defendants' acts of concealment when he began smoking in the 1960s, *but* (2) that by the 1970s (and certainly well before May 5, 1982), Mr. Rizzuto was no longer relying on any of the tobacco companies' alleged misstatements or omissions, because at that point he knew that smoking was hazardous and was not under any misimpressions about the risks.[3]

Accordingly, defendants asked the trial court to instruct the jury that it could not find for plaintiff unless it concluded that Mr. Rizzuto had been defrauded by conduct that occurred after May 5, 1982, as defendants contended was required by the statute of repose. *See* R. 96:19197-97:19241 [App. Tab C at No. 8] (for fraud claim, requesting instruction that the "issue for your determination is whether Mr. Rizzuto reasonably relied to his detriment on any statement made by each Defendant, after May 5, 1982, which concealed or omitted material information regarding the health effects of cigarettes or their addictive nature"); *id.* at No. 9 (for conspiracy claim, requesting instruction that "the issue for your determination is whether Mr. Rizzuto reasonably relied to his detriment on a statement made after May 5, 1982, which concealed or omitted material information regarding the health effects of cigarettes or their addictive nature, and that was made in furtherance of

3 To be sure, the evidence on both of these points was disputed. Defendants pointed to evidence suggesting that Mr. Rizzuto *never* relied on defendants' actions when making decisions about smoking. *See, e.g.*, T. 2625-26, 2645, 2649-50, 2772 [App. Tab X] (Mr. Rizzuto testifying that he began smoking because his family and friends smoked, and that his choices of cigarette brands were based on which ones "looked cool" and would "impress the girls"); *id.* at 2858 (testifying that he never heard any statement by any tobacco company regarding the relationship between smoking and health). And plaintiff argued to the jury that Mr. Rizzuto *never* knew "the truth" about cigarettes. *Id.* at 3606. But based on the evidence, the jury *could* have concluded that Mr. Rizzuto relied to his detriment when he was a teenager but ceased relying when he was an adult.

each Defendant's agreement to conceal or omit material information regarding the health effects of cigarettes or their addictive nature"). Defendants also asked for questions on the verdict form reflecting the same requirement. *See* R. 96:19197-97:19241 [App. Tab D at Nos. 4-5]; T. 3293-3301 [App. Tab X].

The court rejected defendants' proposed instructions and verdict form questions with the temporal limitation that defendants argued was required by the statute of repose. *See* T. 3314-18, 3385, 3396-99, 3402-06 [App. Tab X]; R. 99:19650-19671 [App. Tab E]; R. 99:19647-19649 [App. Tab F]. Because it was not instructed on the statute at all, the jury could have based its finding of liability for fraud or conspiracy solely on acts and reliance occurring long before 1982.

2. Events at Trial Relating to Compensatory Damages

Plaintiff sought both economic and noneconomic damages. She asked the jury to award $1,132,337 in economic damages, representing Mr. Rizzuto's past expenses as stipulated to by the parties ($56,000) plus the present value of his future expenses according to plaintiff's experts (about $1.07 million). *See* T. 2577, 2579, 2562, 3430-33, 3509 [App. Tab X]. Plaintiff also requested $5 million in damages for noneconomic harms, including pain and suffering. *See id.* at 3510.

Defendants, on the other hand, emphasized evidence that Mr. Rizzuto was doing relatively well. His treating pulmonologist, for example, agreed that he was "getting along well" at the time of trial and that, considering "what [Mr. Rizzuto was] able to do on a day-to-day basis, he[was] pretty fortunate." *Id.* at 1706, 1752; *see also id.* at 1717 (Mr. Rizzuto was doing "quite well" in September 2001); *id.* at 1719 ("doing quite well" in June 2003); *id.* at 1721 ("looking well" in 2004). Mr. Rizzuto's COPD had been "stable" and "controlled" since 2000 (*e.g.*, *id.* at 1706, 1720, 1723-27, 1750); he had not since then experienced any exacerbations of, or hospitalizations for, his disease (*see, e.g.*, *id.* at 1642, 1669, 1719, 1750). Indeed, as of just a few weeks before trial, Mr. Rizzuto "had no recent medical issues or problems," and his lung function tests were "holding stability." *Id.* at 1746; *see also id.* at 1706 ("medicines [we]re working for him").

Although Mr. Rizzuto had experienced some shortness of breath when exerting himself and occasionally had difficulty walking (due in substantial part to an unrelated degenerative joint disease in his feet), his symptoms had not been "getting any worse" over the years (*id.* at 1727-28, 1731-33, 1740), and "ha[d] never prevented [him] from being able to perform the exercises" at his pulmonary rehabilitation sessions for extended periods of time (including with weights) (*id.* at 1734-36, 1740-41, 2864-66). Mr. Rizzuto had never needed home attendant care, and his doctor did not see any reason to believe he would need it in the near future. *See id.* at 1752. He still did all of his chores by himself, ran his own errands, and left the house as many as fourteen times a week. *See id.* at 2547-49, 2717-18, 2877-78, 2907-10. He was able to travel to Europe a few years before the trial without "any problems" and was planning a trip to New York. *Id.* at 1718. In short, although there was testimony that he could expect a "slow, steady decline" (*id.* at 1759), his prognosis remained relatively positive (*id.* at 1649); indeed, his doctor was "ecstatic for him" (*id.* at 1785).

3. Verdict

The jury returned a verdict in favor of plaintiff on all of her claims and awarded $2.55 million in economic damages and $10 million in noneconomic damages—both double the amounts that plaintiff had requested. The jury allocated 55% fault to PM USA, 25% to Liggett, and 20% to Mr. Rizzuto. It declined to find either defendant liable for punitive damages. *See* R.99:19647-19649 [App. Tab F].

D. Post-Trial Proceedings

Plaintiff moved for entry of judgment without any reduction for Mr. Rizzuto's share of fault because the jury had found defendants liable for intentional torts. R. 99:19751-19759 [App. Tab G]. Defendants opposed this motion, arguing that (1) Florida's comparative fault statute (§ 768.81, Fla. Stat.) requires a reduction; and (2) plaintiff had waived any argument to the contrary by repeatedly referencing Mr. Rizzuto's acceptance of partial responsibility for his injuries during trial, without ever suggesting that any comparative fault reduction would not apply to all of plaintiff's claims. R. 101:20079-102:20207 [App. Tab H].

Defendants moved for a new trial on two grounds pertinent to this appeal, arguing that (1) the trial court erred in failing to instruct the jury and include questions on the verdict form regarding the statute of repose; and (2) the jury's compensatory damages award was excessive and was motivated by passion or prejudice. *See* R. 108:21564-109:21636 [App. Tab I at 33-34, 36, 43-44]; R. 102:20208-103:20430 [App. Tab J]; R. 100:19917-19919 [App. Tab K]. As an alternative to a new trial based on excessive damages, defendants asked for a remittitur of the economic damages to $1.13 million and the noneconomic damages to no more than $1 million. R. 102:20208-103:20430 [App. Tab J at 2].

On September 26, 2013, the trial court denied defendants' motions for new trial. By agreement of the parties, the court remitted the economic damages award to $1,132,337. It denied defendants' request for remittitur of the noneconomic damages. R. 109:21654 [App. Tab L]; R. 109:21655-21656 [App. Tab M]. The court entered a final judgment imposing joint and several liability on defendants of $11,132,337, declining to reduce the award based on comparative fault. R. 109:21652-21653 [App. Tab N]. PM USA noticed this appeal on October 24, 2013. R. 109:21684-21689 [App. Tab O].

SUMMARY OF ARGUMENT

I

The jury's $10 million noneconomic damages award is grossly excessive and was motivated by passion, prejudice, and/or a disregard for the trial court's instructions. The trial court abused its discretion in holding otherwise.

First, both the economic and noneconomic damages verdicts were double the amounts that plaintiff herself had requested. That is a strong indicator of excessiveness and passion or prejudice under Florida law, because attorneys typically request damages amounts at the outer limit or well above what can actually be sustained on the evidence, as was certainly the case here.

Second, the jury's $10 million award was far greater than the amount necessary to compensate Mr. Rizzuto for his alleged noneconomic harms. Although COPD can be a serious illness, the evidence was unequivocal that Mr. Rizzuto has an unusually mild form of the disease. His own treating pulmonologist made clear at trial that his prognosis was relatively positive, that his COPD was stable, and that he had been doing "well" since 2000. He is also able to pursue most normal activities, including exercise and travel.

Third, the award is far greater than almost every one of the affirmed noneconomic damages awards to living tobacco plaintiffs with lung disease—which are mostly *under $1 million*—even though most of those plaintiffs were much more severely afflicted than Mr. Rizzuto. Indeed, the amount of noneconomic damages here, if affirmed, would be the *highest* awarded to a living *Engle* progeny plaintiff with lung disease ever affirmed on appeal. Only two awards to living progeny plaintiffs with lung disease are close or equal to the award here—and they were rendered in cases involving injuries that were vastly more serious than those here, and to plaintiffs who were near death at the time of their trials after years of extreme suffering.

Florida courts routinely order a new trial on both liability and damages where the compensatory damages are excessive and the jury has been unduly influenced by passion or prejudice, because of the likelihood that the jury's passion or prejudice infected *all* aspects of the jury's verdict. The Court should grant that remedy here,[4] but if it does not, it should either (1) order a new trial on the issue of noneconomic damages or (2) drastically remit the noneconomic damages award;

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[4] Any new trial would not include plaintiff's claim for punitive damages. Because plaintiff has not appealed the jury's finding that she is not entitled to punitive damages, she has waived any possibility of seeking a new trial on that finding. *See Airvac, Inc. v. Ranger Ins. Co.*, 330 So. 2d 467, 468 (Fla. 1983) (failure to cross-appeal a decision below precludes the appellee from contesting that decision in any subsequent new trial); *Campbell v. State*, 9 So. 3d 59, 61 (Fla. 1st DCA 2009) (per curiam) ("[T]he failure to raise [an] issue on [cross]-appeal has effectuated a waiver of future arguments regarding that issue."). Moreover, the grounds for reversal that defendants are asserting do not call into question the validity of the jury's verdict on punitive damages.

we submit that a lawful award should not exceed $1 million, and certainly should be far lower than the $10 million sum under review.

II

The fraud statute of repose requires judgment or a new trial for defendants on the concealment and conspiracy claims. The statute requires a plaintiff to bring suit no more than twelve years "after the date of the commission of the alleged fraud." The natural meaning of the term "the alleged fraud" is the fraud alleged in the plaintiff's own "action"—in other words, "the" fraud "alleged" to have harmed the plaintiff or the individual whom the plaintiff represents in bringing the action. A fraudulent act cannot harm a plaintiff unless the plaintiff *relies* on that act to his or her detriment. Therefore, as the Fourth DCA has held, the statute of repose requires a plaintiff to bring a fraud claim within twelve years of the commission of a fraudulent act or omission *on which he or she relied.* It thus requires reliance on and injury from concealment occurring after May 5, 1982. This interpretation is consonant with the Legislature's purpose in enacting the statute—to protect defendants against the difficulties of defending against "stale" fraud claims.

In this case, the evidence established that Mr. Rizzuto knew of the dangers of smoking by 1982 and could not have been ignorant of any facts wrongfully concealed by the tobacco companies. But even if there was some doubt on the subject, the defendants proposed jury instructions and verdict form questions that accurately stated the law, were supported by the evidence presented at trial, and were necessary to allow the jury to resolve all of the issues properly. Plaintiff heavily emphasized evidence of Mr. Rizzuto's supposed reliance on alleged statements and concealment long *before* May 5, 1982, and there was, as noted, ample evidence that by the 1982 cutoff date Mr. Rizzuto was well aware of the hazards of smoking and could no longer have relied on any statements or concealment by defendants or a co-conspirator. Nevertheless, the court refused to apply or instruct the jury regarding the statute of repose. This error entitles PM USA to judgment or a new trial on the fraud and conspiracy claims, and in turn removes the apparent basis for the trial court's refusal to apply comparative fault.

III

Even if this Court affirms the judgment on the fraud and conspiracy claims, it should reverse the trial court's refusal to reduce the jury's award based on Mr. Rizzuto's share of comparative fault. Florida law requires a comparative fault reduction in actions that include intentional tort claims so long as the "substance of the action," examined as a whole, is "based upon a theory of . . . products liability." That is the case here: the crux of plaintiff's case was that Mr. Rizzuto was harmed by defendants' defective products and by defendants' failure to provide him with adequate information about the risks of those products.

In any event, plaintiff represented throughout trial—with respect to *all* of her claims and without qualification—that she accepted Mr. Rizzuto's partial responsibility for his alleged injuries. Indeed, on a number of occasions plaintiff specifically tied her admission of fault to her fraud claims. The trial court should have held her to these clear representations and reduced her award; she waived, or is estopped from making, any argument to the contrary.

ARGUMENT

I. THE $10 MILLION AWARD OF NONECONOMIC DAMAGES IS GROSSLY EXCESSIVE AND WAS MOTIVATED BY PASSION, PREJUDICE, AND/OR DISREGARD OF THE JURY INSTRUCTIONS.

A. Standard Of Review

"[A] trial court's determination of whether a damage award is excessive, requiring a remittitur or a new trial, is reviewed by an appellate court under an abuse of discretion standard." *Engle*, 945 So. 2d at 1263. The trial court was required to determine if the award was "excessive . . . in light of the facts and circumstances which were presented to the trier of fact," and was required to consider "[w]hether the amount awarded is indicative of prejudice[or] passion"; "[w]hether it appears that the trier of fact ignored the evidence in reaching a verdict"; "[w]hether the amount awarded bears a reasonable relation to the amount of damages proved and the injury suffered"; and "[w]hether the amount awarded is supported by the evidence." § 768.74(1), (5), Fla. Stat. The court's discretion in this regard must be exercised consistently with the "intention of the Legislature that awards of damages be subject to close scrutiny by the courts." § 768.74(3), Fla. Stat. An award should be set aside if it was "so extravagant that it shock[ed] the judicial conscience, or [wa]s manifestly unsupported by the evidence or indicate[d] the jury was influenced by passion, prejudice or other matters outside the record." *Citrus Cnty. v. McQuillin*, 840 So. 2d 343, 347 (Fla. 5th DCA 2003).

B. Discussion

The jury's noneconomic damages award[5] was (1) double the amount requested by the plaintiff herself, (2) far greater than the amount necessary to compensate Mr. Rizzuto, and (3) grossly excessive compared to awards in other comparable cases. Each of these factors makes clear that the award was excessive and motivated by passion, prejudice, or a disregard for the evidence and the trial court's instructions. As explained below, the proper remedy under these circumstances is a new trial on both liability and compensatory damages or at least on damages alone. At a minimum, the Court should grant a substantial remittitur of the noneconomic damages award.

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5 Defendants stipulated to a remittitur of the economic damages award to $1.13 million, and do not challenge the validity of the remitted amount. But as explained below, the fact that the jury awarded double the amount of economic damages that plaintiff requested is a strong indicator that the jury's decisions on liability and damages in general were motivated by passion or prejudice and disregard for the evidence and the trial court's instructions.

1. The Jury's Decision to Award Twice as Much as Plaintiff Requested Demonstrates Both Excessiveness and the Influence of Passion or Prejudice.

It is well established under Florida law that when a jury awards more than the amount of compensatory damages requested by the plaintiff, that is a compelling indicator that the award is excessive and has been motivated by passion or prejudice. In *R.J. Reynolds Tobacco Co. v. Webb*, 93 So. 3d 331 (Fla. 1st DCA 2012), for example, the jury awarded $7.2 million in compensatory damages to the personal representative of an *Engle* class member who had died of lung cancer. *Id.* at 332-33. The First DCA concluded that the award was excessive, reasoning in part that "the fact that the jury awarded double the amount of compensatory damages requested by [plaintiff's] counsel . . . suggest[ed] the jury was influenced by prejudice or passion." *Id.* at 339. That is because "'it is common practice for attorneys to suggest damages well *in excess* of the amount that could be sustained under the facts in the case.'" *Id.* (emphasis added) (quoting *Nat'l R.R. Passenger Corp. (Amtrak) v. Ahmed*, 653 So. 2d 1055, 1059 (Fla. 4th DCA 1995)). In other words, where the jury awards even *more* than the presumptively excessive amount requested by the plaintiff's lawyer, that circumstance strongly suggests the influence of improper factors and disregard for the court's instructions.

Many other decisions rest on similar reasoning. *See, e.g.*, *Ernie Haire Ford, Inc. v. Atkinson*, 64 So. 3d 131, 133 (Fla. 2d DCA 2011) ("Th[e award] exceeded the amount [plaintiff] requested by more than $300,000. The award was thus against the manifest weight of the evidence presented to the jury at trial, and the trial court abused its discretion by denying [defendant's] motion for remittitur on that issue."); *Glabman v. De La Cruz*, 954 So. 2d 60, 62 (Fla. 3d DCA 2007) (award was excessive where "[t]he jury returned an $8,000,000 verdict, which was $2,000,000 more than what plaintiff's counsel argued to the jury during closing would be a reasonable award for pain and suffering"); *see also Gresham v. Courson*, 177 So. 2d 33, 39 (Fla. 1st DCA 1965) ("A verdict is not *per se* excessive because the jury awards the *full* amount of damages suggested by counsel for the prevailing party, but we would be exceedingly naive should we fail to recognize that as a matter of practice the advocate usually suggests to the jury a figure for damages substantially in excess of the amount that is clearly supportable by the evidence . . . ." (emphases added)).

In this case, the jury's economic damages award (although subsequently remitted) is telling. It was *more than double* the amount that plaintiff's experts had calculated based on estimates of Mr. Rizzuto's past and future medical expenses ($1,132,337). Indeed, by stipulating to a remittitur of this award, plaintiff implicitly acknowledged that the jury could have derived its inflated number only by ignoring the evidence and disregarding the trial court's instructions. The proper amount of economic damages is generally a fairly objective question, the answer to which is firmly grounded in the evidence at trial. Not so here: to reach its award in this case, the jury would have to have speculated about additional future medical expenses that none of plaintiff's experts discussed; or disregarded the inflation figures used by plaintiff's economist to calculate the present value of Mr. Rizzuto's future medical expenses; or assumed that Mr. Rizzuto would live nearly twice as long as the 16.64 years estimated by his expert. *See* T. 2563 [App. Tab X]. In other words, the jury necessarily went outside the record and based its award on factors other than the evidence introduced by the parties.

The award of noneconomic damages confirms that the jury was inflamed. The jury again awarded double the already outsized amount that plaintiff's counsel requested—$10 million instead of the $5 million that counsel essentially conjured from thin air. And just how far the jury's verdict departed from any rational figure becomes all the more clear when the award is evaluated in light of the evidence concerning Mr. Rizzuto's noneconomic harm, as discussed next.

2. The Evidence Related to Mr. Rizzuto's Alleged Pain and Suffering Supports Nothing Close to a $10 Million Award.

As with all damages awards, noneconomic 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) (internal quotation marks omitted). Even the $5 million figure plaintiff's counsel requested far exceeded what was appropriate to compensate Mr. Rizzuto for his pain and suffering; the $10 million that the jury awarded is truly outlandish.

As discussed above (at pp. 9-11), Mr. Rizzuto's own treating pulmonologist made clear that his condition, considering his COPD, was exceptionally favorable. He had been doing "well" since 2000; was "pretty fortunate" given what he was "able to do on a day-to-day basis"; and "ha[d] no recent medical issues or problems." T. 1706, 1717, 1719-27, 1746, 1750, 1752 [App. Tab X]. He was capable of exercising for extended periods, doing chores, running errands, leaving the house on a regular basis, and traveling to Europe. *Id.* at 1718, 1734-36, 1740-41, 2547-49, 2717-18, 2864-66, 2877-78, 2907-10. His COPD was "stable" (*id.* at 1706) and his doctor was "ecstatic for him" (*id.* at 1785).

We know of no other *Engle* progeny trial involving such a mild case of COPD as this one. Thus, although Mr. Rizzuto was entitled to compensation for his pain and suffering upon a finding of liability, his damages should properly be at the very low end of the range of awards for living COPD sufferers. Instead, as discussed next, he has received the highest such judgment.

3. Comparison to Noneconomic Damages Awards in Similar Cases Confirms the Excessiveness of the Award Here.

A key factor used by Florida courts in evaluating an award for excessiveness is whether the "award was excessive compared to *similarly situated* cases." *Philip Morris USA Inc. v. Putney*, 117 So. 3d 798, 800 (Fla. 4th DCA 2013) (emphasis added); *see also Webb*, 93 So. 3d at 337 ("In reviewing an award of damages for excessiveness, the court may consider the philosophy and general trend of decisions in comparable cases."); *McQuillin*, 840 So. 2d at 347 & n.2. Here, that analysis should be conducted based on awards in *Engle* progeny cases involving *living* tobacco plaintiffs suffering from lung disease. The plaintiffs in wrongful-death cases, by contrast, are not "similarly situated" to those in cases involving living plaintiffs, primarily because wrongful-death cases implicate the losses not of the smoker himself but of his or her survivors.

Moreover, the Court's analysis should be conducted based primarily on awards that have been reviewed for excessiveness on appeal, and (to a lesser extent) those that were not challenged by the defendants on excessiveness grounds. *See, e.g.*, *Webb*, 93 So. 3d at 338 (discounting a damages award cited by the plaintiff in support of her verdict because the "award . . . never received the imprimatur of an appeals court"); *Bravo v. United States*, 532 F.3d 1154, 1166 (11th Cir. 2008) ("The restriction of our consideration to reported appellate decisions in which awards were tested for size assures that we assess the 'philosophy and general trend of prior decisions in such cases' on a statewide basis, not on the basis of varied trial court decisions."); *Davis v. United States*, No. 08-cv-81447, 2010 WL 2331094, at *9 (S.D. Fla. June 10, 2010) ("[T]he court should generally limit its inquiry to cases where pain and suffering awards were upheld against excessiveness challenges.").

The jury's $10 million award dwarfs almost every one of the final noneconomic damages awards in progeny cases involving living tobacco plaintiffs suffering from lung disease. *See, e.g.*, R. 102:20208-103:20430 [App. Tab P at 3] (*Lock*, $400,000); R. 102:20208-103:20430 [App. Tab Q at 5] (*Reese*, $583,000); R. 102:20208-103:20430 [App. Tab S at 3] (*Ruffo*, $1.5 million); R. 102:20208-103:20430 [App. Tab T at 17] (*Engle* named plaintiff Mary Farnan, $1.6 million); Verdict, *Koballa v. R.J. Reynolds Tobacco Co.*, No. 2007-33334-CICI, at 2 (Fla. 7th Cir. Ct. Apr. 7, 2011) ($1 million),[6] *aff'd*, 99 So. 3d 630 (Fla. 5th DCA 2012) [App. Tab R at 2]; *Arnitz v. Philip Morris USA, Inc.*, No. 00-4208-Div. H, 2004 WL 3395018 (Fla. 13th Cir. Ct. Oct. 27, 2004) ($446,000), *aff'd*, 933 So. 2d 693 (Fla. 2d DCA 2006); *Davis v. Liggett Grp., Inc.*, No. 02-18944 05, 2004 WL 3235406 (Fla. 17th Cir. Ct. Apr. 28, 2004) ($500,000), *aff'd*, 973 So. 2d 467 (Fla. 4th DCA 2007); *Carter v. Brown & Williamson Tobacco Corp.*, No. 95-00934, 1996 WL 566108 (Fla. 4th Cir. Ct. Aug. 8, 1996) ($500,000), *rev'd*, 723 So. 2d 833 (Fla. 1st DCA 1998), *rev. quashed and verdict upheld*, 778 So. 2d 932 (Fla. 2000); *see generally Webb*, 90 So. 3d at 337.

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[6] As a Florida court record, the *Koballa* verdict form is subject to judicial notice pursuant to § 90.202(6), Fla. Stat., and PM USA hereby requests that this Court take such notice of it.

Indeed, the $10 million award here would, if affirmed, be the *highest* noneconomic damages award to a living *Engle* progeny plaintiff with lung disease ever affirmed on appeal. Only two such amounts even compare: the $10 million award affirmed per curiam in *R.J. Reynolds Tobacco Co. v. Smith*, 131 So. 3d 18 (1st DCA 2013), and the $8 million award affirmed in *Philip Morris USA, Inc. v. Kayton*, 104 So. 3d 1145 (Fla. 4th DCA 2012) (formerly *Tate*).[7] Neither of these awards can support affirmance here, for two independent reasons.

First, the pain-and-suffering evidence in *Smith* and *Kayton* was far from "comparable" to the evidence presented in this case. The smoker in *Smith* had "a lung removed due to smoking-caused cancer and then lived the final 20 years of his life with only one lung and recurring health concerns." 131 So. 3d at 18 (Wetherell, J., specially concurring). He was unable to take "walks around the block," go bowling, and have the "same type of intimate relationship" with his wife as before. *Id.* at 20-21 (Makar, J., concurring). He died several months after entry of the final judgment. *Id.* at 19 n.6 (Wetherell, J., specially concurring).

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[7] Like the decedent in *Smith*, Ms. Tate passed away during the pendency of the appeal, and her daughter was substituted as the appellee. The Fourth DCA affirmed the judgment and damages awarded on the strict liability and negligence claims but reversed the judgment on the conspiracy claim and the punitive damages award, holding that the trial court had erred in striking PM USA's affirmative defense on the statute of repose. *See Kayton*, 104 So. 3d at 1153.

The *Kayton* smoker's "COPD was 'very severe'" by the time of trial and her "condition [had] steadily deteriorated since her diagnosis." 104 So. 3d at 1148. When she testified, she had only twenty-two percent lung capacity; "had to be directly connected to an oxygen concentrator via a fifty-foot tube" "when she was at home," *id.*; and could not bathe, dress, or run errands herself, *see* R. 102:20208-103:20430 [App. Tab U at 1305-06]. Her treating pulmonologist "believed it was miraculous that she had not already succumbed to the disease." *Kayton*, 104 So. 3d at 1148. These facts bear little resemblance to those here, yet the jury awarded $2 million *more* for Mr. Rizzuto's comparatively mild pain and suffering than was awarded to Ms. Tate.

Second, there are additional reasons why the affirmances of the awards in *Smith* and *Kayton* should not guide the Court's decision here. In *Smith*, two of the three judges on the panel wrote specially to express their view that the $10 million dollar noneconomic damages award was grossly excessive, concurring in the judgment only because they deemed themselves bound by the First DCA's prior affirmance of a $10.8 million award in *R.J. Reynolds Tobacco Co. v. Townsend*, 90 So. 3d 307 (Fla. 1st DCA 2012). Judge Wetherell described the award in *Smith* as "conscience-shocking" and opined that it "grossly overcompensate[d] the plaintiff." 131 So. 3d at 19 (Wetherell, J., specially concurring). He bemoaned the fact that "the *Townsend*-fueled *Engle* verdict lottery and its jackpot-sized damages awards"—"mega-noneconomic awards," as he called them—would "continue in the trial courts within this court's jurisdiction." *Id.* at 19-20. Similarly, Judge Makar noted that "[i]f th[e] case had arisen prior to [*Townsend*], it would be exceptionally difficult to justify the $10 million award for non-economic damages under the statutorily required 'close scrutiny' spelled out in section 768.74(3), Florida Statutes." *Id.* at 20 (Makar, J., concurring with opinion). We respectfully disagree with the First DCA's conclusion that it was bound by *Townsend*—a wrongful-death case—in a case involving a living plaintiff. *See* pp. 22-23 *supra.* But regardless, we are aware of no precedent of *this* Court that would compel it to affirm an amount of damages that the majority of the judges in *Smith* considered grossly excessive—even to a plaintiff afflicted far more gravely than Mr. Rizzuto.

The holding in *Kayton* was equally misguided. In summarily concluding that an $8 million award was "within the range of non-economic damages upheld in comparable cases," 104 So. 3d at 1150, the Fourth DCA cited only one personal injury case involving lung disease: *Philip Morris USA, Inc. v. Naugle*, 126 So. 3d 1155 (Fla. 4th DCA 2012). After *Kayton* was decided, the Fourth DCA withdrew that *Naugle* opinion, vacated the $9.825 million noneconomic damages award on the ground that it was "infected by passion and prejudice," and ordered a new trial on damages. *Philip Morris USA, Inc. v. Naugle*, 103 So. 3d 944, 948 (Fla. 4th

DCA 2012).[8] And on remand, the retrial jury awarded $3.5 million—about a third of the award at issue here—even though the plaintiff was in critical condition at the time of the retrial and died shortly thereafter. Verdict, *Naugle v. Philip Morris USA Inc.*, No. 2007-CV-036736 (19), at 1 (Fla. 17th Cir. Ct. Oct. 16, 2013) [App. Tab V at 1].[9] The other cases *Kayton* cited were inapposite: two wrongful-death cases (*Campbell* and *Townsend*) and a personal injury case involving multiple forms of debilitating cancer (*Lukacs*). *See* 104 So. 3d at 1150. Thus, whatever modest value *Kayton* might have had as a benchmark for this case evaporated once its only legitimate damages lodestar, *Naugle*, was vacated.

In sum, because the evidence makes clear that this case is at the very mild end of the spectrum of plaintiffs suffering from COPD, the award should be toward the bottom end of the range of awards typically given to such plaintiffs—not, as here, marking a record high, and certainly not more than plaintiff requested.

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8 Even the award that was *vacated* in *Naugle* was less than the award granted to the plaintiff here, and the plaintiff in *Naugle* was in far worse condition than Mr. Rizzuto. *See* 126 So. 3d at 1163 (discussing the evidence that Ms. Naugle had difficulty breathing and getting out of bed; that she was dependent on an oxygen tube twenty-four hours a day; and that she was unable to walk to her car, drive, do grocery shopping, stand up in the shower, or bend over to shave her legs).

9 As a Florida court record, the *Naugle* verdict is subject to judicial notice pursuant to § 90.202(6), Fla. Stat., and PM USA hereby requests that this Court take such notice of it.

4. The Court Should Order a New Trial on All Claims or, Alternatively, a Remittitur of the Noneconomic Damages Award to No More Than $1 Million.

"A new trial may be ordered on the grounds that the verdict is excessive" when, *inter alia*, "the jury has been unduly influenced by passion or prejudice." *Brown v. Estate of Stuckey*, 749 So. 2d 490, 498 (Fla. 1999). A new trial on both liability and compensatory damages is appropriate here. But if the Court disagrees, it should either (1) grant a new trial on the issue of noneconomic damages or (2) remit the noneconomic damages award to no more than $1 million or to some other sum substantially below $10 million.

Florida courts routinely order a new trial on liability as well as damages where an award has been motivated by passion or disregard for the trial court's instructions, because these influences likely infected both aspects of the verdict. *See, e.g.*, *Fla. Power & Light Co. v. Watson*, 50 So. 2d 543, 543 (Fla. 1950) (on rehearing, granting a new trial on all issues where the verdict was excessive); *Cardinal v. Wendy's of S. Fla., Inc.*, 529 So. 2d 335, 340 & n.2 (Fla. 4th DCA 1988) (affirming order granting a new trial on all issues where the trial court found that the "jury acted upon passion, prejudice, sympathy or some other consideration outside of the evidence in reaching its verdict" and had "misunderst[ood] or disregard[ed] [the] instructions"); *see also Christopher v. Florida*, 449 F.3d 1360, 1368 (11th Cir. 2006) ("The gross excessiveness of the[] awards casts doubt on the validity of the entire verdict, including liability and the $4 million in non-economic damages."); *Dossett v. First State Bank*, 399 F.3d 940, 947 (8th Cir. 2005) ("if passion or prejudice influenced the jury's damages decision, then that same passion or prejudice may well have affected its decision on the issue of liability").

In other cases, Florida courts have granted a new trial limited to the issue of damages upon a finding that an award has been driven by passion or prejudice, while making clear that a remittitur is insufficient under these circumstances because an objective jury might well award less than the maximum amount that can find support in the record. *See, e.g.*, *Lassitter v. Int'l Union of Operating Eng'rs*, 349 So. 2d 622, 627 (Fla. 1977) (granting new trial on damages where award was excessive and noting that, "[i]n the *absence* of improper influences a remittitur may be appropriate, but here the District Court concluded that the verdicts were indicative of improper influences of passion and prejudice" (emphasis added)); *Naugle*, 103 So. 3d at 948 ("[B]ecause the trial court expressly found that both the compensatory and punitive damages awards were infected by passion and prejudice, and that the jury disregarded the court's instructions, . . . the awards must be set aside because these errors cannot be cured by remittitur.").

Thus, if the Court agrees with PM USA that the jury's award was excessive and a result of passion or prejudice, it should grant a new trial on both liability and damages or, failing that, on noneconomic damages alone. In the alternative, the

Court should remit the noneconomic damages award to no more than $1 million—the maximum amount that would conform to the evidence and adhere to the "general trend of decisions in comparable cases." *Webb*, 93 So. 3d at 337; *see* pp. 22-28 *supra*. At a bare minimum, the Court should substantially remit the award to an amount substantially lower than $10 million.

II. PM USA IS ENTITLED TO JUDGMENT OR A NEW TRIAL ON THE FRAUD AND CONSPIRACY CLAIMS BECAUSE THE TRIAL COURT FAILED TO APPLY THE STATUTE OF REPOSE.

A. Standard Of Review

Generally, this Court "review[s] the denial of a requested instruction for an abuse of discretion." *Hoskins v. State*, 965 So. 2d 1, 14 (Fla. 2007). But "[b]ecause this issue presents a question of statutory interpretation, the standard of review is de novo." *Hampton v. State*, 103 So. 3d 98, 110 (Fla. 2012); *see also Johnson v. State*, 78 So. 3d 1305, 1310 (Fla. 2012) ("Judicial interpretations of statutes are pure questions of law subject to de novo review."); *McConnell v. Union Carbide Corp.*, 937 So. 2d 148, 152-53 (Fla. 4th DCA 2006) ("Many appellate courts have held that a decision to give or withhold a jury instruction is to be reviewed under the abuse of discretion standard of review. But whether the jury should be instructed at all on an issue actually presents a question of law because the court has a duty to instruct on the law applicable to the issues litigated." (internal quotation marks and citation omitted)).

"The party claiming reversible error . . . must show that: (1) the requested instruction accurately states the applicable law; (2) the evidence and testimony presented support giving the instruction; and (3) the instruction was necessary to allow the jury to properly resolve all of the issues." *Hart v. Stern*, 824 So. 2d 927, 929 (Fla. 5th DCA 2002). The same standard applies to verdict-form questions. *See Guess v. City of Miramar*, 889 So. 2d 840, 845 (Fla. 4th DCA 2004).

B. Discussion

Defendants' position was that they could not be held liable for fraud or conspiracy unless Mr. Rizzuto had reasonably relied to his detriment on a concealment by defendants or their co-conspirators occurring after May 5, 1982 (12 years before the *Engle* complaint). The court apparently accepted plaintiff's position that because of defendants' alleged concealments after that date, the statute of repose did not bar plaintiff's claim, even if nothing defendants or their co-conspirators did or refrained from doing after May 5, 1982, had any effect on Mr. Rizzuto.

PM USA joins in and adopts the portion of the Initial Brief filed by Liggett arguing that Mr. Rizzuto failed to prove detrimental reliance on any tobacco-company statement after May 5, 1982, and that defendants are therefore entitled to judgment on the fraud and conspiracy claims. Alternatively, as we argue in the discussion that follows, the trial court's refusal to submit to the jury defendants' proposed instructions and verdict form questions on the statute of repose constituted reversible error entitling defendants to a new trial on the concealment and conspiracy counts, which were the apparent predicates for the trial court's refusal to apply the comparative fault statute.

1. Defendants' Proposed Instructions and Verdict Form Questions Accurately Stated the Law.

The Florida Supreme Court has granted review in two *Engle* progeny cases to resolve a conflict between the Third and Fourth DCAs on whether the statute of repose requires a plaintiff to prove reliance on an act of concealment within twelve years before filing suit. The Fourth DCA has held that a plaintiff must prove that the concealment that injured the smoker occurred within the twelve-year period. *Philip Morris USA, Inc. v. Hess*, 95 So. 3d 254, 260-61 (Fla. 4th DCA 2012), *rev. granted*, No. SC12-2153 (Fla. June 3, 2013). The Third DCA has held that reliance on, and injury from, a concealment within twelve years of the complaint is not required so long as similar fraudulent conduct by the defendant extended into the actionable period. *See Frazier v. Philip Morris USA Inc.*, 89 So. 3d 937, 947-48 (Fla. 3d DCA 2012), *rev. granted sub nom, Philip Morris USA, Inc. v. Russo*, No. SC12-1401 (Fla. Sept. 3, 2013). *But see Lorillard Tobacco Co. v. Alexander*, 123 So. 3d 67, 75 (Fla. 3d DCA 2013) ("Since the statute of repose begins in 1982, [the decedent's] belief and reliance through 1985 was relevant to show that his cause of action was not barred by the statute of repose.").

This Court may wish to await the Supreme Court's decisions in *Hess* and *Russo* (both scheduled for oral argument on April 30, 2014) before addressing this issue, in which event PM USA requests that the Court permit additional briefing after those decisions are released. Should the Court elect to reach the merits without awaiting the Supreme Court's decision, we respectfully submit that the Fourth DCA's analysis in *Hess* was correct and that therefore it was error to refuse to submit the repose defense to the jury.

a. The Statutory Text Requires a Plaintiff to Prove Reliance on a Misleading Statement or Omission Made Within Twelve Years Before the Complaint.

The statute of repose requires that a plaintiff bring an "action for fraud" no more than twelve years "after the date of the commission of the alleged fraud." § 95.031(2)(a), Fla. Stat. The only sensible reading of the phrase "the alleged fraud" is that it refers to the fraud alleged in the plaintiff's own "action." Because a plaintiff cannot bring an "action" seeking damages for a fraud committed against *other* people, "the alleged fraud" relevant to the statute of repose must be the fraud claimed to have injured the plaintiff *herself*. And the "commission" of that fraud cannot occur without reliance by the plaintiff, because reliance is an element of every fraud-based claim. *See, e.g.*, *Johnson v. Davis*, 480 So. 2d 625, 627 (Fla. 1985); *Engle*, 945 So. 2d at 1263; *Douglas*, 110 So. 3d at 425. If the allegedly defrauded party has *not* relied on a defendant's act of concealment due to his ignorance of the concealed fact or facts, that concealment could not have been a cause of his injuries, and no actionable fraud has been "committed." Members of the *Engle* class are deemed to have filed their complaints on May 5, 1994, the date that the *Engle* class complaint was filed. *See Hess*, 95 So. 3d at 260. Thus, the statute of repose requires an *Engle* progeny plaintiff to prove that he or she detrimentally relied on a fraudulent concealment occurring after May 5, 1982.

The Fourth DCA correctly applied this principle in *Hess*. There, the jury expressly found that a member of the *Engle* class had "relied on PM USA's statements only *before* May 5, 1982." 95 So. 3d at 260. The court held that "the triggering event set forth in the applicable statute of repose, 'the date of the commission of the alleged fraud,' necessarily includes reliance by the plaintiff." *Id.* at 261. Because the jury's verdict had specified that the decedent had not relied to his detriment on an act of concealment after May 5, 1982, the court held that PM USA had "not defraud[ed] [the decedent] within the twelve-year period established by the statute of repose," and was therefore not liable to the plaintiff for fraud. *Id.*

Hess has been followed several times in the Fourth DCA. In *Kayton*, the court made clear that *Hess*'s analysis applied equally to conspiracy claims. *See* 104 So. 3d at 1151 (trial court erred in striking repose defense to conspiracy claim). In *Philip Morris USA Inc. v. Cohen*, 102 So. 3d 11 (Fla. 4th DCA 2012), the court held that the trial court had erred in refusing to instruct the jury on the statute of repose. *See id.* at 15 (because the plaintiff was required to prove "that [the smoker] relied upon statements or omissions by appellants made after [May 5, 1982, t]he jury should have been instructed accordingly"). And in *Naugle*, the court held that not only the plaintiff's reliance but also the acts of concealment themselves must occur within the twelve years preceding the filing of the complaint. 103 So. 3d at 947 (holding that "any concealment claim in [an *Engle* progeny] case had to be based on conduct that occurred after May 5, 1982"); *see also R.J. Reynolds Tobacco Co. v. Buonomo*, __ So. 3d __, No. 4D10-3543, 2013 WL 6479415, at *2 (Fla. 4th DCA Dec. 11, 2013); *Putney*, 118 So. 3d at 804.

b. The Allegation of a Conspiracy Does Not Change the Reliance Requirement.

As noted above, the Third DCA has held that a fraud plaintiff need not prove reliance within the twelve-year actionable period, so long as the case involves ongoing fraudulent conduct (either by the defendant itself or by co-conspirators) extending into that period. *See Frazier*, 89 So. 3d at 947-48.[10] The only authority cited by the Third DCA for this conclusion was *Laschke v. Brown & Williamson Tobacco Corp.*, 766 So. 2d 1076 (Fla. 2d DCA 2000), in which the Second DCA stated that "[i]n claims alleging conspiracy, the critical date for statute of repose

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[10] A recent decision by the Third DCA appears to be inconsistent with *Frazier*. In *Alexander*, the Third DCA held that "[s]ince the statute of repose begins in 1982, [the decedent's] belief and reliance through 1985 was relevant to show that his cause of action was not barred by the statute of repose." 123 So. 3d at 75.

purposes should be the date of the last act done in furtherance of the conspiracy." 766 So. 2d at 1079. The First DCA has relied on the same sentence in *Laschke* for the same principle. *See Webb*, 93 So. 3d at 333; *R.J. Reynolds Tobacco Co. v. Hiott*, 129 So. 3d 473, 478 (Fla. 1st DCA 2014).

Laschke, however, did not in fact hold that proof of reliance on a fraudulent statement within the actionable period was unnecessary. It simply held that where a plaintiff alleges that several defendants conspired to engage in acts of concealment or fraud *on which the plaintiff relied during the twelve-year period*, a defendant is not entitled to summary judgment merely because the plaintiff did not use its products (as opposed to those of its co-conspirators) during that period. *See* 766 So. 2d at 1078-79. The Second DCA has recently made clear that *Frazier* and *Webb* misread its decision in *Laschke*, holding that "[t]he statute of repose begins to run on a claim for fraudulent concealment based on an ongoing pattern of concealment when the last act of concealment *on which the plaintiff relied* occurs." *Philip Morris USA, Inc. v. Hallgren*, 124 So. 3d 350, 353 (Fla. 2d DCA 2013) (emphasis added) (citing *Laschke*, 766 So. 2d at 1079); *see also id.* (holding that because the plaintiff had provided sufficient evidence "not only" of the defendants' "misleading advertising campaigns . . . that continued until the late 1990s, but *also of [the decedent's] direct reliance on that misleading advertising*," he had satisfied his burden of proof for fraud and conspiracy (emphasis added)).

That makes perfect sense. An allegation of an ongoing conspiracy does not alter the requirement of reliance on an act occurring within the twelve-year period; it simply permits that reliance to be on an act of a co-conspirator rather than that of the defendant itself. In other words, the existence of a conspiracy makes a defendant liable to the plaintiff for the acts of the defendant's co-conspirators that harmed *that plaintiff*, not for co-conspirator acts that may (or may not) have harmed *others*. *See Liappas v. Augoustis*, 47 So. 2d 582, 582 (Fla. 1950) ("The gist of a civil action for conspiracy is not the conspiracy itself, but the civil wrong which is done pursuant to the conspiracy and which *results in damage to the plaintiff*." (emphasis added)). Because a claim for conspiracy to conceal, like a claim for concealment itself, is not actionable "absent detrimental reliance by the plaintiff, whether a fraudulent act was committed within twelve years of the filing of an action can only be determined based on the timing of a particular plaintiff's alleged reliance." *Kayton*, 104 So. 3d at 1151 (citation omitted); *see also Shepard v. Philip Morris, Inc.*, No. 96-1720-CIV-T-26B, 1998 WL 34064515, at *4 (M.D. Fla. Apr. 28, 1998) (rejecting the argument that the "continuing nature of [a] fraud overcomes the application of the statute of repose"); *Putney*, 117 So. 3d at 804.

c. The Legislative Intent Underlying the Statute of Repose Requires the Same Conclusion.

The construction of the statute of repose adopted by the court below effectively vitiates its express purpose in any case involving an alleged pattern or practice of fraudulent conduct. As the Florida Supreme Court has explained, fraud statutes of repose afford protection against "the difficulties of defending against a stale fraud claim." *Carr v. Broward Cnty.*, 541 So. 2d 92, 95 (Fla. 1989). They are designed to "extinguish[]" such claims after a certain period even if that means that the claims lose their viability "before [the fraud] is discovered" by the plaintiff. *Kush v. Lloyd*, 616 So. 2d 415, 418 (Fla. 1992); *see also id.* at 421 (a "statute of repose represents a legislative determination that there must be an outer limit beyond which . . . suits may not be instituted").[11] This is because fraud claims are the "most susceptible to concerns of stale memories, and most deserving of the observation that a defendant ought not to be called on to defend a claim when the evidence has been lost, memories have faded, and witnesses have

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[11] Plaintiff briefly suggested at trial that *Kush* stands for the proposition that "[t]he statute of repose looks only to the defendant's conduct." T. 3296 [App. Tab X]. Not so. In that case, a couple sued a doctor for medical malpractice, alleging that he had failed to inform them, before they conceived a child born with birth defects, that they were carriers of a hereditary disease. The doctor moved to dismiss the claim under the four-year statute of repose for medical malpractice claims. 616 So. 2d at 415-17; *see* § 95.11(4)(b), Fla. Stat. The trial court denied the motion, reasoning that the actionable period began to run from the birth of the child rather than the date of the medical advice. The Florida Supreme Court disagreed and dismissed the claim, holding that a statute of repose "runs from the date of a discrete act on the part of the defendant without regard to when the cause of action accrued." *Kush*, 616 So. 2d at 418. As applied to the fraud statute of repose, *Kush* means that a plaintiff must show that the defendant committed a fraud within the twelve-year period *and* that this fraud injured her. Certainly, the *Kush* plaintiffs would not have been able to evade the four-year statute of repose by showing that their doctor had given similar negligent medical advice to someone *else* in the four years before they filed their suit. The same is true here.

disappeared." *Kish v. A.W. Chesterton Co.*, 930 So. 2d 704, 707 (Fla. 3d DCA 2006) (internal quotation marks omitted); *see also Nehme v. Smithkline Beecham Clinical Labs., Inc.*, 863 So. 2d 201, 209 (Fla. 2003) ("As time passes, memories fade, documents are destroyed or lost, and witnesses disappear.").

The purpose of the statute of repose—to protect defendants from "stale" claims that are often based on allegations of dimly-recalled statements made long before—would be substantially undermined if plaintiffs could establish liability based on misrepresentations made decades before trial, simply because the defendants continued to defraud *other* people later. For example, because a defendant's knowledge evolves over time, its state of mind—that is, whether it knew at the time that its statements were false and whether it made them with a purpose to deceive—would typically have to be established through corporate actors who are deceased, otherwise unavailable to testify, or unable to recall the events or the state of mind that accompanied or prompted their actions. And even more challengingly, the defendant would have to contest a plaintiff's reliance—what he or she knew and believed about the hazards of smoking and at what times—through evidence about the circumstances and states of mind of the plaintiff, her family members, and other witnesses decades before the suit was filed. That is precisely why the statute of repose exists: to give defendants a fair chance to develop their case before the evidence becomes stale.

In sum, "the triggering event set forth in the . . . statute of repose . . . necessarily includes reliance by the plaintiff," because "[i]f it did not, a plaintiff would still be able to seek recovery . . . after the twelve-year repose period applicable to the plaintiff"; "[s]uch a reading [would be] contrary to the intent of the statute." *Hess*, 95 So. 3d at 261. Thus, defendants' proposed instructions and verdict form questions on the subject correctly stated the law.[12]

2. The Evidence At Least Created a Jury Issue Regarding the Applicability of the Statute of Repose.

"[T]he evidence and testimony presented support[ed]" submission of the repose issue to the jury. *Hart*, 824 So. 2d at 929. As discussed above (*see* pp. 6-7 *supra*), plaintiff relied heavily on evidence of Mr. Rizzuto's supposed reliance on alleged statements and concealments long *before* May 5, 1982. And there was ample evidence from which the jury could have found that by May 5, 1982, Mr.

[12] Plaintiff suggested below that our repose argument is barred by the *Engle* litigation. *See* T. 3293-94, 3300-01 [App. Tab X]. Although her argument was cryptic, she appeared to be suggesting that the *Engle* defendants did not appeal the trial court's denial of their motion for directed verdict based on the statute of repose after Phase II-A of that trial, and thus that they cannot assert their repose argument in progeny cases. *See id.* Plaintiff is wrong. Only the three named plaintiffs were parties to Phase II-A; the Phase II-A jury did not determine whether *Mr. Rizzuto* relied on an act of concealment after 1982, and nothing else that happened in Phase II-A prevents defendants from raising a repose defense here. In any event, the Phase II-A jury found that each of the three named plaintiffs *had* proven reliance after 1982, rendering moot the question of whether those plaintiffs were *required* to prove that fact in order to recover on their fraud claims.

Rizzuto was fully aware of the hazards of smoking and thus could not have relied to his detriment on any subsequent act of concealment by defendants. This evidence included the cautionary statements Mr. Rizzuto received from family members in the 1960s (*see* T. 2674-75 [App. Tab X]); his receipt and understanding of the Surgeon General's warning from and after 1966 (*id.* at 2780-82); his family members' decisions to quit in the 1960s and 1970s (*id.* at 2790-92); his own attempts to quit in the 1970s (*id.* at 2678); and his exposure to the term "cancer stick" in reference to cigarettes by 1970 (*id.* at 2789). Although plaintiff disputed Mr. Rizzuto's awareness of the risks at various times (*see* pp. 6-8 & n.3 *supra*), the jury certainly *could* have concluded—if indeed such a conclusion was not compelled by the evidence—that even if Mr. Rizzuto had been misled when he was a teenager, he no longer was by May 5, 1982.

For similar reasons, defendants' instructions and verdict form questions were "necessary to allow the jury to properly resolve all of the issues." *Hart*, 824 So. 2d at 929. As just noted, the vast bulk of plaintiff's fraud-related evidence related to defendants' conduct and Mr. Rizzuto's state of mind before May 5, 1982. Because the jury was not instructed on the statute of repose, its finding of reliance quite likely rested solely on that conduct. The trial court's failure to submit the repose defense is therefore reversible error that entitles PM USA to a new trial on the fraud and conspiracy claims. *See Cohen*, 102 So. 3d at 15.

III. THE TRIAL COURT ERRED IN FAILING TO REDUCE THE DAMAGES AWARD BASED ON PLAINTIFF'S SHARE OF COMPARATIVE FAULT.

A. Standard Of Review

Questions of statutory interpretation are reviewed *de novo*. *Borden v. East-European Ins. Co.*, 921 So. 2d 587, 591 (Fla. 2006).[13] A trial court's decision related to waiver is reviewed for abuse of discretion. *See Valle v. Moore*, 837 So. 2d 905, 908 (Fla. 2002); *Hiott*, 129 So. 3d at 479.

B. Discussion

The jury concluded that Mr. Rizzuto was 20 percent at fault for his injuries. R. 99:19647-19649 [App. Tab F]. Over defendants' objection, however, the trial court declined to reduce plaintiff's award based on comparative fault because the jury had found defendants liable for intentional torts. R. 109:21652-21653 [App. Tab N]. That was error: the comparative fault statute required a reduction here, and plaintiff waived, or was estopped from making, any argument to the contrary.

1. The Comparative Fault Statute Applies.

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

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[13] In *R.J. Reynolds Tobacco Co. v. Sury*, 118 So. 3d 849 (Fla. 1st DCA 2013), the First DCA held that the comparative fault "statute allows for some discretion in the determination of whether an action is 'a negligence action.'" *Id.* at 852. We respectfully disagree with the court's application of an abuse-of-discretion standard of review; this issue, like all issues of statutory interpretation, should be reviewed *de novo*. *See Borden*, 921 So. 2d at 591.

percentage of fault." § 768.81(3), Fla. Stat. Whether an action is a "negligence action" depends on "[t]he substance of an action," and "means, without limitation, a civil action for damages based upon a theory of negligence, strict liability, [or] products liability." *Id.* § 768.81(1)(c). The comparative fault provision "does not apply to . . . any action based upon an intentional tort." *Id.* § 768.81(4).

The applicability of the statute turns on the nature of the case overall, not on the individual claims in the case. The statute repeatedly uses the term "action"—"[n]egligence action"; "civil action"; "substance of the action"; "[p]roducts liability action"; "action based upon an intentional tort"—and never once uses terms like "claim" or "count." The Legislature surely understood this distinction.

It is therefore unsurprising that the Florida Supreme Court has held that the exemption for "action[s] based upon an intentional tort" does not apply unless "the *entire action* . . . is founded or constructed on an intentional tort," because "[t]he drafters did not say *including* an intentional tort[,] or *alleging* an intentional tort[,] or *against parties charged with* an intentional tort," but rather "'*based upon* an intentional tort.'" *Merrill Crossings Assocs. v. McDonald*, 705 So. 2d 560, 563 (Fla. 1997) (first and last emphases added) (quoting *Slawson v. Fast Food Enters.*, 671 So. 2d 255, 258 (Fla. 4th DCA 1996)). "In other words, the issue is whether an action . . . actually has *at its core* an intentional tort." *Id.* (emphasis added). If the "substance of an action," examined as a whole, is "based upon a theory of negligence, strict liability, [or] products liability," it is a "negligence action" notwithstanding the presence of intentional tort claims. § 768.81(1)(c), Fla. Stat.; *see, e.g.*, *NationsBank, N.A v. KPMG Peat Marwick LLP*, 813 So. 2d 964, 970 (Fla. 4th DCA 2002) (action was not "based on" an intentional tort even though some intentional misconduct may have contributed to plaintiff's injury); *Palmas Y Bambu, S.A. v. E.I. Dupont De Nemours & Co.*, 881 So. 2d 565, 569 (Fla. 3d DCA 2004) (action was "products liability case" despite assertion of fraudulent concealment and Florida RICO claims); *Laschke*, 766 So. 2d at 1077 ("All of the counts of [plaintiff's] second amended complaint are based on product liability theories . . . [including] conspiracy to commit fraud . . . ."); *Sharp v. Leichus*, No. 2004-CA-643, 2006 WL 515532, at *6 (Fla. 2d Cir. Ct. Feb. 17, 2006) (finding it "abundantly clear that Plaintiff's case [wa]s, in fact, a products liability case" despite claims of fraudulent misrepresentation and concealment, because plaintiff had "sustained her physical injuries as a result of her ingestion of a particular drug," and the "representations at issue [were] only relevant to the extent they pertain[ed] to the dangers of the underlying *product*" (emphasis in original)), *aff'd per curiam*, 952 So. 2d 555 (Fla. 1st DCA 2007).

This is not a case in which plaintiff's "entire action" was "founded or constructed on an intentional tort." *Merrill*, 705 So. 2d at 563. Far from it. Much of plaintiff's case focused on her strict liability and negligence claims, and the "core" of even her intentional tort claims was defendants' alleged failure to provide Mr. Rizzuto with adequate information about the risks of their *products*. As stated in the complaint, those claims rested on defendants' alleged concealment and agreement to conceal "[w]ith respect to . . . the manufacture, marketing and sale of [defendants'] *cigarettes*." R. 18:3543-3599 [App. Tab A at ¶¶ 21, 25] (emphasis added). And the *Engle* findings on which plaintiff grounded her claims for concealment and conspiracy established only that the defendants "concealed" information "concerning the *health effects or addictive nature of cigarettes*" and "agreed to conceal" information "concerning the *health effects of cigarettes or their addictive nature*." *Id.* at ¶¶ 12(d), (e) (emphases added). Thus, defendants' "representations . . . [we]re only relevant to the extent they pertain[ed] to the dangers of the underlying *product*." *Sharp*, 2006 WL 515532, at *6.

In short, as a matter of law, because the "core" of plaintiff's action was "based upon . . . products liability," it is a "negligence action" subject to comparative fault. §§ 768.81(1)(c), (3), Fla. Stat. The trial court's refusal to apply a comparative fault reduction to the judgment in this case was therefore error.[14]

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[14] If the Court concludes that an abuse-of-discretion standard applies to the question of whether this case qualifies as a "negligence action" (*see* n.13 *supra*), we submit that the trial court abused its discretion for the reasons discussed above. Indeed, the trial court simply entered final judgment as plaintiff requested, and gave no indication that it had exercised any discretion to determine the nature of her action. Thus, if the Court were to follow *Sury*, it should at a minimum remand the case for the trial court to exercise its discretion. *See, e.g.*, *Burdick v. State*, 594

2. Plaintiff Waived Any Argument that Comparative Fault Does Not Apply.

The statute required the trial court to apply a reduction in this case. But if the Court disagrees, we submit that plaintiff has waived (or is estopped by her trial conduct from making) any argument that comparative fault does not apply, and that the trial court abused its discretion to the extent it concluded otherwise. *See Hess*, 95 So. 3d at 256 n.2 ("[A]ny error in the reduction of the compensatory damages award was invited by Mrs. Hess."); *Singer v. Singer*, 442 So. 2d 1020, 1022 (Fla. 3d DCA 1983) (a party "waive[s] her right to advance [any] claims" that are contradicted by her "conduct throughout the . . . proceedings"); *Federated Mut. Implement & Hardwood Ins. Co. v. Griffin*, 237 So. 2d 38, 41 (Fla. 1st DCA 1970) ("one who assumes a particular attitude in a case and adopts a particular theory is generally estopped to assume . . . in a later phase of that same case . . . any other or inconsistent position toward the same parties and subject matter").

During both opening and closing arguments, plaintiff's counsel repeatedly referenced Mr. Rizzuto's acceptance of responsibility without limiting that acceptance to the non-fraud claims. To the contrary, plaintiff *specifically tied* her

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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.").

admission of comparative fault to her fraud claims. *See, e.g.*, T. 1091 [App. Tab X] ("You know, John Rizzuto accepts his fault, and he wants a fair portion of the responsibility. . . . The only question is *what portion belongs on the tobacco companies who . . . concealed* the health consequences and the addictiveness [of cigarettes]." (emphases added)); *id.* at 1060-61 ("So the next question [on the verdict form] after class membership, was John Rizzuto impacted by the tobacco industry's 50-year *conspiracy to conceal* . . . . What portion of the shared responsibility for John Rizzuto's injuries belongs to Philip Morris and Liggett." (emphasis added)); 3504-05 ("It wasn't just the *concealment*, it was the entire *conspiracy*, it was the whole thing, it was the entire industry. And . . . we've told you this already, that Mr. Rizzuto accepts his fault . . . and wants a fair portion of the responsibility." (emphases added)); *id.* ("The only question the evidence has shown is what portion [of responsibility] belongs on the tobacco companies who created and designed nicotine delivery devices, *marketed* to ensnare teens into the addiction cycle, and then made them customers for life, what is their fair share of that responsibility?" (emphasis added)); *see also id.* at 3496-97.

These statements could not have left the jury with any impression other than that plaintiff was accepting some measure of fault with respect to *each* of her claims. *See Foreline Sec. Corp. v. Scott*, 871 So. 2d 906, 911 (Fla. 5th DCA 2004) (trial court erred in declining to apply comparative fault where the jury was "misled . . . into believing that it was allocating fault" on all claims, because it "may have reached a different verdict on damages had it known that [the defendant] would bear the entire amount").

The First DCA's decision in *Hiott* is especially instructive. There, the court affirmed a trial court's decision that the plaintiff had waived any argument that comparative fault should not be applied. *See Hiott*, 129 So. 3d at 475. The court reasoned that the plaintiff had "*failed to inform the jury* that she intended to reserve her right to assert the inapplicability of comparative fault to any of her claims." *Id.* at 480-81 (emphasis added). To the contrary, she had "encouraged the jury, from *voir dire* through closing argument, that she accepted [partial responsibility]," and "used th[at] admission . . . as a tactic to secure an advantage with the jury throughout the trial." *Id.* at 481. These facts made *Hiott*—and make Mr. Rizzuto's case—distinguishable from *Sury*, in which the First DCA found no waiver largely because the plaintiff "never argued to the jury or the court that the damages for his father's terminal illness should be reduced by his portion of fault." *Sury*, 118 So. 3d at 851; *Hiott*, 129 So. 3d at 480.

As in *Hiott*, plaintiff sought a clear benefit from accepting in front of the jury partial responsibility for *all* damages stemming from Mr. Rizzuto's smoking of defendants' cigarettes, and she cannot "have it both ways by avoiding comparative fault after the verdict." *Hiott*, 129 So. 3d at 481; *see also*

R. 96:19137-19196 [App. Tab W at 1] (*Cohen*: "It would be improper to allow a plaintiff to concede partial responsibility to bolster his or her case to the jury, and then reduce the scope of that concession after trial in order to maximize his or her compensatory damages award."). In permitting plaintiff to repudiate her acceptance of responsibility and increase her recovery by deeming her claims exempt from a comparative fault reduction, the trial court erred.

CONCLUSION

The judgment should be reversed and the case remanded for a new trial on both liability and damages, or alternatively on noneconomic damages alone. If the Court does not order a new trial, then it should remit the noneconomic damages award to $1 million or such other substantial reduction as the Court deems proper, and reduce the remitted judgment based on plaintiff's share of comparative fault. If the court orders neither a new trial on all claims nor a comparative-fault reduction, it should order a new trial on the fraudulent concealment and conspiracy-to-conceal claims and direct the trial court to deliver defendants' requested instructions and verdict form questions applying the statute of repose.

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Respectfully submitted,

/s/Joseph H. Lang, Jr.
FL Bar No. 59404
CARLTON FIELDS JORDEN BURT, P.A.
4221 W. Boy Scout Blvd., Suite 1000
Tampa, FL 33607
Phone: (813) 229-4253
Facsimile: (813) 229-4133
E-mail: jlang@CFJBLaw.com
E-mail: jgrayson@CFJBLaw.com
E-mail: tpaecf@cfdom.net