IN THE DISTRICT COURT OF APPEAL
FOURTH DISTRICT OF FLORIDA

CASE NO. 4D13-570
L. T. Case No. 2007 CA 020247 MB AG

SHIRLEY B. BAKER, Personal Representative of the Estate of ELMER P. Baker,

Plaintiff/Appellant,

vs.

R.J. REYNOLDS TOBACCO COMPANY,

Defendant/Appellee.

_____/

APPEAL FROM A FINAL JUDGMENT OF THE FIFTEENTH JUDICIAL CIRCUIT COURT, PALM BEACH COUNTY, HON. DAVID F. CROW

APPELLANT'S REPLY BRIEF / CROSS-APPEAL ANSWER BRIEF

DAVID J. SALES
Fla. Bar No. 794732
DAVID J. SALES, P.A.
1001 U. S. Highway One, Suite 200
Jupiter, FL 33477
561-744-0888
561-744-0880 (fax)
david@salesappeals.com
Attorney for Plaintiff/Appellant

TABLE OF CONTENTS

TABLE OF CITATIONS

Cases **Page**

Statutes

Other Authorities

REPLY BRIEF

ARGUMENT

I. Plaintiff Was Entitled to a New Trial Due to an Inconsistent Verdict.

A. The Invited Error Doctrine Does Not Apply.

Sixteen pages into its Answer Brief, RJR acknowledges that Plaintiff is "right" that this Court's decision in *R.J. Reynolds Tobacco Co. v. Brown*, 70 So. 3d 707 (Fla. 4th DCA 2011) "required" the parties and the trial court to use the jury instructions and verdict form used in this case. RJR nowhere asserts this was harmful error. To the contrary, RJR's argument on this point (AB.18-21) necessarily denies the existence of harmful error because it contends that the jury's verdict "was consistent." (AB.18) More importantly, as Plaintiff previously argued to the Court (IB.26), the trial court's error was not in using instructions and a verdict form which this Court "required," but in failing to remediate a verdict which, as the trial court initially acknowledged (T.23:3129), would need to be corrected, if inconsistent.

RJR's own authorities show that this case is not one which supports the application of the invited error doctrine. Plaintiff's counsel was *not* "'allowed to sandbag the trial judge'" by seeking a ruling counsel knew or should have known would result in reversal. (AB.12 (quoting *Weber v. State*, 602 So. 2d 1316, 1319 (Fla. 5th DCA 1992)). Plaintiff's counsel did not engage the trial court in a "game

of 'check' and 'checkmate' or 'heads I win, tails you lose,'" *id.* at 1318-19, in an effort to exploit the system and guarantee herself a second trial. To the contrary, Plaintiff's counsel had every reason to believe just the opposite, that doing what this Court "required" in *Brown* was the right thing to do because this Court said so. By comparison, in the cases cited by RJR (AB.12), the party asserting trial court error on appeal not only prompted trial court error, but also should not have asked the trial court to take the actions later complained of.

In *Fuller v. Palm Auto Plaza, Inc.*, 683 So. 2d 654 (Fla. 4th DCA 1996), at the plaintiff's request, the trial court allowed the jury to decide an issue which should have been resolved as an issue of law by the trial court. As this Court made clear, the "invited error" doctrine precluded appellate review because it exists for the purpose of preventing a party from taking inconsistent positions: "'A party cannot claim as error on appeal that which he invited or introduced below. *That is*, he cannot take an inconsistent position on appeal.'" *Id.* at 655 (emphasis added) (quoting *Held v. Held*, 617 So. 2d 358, 359-60 (Fla. 4th DCA 1993)); *see also id.* at 360 (after arguing trial court lacked authority to take specific action, husband took "inconsistent" position at trial, "where his attorney suggested that very option"); *Gupton v. Village Key & Saw Shop, Inc.*, 656 So. 2d 475, 478 (Fla. 1995) (where party had "not changed its position," invited error doctrine did not apply);

Goodwin v. State, 751 So. 2d 537, 544 n. 8 (Fla. 1999) (party cannot "take advantage" on appeal of error it causes).

In *Muina v. Canning*, 717 So. 2d 550 (Fla. 1st DCA 1998), the trial court was "induced by the argument of appellant's trial counsel" to enter a form of judgment which the appellant later asserted on appeal was error. He could not do so even though the judgment was "erroneous on its face as a matter of law." *Id.* at 551, 553-54. The decisions cited by the First District in *Muina* likewise confirm why the invited error doctrine has no application here. *See id.* at 554 (citing *Wilmo on the Bluffs, Inc. v. CSX Transportation*, 559 So. 2d 294 (Fla. 1st DCA 1990) (party cannot seek summary judgment on grounds there was no issue of material fact, and then on appeal assert there was an issue of fact on the same question); *Risk Mgt. Services, Inc. v. McCraney*, 420 So. 2d 374 (Fla. 1st DCA 1982) (when trial counsel erroneously represents certain case law as controlling when case law is already superseded by statute, party cannot appeal on ground that trial court followed that case law); *Mohammad v. Mohammad*, 371 So. 2d 1070 (Fla. 1st DCA 1979) (appellant could not assert error arising out of trial court order that he pay for children's college, when trial court merely accepted his offer to do so).

Contrary to what RJR suggests (AB.12), *Dial v. State*, 922 So. 2d 1018, 1020 (Fla. 4th DCA 2006) does not include any discussion of the invited error doctrine. The important principle discussed in *Dial* was that, in a criminal case,

"Florida allows inconsistent verdicts because they may result from a jury's lenity rather than a definitive statement on the innocence or guilt of a defendant." In a criminal case, an inconsistent verdict is one in which "an acquittal on one count negates a necessary element for conviction on another count." Id. (citation omitted). In applying this principle, this Court concluded that a guilty verdict for manslaughter of a child was not inconsistent with a jury's rejection of a first-degree felony murder charge. *Id.* at 1021.

After affirming on this ground, the Court indicated in a one-sentence footnote that the defendant's trial position estopped "him" (*i.e.,* the defendant) from "arguing an inconsistent verdict," based on the failure to object to jury instructions. *Id.* at 1021 n. 1. The Court cited *McKee v. State*, 450 So. 2d 563 (Fla. 3d DCA 1984), without further explanation. Through its bracketed alteration of the quotation (AB.12), RJR suggests that this Court established a rule of law that precludes appeals on grounds of inconsistent verdict wherever "a party" (which RJR placed in brackets and substituted for "him," the Court's actual language) fails to object to jury instructions. But even a brief examination of *McKee*, which RJR also cites (AB.15), shows that it is merely in line with the prohibition against trying to take advantage of "inconsistent" positions. 450 So. 2d at 564. Moreover, the Third District in *McKee* made a point of expressing "satisfaction" knowing that the jury "acted in accordance with the law." *Id.* After having "charitably" received

"the appetizer and the main course," the defendant was not "entitled to dessert and coffee." *Id.* In this case, for reasons appearing below and previously expressed (IB.22-26), the jury's verdict is not "in accordance with the law" and Plaintiff received no such charity or kindness from the jury.

Contrary to what RJR's argument implies (AB.18), the application of the Florida Supreme Court's decision in *Douglas*, with respect to the significance of a class membership finding, did not "change" what the Supreme Court decided in *Engle*. *Douglas* constitutes a confirmation that it meant what it said in *Engle*, that the *Engle* Phase I jury decided issues of "general causation" and left issues of "individual" or "specific" causation for the juries in separate class member suits. 110 So. 3d at 428-29 (citing and quoting *Engle*, 945 So. 2d at 1254-55). What the Supreme Court explained in *Douglas*, however, is that a finding of class membership (addiction was a legal cause of a smoker's disease and death), coupled with the Phase I findings of negligence or strict liability, constitutes a finding of liability as to those two *Engle*-based claims. *Id.* at 430. Even if that aspect of *Douglas* represented a change in the law, as Plaintiff previously explained (IB.8-9, 22-25), that was precisely the argument Plaintiff made to the trial court when arguing that the verdict was inconsistent; and that is the error complained of on appeal. For these reasons, the rule requiring preservation of arguments based on

intervening changes in the law, recited by RJR (AB.16-17), should support rather than work against Plaintiff.

Douglas necessarily did "change" *Brown* and its requirement of specific causation instructions for those two claims.[1] But if this Court concludes the trial court's application of *Brown* was harmful error (necessarily rejecting RJRs contrary argument), the Court may "very guardedly" exercise "discretion" to excuse any lack of preservation occasioned by the Court's own misapprehension of *Engle*'s requirements. *Sanford v. Rubin*, 237 So. 2d 134, 137 (Fla. 1970). The Court can do so because, as explained in RJR's own authority (AB.16), such an "error … goes to the foundation of the case or goes to the merits of the cause of action." *Clay v. Prudential Ins. Co. of America*, 670 So. 2d 1153, 1155 (Fla. 4th DCA 1996) (quoting *Sanford*). The importance of class membership in *Engle*-progeny litigation, and its impact on the application of the Phase I jury findings, is not a "fairly debatable" matter, *id.* at 1155, which might vitiate Plaintiff's right to be excused from preservation. Rather, the class membership question and resulting significance goes to the very heart of Plaintiff's claim, and her entitlement to a verdict on these two claims. As *Douglas* made clear, a plaintiff who wins the issue

[1]A plaintiff's burden of proof consists of (1) class membership, (2) showing that addiction to cigarettes was the cause of disease, and (3) damage. 110 So. 3d at 430. A trial court cannot require specific causation instructions on the claims of negligence and strict liability. *Id.* at 429-30. While *Douglas* does not expressly overrule *Brown*, its citation to *Brown* as "*contra*" authority suggests strongly that it disapproved of this Court's requirements in *Brown*. 110 So. 3d at 430.

of class membership, necessarily also wins her non-intentional tort claims of negligence and strict liability, subject to a jury's apportionment of fault on these claims. Here, Plaintiff 'won' the issue of class membership, but 'lost' those same claims. It is difficult to see what could be more fundamental in this litigation.

Finally, RJR says (AB.16), without support or proof, that "many other" *Engle*-progeny plaintiffs convinced unspecified trial courts to reject *Brown*'s application and convince them to violate this Court's command by using instructions that were not in compliance with *Brown*'s requirements. It is impossible to reply to this argument, bereft of any reference or record citation, except to state that the experience of undersigned counsel here, a veteran of many progeny trials, was different and included repeated use of *Brown*-compliant jury charges and verdict forms.

B. The Verdict Was Inconsistent.

For the reasons just and previously (IB.23-24) discussed, the verdict in this case was fundamentally inconsistent. It is not possible in this litigation to lawfully conclude that (1) a smoker was addicted to an *Engle* defendant's cigarettes containing nicotine, *and* (2) that the addiction was a legal cause of an *Engle*-qualifying disease like lung cancer, *but* also (3) that the defendant's negligence or defective cigarettes were not the cause of that same disease. Rather, on the product defect claim, a proper application of *Engle* holds that

> legal causation for the strict liability claim [is] established by proving that addiction to the *Engle* defendants' cigarettes containing nicotine was a legal cause of the injuries alleged. When an *Engle* class member makes this showing, injury as a result of the *Engle* defendants' conduct is ***assumed*** based on the Phase I common liability findings.

110 So. 3d at 429 (emphasis added). Similarly, *Douglas* teaches that items (1) and (2) above, coupled with the Phase I jury finding of negligence, conclusively resolves the issue of liability for negligence. 110 So. 3d at 430.

RJR says (AB.18) that *Douglas* was "fundamentally different" from this case, but no *Engle*-progeny case can differ on the application of the core issue of law resolved by *Douglas*. Contrary to what RJR suggests (AB.18), *Douglas* does address this issue directly because the Supreme Court held that the Second District (not the trial court) "misapplied Engle" because it "required a separate causation instruction and finding for the negligence claim." *Id.* at 429-30. The mere fact that Plaintiff signaled that she accepted some responsibility for Mr. Baker's smoking behavior (AB.19-20), which is customary in tobacco litigation,[2] did not deprive Plaintiff of the right to assert that the jury's verdict is fundamentally inconsistent. *Douglas* teaches us what the conclusive effect of class membership actually is, and

[2] *See, e.g.*, *Philip Morris USA, Inc. v. Arnitz*, 933 So. 2d 693, 698 (Fla. 2d DCA 2006) (smoker has the right to plead his own comparative negligence); *R.J. Reynolds Tobacco Co. v. Sury*, 118 So. 3d 849, 851 (Fla. 1st DCA 2013) (by acknowledging deceased smoker's "partial responsibility," plaintiff did not waive right to assert that comparative fault statute applied only to claims of negligence and product defect, and did not apply to intentional tort claims).

establishes, standing alone, that this was an inconsistent and therefore unlawful verdict.

Moreover, despite what RJR suggests (AB.19-21), the jury's verdict cannot be excused by speculation that the jury found class membership, but also apportioned one hundred percent of responsibility for Mr. Baker's lung cancer to Mr. Baker, so as to override what naturally flows from its finding of class membership. This jury did not decide the issue of apportionment. Similarly, the timing of Mr. Baker's smoking initiation or quit attempts was not material to the inconsistency of the jury's verdict because, regardless of when Mr. Baker began smoking or tried to quit, RJR's negligence and defective products were conclusively established as a legal cause of his cancer and death (based on the finding of class membership).

II. Plaintiff Was Entitled to a New Trial Due to the Admission of Irrelevant, Prejudicial Evidence.

RJR argues to this Court (AB.23-25) that *whether* Mr. Baker ever quit smoking was a disputed issue of fact. In doing so, RJR revives the misleading argument it made to the trial court, which helped it to secure admission of the life insurance application in the first place. In her Initial Brief (15-18), Plaintiff thoroughly examined the testimony of every witness (including RJR's retained expert), in addition to the statements and arguments of RJR itself. They are uniformly consistent and dispel any notion that Mr. Baker ever quit smoking prior

to 1983. Counsel for RJR could not have been any clearer when he made his opening statement. (*See* T.3:152, 167, 171 (repeatedly emphasizing the *absence* of any quit attempts over a forty year period)). And he could not have been any clearer when he argued this very point to the jury, *immediately after discussing the life insurance application*: Mr. Baker "*never tried to quit*" and "*the longest he ever stopped was for two hours*." (T.23:3011 (emphasis added)) Contrary to the revisionist history of its Answer Brief (23-24),[3] RJR never suggested to the jury that the life insurance application was important because it was special, "contemporaneous" proof from Mr. Baker himself that he could control his smoking and was therefore not addicted to nicotine. It is true, as RJR notes (AB.2-3, 23), that it was able to persuade the trial court with this argument, but RJR simply misled the trial court as to what the evidence would show, and what its actual trial arguments would be.

Plaintiff suggests that the actual reason for RJR's efforts to secure the admission of this prejudicial evidence was foreshadowed not only by Plaintiff's

[3]RJR indicates (AB.24) that the record support for the existence of such a dispute is found at pages 2-6 and 23-24 of its Answer Brief. The only record evidence to which it refers, however, is the application itself, at pages 2 and 23. The balance of these pages describe the trial court's pretrial *in limine* order relating to the application (AB.2), Mr. Baker's knowledge of the health risks of smoking (AB.3-4), the parties' arguments to the jury about the application (AB.4-5), directed verdict motions, instructions and the verdict form (AB.5-6), the statute of repose (AB.6), and punitive damage instructions. (AB.6) There simply was no such dispute.

repeated, pretrial concerns over the prejudicial impact of this evidence, but also in opening statements. RJR's counsel improperly, and contrary to the spirit of a pretrial ruling of the trial court, told the jury that Mr. Baker "signed that life insurance form and he ***got the policy***." (T.3:177 (emphasis added)). RJR is correct (AB.2) that the trial court had prohibited RJR from suggesting that very thing, but RJR's counsel violated the trial court's command, drawing a private admonishment from the trial court at sidebar; *i.e.,* "don't say that again." (T.3:178) Although Plaintiff immediately asked the trial court to strike the improper comment (T.3:178), it did not do so. Thus, Plaintiff accordingly preserved the improper comment for review in the context of the issue raised here. *Cf.*, *Barkett v. Gomez*, 908 So. 2d 1084, 1088 (Fla. 3d DCA 2005) (party objecting to "improper comment" must request "curative instruction or a mistrial").

But what made this evidence particularly prejudicial was its relationship to the subject matter of this lawsuit. Plaintiff was in court seeking money damages for the death of her husband as a result of smoking cigarettes. Although it was undisputed that the harmful content of the application was not written by Mr. Baker (IB.11), Mr. Baker's death made it impossible for him to explain the circumstances of the application. Thus, RJR was able to deftly suggest not only that Mr. Baker was an insurance cheat, just as Plaintiff's counsel suggested would occur, but also that Plaintiff had already been paid for his death. Given the uniform

evidence that Mr. Baker had never quit—driven home by RJR's own arguments—the jury necessarily would reach these conclusions. As argued to the trial court, few parties could overcome such a handicap in a wrongful death case. Of note is the fact that RJR was not even interested in applying the nominal life insurance proceeds against any recovery as a collateral source, pursuant to section 768.76(2)(a)(1), Florida Statutes, had Plaintiff prevailed. Rather, it merely wanted the jury to know about the application and suggest that Mr. Baker had lied to obtain it.

If there could be any doubt on this score, the Court need only focus on RJR's jury arguments on this point. Counsel for RJR told the jury that the application proved "there is no question that for decades Mr. Baker has known that smoking is dangerous and that it could kill him and that when he applies for life insurance, he ended up applying as a non-smoker. He was a man that understood the risks." (T.23:3010-11) RJR is somewhat direct in acknowledging what it really wanted to tell the jury: "Mr. Baker knew that smokers pay higher insurance premiums." (AB.26 (quoting SR.1:3)) But it dissembles when suggesting simultaneously (AB.26) that it did not mean to suggest that Mr. Baker was an insurance cheat. No one could take these comments in any other way, especially when coupled with counsel's improper opening statement telling the jury that Mr. Baker "got" the policy.

RJR's argument (AB.25) that the weight of this evidence was a jury issue entirely misses the point. It secured the admission of unfairly prejudicial evidence on grounds which proved absent at trial, and it interfered with the trial court's gate-keeping function to prohibit the admission of such evidence. A trial court that properly performs this function does not "usurp" the jury's role. (AB.25) Rather, it does precisely what the trial court is charged to do. A trial court "must" weigh such evidence against other facts in the record and "balance" it against "the strength of the reason for exclusion." *Walker v. State*, 707 So. 2d 300, 309 (Fla. 1997) (quoting C. Ehrhardt, *Florida Evidence* § 403.1 (2d. ed. 1984)). It is proper in this setting for

> the court to consider the need for the evidence; the tendency of the evidence to suggest an improper basis for the jury for resolving the matter, *e.g.,* an emotional basis; the chain of inference necessary to establish the material fact; and the effectiveness of a limiting instruction.

Id. at 310.

Nearly every one of these considerations suggests error by the trial court. RJR did not need evidence to suggest that Mr. Baker quit smoking. Such evidence contradicted its theory of the case. It did not need evidence to suggest that Mr. Baker knew smoking could be harmful because other such evidence was abundant, according to RJR. The evidence did suggest an improper basis for resolving this case because RJR had already created the impression that Mr. Baker lied and/or

that Plaintiff had already recovered money for his death. It is hard to see how the prejudicial impact of this evidence could have been limited. That is especially so because the modest limit that Plaintiff was able to obtain through a pretrial motion was breached by counsel for RJR (without redress from the trial court). The fact that the trial court's error was harmful should be obvious. Even in a criminal case, just because a defendant is the beneficiary of a murder victim's life insurance policy does not mean that the existence of that policy admissible, unless premeditation is an element of the offense. *Evans v. State*, 432 So. 2d 584, 585-86 (Fla. 2d DCA 1983). Rather, it is properly excluded as unfairly prejudicial when compared to its probative value. That should have been the result here. The error was not rendered harmless when the jury found that Mr. Baker was an *Engle* class member. (AB.28) To the contrary, the peculiarity and inconsistency of the jury's verdict was a likely product of this harmful evidence because although the jury class membership finding necessarily entitled Plaintiff to some relief, the jury simultaneously denied that relief through its inconsistent finding that there was no damage proximately caused by RJR's conduct.

Under the standard articulated in the second paragraph of *Special v. Baux*, 79 So. 3d 755, 757 (Fla. 4th DCA 2011) (en banc), *rev. granted*, 90 So. 3d 273 (Fla. 2012), "[t]o avoid a new trial, the beneficiary of the error in the trial court must show on appeal that it is more likely than not that the error did not influence

the trier of fact and thereby contribute to the verdict." RJR devotes a single paragraph to its obligation under *Special* (AB.28), by telling this Court that the jury necessarily found the life insurance not "persuasive." Its reason is that Plaintiff won on the issue of class membership. To the contrary, the fact that the jury found for Plaintiff on this question meant that she was entitled to a liability verdict, which the jury simultaneously refused her. The life insurance application was not tethered to issues of class membership; but it was tethered to the question of whether Plaintiff deserved money damages, and whether she had suffered any loss. That is why it is likely that the trial court's error was harmful, regardless of whether the *Special* standard applies, or the differing standards applied in other District Courts of Appeal.

CROSS-APPEAL ANSWER BRIEF

STATEMENT OF THE CASE AND FACTS

Concealment Mattered—Nicotine Addiction. Defendants do not contest the jury's finding that Mr. Baker was an *Engle* class member, *i.e.,* that he was addicted to nicotine in cigarettes and that addiction was the cause of his lung cancer and death. (T.23:3121) Because Mr. Baker was a class member, Plaintiff was entitled to the benefit of the *Engle* Phase I jury findings on concealment and conspiracy to conceal. As the trial court instructed the jury on the concealment claim, the finding was that RJR "concealed or omitted material information … concerning the health effects or addictive nature of smoking cigarettes or both." (T.22:2876) On the conspiracy claim, the finding was that RJR and its co-conspirators "agreed to conceal or omit information regarding the health effects of cigarette smoking or the addictive nature of cigarettes…." (T.22:2876) Thus, the trial court directed the jury to focus on both the health effects of cigarettes and their addictiveness.

Plaintiff introduced substantial evidence as to how and why the industry concealed its knowledge that cigarettes are addictive, as well as the impact of its concealment on smokers like Mr. Baker. Plaintiff's evidence spanned a period from the 1950s and well into the 1990s. When the *Engle* defendants were first organizing their conspiracy in 1952, one company's scientific director noted, "it's fortunate for us that cigarettes are a habit they can't break" (T.4:315-16), which

meant that they were addicted. (T.4:316) The industry accordingly plotted to exploit the addictiveness of nicotine by establishing confidence and "to free millions of Americans from the guilty fear that is going to arise deep in their biological depths, regardless of any poo-pooing logic, every time they light a cigarette." (T.4:319)

A previously secret industry document (Ex.PT3615; T.5:407) reflects the industry's understanding in 1963 that the industry was "in the business of selling nicotine, an addictive drug." (T.5:409) This document was hidden **until the 1990s** and, in fact, through the **mid-1990s**, RJR never acknowledged that nicotine was an addictive drug. (T.5:408-10) In fact, "[t]he tobacco industry had worked for years and had commissioned scientific investigations into what it was about nicotine that made it addictive" and "concluded that nicotine is truly addictive." (T.6:523) The public health community's understanding of that same issue lagged well behind the industry's. It was **not until 1988** when the Surgeon General first declared that nicotine was an addictive drug. (T.6:522) Prior to that time, the tobacco companies "had more information about addiction and nicotine than the general public." (T.6:522) The Surgeon General also explained in 1988 for the first time that the way in which nicotine addicts is similar to the mechanisms of street drugs like heroin and cocaine. (T.6:525)

Even at this late date, however, the industry refused to acknowledge that nicotine was an addictive drug. To the contrary, **in 1988**, it called the Surgeon General's report "irresponsible" and nothing more than "scare tactics." (T.6:526) That was entirely consistent with the industry's longstanding plan to provide smokers with a psychological crutch to ensure continued consumption of cigarettes (T.6:527; *see also* Ex.PT1933; T.5:427 (1964 memorandum: industry "must … provide … answers which will give smokers a psychological crutch and a self-rationale to continue smoking")) In fact, according to data collected by the Federal Trade Commission in 1981 (Ex.PT3165:3-40), the majority of Americans did not think that smoking was addictive.

In contrast to what the public knew prior to 1988, the industry's knowledge was substantial. It not only understood that cigarette smoking produced a "pharmacological effect," (T.6:548), but also studied the optimum levels of nicotine "necessary to maintain addiction." (T.6:553) RJR itself explained internally that "in designing any cigarette product, the dominant specification should be nicotine delivery." (T.6:559) In a now well-known but previously secret report, one RJR scientist explained that the "tobacco industry may be thought of as being a specialized segment of the pharmaceutical industry," and "based upon design manufacture and sale of attractive dosage forms of nicotine." (T.6:562-63) Nicotine is, in fact, "the *sine qua non*" of the industry. (T.6:565) None of this

information was known to the public "**during the mid '90s and before**." (T.6:564; *see also* T.6:576-77) (co-conspirator never disclosed its knowledge that a "cigarette pack" is "a storage container for a day's supply of nicotine"))

As Plaintiff's expert explained, the industry and RJR "deliberately played down the role of nicotine." (T.6:567) The actions of nicotine, while understood by the industry, were not as well understood even by physicians, and "even **into the 1990s**." (T.6:567-68) The industry could not admit these matters publicly because, as previously secret RJR documents reflect, that would have implied the elimination of nicotine from cigarettes, with the consequence that it would "eventually liquidate [RJR's] business." (T.6:569) Instead, it actively studied means to potentiate the effects of nicotine, by doing such things as adding ammonia compounds to tobacco. (T.6:571-72) RJR products do contain ammonia compounds. (T.6:572) RJR never disclosed these matters to the public "**up to the mid '90s**" (T.6:593; *see also* T.6:612-13 (RJR studying the addition of levulinic acid to cigarettes **in 1989**, which affects the uptake of nicotine in the brain, none of which was shared with the public); T.6:615 (RJR studying the effect of levulinic acid on rat brain tissue))

Plaintiff demonstrated the industry's suppression of its knowledge that nicotine is addictive through what RJR's co-conspirators concealed as well. Philip Morris likened the smoker to Pavlov's dog and lab rats, conditioned to "salivate"

and activate a "lever" to obtain the next reward of a food pellet. (T.6:596) Philip Morris likewise recognized that without nicotine, "the cigarette market would collapse, Phillip Morris would collapse and [they]'d all lose [their] jobs and [their] consulting fees." (T.6:597) Similarly, in **December 1982**, a senior RJR scientist acknowledged, just as a research director had 30 years earlier, that most smokers would "like to stop…. Many, but not most, of those who would like to stop are able to do so." (T.6:603) It was accordingly incumbent on RJR to influence the "entry/exit rates" for smokers and the way that it could do so was with nicotine. (T.6:604) Of course, it never told the public these things and in fact, it recognized that it could not "be comfortable selling a product which most of our customers would stop using if they could" because "if the exit gate from our market should suddenly open, we could be out of business almost overnight." (T.6:604)

Mr. Baker's smoking history suggested that there was a direct relationship between the concealment of nicotine's addictiveness and his smoking behavior. His smoking history reflected significant changes in the "**late '80s or early '90s**" (T.16.2012), which coincided with the enhanced public health understanding of the role that nicotine played in addicting smokers like Mr. Baker. It was at that point that Mr. Baker undertook to try and quit smoking, using "the patch, the gum" (*i.e.,* nicotine replacement therapies), and even "hypnotism." (T.16:2013) It was at that point, according to Mr. Baker's son, that he expressed a belief that he was

"addicted"—but his health was already "failing." (T.16.2014) It was during this same period (**in 1993**) that Mr. Baker developed lung cancer. (T.16:2015)

Addiction to nicotine matters for a smoker because it is the root cause of smoking-related illness. As the Surgeon General explained in 2010, sustained use and long-term exposures to tobacco smoke are due to the powerfully addicting effects of nicotine, and inhaling the complex mixture of combustion compounds in tobacco smoke causes diseases like cancer. (T.7:704-05) "Nicotine addiction is the fundamental reason that individuals persist in using tobacco products, and this persistent tobacco use contributes to [those] diseases." (T.7:706) "All the way through the … **mid 1990s, even up to 1998**," RJR never acknowledged those matters to be true, despite contrary knowledge. (T.7:704-06) On the question of nicotine, **as late as 1994**, the industry's most senior executives testified before Congress that nicotine was not addictive. (T.7:707-09; Ex.PT1771; Ex.PT1772)

As suggested above, one reason for the concealment of nicotine's addictiveness was that acknowledging the role that nicotine played implied disastrous financial consequences for the industry. But there was another reason: the fear of losing lawsuits. In a 1980 internal memorandum (Ex.PT2184A) from the Tobacco Institute (an *Engle* co-conspirator), its officials discuss work by the National Institute on Drug Abuse on the question of whether nicotine is addictive. The matter was one of importance because as

> Shook, Hardy [counsel for industry] reminds us, … the entire matter of addiction is the most potent weapon a prosecuting attorney can have in a lung cancer/cigarette case. We can't defend continued smoking as freed choice if the person was addicted.

(T.7:716) RJR and the industry, of course, knew that was exactly the problem faced by smokers. (T.7:718) The industry's denials—motivated out of financial concerns and fear of litigation exposure of nicotine's addictiveness—mattered for smokers because they served as a psychological crutch, which led to continued smoking and addiction of smokers. (T.7:711)

Concealment Mattered—the False Controversy and Filter Fraud. The evidence in this case of the "false controversy" concerning the health effects of smoking was similar to that considered by this Court in cases like *Philip Morris USA Inc. v. Putney*, 117 So. 3d 798, 802-03 (Fla. 4th DCA 2013) and *Philip Morris USA, Inc. v. Naugle*, 103 So. 3d 944, 948 (Fla. 4th DCA 2012). It was "created by the tobacco industry aimed at creating doubt among smokers that cigarettes were hazardous to health." *Naugle*, 103 So. 3d at 947 n. 3. Plaintiff's expert also explained how the controversy worked to create a psychological crutch for continued smoking, just as the industry intended. Such crutches allow smokers to "not be afraid of reality." (T.4:320) The industry's real product was "doubt," because it needed to "compet[e] with the bodies of fact that exist in the mind of the general public." (T.5:457) This was a means of establishing the controversy. (T.5:457)

Plaintiff provided the jury with the industry's own appraisals of its success, including a 1972 Tobacco Institute memorandum. (Ex.PT2350) It confirms that the industry never sought to convince smokers that cigarettes did not cause disease; rather, its purpose was "creating doubt about the health charges without actually denying it." (T.5:472) The "strategy was brilliantly conceived and executed." (T.5:472) There was no evidence that this strategy or its effect on smokers terminated prior to May 5, 1982. To the contrary, it continued beyond that date. Plaintiff's proof in this case also included substantial evidence of the false controversy over several decades. (*E.g.,* T.4:323-61), including evidence of the **1984** campaign by the Tobacco Institute, "The Cigarette Controversy, Why More Research Is Needed." (T.4:333; *see also* Ex.PT467; T.6:508-09 (**1984** "Open Debate" advertising campaign of RJR asserting that there was "more than one side" to the controversy); Ex.PT1680; T.6:505-06 (televised **1983** interview with Tobacco Institute spokeswomen "not denying" cigarettes smoking "could be a risk factor," but asserting that no causal relationship was established)) Just a few years earlier, according to data reviewed by the FTC in 1981, there remained "significant gaps in consumer knowledge" about "how dangerous smoking is." (Ex.PT3165:3-10; T.6:517)

Plaintiff's case also included proof of a wide variety of matters that the industry never disclosed during Mr. Baker's lifetime:

- The industry had identified the chemicals in smoke that caused cancer. (T.5:388)

- Despite committing to remove those chemicals if ever discovered, the industry knew this could not be done. (T.5:389; 431; 470) This also provided a psychological crutch to smokers by reassuring them to continue smoking. (T.5:430)

- Cigarette filters were a mere "illusion" that provided no benefit to smokers who switched to them. (T.5:395-96) Smokers of filtered cigarettes got the same amount of tar and nicotine as smokers of regular brands. (T.5:478)

The consequences of the industry's concealment were starkly described by the Surgeon General in 2010. The public health community had historically wanted to reduce smoking prevalence but,

> [a]t the time the adverse effects of smoking were being recognized, the tobacco industry developed cigarettes with low machine-measured yields of tar and nicotine, and public health authorities encouraged consumers to select them. Unfortunately, it took public health researchers and federal authorities many years to discover what the tobacco industry knew much earlier: the health benefits of reductions of tar and nicotine intakes were negligible at best for persons using these products. In 2001, an NCI report concluded: "There is no convincing evidence that changes in cigarette design between 1950 and the mid 1980s have resulted in an important decrease in the disease burden caused by cigarette use either for smokers as a group or for the entire population." Thus, by the twenty-first century, it was apparent that five decades of evolving cigarette design had not reduced overall disease risk among smokers, and new designs were used by the tobacco industry as a tool to undermine prevention and cessation efforts.

(Ex.PT3895; T.6:541) Mr. Baker smoked filtered Winston and Pall Mall cigarettes. (T.16:2008) There was no evidence that Mr. Baker was different in these respects

from millions of Americans who were directly harmed by the industry's concealment of what it knew.

SUMMARY OF THE ARGUMENT

I. The trial court correctly denied RJR's motion for directed verdict on grounds that Plaintiff's claims were barred by the statute of repose. Plaintiff proved not only that the industry's conduct continued well beyond May 5, 1982, but also that it was able to suppress the truth of nicotine's addictiveness until at least 1988, when the Surgeon General first declared that nicotine was an addictive drug. It was shortly thereafter that Mr. Baker's smoking took a different turn, with new attempts to quit reflecting an awareness of the role that nicotine played in his smoking behavior. The jury was free to conclude that the superior knowledge of RJR and the industry concerning this very subject made a difference.

Similarly, although Mr. Baker expressed an awareness of the health risks of smoking, RJR and the industry never shared with the public their more extensive knowledge, for example, that they manipulated cigarettes to increase their addictiveness, and that filters touted as health-sparing devices were actually worthless. As the Surgeon General has now confirmed, the industry took advantage of its superior knowledge, with the result of suppressing smoking cessation. Moreover, Plaintiff proved the same "false controversy" proven in other cases

which this Court has held sufficient to reach the jury on the question of reliance, or proximate cause.

Because RJR interposed the affirmative defense based on the statute of repose, it was RJR's burden to prove that the timing of Mr. Baker's lung cancer suggested no causal connection between its conduct and the reliance proven beyond May 5, 1982. It never attempted to prove that Mr. Baker would have gotten lung cancer despite his continued reliance. This was an additional ground to deny RJR's motion for directed verdict.

II. Plaintiff acknowledges this Court's holding in *Ciccone* that *Engle* progeny plaintiffs cannot recover punitive damages for non-intentional tort claims. Plaintiff believes this aspect of *Ciccone*, based on the First District's decision in *Soffer*, is incorrect. *Soffer* is pending review by the Supreme Court. In all events, the Court need not have reached the conclusion in *Ciccone* that all non-intentional tort claims fail to support punitive damages in this litigation. The *Ciccone* plaintiff only sought punitive damages for a non-existent "gross negligence" claim which was not supported by any *Engle* finding, and was never approved by the Supreme Court's *Engle* decision. This Court was correct that the *Ciccone* plaintiff could not seek punitive damages for the patently non-*Engle* claim of "gross negligence," but its statement that the same rule applies to all non-intentional tort claims based on the *Engle* findings is dicta.

III. *Douglas* forecloses arguments that application of *Engle* results in a denial of due process.

ARGUMENT

I. The Statute of Repose Did Not Bar Plaintiff's Claims Sounding in Concealment.

A. Standard of Review. Review of directed verdict motions is *de novo*. *R.J. Reynolds Tobacco Co. v. Ciccone*, 123 So. 3d 604, 615 (Fla. 4th DCA 2013). The Court should affirm the trial court's denial of RJR's directed verdict motion unless no proper view of the evidence could have sustained a verdict in favor of Plaintiff. *Owens v. Publix Supermarkets, Inc.,* 802 So.2d 315, 329 (Fla.2001). The Court evaluates all facts in evidence and all reasonable inferences that can be drawn from those facts in the light most favorable to Plaintiff. *Id.* A directed verdict "is not appropriate in cases where there is conflicting evidence as to the causation or the likelihood of causation." *Friedrich v. Fetterman & Associates, P.A.*, 2013 WL 5745617 at *3 (Fla. Oct. 24, 2013). This standard applies to the issue of "reliance" for *Engle*-progeny claims sounding in concealment. *Naugle*, 103 So. 3d at 946.

B. Plaintiff Met Her Burden of Proof, and RJR Failed to Meet Its Burden on Its Affirmative Defense.

RJR takes a very narrow view of what these cases are all about. There are two sides to the *Engle* concealment coin. One relates to the health risks of

smoking, certainly, but the other relates to industry concealment about the addictiveness of nicotine. Even the public health community did not recognize nicotine for what it is until 1988, when the Surgeon General first declared it an addictive drug, likening its action to that of street drugs such as heroin and cocaine. If the matter were not self-evident, Plaintiff established that denying smokers the important knowledge that they were consuming an addictive drug perpetuates smoking, just as the industry wanted. Moreover, as the Surgeon General has only recently explained, it is the action of nicotine that is the real cause of diseases like lung cancer because (just as the industry knew and concealed), without nicotine, smokers would quit smoking and not develop those diseases.

Moreover, in this case, Mr. Baker's quit attempts, though unsuccessful, appeared to coincide with the increased awareness of the effects of nicotine, without which such things as nicotine-replacement therapies obviously could not have been developed. Mr. Baker actually tried nicotine gum and patches after the Surgeon General declared nicotine an addictive drug, as well as other treatment methods (*i.e.*, hypnosis). But this took place late in his life, when his health was already failing, and he developed lung cancer. On this record, focusing solely on the concealment of nicotine's addictiveness, the jury was free to "infer" reliance by Mr. Baker, *e.g., Philip Morris USA Inc. v. Cohen*, 102 So. 3d 11, 14 n. 2 (Fla. 4th DCA 2012), and that earlier disclosure of the powerful effects of nicotine would

have made a difference. Moreover, the jury was also free to consider the industry's suppression of the fact that it was actively seeking to manipulate its products (and the bodies of its consumers) by adding chemicals to tobacco to potentiate the effects of nicotine. Arming consumers with such knowledge, the jury was free to conclude, bears directly on their interest, efforts and methods to quit smoking.

Moreover, as in *Putney*, "this case contains sufficient evidence from which the jury could decide" that Mr. Baker "relied … on the false controversy created by the tobacco industry during the years []he smoked (aimed at creating doubt among smokers that cigarettes were hazardous to health) without the necessity of proving [he] relied on any specific statement" by an *Engle* conspirator. 117 So. 3d at 802. As the Court also noted in *Naugle*, citing *R.J. Reynolds Tobacco Co. v. Martin*, 53 So. 3d 1060 (Fla. 1st DCA 2010) (jury entitled to "infer" reliance on the false controversy), the industry created doubt "as to **all** of the known health hazards created by smoking." 103 So. 3d at 947 (emphasis in original). As in *Naugle*, Plaintiff's proof showed that its conduct continued "well after 1982," making it a jury question whether Plaintiff would have continued to smoke but for the concealment, and whether Mr. Baker "relied" on the controversy. *Id.* Moreover, as the Court indicated, there is a difference between a smoker's generalized knowledge of the health risks (*i.e.,* that they "**could have been**" dangerous) and the preclusive *Engle* findings that the industry "**knew**" in fact that cigarettes

"presented dangerous health consequences … as well as the addictive nature of smoking." *Id.* (emphasis in original). Plaintiff was entitled to have the jury resolve her claims for concealment and conspiracy to conceal.

As to the timing of these matters, it is important to remember that the statute of repose was an affirmative defense. *Johnston v. Hudlett*, 32 So. 3d 700, 704 (Fla. 4th DCA 2010). As a result, RJR bore the burden of proof on that defense. *Ellingham v. Fla. Dep't of Children & Family Services*, 896 So. 2d 926, 927 (Fla. 1st DCA 2005). Plaintiff established the reliance (*i.e.,* proximate cause) element on her claims sounding in concealment and she presented evidence as in *Naugle* that "reliance" remained present after May 5, 1982. RJR has not pointed the Court to any evidence to suggest that Mr. Baker's continued reliance (*e.g.*, failing to undertake cessation efforts until nicotine's addictiveness was announced by the Surgeon General) did not contribute to his lung cancer or death. This failure provided the trial court with an independent reason to deny RJR's directed verdict motion.

C. *Hess* Was Wrongly Decided.

For the reasons expressed by the First, Second and Third Districts, Plaintiff respectfully submits that *Philip Morris USA, Inc. v. Hess*, 95 So. 3d 254 (Fla. 4th DCA 2012) was wrongly decided, and that the statute of repose did not begin to run until RJR and the industry's fraudulent conduct terminated. *See R.J. Reynolds*

Tobacco Co. v. Webb, 93 So. 3d 331 (Fla. 1st DCA 2012); *Philip Morris USA, Inc. v. Hallgren*, 124 So. 3d 350 (Fla. 2d DCA 2013); *Frazier v. Philip Morris USA, Inc.*, 89 So. 3d 937 (Fla. 3d DCA 2012). *Hess* and *Frazier* are currently before the Florida Supreme Court, which accepted them for review. If the Supreme Court resolves either or both cases before this case is retried, the trial court should obviously apply the then-existing law as declared by the Supreme Court. Until then, Plaintiff acknowledges that the trial courts of this District are bound by *Hess* and its progeny.

Having said that, Plaintiff also acknowledges that the Court has recently clarified *Hess* to indicate that it applies to claims for conspiracy to conceal, and concealment claims against individual *Engle* defendants. *Philip Morris USA, Inc. v. Kayton*, 104 So. 3d 1145, 1150 (Fla. 4th DCA 2012); *R.J. Reynolds Tobacco Co. v. Buonomo*, 2013 WL 6479415 at *2, 4 (Fla. 4th DCA Dec. 11, 2013). Plaintiff accordingly agrees that, depending on the Supreme Court's disposition of *Hess* and/or *Frazier*, the trial court on remand is obliged to charge the jury on the statute of repose as to both claims for concealment and conspiracy to conceal.

II. Plaintiff Was Entitled to Plead and Recover Punitive Damages.

A. Standard of Review.

Plaintiff agrees this issue is reviewed *de novo.*

B. *Ciccone* Constitutes Dicta Because It Evaluated a "Gross Negligence" Claim that Was Not Part of the *Engle* Class Action.

For the reasons stated by the Second District in *Hallgren*, Plaintiff respectfully submits that *Ciccone* and *Soffer v. R.J. Reynolds Tobacco Co.*, 106 So. 3d 456 (Fla. 1st DCA 2012) incorrectly address the issue whether *Engle* class members can plead and recover punitive damages for non-intentional tort claims based on the *Engle* Phase I jury's findings, and approved by the Supreme Court in *Engle*. *See Hallgren*, 124 So. 3d at 355 (quoting *Soffer*, 106 So. 3d at 463-64 (Lewis, J., dissenting) (*Engle* progeny plaintiffs "must file the same claims" as those asserted by the class but need not seek the identical remedy)). The First District certified this issue as a question of great public importance in *Soffer*, 106 So. 3d at 461, and the case is pending before the Supreme Court on jurisdiction. In *Hallgren*, 124 So. 3d at 358, the Second District certified this question as one of great public importance, but RJR and Philip Morris (the defendants and appellants there) did not seek Supreme Court review on this ground.

Plaintiff recognizes that this Court expressly followed *Soffer* in *Ciccone* to conclude that the plaintiff there could not seek punitive damages "under the theory of gross negligence since that cause of action was not pled in the original *Engle* class case." To the extent that the Court indicated that progeny plaintiffs cannot obtain punitive damages for *any* non-intentional tort claim, 123 So. 3d at 616, the

Court misapprehended the applicable law for the reasons given in *Hallgren*. But more importantly, this statement constituted *dicta* in *Ciccone* for the obvious reason that *the* non-intentional tort claim at issue was one for "gross negligence" and there simply is *no* "gross negligence" finding among the Phase I findings approved by the Supreme Court in *Engle*. In fact, the words "gross negligence" appear only one time in *Engle*, in the dissenting portion of Justice Lewis's separate opinion which discusses the general purposes of punitive damages. 945 So. 2d at 1279 (Lewis, J., concurring and dissenting). *Engle* progeny plaintiffs are not authorized to bring "gross negligence" claims at all because there simply was no "claim" for gross negligence arising out of *Engle*. Moreover, at least on appeal, the *Ciccone* plaintiff did not assert entitlement to punitive damages on the actual non-intentional tort claims arising out of *Engle* which could support punitive damages, strict liability and negligence.

The Court should not have reached the issue raised in *Soffer* because it was not necessary to the disposition of the appeal. Having said that, Plaintiff recognizes that *Ciccone* represents the Court's statement of the law and this issue and understands that the trial court will follow the Court's guidance on this issue on remand, pending any different outcome dictated by the Supreme Court's disposition of *Soffer*.

III. Application of *Engle* Does Not Violate Defendant's Due Process Rights.

This argument is foreclosed by *Douglas*. 110 So. 3d 419.

CONCLUSION

For the reasons stated in Plaintiff's Initial and Reply Briefs, the Court should reverse the judgment of the trial court and order a new trial. If the Court reverses the trial court's judgment as to Point I only, Plaintiff is entitled to a new trial on her claims for negligence and strict liability. If the Court reverses the judgment as to Points I and II, or Point II only, it should direct the trial court to conduct a new trial as to all her claims (*i.e.,* including those for concealment and conspiracy to conceal). The Court should reject all arguments raised in the Cross-Appeal.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been sent by electronic mail to the attorneys on the attached list this 17th day of February, 2014.

/s/ David J. Sales /s/
Fla. Bar No. 794732
DAVID J. SALES, P.A.
1001 U. S. Highway One, Suite 200
Jupiter, FL 33477
561-744-0888
561-744-0880 (fax)
david@salesappeals.com
Attorney for Plaintiff/Appellant

CERTIFICATE OF COMPLIANCE

I CERTIFY that the foregoing is in Times New Roman 14-point font and complies with the font requirements of Fla.R.App. 9.210(a)(2).

/s/ David J. Sales /s/
Florida Bar No: 794732
Attorney for Plaintiff/Appellant

Shirley B. Baker, etc. v. R. J. Reynolds Tobacco Company
ATTORNEY LIST

Attorney for Plaintiff
Harry A. Shevin
HAS@acallforjustice.com
dcr@acallforjustice.com
Sean C. Domnick
SCD@acallforjustice.com
Domnick & Shevin PL
5100 PGA Blvd., Suite 317
Palm Beach Gardens, FL 33418
Telephone: 561.630.5363
Facsimile: 561.630.5654

Attorney for R. J. Reynolds Tobacco Co.
John Philip Wiederhold
jwiederhold@wmrfla.com
mwalsh@wmrfla.com
lfee@wmrfla.com
Wiederhold & Moses, P.A.
560 Village Blvd., Suite 240
P. O. Box 3918
West Palm Beach, FL 33402
Telephone: 561.615.6775
Facsimile: 561.615.7225

Eric L. Lundt
eric.lundt@sedgwicklaw.com
Gordon James, III
pamela.olshan@sedgwicklaw.com
Lenore C. Smith
lenore.smith@sedgwicklaw.com
jonathan.thomas@sedgwicklaw.com
Sedgwick LLP
2400 E. Commercial Blvd., Suite 1100
Fort Lauderdale, FL 33308
Telephone: 954.958.2500
Facsimile: 954.958.2513

Charles R.A. Morse
cramorse@jonesday.com
Paul Reichert
preichert@jonesday.com
Jones Day
222 Wast 41st Street
New York, NY 10017-6702
Telephone: 212.326.3939
Facsimile: 212.755.7306

Mark A. Belasic
mabelasic@JonesDay.com
Jones Day
901 Lakeside Avenue
Cleveland, OH 44114-1190
Telephone: 216.586.3939
Facsimile: 216.579.0212