APPENDIX

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 13-15258

D.C. Docket No. 3:09-cv-13723-MMH-JBT

CHERYL SEARCY,

Plaintiff-Appellee,

versus

R.J. REYNOLDS TOBACCO COMPANY, et al.,

Defendants-Appellants.

Appeal from the United States District Court
for the Middle District of Florida

(September 5, 2018)

Before MARTIN, ANDERSON, and JULIE CARNES, Circuit Judges.

JULIE CARNES, Circuit Judge:

Cheryl Searcy ("Plaintiff") sued the defendants, R.J. Reynolds Tobacco Company and Philip Morris Inc. (together, "Defendants") for unintentional and intentional torts arising from the death of her mother, Carol Lasard, alleging that Lasard's illnesses were

caused by her addiction to cigarettes manufactured by Defendants. The jury found for Plaintiff on both the unintentional and intentional tort claims and awarded substantial damages. Defendants assert on appeal that the district court violated their due process and Seventh Amendment rights when it directed the jury that it should deem Defendants' alleged tortious conduct in the present case to have been proven based on the findings of another jury in a prior proceeding. Defendants also contend that the district court should have applied Florida's comparative fault statute to reduce the jury's damages award based on the fault the jury attributed to Lasard. After careful review, we affirm the district court.

I. PROCEDURAL AND FACTUAL BACKGROUND

A. The *Engle* Litigation

This is an "*Engle* progeny" case—so named because it stems from the *Engle* class action initiated in 1994 in Florida state court against the major tobacco companies alleging negligence, strict liability, fraudulent concealment, and conspiracy to conceal (among other claims), arising from these companies' manufacture and sale of cigarettes. Although much ink could be (and has been) spilled describing the history of *Engle* litigation over the past two and a half decades, we cover only the most pertinent facts here.[1]

Suffice it to say, the initial *Engle* class action culminated in jury findings establishing certain elements

---

[1] For a more complete history, *see Graham v. R.J. Reynolds Tobacco Co.*, 857 F.3d 1169, 1174–81 (11th Cir. 2017) (en banc); *see also id*. at 1196–1212, 1221–1285 (Tjoflat, J., dissenting).

of Defendants' conduct (the "*Engle* jury findings") that the Florida Supreme Court determined would be given res judicata effect in subsequent lawsuits brought by members of the *Engle* class. *See Engle v. Liggett Grp., Inc.*, 945 So. 2d 1246, 1276–77 (Fla. 2006). According to that court, the *Engle* jury did not decide the defendants' liability, but instead "decided issues related to [the defendants'] conduct." *Id.* at 1263. As a result, the Florida Supreme Court held that *Engle* "progeny" plaintiffs may use the *Engle* jury findings to establish the conduct elements for the "strict liability, negligence, breach of express and implied warranty, fraudulent concealment, and conspiracy to fraudulently conceal claims alleged by the *Engle* class." *Philip Morris USA, Inc. v. Douglas*, 110 So. 3d 419, 436 (Fla. 2013).

Specifically, the *Engle* jury findings establish: (1) "that smoking cigarettes causes" various diseases, including "lung cancer"; (2) "that nicotine in cigarettes is addictive"; (3) "that the defendants placed cigarettes on the market that were defective and unreasonably dangerous"; (4) "that the defendants concealed or omitted material information not otherwise known or available knowing that the material was false or misleading or failed to disclose a material fact concerning the health effects or addictive nature of smoking cigarettes or both"; (5) "that the defendants agreed to conceal or omit information regarding the health effects of cigarettes or their addictive nature with the intention that smokers and the public would rely on this information to their detriment"; (6) "that all of the defendants sold or supplied cigarettes that were defective"; (7) "that all of the defendants sold or supplied cigarettes that, at the time of sale or supply,

did not conform to representations of fact made by said defendants"; and (8) "that all of the defendants were negligent." *Engle*, 945 So. 2d at 1276–77.

Thereafter, in the progeny phase of *Engle* litigation, "individual plaintiffs must establish (i) membership in the *Engle* class; (ii) individual causation, i.e., that addiction to smoking the *Engle* defendants' cigarettes containing nicotine was a legal cause of the injuries alleged; and (iii) damages." *Douglas*, 110 So. 3d at 430.

B. This Case

Plaintiff's mother, Carol Lasard, died of lung cancer and chronic obstructive pulmonary disease, having been addicted to cigarettes since she was fifteen years old. Proceeding as an *Engle* class member, Plaintiff sued both R.J. Reynolds and Phillip Morris—the companies that manufactured the cigarettes Plaintiff claims caused her mother's death. She asserted both non-intentional tort claims (negligence and strict liability) and intentional tort claims (concealment and conspiracy to conceal). At issue for purposes of Defendants' present due process challenge are the intentional tort claims, hereinafter referred to as the "concealment claims." As to the concealment claims before it, the *Engle* jury had found that the defendant tobacco companies had "concealed or omitted material information not otherwise known or available knowing that the material was false or misleading or failed to disclose a material fact concerning the health effects or addictive nature of smoking cigarettes or both" and further that these defendants had agreed to conceal "information regarding the health effects of cigarettes or their addictive nature with the

intention that smokers and the public would rely on this information to their detriment." *See Engle*, 945 So. 2d at 1277 (emphasis added). Yet, to prevail on an intentional tort claim, a plaintiff who is a member of the *Engle* class cannot rest solely on the above *Engle* findings but must prove that the defendant's tortious act caused her injury: that is, for a concealment claim, the plaintiff must show that in deciding or continuing to smoke, she relied on the particular misleading information disseminated by the particular defendant and that such reliance caused harm. *See Philip Morris USA, Inc. v. Russo*, 175 So. 3d 681, 686 (Fla. 2015) ("*Engle*-progeny plaintiffs must certainly prove detrimental reliance in order to prevail on their fraudulent concealment claims."); *Hess v. Philip Morris USA, Inc.*, 175 So. 3d 687, 698 (Fla. 2015) (same).

Plaintiff indicates that there were two types of concealed information on which her mother, Lasard, relied. First, Lasard began smoking as a young girl, before cigarette warnings were required, and the concealment at issue for that time period was the *Engle* defendants' general failure to warn the public that smoking could be addictive and dangerous to one's health, as well as their marketing of filtered cigarettes as being healthier. The evidence of this concealment "was based on the general conduct findings in *Engle* . . ." But, at trial, Plaintiff also focused on a type of concealment specific to Lasard that Defendants note was not common to the entire *Engle* class nor necessarily decided by the *Engle* jury as an act on which it based its class-wide concealment findings: the misleading marketing of low-tar/low-nicotine cigarettes as being safer than other types of cigarettes on the market.

The trial court instructed the jury that it should rely on the *Engle* findings as if the jury had found those facts itself. The court did not instruct the jury that to the extent it based its verdict on the alleged concealment related to the low-tar/low-nicotine cigarettes, Plaintiff would bear the burden of proving that particular act of concealment.

At trial, the jury found that Defendants were liable on both the unintentional tort claims of negligence and strict liability, as well as on the intentional tort claims of fraudulent concealment and conspiracy to fraudulently conceal. The jury awarded Plaintiff $6,000,000 in compensatory damages and $20,000,000 in total punitive damages.

In response to a question on the special verdict form asking whether Plaintiff shared any fault for her injury, the jury allocated 40% of the fault to Lasard and 30% to each Defendant. In thereafter preparing the judgment, the district court acknowledged that Plaintiff's negligence claim was subject to apportionment based on her degree of fault, but nevertheless it did not reduce her damages to reflect that finding. The court explained that Defendants had also been found liable on intentional tort claims (the fraudulent concealment and conspiracy to fraudulently conceal), which unlike a negligence claim are not subject to apportionment under Florida's comparative fault statute, Florida Statute § 768.81. Because the jury had returned a single damages award that was not divided between the two types of claims—one of which was subject to apportionment based on a plaintiff's fault and one of which was non-apportionable—the court concluded that it could not properly reduce the award based on Lasard's degree of fault.

Although the district court did not adjust the damages award based on Lasard's comparative fault, it did conclude that both the compensatory and punitive award were excessive. The court therefore remitted the award to $1,000,000 in compensatory damages, owed jointly and severally by Defendants, and $1,670,000 in punitive damages, owed independently by each.

C. Defendants' Enumeration of Errors

On appeal, Defendants allege three errors. The first two involve alleged constitutional violations arising from the district court's use of the *Engle* findings. First, Defendants contend that the district court erroneously permitted Plaintiff to rely on the *Engle* findings to establish the conduct elements of her intentional tort claims for concealment and conspiracy to conceal. Defendants argue that, by allowing the jury to rely on these findings, the district court violated Defendants' federal due process rights. Second, Defendants argue that to determine whether punitive damages were warranted, the district court required the jury to speculate as to the basis for the *Engle* findings. Defendants say this exercise violated the Seventh Amendment's Reexamination Clause. Finally, Defendants contend that the district court erred by refusing to apply Florida's comparative fault statute to reduce Plaintiff's damages commensurate with her own fault, as determined by the jury. Alternatively, Defendants argue that Plaintiff waived her right to contest a reduction.

II. DUE PROCESS CHALLENGE

A. The Trial Proceedings

Addressing Defendants' due process argument, we review questions of constitutional law *de novo*. *Nichols v. Hopper*, 173 F.3d 820, 822 (11th Cir. 1999). The district court here instructed the jury that, before it could apply the *Engle* jury findings, it must first determine whether Plaintiff was a member of the *Engle* class. To be a member of that class, the court explained, Plaintiff had to prove that her mother was addicted to cigarettes containing nicotine and that this addiction was a legal cause of her death. The court further directed that, if the jury found that Plaintiff had proved membership in the *Engle* class, it must then apply the pertinent findings made in *Engle*, just as if the jury had determined those facts themselves. Once again, those findings were that: (1) nicotine is addictive and smoking cigarettes causes lung cancer; (2) the *Engle* defendants (including Defendants) were negligent; (3) the *Engle* defendants placed cigarettes on the market that were defective and unreasonably dangerous; (4) the *Engle* defendants concealed material information that was not otherwise known, knowing that the material was false or misleading, or they failed to disclose a material fact concerning the health effects or addictive nature of smoking cigarettes, or both; and (5) the *Engle* defendants agreed to conceal the health effects of cigarettes or their addictive nature, with the intention that smokers would rely on this information to their detriment.

In other words, all that was left for the jury to decide was whether Defendants' conduct was a legal

cause of Lasard's injuries for the negligence, strict liability, and concealment claims—if so, the *Engle* jury findings took care of the rest and established that Defendants had acted tortiously. And to repeat, the question of whether Defendants had concealed material information concerning the health effects or addictive nature of smoking cigarettes was not to be reconsidered by the jury, as that determination had already been made in the earlier *Engle* proceeding. Instead, as instructed by the court, the only question before the jury on the concealment claims was whether Plaintiff's mother had relied to her detriment on information that the jury was directed to find was both material and had been concealed by Defendants, concerning the health effects or addictive nature of smoking cigarettes. Finally, if the jury found this reliance, it must lastly decide whether this reliance was a legal cause of Lasard's lung cancer and death. The jury found that Lasard had so relied and, given that answer, it found Defendants liable on the concealment claims, as well as the negligence and strict liability claims.

B. Defendants' Due Process Challenge to the Preclusive Effect of *Engle* on Plaintiff's Concealment Claims

1. Defendants' Arguments

Defendants contend that their due process rights were violated by giving preclusive effect to the *Engle* jury findings relating to Plaintiff's negligence, strict liability, and concealment claims. Defendants acknowledge, however, that our precedent forecloses a due process challenge to the application of the *Engle* jury findings on negligence and strict liability claims.

Specifically, in *Graham v. R.J. Reynolds Tobacco Company*, 857 F.3d 1169, 1183–86 (11th Cir. 2017) (en banc), our Court held that treating the *Engle* jury findings on negligence and strict liability as res judicata did not violate due process, affirming our earlier decision in *Walker v. R.J. Reynolds Tobacco Company*, 734 F.3d 1278, 1287–90 (11th Cir. 2013). Accordingly, based on this precedent, we likewise hold that the district court's instruction that the jury must apply the *Engle* findings in deciding Plaintiff's negligence and strict liability claims did not violate Defendants' due process rights.

Yet, neither *Walker* nor *Graham* faced the question whether the *Engle* jury findings on intentional concealment claims would survive a due process challenge, and, until recently, that has remained an open issue.[2] In both its pre-*Graham* and post-*Graham* briefing, Defendants have argued that an intentional concealment claim—depending as it must on a specific statement or omission by a specific defendant—presents due process issues that did not necessarily arise with a class-wide negligence or strict liability claim. Relying largely on the Supreme Court's opinion in *Fayerweather v. Ritch*, 195 U.S. 276 (1904), Defendants have consistently argued that, to satisfy due process, a court may only give issue-preclusive effect to an earlier jury's findings if that jury "actually decided" the matter that is at issue in the second proceeding. Indeed, in *Graham,* we assumed without deciding

---

[2] Concealment claims were likewise not before the Florida Supreme Court in the seminal Florida case that accorded preclusive effect to the *Engle* findings: *Philip Morris USA, Inc. v. Douglas*, 110 So. 3d 419 (Fla. 2013).

that Defendants are right; that is, that due process requires that the factual matter was actually decided by the jury on whose finding preclusion is sought. *See Graham*, 857 F.3d at 1181 ("We will assume, without deciding, that the 'actually decided' requirement is a fundamental requirement of due process under *Fayerweather* . . ."). Acting on that assumption, we ourselves reviewed the *Engle* proceedings and announced that we were "satisfied that the *Engle* jury actually decided common elements of the negligence and strict liability of [the *Graham* defendants]." *Id.*

Relying on *Graham,* Defendants argue in their first supplemental brief that we should likewise review the *Engle* record to determine whether the concealment found by the *Engle* jury to have occurred class-wide among all the defendants was necessarily the same concealment or misrepresentation on which Lasard relied in deciding to continue to smoke. Defendants insist that having undertaken this review, we will find it impossible to conclude, based on the unspecified concealment found class-wide by the *Engle* jury, that the latter necessarily decided that the particular concealment asserted here by Plaintiff occurred.

Specifically, Defendants say, the *Engle* jury rendered what Plaintiffs have called "the general conduct findings," which stated, in pertinent part, that the *Engle* defendants had "failed to disclose a material fact concerning the health effects or addictive nature of smoking cigarettes, or both." *Engle*, 945 So. 2d at 1277 (emphasis added). In short, these finding indicate the *Engle* jury's conclusion that the tobacco companies had either not told the public that smoking

would damage a person's health or had not made public their awareness that cigarette-smoking is an addictive activity, or maybe both. Yet, given the numerous theories of concealment advanced at the *Engle* trial, Defendants argue that it is impossible to figure out on which act or acts of concealment the *Engle* jury was focusing when it made the above findings. And given the fact that our holding in *Graham* was conditioned on our conclusion that the Florida Supreme Court in *Engle* and *Douglas* had determined that the *Engle* jury had actually decided only those issues that were common to the class as a whole, *Graham*, 857 F.3d at 1183 ("The only way to make sense of these [*Engle*] proceedings is that the Florida courts determined that the *Engle* jury actually decided issues common to the class . . ."), Defendants argue that to be able to apply the *Engle* general concealment finding to a particular concealment theory presented in a progeny case, one has to be able to identify the common act(s) of concealment that the *Engle* jury had in mind in reaching its finding.

That is simply not doable, Defendants argue, given the multiplicity of concealment allegations and the inability to figure out which theories the *Engle* jury might have discarded versus which theories they found to have been proved by the *Engle* plaintiffs by a preponderance of the evidence. Finally, with regard to the "general conduct finding," Defendants complain that because it is framed in the disjunctive, the *Engle* jury findings do not establish whether the *Engle* jury actually decided that Defendants concealed material information about the health effects of cigarettes or

whether instead the jury decided that it was the concealment of the addictive nature of cigarettes that the jury found tortious.

Defendants note that all of the above problems are magnified in this case because, in attempting to prove her own concealment claim, Plaintiff focused greatly on a very specific theory of concealment: that Defendants had, through misleading advertisements, misled the public into believing that low-tar or low-nicotine cigarettes were healthier than normal cigarettes, when in fact those "low" cigarettes were just as bad for the smoker as were standard cigarettes.

According to Defendants, the problem with Plaintiff's particular concealment theory is there is no way to determine whether the *Engle* jury actually bought that argument because its findings give no clue as to what acts of concealment it had actually found. Defendants emphasize that the *Engle* jury was presented with thousands of different alleged misstatements as to the effects of cigarettes that the jury could have used as the basis for its general finding that something had been concealed. So, ultimately, Defendants say, it is anyone's guess as to what information the *Engle* jury actually decided had been concealed by Defendants. Taken altogether, Defendants argue that it simply cannot be determined whether the *Engle* jury actually decided that Defendants fraudulently concealed material information about low-tar cigarettes which is the concealment on which Lasard specifically relied.

And to underscore the unlikelihood that the *Engle* jury found that Defendants concealed information about low-tar/low-nicotine cigarettes in particular,

Defendants point out that the Florida Supreme Court had premised its decision to give preclusive effect to the *Engle* findings on the court's conclusion that the jury had decided only those issues that were "common to the entire class." *Douglas*, 110 So. 3d at 422. Because not all of the members of the *Engle* class smoked low-tar/nicotine cigarettes, Defendants argue that it is impossible to conclude that the *Engle* jury necessarily based a class-wide finding of concealment on a theory applicable to only some plaintiffs. And, according to Defendants, that is a fairly significant problem for a plaintiff like Searcy, who based a large part of her case on the concealment claims on Defendant's alleged deceptive marketing of low-tar/nicotine cigarettes.

2. Supplemental Briefing

After we reiterated in *Graham* that giving preclusive effect to the *Engle* jury findings on negligence and strict liability did not violate due process, the parties simultaneously filed supplemental briefs to address *Graham*'s impact on the preclusive effect of the *Engle* jury's concealment findings. Plaintiff maintained that *Graham* reaffirmed our holding in *Walker* that we need not look through the *Engle* record to determine what the *Engle* jury actually decided, 857 F.3d at 1174, while Defendants argued that *Graham* stood for precisely the opposite proposition because we expressly noted in *Graham* that we had reviewed the *Engle* trial record ourselves, which permitted us to conclude "that the *Engle* jury actually decided common elements of the negligence and strict liability," *id.* at 1181. As set out above, Defendants insisted that, unlike the *Engle* jury findings on negligence and strict liability, there was no theory of common liability

regarding the concealment claims—which they say could have been based on potentially thousands of different individual statements by the *Engle* defendants or one of many different facets of cigarette advertising.

Because Plaintiff and Defendants had filed their supplemental briefing on *Graham* simultaneously, Plaintiff's brief had not addressed Defendants' argument that it was impossible to figure out which specific act or acts of concealment the *Engle* jury had actually decided was common to all defendants. Nor did Plaintiff address Defendants' observation that *Graham* "assume[d], without deciding, that the 'actually decided' requirement is a fundamental requirement of due process" and, acting on that assumption, conducted an independent review of the *Engle* proceedings to determine that "the *Engle* jury actually decided common elements of the negligence and strict liability" claims as to all defendants. *Id.*

Given the review of the *Engle* trial record undertaken in *Graham*, we directed the parties to provide additional briefing that would help us undertake a similar review to determine whether the *Engle* jury had actually decided that the *Engle* defendants had deceptively marketed low-tar cigarettes, which appears to be the concealment theory on which Plaintiff largely relied. Accordingly, we directed Plaintiff and Defendants to file further briefing to answer a set of questions issued by the Court about what the *Engle*

jury actually decided as that would relate to the theory of concealment that Plaintiff pursued in the present case.[3]

Notwithstanding that directive, Plaintiff, in her second supplemental brief, was unable to provide any support for an argument that the *Engle* jury's finding of liability against the Defendants on the concealment claims was based on concealment related to the deceptive marketing of low-tar cigarettes, as opposed to one of the many other theories of concealment posed by

---

[3] In her concurring opinion, Judge Martin indicates her disagreement with our decision to ask for supplemental briefing on the above question, indicating that this briefing was unnecessary because *Graham*'s holding "rest[ed] on giving full faith and credit to the judgment of the Florida Supreme Court." Concurring Op. at 1, 3. But that mischaracterizes *Graham* and misses the point. First, if *Graham* was merely following *Engle* and *Douglas*, then there was no reason for the Court to review the *Engle* trial record. Second, as *Graham* correctly observed, a state proceeding is only entitled to full faith and credit if it complies with due process. 857 F.3d at 1185 ("'[S]tate proceedings need do no more than satisfy the minimum procedural requirements' of due process to receive full faith and credit. The record in this appeal establishes that R.J. Reynolds and Philip Morris were afforded the protections mandated by the Due Process Clause." (alteration in original) (citation omitted) (quoting *Kremer v. Chemical Constr. Corp.*, 456 U.S. 461, 481 (1982))); *see also Kremer*, 456 U.S. at 482 ("The State must, however, satisfy the applicable requirements of the Due Process Clause. A State may not grant preclusive effect in its own courts to a constitutionally infirm judgment, and other state and federal courts are not required to accord full faith and credit to such a judgment." (emphasis added)).

the *Engle* plaintiffs.[4] Instead, in this second supplemental brief, Plaintiff simply repeated her legal argument, which is essentially that: even if this Court could not conclude that the *Engle* jury had actually decided a concealment theory that was common to all defendants and that could therefore be applied in all subsequent trials, such a conclusion did not matter. According to Plaintiff, because the Florida Supreme Court had determined that the findings of the *Engle* jury concerning the concealment claims should be given preclusive effect in future trials, the Full Faith and Credit Clause precludes this Court from questioning that decision, Defendants' due process challenge notwithstanding. In short, Plaintiff does not argue, or offer any evidence to support an argument, that the *Engle* jury necessarily based its finding of concealment against the tobacco company defendants on the defendants' conduct regarding the marketing of low-tar cigarettes. This being Plaintiff's position, we therefore have to assume that the *Engle* jury *did not* actually decide that question.

---

[4] Plaintiff's only citation or discussion of the *Engle* trial record was her single-sentence incorporation by reference of a filing made in another case. Arguably, this is insufficient on its face. *See Carmichael v. Kellogg, Brown & Root Servs., Inc.*, 572 F.3d 1271, 1283 (11th Cir. 2009) (holding that an issue that a party "fail[s] to develop" an argument for and does not "offer any citation to the record in support of it" is "waived"); *Four Seasons Hotels & Resorts, B.V. v. Consorcio Barr S.A.*, 377 F.3d 1164, 1167 n.4 (11th Cir. 2004) ("reject[ing] the practice of incorporating by reference" arguments made in filings outside a party's appellate briefs). At any rate, the referenced filing cites to only four instances where the *Engle* jury—in the course of a year-long trial—was presented with evidence about the *Engle* defendants' concealment of information related to low-tar cigarettes.

So, the threshold question before us became how we would decide that which *Graham* had only assumed: whether due process requires that a factual issue must have been "actually decided" in an earlier proceeding for that issue to be given preclusive effect in a later proceeding. We were saved from having to answer that question, however, because while awaiting the filing of Defendants' second supplemental brief, another panel of this Court decided the overarching question before us. That panel held that due process is not violated by applying preclusive effect to the *Engle* jury's concealment findings in a subsequent trial. *See Burkhart v. R.J. Reynolds Tobacco Co.*, 884 F.3d 1068, 1091–93 (11th Cir. 2018).

As in this case, the defendants in *Burkhart* had argued that, while *Graham* decided the due process question as to *Engle* negligence and strict liability claims, *Graham* did not address the due process considerations applicable to concealment claims. The *Burkhart* court agreed, acknowledging that *Graham* had not decided whether its holding would also protect against a due process challenge to the giving of preclusive effect to the *Engle* concealment findings. In deciding that issue, *Burkhart* read *Graham* as holding that for purposes of giving res judicata effect to *Engle* findings, due process is satisfied so long as the defendants had notice and an opportunity to be heard on the claims at issue. 884 F.3d at 1092. And *Graham* concluded that the tobacco defendants had been put on notice of the class's "common evidence and theories of negligence and strict liability," and "were given an opportunity to be heard on the common theories in a year-long trial . . ." *Id.* (quoting *Graham*, 857 F.3d at 1185). Ultimately, *Burkhart* concluded that the above

rationale "applies equally . . . to *Engle* progeny plaintiffs' concealment and conspiracy claims." *Id.* at 1092–93. That is, the *Engle* defendants had notice and an opportunity to be heard regarding those claims as well. In short, *Burkhart* held that the "shared rationale in *Graham* and *Walker* . . . . make clear that treating as preclusive the *Engle* jury's findings as to the conduct elements of *Engle* progeny plaintiffs' fraudulent concealment and conspiracy claims does not violate due process." *Id.* at 1091.

Admittedly, *Burkhart* did not examine the question that has been before us in this case through supplemental briefing. Specifically, for purposes of granting preclusion consistent with the due process clause, is it enough that a defendant had a right to be heard on a plaintiff's claims in a first action, if ultimately one is unable to discern what the jury actually decided in making its findings on those claims? Again, as applicable to this case, the *Engle* jury rendered a very general finding that the tobacco defendants had concealed material information. Yet multiple acts of concealment had been presented to the *Engle* jury, and their general finding did not indicate which acts of concealment may have underlain their finding versus which allegations of concealment they might have rejected. Fast forward to a later progeny case relying largely on a very specific type of concealment—the concealment of the harmful effect of low-tar/low-nicotine cigarettes—and it becomes difficult to determine whether the *Engle* jury's basis for its general finding of concealment was the particular concealments regarding low-tar/low-nicotine cigarettes. But, in this later trial, the jury is essentially told that the *Engle* jury found this act of concealment to have occurred

and that the progeny jury should consider it to have been proved. A concern that due process may require that an issue/claim/fact must have actually been decided by an original jury to be given preclusive effect was important enough to the *Graham* majority to prompt it to parse the *Engle* record to insure that the negligence/strict liability claims before it represented common claims that the jury had necessarily decided.

Even though the same argument was raised before the *Burkhart* panel, the latter did not address this intriguing question, and we conclude that the panel's rejection of a due process challenge to the application in progeny cases of the *Engle* jury findings regarding concealment claims was categorical. Indeed, although they disagree with *Burkhart*'s conclusion, Defendants now concede that this Court has conclusively resolved this issue. Because we are bound to follow precedent, the *Burkhart* decision therefore ends any debate in this court as to whether the *Engle* jury findings related to the concealment claims are to be given preclusive effect. The answer is: they will. And that being so, we are required to reject Defendants' same due process argument here.

III. SEVENTH AMENDMENT CHALLENGE

A. Reexamination Clause of the Seventh Amendment

Defendants argue that the jury's award of punitive damages must be vacated because the jury's consideration of this issue was impermissible under the Seventh Amendment of the United States Constitution. This argument raises a constitutional question that is reviewed *de novo*. *Nichols*, 173 F.3d at 822.

The Reexamination Clause of the Seventh Amendment states that "no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law." U.S. Const. amend. VII.

Defendants argue that allowing the jury to award punitive damages based on the *Engle* findings required the jury to speculate as to what the specific conduct was that formed the basis of the *Engle* jury findings. Such an endeavor, Defendants argue, violates the Reexamination Clause. Defendants contrast the compensatory damages award, which was based on the actual, individual harm suffered by Plaintiff as determined by the jury at her trial, with the punitive damages award, which they say required the jury to reassess the *Engle* jury findings in order to decide whether to award any punitive damages, and, if so, how much.

Plaintiff counters that the Seventh Amendment is not implicated by punitive damages awards because "the jury's award of punitive damages does not constitute a finding of 'fact.'" *Cooper Indus., Inc. v. Leatherman Tool Grp., Inc.*, 532 U.S. 424, 437 (2001). Plaintiff points to cases that establish that a court may review a punitive damages award without implicating the Seventh Amendment. *See, e.g.*, *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 15 (1991) ("Under the traditional common-law approach, the amount of the punitive award is initially determined by a jury instructed to consider the gravity of the wrong and the need to deter similar wrongful conduct. The jury's determination is then reviewed by trial and appellate courts to ensure that it is reasonable.").

Alternatively, Plaintiff argues that, even if the Seventh Amendment is applicable to punitive damages determinations, the jury did not reexamine the *Engle* jury findings. Plaintiff contends that she put on sufficient evidence at trial of Defendants' intentionally tortious conduct for the jury to decide that punitive damages were appropriate and to calculate the award amount. Thus, the jury's punitive damages award did not require the jury to speculate as to the basis for the *Engle* findings.

The Reexamination Clause has been held to prevent second-guessing by successive juries in the contexts of partial retrials and multiple-stage trials like the *Engle* progeny suit here. In *Gasoline Products Company, Inc. v. Champlin Refining Company*, 283 U.S. 494 (1931), the Supreme Court set the standard for what constitutes unconstitutional reexamination in violation of the Seventh Amendment. There, the Court stated that the Reexamination Clause requires that partial retrials "may not properly be resorted to unless it clearly appears that the issue to be retried is so distinct and separable from the others that a trial of it alone may be had without injustice." *Id.* at 500. In that case, the Court addressed an error in the trial court's jury instructions on damages in a breach of contract case. *Id.* at 495–97. The defendant had argued that a partial retrial on damages, without also retrying the issue of liability, would violate the Reexamination Clause. *Id.* at 497. The Supreme Court agreed that, under the circumstances, damages and liability were inseparable because the alleged contract was oral and it was uncertain what the first jury found to be the terms of the contract. *Id.* at 498–500. Thus, because the trial court could not instruct the second

jury on the terms of the contract (and how they were breached), the jury would be unable to determine the appropriate compensation without reexamining the first jury's liability determination. *Id.* at 499–500.

This Court has likewise observed that compensatory damages and liability can be so intertwined that retrial on the former without the latter is impossible where there has been a compromised verdict: "one where it is obvious that the jury compromised the issue of liability by awarding inadequate damages." *Burger King Corp. v. Mason*, 710 F.2d 1480, 1486–87 (11th Cir. 1983) (internal quotation marks omitted). Defendants also direct the Court to an unpublished case, *SEB S.A. v. Sunbeam Corporation*, 148 F. App'x 774, 796 (11th Cir. 2005),[5] in which the plaintiff argued that the damages award it received at trial was compromised by the district court's exclusion of evidence relevant to damages. Plaintiff therefore requested a new trial only on the issue of additional damages. We denied the request, reasoning:

> Although any additional award would be based on the same, underlying conduct as the existing award of $6.6 million, we have no way of knowing from the jury's verdict how and in what ways the jury found [the defendant] liable. We can speculate as to the jury's conclu-

---

[5] Unpublished cases do not constitute binding authority and may be relied on only to the extent they are persuasive. *United States v. Futrell*, 209 F.3d 1286, 1289 (11th Cir. 2000) (citing 11th Cir. R. 36-2). Because there are so few cases that address the Reexamination Clause, we cite this case only as an example of how the issue has been analyzed.

> sions based on the damages evidence presented by [the plaintiff], but we cannot know for sure.

Id. at 797 (footnote omitted). We further pointed to the fact that "[t]he jury gave no indication of its method of calculating damages, how its damages calculation related to [the defendant's] liability, or any specific finding as to the moment or moments in the [contract's] term on which [the defendant] breached the [contract]." *Id.* Consistent with *Gasoline Products*, *SEB* followed the rule that instructing a second jury to decide an issue that requires it to speculate about the basis of the first jury's verdict is a prohibited reexamination.[6]

The above caselaw notwithstanding, we have held that liability and compensatory damages are often severable. *See Mfg. Research Corp. v. Greenlee Tool*

---

[6] This is the same point made by one of the unpublished cases from another circuit relied on by Defendants. *See Hardman v. AutoZone, Inc.*, 214 F. App'x 758, 765–66 (10th Cir. 2007) (affirming a trial court's order for a full retrial, rather than a retrial only on punitive damages, "because alternative theories of liability were submitted to the first jury and a second jury tasked only with having to determine a new punitive damage award would unfairly be required to speculate as to what . . . conduct formed the basis of the first jury's verdict of liability" (internal quotation marks omitted)). The other unpublished case relied on by Defendants makes the same point as *Burger King*: that a second jury cannot be allowed to revisit an earlier jury's findings where the issues are inseparably intertwined. *See E.E.O.C. v. Stocks, Inc.*, 228 F. App'x 429, 432 (5th Cir. 2007) ("In the discrimination context, a jury's verdict on punitive damages is 'intertwined with its view of the facts determining liability and its award for emotional injury.'" (quoting *Hardin v. Caterpillar, Inc.*, 227 F.3d 268, 272 (5th Cir. 2000))).

Co., 693 F.2d 1037, 1041–42 (11th Cir. 1982) (observing that "[t]rial of damages alone after liability is an established practice"). For example, when a jury clearly found a defendant liable, but reached unreliable figures for damages because of unclear jury instructions, we granted retrial solely on the issue of damages. *See Overseas Private Inv. Corp. v. Metro. Dade Cty.*, 47 F.3d 1111, 1116 (11th Cir. 1995) ("Because the liability issues were properly and clearly decided by the jury, the remedy in this instance is to remand the case to the district court for a new trial on the amount of damages only."). Similarly, in *Manufacturing Research Corporation v. Greenlee Tool Company*, 693 F.2d 1037 (11th Cir. 1982), a tortious interference with business relations suit, the defendant objected to the district court's retrial on damages alone, arguing "that no finding was made as to which statements were found by the first jury to be tortious [ ] [and] [o]n retrial the jury was able to assume each incident was tortious and left only to determine causation and damages." *Id.* at 1041. We rejected this argument, noting that "[t]he [first] jury specifically found liability. The repetition of some of the liability evidence, necessary to establish causation, did not render the [second] trial unfair." *Id.* at 1041–42.

And just as with the separation of liability and damages, a finding that the defendant has been negligent can be severed from a later proceeding that determines the comparative fault between the defendant and the plaintiff. In ordering the decertification of the *Engle* class, the Florida Supreme Court anticipated and rejected a potential Seventh Amendment challenge. The court relied on the Fifth Circuit's decision in *Mullen v. Treasure Chest Casino, LLC*, 186

F.3d 620 (5th Cir. 1999), to conclude that the separation of the *Engle* defendants' negligence (which had already been decided) from the plaintiffs' comparative negligence (to be decided in the progeny trials) would not implicate the Seventh Amendment, because the question of causation would be left to the progeny juries. *Engle*, 945 So. 2d at 1270 ("[*Mullen*] held that the risk of infringing on the parties' Seventh Amendment rights is not significant and is in fact avoided where the liability issues common to all class members are tried together by a single initial jury, and issues affecting individual class members such as causation, damages, and comparative negligence are tried by different juries."). The Florida Supreme Court did not, however, address any Seventh Amendment implications of its decision to have punitive damages questions reserved for the progeny trials.

B. Reexamination of the *Engle* Jury Findings

Applying this framework to the facts at hand, we will assume that the Seventh Amendment applies to a jury's determination to award punitive damages. We also will assume that, depending on the circumstances, the Seventh Amendment could be violated when a second jury is called on to decide punitive damages arising out of a verdict of liability rendered by a previous jury. In this case, however, we find no violation of the Seventh Amendment.

First, we note that the jury here was neither asked nor required to speculate about the *Engle* jury findings in reaching a decision on punitive damages. On the first day of the trial, the jurors were instructed that "the [*Engle*] findings established only what they

expressly state and you must not speculate about the basis for any of the findings." As to the standard to be applied by the jury in its deliberations, the district court instructed that punitive damages were warranted only if the jury found by clear and convincing evidence that "the fraudulent conduct by defendant causing Carol Lasard's lung cancer death" showed:

> [1] reckless disregard of human life or the safety of the persons exposed to the effect of such conduct . . . [2] an entire lack of care that the defendant must have been conscientiously indifferent to the consequences . . . [3] an entire lack of care that the defendants must have wantonly or recklessly disregarded the safety and welfare of the public . . . [o]r . . . [4] such reckless indifference to the rights of others as to be equivalent to an intentional violation of those rights.

Ultimately, the district court instructed the jury that it would have to consider whether punitive damages were appropriate, "as punishment to that defendant and as a deterrent to others."

In essence, the jury was instructed to focus on Defendant's conduct toward Lasard because it was told that it could award punitive damages only if it found that "the conduct of that Defendant was a substantial cause of Carol La[s]ard's lung cancer and death and that *such conduct* warrants punitive damages." (Emphasis added). In other words, the jury was instructed that any punitive damages award had to be based on the conduct of Defendants that caused Lasard's death. The jury was not asked to speculate about what the earlier *Engle* jury had found, but merely to examine

the evidence that had been presented before it at trial to determine whether punishment of Defendants via additional damages was warranted.

Indeed, as a practical matter, absent some proof of the specific conduct of Defendants that warranted punitive damages, the jury arguably would have had no basis or context in which to evaluate Defendant's behavior. That is, if the only evidence Plaintiff had offered up was evidence of Lasard's own smoking history, combined with the general *Engle* verdict finding of some unspecified concealment by Defendants, Defendants might well argue that the jury was necessarily required to reexamine this *Engle* finding, because without this finding there would have been no other evidence available to gauge the egregiousness of Defendant's conduct for purposes of determining punitive damages.

In this case, however, Plaintiff presented evidence supporting a finding that Defendants' conduct warranted punitive damages: specifically, evidence that Defendants had marketed low-tar/low-nicotine cigarettes as healthier and safer than other cigarettes, knowing that this representation was false; that Plaintiff had relied on this representation, which reliance had contributed to her addiction; and that this addiction led to the lung cancer that killed her. Thus, whatever thinking went into the *Engle* jury's conclusion that Defendants had concealed material information—and whether or not the *Engle* jury based its finding of liability on the particular theory urged by Plaintiff—Plaintiff's jury did not have to revisit that first jury's rationale on liability to reach a decision that Defendants' conduct in the case before it warranted punitive damages.

In summary, because we conclude that the jury was not required to speculate about the *Engle* jury findings when it awarded punitive damages, we also conclude that Defendants' Seventh Amendment rights were not violated.

IV. COMPARATIVE FAULT

Finally, we address Defendants' objections to the district court's application of the Florida comparative fault statute. Defendants argue that the district court erred when it refused to apply the jury's comparative fault findings to reduce Plaintiff's damages award in proportion with Lasard's negligence. First, Defendants argue that the Florida comparative fault statute, Florida Statute § 768.81, required the apportionment of damages because Plaintiff's lawsuit was, in effect, a negligence action. Second, Defendants argue that even if the statute does not mandate apportionment, apportionment is nonetheless required because Plaintiff waived her right to application of the statute's intentional torts exception through her trial conduct.

A. The Comparative Fault Statute

"Florida Statute § 768.81 provides for a reduction of damages in a negligence action for a plaintiff who has herself acted negligently, in proportion to the plaintiff's degree of fault." *Smith v. R.J. Reynolds Tobacco Co.*, 880 F.3d 1272, 1279 (11th Cir. 2018). Specifically, the statute states that "[i]n a negligence action, contributory fault chargeable to the claimant diminishes proportionately the amount awarded as economic and noneconomic damages for an injury attributable to the claimant's contributory fault." Fla.

Stat. § 768.81(2). The statute, however, "does not apply . . . to any action based upon an intentional tort." Fla. Stat. § 768.81(4).

Although when they filed their appeal, Defendants may have had a colorable argument that § 768.81 required apportionment in cases like this where a jury awards a single amount of damages based on both negligence claims and intentional torts, the Florida Supreme Court has since held otherwise. As our Court recently noted, "the Florida Supreme Court . . . resolved the issue decisively . . . . [and] held that when an *Engle* progeny case contains both negligence and intentional tort claims and when the jury has found for the plaintiff on an intentional tort claim, then the compensatory damages award cannot be reduced based on the plaintiff's percentage of fault." *Smith*, 880 F.3d at 1280 (discussing *Schoeff v. R.J. Reynolds Tobacco Co.*, 232 So. 3d 294 (Fla. 2017)); *see also Burkhart*, 884 F.3d at 1086–87 (same). So, taken by itself, § 768.81 does not permit apportionment here.

B. Waiver

Accordingly, Defendants' only potentially viable argument is that Plaintiff waived any right to unapportioned damages she might have under § 768.81.[7]

---

[7] Defendants also suggest that the doctrine of judicial estoppel might apply. In diversity cases, "the application of the doctrine of judicial estoppel is governed by state law." *Original Appalachian Artworks, Inc. v. S. Diamond Assocs., Inc.*, 44 F.3d 925, 930 (11th Cir. 1995). Under Florida law, judicial estoppel applies only when a party maintains inconsistent positions in separate proceedings. *See Fintak v. Fintak*, 120 So. 3d 177, 186–87 (Fla. 2d DCA 2013) ("[T]he party against whom estoppel is sought

See Smith, 880 F.3d at 1280 (acknowledging that the Florida Supreme Court has left open the possibility that § 768.81's intentional tort exception can be waived). Specifically, Defendants argue that at trial Plaintiff took the position that comparative fault would apply, only to abandon that position at the conclusion of the trial.

The parties disagree over whether federal or Florida law governs the waiver analysis here. At the very least, they agree that federal law generally governs waiver in diversity cases. *Morgan Guar. Tr. Co. of N.Y. v. Blum*, 649 F.2d 342, 344 (5th Cir. Unit B July 1981) ("In diversity of citizenship actions, state law defines the nature of defenses, but the Federal Rules of Civil Procedure provide the manner and the time in which defenses are raised and when waiver occurs."); *see also Proctor v. Fluor Enters., Inc.*, 494 F.3d 1337, 1350 (11th Cir. 2007) (same). Plaintiff argues that this general rule holds true here, but Defendants believe an exception to the general rule applies. Both parties cite in support of their position the Seventh Circuit's opinion in *Herremans v. Carrera Designs, Inc.*, 157 F.3d 1118 (7th Cir. 1998). *Herremans* recognized that, "in general . . . it is those [federal] principles, not state-law principles, which, like other procedural rules, govern federal litigation even when the basis of federal jurisdiction is diversity of citizenship." *Id.* at 1123 (citations omitted). However, the court continued:

---

must have asserted a clearly inconsistent or conflicting position in a prior judicial proceeding." (citing *Blumberg v. USAA Cas. Ins. Co.*, 790 So. 2d 1061, 1066 (Fla. 2001))). So judicial estoppel does not apply to inconsistent positions taken in the course of a single trial. For that reason, judicial estoppel cannot apply here.

> There is an exception for cases in which the application of the federal rule would interfere with substantial state interests, and the exception is more likely to be applicable when the state waiver rule is limited to some particular body of substantive law and is therefore more likely to reflect state substantive policies than is a procedural rule of general applicability.

Id. (citations omitted).

Ultimately, we need not decide which law governs because, under either, Plaintiff did not waive the intentional tort exception. Under both federal and Florida law, we review the district court's waiver determination for abuse of discretion. *Proctor*, 494 F.3d at 1350; *Schoeff v. R.J. Reynolds Tobacco Co.*, 232 So. 3d 294, 305 (Fla. 2017). The general framework for waiver under federal and Florida law are also substantially similar. Under federal law, "[w]aiver is the voluntary, intentional relinquishment of a known right." *Glass v. United of Omaha Life Ins. Co.*, 33 F.3d 1341, 1347 (11th Cir. 1994). Florida law is, for our purposes here, the same. *See Major League Baseball v. Morsani*, 790 So. 2d 1071, 1077 n.12 (Fla. 2001) ("Waiver is the voluntary and intentional relinquishment of a known right, or conduct which implies the voluntary and intentional relinquishment of a known right.").

Defendants first point to Plaintiff's complaint, which does not explicitly state that the intentional torts exception to the comparative fault statute should apply. The Second Amended Complaint states that Plaintiff "seeks compensatory and punitive damages

in accordance with the Florida Wrongful Death Act, the Florida Survival Statute and with the Florida Supreme Court's class action decision and mandate in *Engle*." The complaint references comparative fault only in very general terms. It says that, because *Engle* resolved many issues of liability and general causation, Plaintiff "brings this action upon the limited remaining issues in dispute, to-wit: specific causation, apportionment of damages, comparative fault, compensatory damages, entitlement to punitive damages, and punitive damages."

The complaint further states:

> The Decedent's actions in using Defendant's [*sic*] cigarettes as marketed and intended by Defendants, and related to the frequency, duration and manner of Decedent's efforts to cease smoking, should be considered by the jury along with Defendants' acts and omissions for purposes of determining whether the Decedent's acts or omissions rise to the level of negligence and constitute comparative fault.

There are no further mentions in the complaint of comparative fault or how it should apply.

We do not interpret the complaint's mention of comparative fault as a voluntary and intentional relinquishment of the right to unapportioned damages should Plaintiff prevail on the intentional torts, because the legal implications of prevailing on those claims are not discussed. Defendants, moreover, point to no obligation on Plaintiff's part to affirmatively state that comparative fault would not apply if she should prevail on the intentional torts. Neither the

federal nor Florida rules of civil procedure require such statements in the pleadings. *See* Fed. R. Civ. P. 8(a) (requiring "(1) a short and plain statement of the grounds for the court's jurisdiction . . . (2) a short and plain statement of the claim . . . and (3) a demand for the relief sought"); Fla. R. Civ. P. Rule 1.110 (requiring "(1) a short and plain statement of the grounds upon which the court's jurisdiction depends . . . (2) a short and plain statement of the ultimate facts showing that the pleader is entitled to relief, and (3) a demand for . . . relief").

Defendants also cite portions of the trial transcript where Plaintiff admits that Lasard shared some fault for her death. For instance, in her opening statement, Plaintiff "admit[ted] Carol Lasard's actions should be judged, just like the cigarette companies' actions should be judged." But she followed by saying that Lasard "is not at all responsible for the cigarette companies' lies, for their fraud and their conspiracy. The cigarette companies are 100 percent responsible for that. In fact, you will see, those are two totally separate questions on your verdict form." And Plaintiff made the exact same point later in her closing argument: that although Lasard may have borne some fault based on her own negligence in continuing to smoke, she bore no responsibility for Defendants' acts of concealment. This argument suggests that Plaintiff did not envision a reduction of damages based on her mother's fault on the concealment claims.

Turning to the jury instructions, Defendants seem to misread the very jury instructions they cite. Defendants quote the district court's instruction that, "[t]he Court will prepare the judgment to be entered and will reduce plaintiff's total damages as required

by law." Defendants focus on the words "will reduce" but neglect the phrase "as required by law." That said, the above language is admittedly somewhat cryptic and does not clearly communicate to the jury that the damages award will not necessarily be reduced based on the jury's assessment of fault. That is, a jury could understand "as required by law" to be a qualifying phrase that means the court will reduce plaintiff's total damages "only if required by law," suggesting to the jury that there may be some uncertainty whether the damages will be reduced based on a finding that Plaintiff is partially responsible for her own injuries. On the other hand, the jury could arguably understand the word "as required by law" to mean "which is required by law." That interpretation would prompt the jury to conclude that its proportional assessment of fault would be dispositive and require a reduction in plaintiff's total damages. A jury's assessment of the proper amount of damages could be impacted by the particular interpretation it gives to this particular instruction.

Plaintiff, however, anticipated and attempted to ameliorate this ambiguity. Plaintiff's proposed jury instructions included an instruction that "[u]nder the law, some claims are subject to reduction due to the fault of the claimant and others are not." Plaintiff explained:

> What defendants have done on some occasions is argue that if we have not explained that [comparative fault does not apply to the intentional tort claims] very clearly to the jury in opening and closing and throughout the case or even explained it clearly in the jury instructions or the verdict form, that somehow we

> have waived Florida law that comparative fault does not apply to the intentional tort. So we would seek language in here that explains that the recovery or award will be reduced by your Honor under Florida law and that some -- and specifically state that, you know, certain claims of plaintiff would be reduced for comparative fault and some claims, the intentional torts, would not be reduced and your Honor would take care of that under Florida law.

(Emphasis added).

The court responded, "I mean, I don't make the distinction that you are requesting, but I'm saying that I will make the allegations." To this, Plaintiff responded, "Correct, your Honor. And we assume you will make it under Florida law. Comparative fault does not apply to the fraud and conspiracy claim."

Later in the hearing, Plaintiff again reiterated that "this is a[n] issue of waiver and whether or not we waive it." To this, the court recognized, "you are preserving -- you're not waiving. I understand that. I think the record will reflect that." And again in the hearing, the court stated to Defendants that "for purposes of the jury instructions, they are not construing the giving of this instruction as a waiver." As Plaintiff's counsel later argued to the district court, in her understanding of the instructions, they "make[ ] clear that the judge will reduce as required by law. So it doesn't say 'will reduce.' It says 'as required by law.'" The court recognized this and explained that, by giving a less definite instruction, it was merely recognizing that the parties disputed the applicability of the

comparative fault statute, and that the court would decide which interpretation was correct after the verdict.

In the end, though, it was Defendants who were responsible for the jury instruction in question, with Defendants having persuaded the district court that Plaintiff's clarification should not be made to the jury.[8] Thus, Defendants cannot be heard to now complain about jury confusion that may have resulted from the giving of that charge.

As to whether Plaintiff waived anything, in rejecting Defendants' post-verdict request that damages be reduced based on the jury's assessment of fault, the district court held that Plaintiff had not waived her right to avoid comparative fault reduction through the jury instructions. We agree. The district court's conclusion is supported by the record, as described above. Plaintiff clearly communicated her intent not to not waive her right to unapportioned damages and offered a means whereby the court could clarify to the jury that its decision to apportion fault might not necessarily result in a reduction of the damages. Defendants could not have been caught off-guard by Plaintiff's post-verdict request that damages not be reduced.

---

[8] At the charging conference, Plaintiff, as described above, pushed for an instruction to clarify for the jury that the damages for the intentional torts would not be reduced by comparative fault. In response, Defendants asserted that they "disagree[d] with that as a matter of Florida law" because "comparative fault applies to the case as a whole regardless of what particular claim . . . whether [the jury] finds yes or no on intentional torts versus non-intentional torts."

The Florida cases cited by Defendants in support of their waiver argument do not suggest otherwise. We have recognized that, in the context of *Engle* progeny cases, it can be "fairly infer[red]" from the Florida Supreme Court's opinion in *Schoeff v. R.J. Reynolds Tobacco Company*, 232 So. 3d 294 (Fla. 2017), "that the [Florida Supreme Court] is not keen on the notion of waiver." *Smith*, 880 F.3d at 1282. Indeed, in *Schoeff*, the Florida Supreme Court, addressing similar conduct, held that a trial court abused its discretion when it held that an *Engle*-progeny plaintiff had waived the intentional tort exception by arguing comparative fault on her negligence claims.[9] 232 So. 3d at 306. As described above, that is what Plaintiff did here.

Accordingly, we hold that Plaintiff did not waive her statutory right to unapportioned damages, and she is entitled to the full compensatory damages (post-remittitur) that the district court awarded her.

V. CONCLUSION

We reject Defendants' due process arguments because, as we held in *Walker*, *Graham*, and *Burkhart*,

---

[9] In doing so, the Florida Supreme Court also overruled *R.J. Reynolds Tobacco Company v. Hiott*, 129 So. 3d 473 (Fla. 1st DCA 2014)—an opinion relied on by Defendants—"to the extent [*Hiott*] held that the intentional tort exception is waived when an *Engle* progeny plaintiff argues comparative fault on the negligence counts." *Schoeff*, 232 So. 3d at 306. The other case relied on by Defendants—*R.J. Reynolds Tobacco Company v. Sury*—upheld a trial court's determination that the plaintiff had not waived the intentional tort exception and does not establish what sort of conduct would constitute waiver. 118 So. 3d 849, 851–52 (Fla. 1st DCA 2013). For this reason, *Sury* is not instructive here.

the use of the *Engle* findings to establish the conduct elements of the progeny plaintiffs' tort claims is a constitutionally permissible application of res judicata. We reject Defendants' assertion that their Seventh Amendment rights were violated because we conclude that the jury was not asked or required to reexamine the *Engle* findings. Finally, because the district court neither misinterpreted nor misapplied Florida law and Plaintiff did not waive her statutory right to full, unapportioned damages, we reject Defendants' assertion that the damages award should have been apportioned based on Lasard's comparative fault. For these reasons, we **AFFIRM** the district court.

MARTIN, Circuit Judge, concurring:

My approach to the question of whether giving preclusive effect to the Engle jury's fraudulent-concealment and conspiracy-to-fraudulently-conceal findings violates due process is different from that of the Majority.[1] I write separately for that reason. In Graham v. R.J. Reynolds Tobacco Co., 857 F.3d 1169 (11th Cir. 2017) (en banc) our court held that giving preclusive effect to the Engle jury's negligence and strict liability findings did not violate due process. Id. at 1174. I recognize that the fraudulent-concealment and conspiracy-to-fraudulently-conceal findings that we address here were not considered by our en banc court in Graham. Even so, I view the reasoning of Graham to foreclose any due process challenge to Engle's concealment findings, just as it did for Engle's negligence and strict liability findings. It was for that reason that I dissented from my colleagues' decision, over seven months ago, to order supplemental briefing following this Court's decision in Graham. And also for that reason, I continue to disagree with the Majority's description of the questions presented in this case after Graham was decided. See Maj. Op. at 16–23.

Our divergent views stem from our disagreement about how Graham decided the due process issue. The Majority says Graham held that due process was satisfied only after the court conducted an exacting, de novo review of the Engle trial record to determine what was "actually decided" by the Engle jury. Maj.

---

[1] I join the Majority's holdings that the punitive damages award did not violate the Seventh Amendment Reexamination Clause and that the District Court correctly declined to reduce Ms. Searcy's damages under Florida's comparative fault statute.

Op. at 21–22; see Graham, 857 F.3d at 1182–83. But to the contrary, Graham actually held that the Florida Supreme Court's rulings about what the Engle jury decided were due full faith and credit.

Before Graham said anything about the trial record, the opinion first reviewed the Florida Supreme Court's decisions in Engle v. Liggett Group, Inc., 945 So. 2d 1246 (Fla. 2006), and Philip Morris USA, Inc. v. Douglas, 110 So. 3d 419 (Fla. 2013). It concluded "[t]he Florida Supreme Court made clear in Douglas that the Engle jury decided common elements of the negligence and strict liability of the tobacco companies for all class members." Graham, 857 F.3d at 1182. After it discussed these decisions of the Florida Supreme Court, Graham then referenced the Engle trial record in order to apply those Florida Supreme Court rulings, not to conduct a de novo review of what had been decided by the Engle jury. Graham, 857 F.3d at 1182–83. The en banc court concluded that, "[a]fter reviewing the Engle trial record, we are satisfied that the Florida Supreme Court determined that the Engle jury found the common elements of negligence and strict liability against Philip Morris and R.J. Reynolds." Id. at 1182 (emphasis added); see also id. at 1183 ("The only way to make sense of these proceedings is that the Florida courts determined that the Engle jury actually decided issues common to the class . . . ."). Then in its final paragraph on the due process issue, Graham makes clear its holding derived from giving full faith and credit to the Florida Supreme Court's decision in Engle. On that point, our en banc court stated, "We do not give full faith and credit to the decision in Douglas; we instead give full faith and credit to the jury findings in Engle. The

Florida Supreme Court in Engle interpreted those findings to determine what the jury actually decided . . . ." Graham, 857 F.3d at 1185. This summary underscores that the holding in Graham rests on giving full faith and credit to the judgment of the Florida Supreme Court.

In addition to what Graham said about it, giving full faith and credit to Florida's highest court is consistent with this Court's prior precedent in Walker v. R.J. Reynolds Tobacco Co., 734 F.3d 1278, (11th Cir. 2013). And of course, Graham expressly "reaffirm[ed]" Walker. Graham, 857 F.3d at 1174. In Walker, a panel of this Court stated:

> If due process requires a finding that an issue was actually decided, then the Supreme Court of Florida made the necessary finding when it explained that the approved findings from Phase I "go to the defendants underlying conduct which is common to all class members and will not change from case to case" and that "the approved Phase I findings are specific enough" to establish certain elements of the plaintiffs' claims.

Walker, 734 F.3d at 1289 (quoting Douglas, 110 So. 3d at 428). Read together, Walker and Graham do not require a de novo review of the trial record to determine what the Engle jury decided.

It is for these reasons that I do not endorse the Majority's description of the threshold question facing

us in this case after Graham. See Maj. Op. at 18–23.[2] Under Graham, our job is only to determine whether the Florida courts had ruled that the Engle jury actually decided the common elements of fraudulent concealment and conspiracy to fraudulently conceal for all class members. Because the Florida Supreme Court has so held, this analysis should have been straightforward. See Graham, 857 F.3d at 1182 (summarizing the Florida Supreme Court's ruling that "the Phase I findings establish the causal link between the tobacco companies' conduct and the class members' injuries because the companies acted wrongfully toward all of the class members").

I arrive at the same result reached by the majority, although at least in part, by a different route.

---

[2] I agree with the Majority that "a state proceeding is only entitled to full faith and credit if it complies with due process." Maj. Op. at 18 n.5. But Graham held that the Engle jury findings were due full faith and credit because the Florida courts had found the Engle jury "actually decided" those issues. Graham, 857 F.3d at 1185. It strikes me as strong medicine for the majority to say that I "mischaracterize" Graham, especially since I am the only member of this panel who was a signatory to the majority opinion in Graham. As such, I merely state my understanding of the opinion I participated in. And if the Majority thinks we should second guess the Florida courts' judgment in that regard, I understand their approach as being inconsistent with Graham.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA JACKSONVILLE DIVISION

Case No: 3:09-cv-13723

CHERYL SEARCY, as Personal Representative of the Estate of Carol LaSard,

Plaintiff,

v.

RJ. REYNOLDS TOBACCO COMPANY, and PHILIP MORRIS USA, INC.,

Defendants.

ORDER DENYING DEFENDANTS' RENEWED MOTIONS FOR JUDGMENT AS A MATTER OF LAW

THIS CAUSE came before the Court upon Defendant Philip Morris USA, Inc.'s Renewed Motion for Judgment as a Matter of Law and, in the Alternative, for a New Trial Based on Insufficient Evidence of Brand Usage (ECF No. 273); Defendants' Renewed Motion for Judgment as a Matter of Law on Plaintiff's Fraudulent Concealment and Conspiracy Claims or, in the Alternative, for a New Trial (ECF No. 274); and Defendants' Renewed Motion for Judgment as a Matter of Law or, in the Alternative, for a New Trial (ECF No. 275). Plaintiff responded [277], [278], [279].

These matters are therefore ripe for review. UPON CONSIDERATION of the Motions, Responses, the pertinent portions of the record, and being otherwise fully advised in the premises, this Court enters the following Order.

I. BACKGROUND

On March 25, 2013, this Court commenced a jury trial in the above-styled action. The jury returned a verdict on April 1, 2013, finding for Plaintiff on all her tort claims (negligence, strict liability, fraudulent concealment, conspiracy to fraudulently conceal) and awarding Plaintiff $6,000,000.00 in compensatory damages. See Jury Verdict, (ECF No. 251). Phase II of the trial then commenced, and the jury was read instructions on punitive damages. The jury returned a verdict on punitive damages, finding that $10,000,000.00 in punitive damages should be assessed against each Defendant. See Jury Verdict (Phase II), (ECF No. 253). On June 5, 2013, following briefing from the Parties, this Court entered an Order on the Proper Form of Judgment to Be Entered in this Case (ECF No. 267), finding that Defendants are jointly and severally liable for the total amount of compensatory damages found by the jury, and each liable for the amount of punitive damages assessed against them. Final Judgment (ECF No. 268) was entered that same day.

II. DISCUSSION

Pursuant to Federal Rule of Civil Procedure 50(b), Defendants now renew their motions for judgment as a matter of law. Under Rule 50, "[a] party's motion for judgment as a matter of law can be granted at the close of evidence or, if timely renewed, after the jury

has returned its verdict, as long as 'there is no legally sufficient evidentiary basis for a reasonable jury to find'" for the non-moving party. Chaney v. City of Orlando, Fla., 483 F.3d 1221, 1227 (11th Cir. 2007) (quoting Lipphardt v. Durango Steakhouse of Brandon, Inc., 267 F.3d 1183, 1186 (11th Cir. 2001) (citing Fed. R. Civ. P. 50)). Judgment as a matter of law should only be granted "when there is no legally sufficient evidentiary basis for a reasonable jury to find for the party on that issue." Cleveland v. Home Shopping Network, Inc., 369 F.3d 1189, 1192 (11th Cir. 2004); see also Arthur Pew Constr. Co. v. Lipscomb, 965 F.2d 1559, 1563 (11th Cir. 1992) (stating that the "usual inquiry" under Rule 50 is "sufficiency, i.e. whether the evidence was sufficient to submit [the issue] to the jury").

"[I]n ruling on a party's renewed motion under Rule 50(b) after the jury has rendered a verdict, a court's sole consideration of the jury verdict is to assess whether that verdict is supported by sufficient evidence." Chaney, 483 F.3d at 1227 (citing Lipphardt, 267 F.3d at 1186; Arthur Pew, 965 F.2d at 1563). When reviewing a Rule 50(b) motion, the court must look at the evidence in the record and draw all inferences in favor of the non-moving party. Cleveland, 369 F.3d at 1192-93 (citing Reeves v. Sanderson Plumbing Products, 530 U.S. 133, 148-151 (2000)). "Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge." Id. (quoting Reeves, 530 U.S. at 150). A party may join a renewed motion for judgment as a matter of law, with a motion for a new trial under Rule 59 in the alternative. Fed. R. Civ. P. 50(b). A motion for a new trial

should be granted only when "the verdict is against the clear weight of the evidence or will result in a miscarriage of justice." Lipphardt, 267 F.3d at 1186 (quoting Hewitt v. B.F. Goodrich Co., 732 F.2d 1554,1556 (11th Cir. 1984)).

A. Defendant Philip Morris USA, Inc.'s Renewed Motion for Judgment as a Matter of Law and, in the Alternative, for a New Trial Based on Insufficient Evidence of Brand Usage

This Court turns first to the Renewed Motion for Judgment as a Matter of Law filed by Defendant Philip Morris USA, Inc. ("PM USA"). Therein, PM USA argues that is is entitled to judgment as a matter of law because Plaintiff did not proffer sufficient proof to allow a reasonable jury to conclude that PM USA cigarettes were a legal cause of Carol LaSard's ("LaSard") death. Def.'s Renewed Mot., at 1 (ECF No. 273). Specifically, PM USA maintains (1) Plaintiff provided insufficient evidence to allow a jury to determine the quantity of PM USA cigarettes LaSard smoked, and (2) there is no evidence that LaSard smoked PM USA brand cigarettes before 1981, the date by which Plaintiff's expert witnesses conceded it became more likely than not that LaSard would still have developed lung cancer even if she had quit smoking at that time. Id. Plaintiff disagrees, contending that PM USA cannot meet its heavy burden to show no legally sufficient evidentiary basis for the jury's verdict against it. Resp., at 1 (ECF No. 277).

In this trial, Plaintiff presented the jury with evidence regarding LaSard's use of cigarettes manufactured by PM USA, expert testimony regarding the

causation of LaSard's lung cancer, expert testimony regarding LaSard's addiction to cigarettes, and fact witness testimony that LaSard smoked PM USA's so-called "health" and "light" cigarettes, thinking that they were safer and would help her quit smoking. See, e.g. Mar. 25, 2013 Trial Tr., at 44:21-23, 46:7-16 (ECF No. 277-1); Mar. 28, 2013 Trial Tr., at at 31:3-8 (ECF No. 277-6); Mar. 27 Trial Tr., at 70:3-22 (ECF No. 277-4); Mar. 27 Trial Tr., at 134:20-135:5 (ECF No. 277-5). Additionally, Plaintiff also introduced into evidence the 2010 Surgeon General Report, which includes the conclusion: "The evidence on the mechanisms by which smoking causes disease indicates that there is no risk-free level of exposure to tobacco smoke." Report, at 9 (ECF No. 277-3).

Both LaSard's daughter and former son-in-law testified that she smoked multiple PM USA brands. James Searcy, LaSard's former son-in-law, testified that LaSard smoked about a pack a day and specifically referenced her smoking the PM USA brands Benson & Hedges, Virginia Slims, and Merit. See Mar. 27, 2013 Trial Tr., at 67:25-68:7 (ECF No. 277-4). Cheryl Searcy, LaSard's daughter, also stated that her mother smoked the PM USA brand Merit on a regular basis. See Mar. 27, 2013 Trial Tr., at 134:4-6 (ECF No. 277-5). PM USA's contention that the testimony on which brands LaSard smoked and when was purely speculative is without merit.[1] Def.'s Renewed Mot., at 4.

---

[1] This Court notes that U.S. District Judge Marcia Howard in another Engle progeny case denied a similar motion for judgment as a matter of law. See Denton v. R.J. Reynolds, et al., Case No.

One of Plaintiffs expert witnesses, Dr. David Burns, a pulmonologist who has worked for decades with the Surgeon General's Office and other agencies, testified unequivocally that PM USA cigarettes caused LaSard's lung cancer. See Mar. 25, 2013 Trial Tr., at 44:21-23 (ECF No. 277-1). PM USA did not rebut this assertion by naming an expert to testify that the use of PM USA cigarettes was insufficient to contribute substantially to the plaintiffs illness, which PM USA has done in other Engle progeny cases. See Resp., at 5, n. 1; Defense Expert Reports in Other Cases (ECF No. 277-2). Another expert witness, Dr. Michael Cummings, who specializes in nicotine addiction research, testified that LaSard was addicted to PM USA cigarettes, that the PM USA brand low-nicotine cigarettes LaSard smoked were engineered to deliver an addictive dose of nicotine, and that those specifically designed low-nicotine cigarettes did maintain and sustain LaSard's addiction. See Mar. 28, 2013 Trial Tr., at at 31:3-8, 124:4-7, 133:1-11 (ECF No. 277-6). Based on this evidence, a reasonable jury could find that PM USA's cigarettes were a legal cause of LaSard's death.

3:09-cv-13723-MMH-JBT, Aug. 1, 2012 Trial Tr., at 157:14-16 (ECF No. 277-9). Judge Howard noted that the expert's testimony that all of the cigarettes that decedent smoked contributed to her illness and the plaintiff's testimony that decedent smoked a certain brand of cigarettes for some period of time in the 1980s provided a legally sufficient basis for the jury to find for the non-moving party. Id. at 156:14-23. Judge Howard noted that while the jury is free to accept or reject the testimonies of plaintiff's expert and plaintiff, "[T]he only conclusion can be that the plaintiff has presented sufficient evidence for reasonable and fair-minded persons, in the exercise of impartial judgment, to reach different conclusions." Id. at 157:1-14.

Additionally, the jury's specific findings here were not against the great weight of the evidence such that a new trial should be ordered. After hearing testimony from Plaintiff and Defendants, including the testimony discussed above, and being instructed by this Court, the jury returned a verdict finding, among other things, that LaSard was addicted to cigarettes, that LaSard's addiction was a legal cause of her lung cancer and death, and that smoking cigarettes manufactured by PM USA was a legal cause of LaSard's lung cancer and death. See Jury Verdict, at 1-2 (ECF No. 251). The jury apportioned 40% of fault that was a legal cause of LaSard's death to LaSard herself, 30% to Reynolds, and 30% to PM USA. See id. at 3. Here, due to the testimony presented, there was sufficient evidence for the jury to conclude that LaSard smoked and was addicted to cigarettes manufactured by PM USA and that her smoking those cigarettes caused her lung cancer and death. Accordingly, PM USA's Renewed Motion for Judgment as a Matter of Law must be denied.

B. Defendants' Renewed Motion for Judgment as a Matter of Law on Plaintiff's Fraudulent Concealment and Conspiracy Claims or, in the Alternative, for a New Trial

Defendants also argue that they are entitled to judgment as a matter of law, or at least a new trial, on Plaintiff's claims for fraudulent concealment and conspiracy because Plaintiff failed to meet her burden of proof on those claims. See generally Defs.' Renewed Mot. (ECF No. 274). Defendants incorporate the arguments set forth in their other post-trial motions as if fully set forth in the instant Motion. Id. at 1, n.1.

Plaintiff responds that Defendants seek to set aside the jury's verdict by cherry-picking record excerpts, ignoring Plaintiff's ample evidence, and asking the Court to improperly draw all inferences in favor of Defendants. Resp., at I (ECF No. 278).

Defendants' main argument is that Plaintiff failed to provide evidence on the element of detrimental reliance. Detrimental reliance is an essential element of fraudulent concealment under Florida law. See Philip Morris USA, Inc. v. Naugle, 103 So.3d 944, 947 (Fla. Dist. Ct. App. 2012) ("A claim of fraudulent misrepresentation and/or concealment requires proof of detrimental reliance on a material misrepresentation."). If a plaintiff claims to be misled, but cannot demonstrate a causal connection between the defendant's conduct and the plaintiff's misapprehension, the plaintiff cannot recover." Id. (quoting Humana, Inc. v. Castillo, 728 So.2d 261, 265 (Fla. Dist. Ct. App. 1999)). Nevertheless, "it is immaterial whether [the statement] passes through a direct or circuitous channel in reaching [the representee], provided it be made with the intent that it shall reach him and be acted on by the injured party." Refined Sugars Inc. v. Southern Commodity Corp., 709 F. Supp. 1117 (S.D. Fla. 1988) (quoting Harrel v. Branson, 344 So. 2d 604, 606 (Fla. Dist. Ct. App. 1977)).

Defendants' arguments are unavailing. The Engle findings "preclusively establish the Tobacco Companies engaged in a conspiracy to conceal or omit information regarding the health effects of cigarettes and their addictive nature with the intention that smokers and the public would rely on the information to their detriment." Philip Morris USA, Inc. et al. v. Putney, --- So.3d ---, Case Nos. 4D10-3606, 4D10-

5244, 2013 WL 2494172 at *2 (Fla. Dist. Ct. App. June 12, 2013); see also Philip Morris USA, Inc. v. Naugle, 103 So.3d 944, 947 (Fla. Dist. Ct. App. 2012); Engle v. Liggett Group, Inc., 945 So.2d 1246 (Fla. 2006). As a number of Florida appellate courts have recognized, a jury verdict in favor of an Engle plaintiff on her fraudulent concealment and conspiracy claims is not unreasonable where the plaintiff presents sufficient evidence from which the jury could infer that the smoker relied "(1) on pervasive misleading advertising campaigns for cigarettes in general and (2) on the false controversy created by the tobacco industry during the years she smoked (aimed at creating doubt among smokers that cigarettes were hazardous to health) without the necessity of proving [the smoker] relied on any specific statement from a specific co-conspirator." Putney, 2013 WL 2494172 at *3; see also R.J. Reynolds Tobacco Co. v. Martin, 53 So.3d 1060 (Fla. Dist. Ct. App. 2010); Philip Morris USA, Inc. v. Kayton, 104 So.3d 1145 (Fla. Dist. Ct. App. 2012) (despite the plaintiff's inability to recall a specific statement by an Engle conspirator, her testimony that relied on billboard and magazine advertising was sufficient to deny a post-trial motion for directed verdict); Philip Morris USA Inc. v. Cohen, 102 So.3d 11, 14 n. 2 (Fla. Dist. Ct. App. 2012); R.J. Reynolds Tobacco Co. v. Webb, 93 So.3d 331 (Fla. Dist. Ct. App. 2012).

This case is similar to Martin, which remains good law in Florida and continues to be relied upon by Flor-

ida appellate courts, despite Defendants' disagreement with the holding.[2] In Martin, the Court rejected the tobacco company defendant's argument that plaintiff failed to prove the reliance element of her fraudulent concealment claim because she put on no direct evidence showing decedent relied on information put out by the tobacco companies omitting scientific findings on the harmful effects of smoking. Martin, 53 So.3d at 1069. The Court ruled that there was abundant evidence "from which the jury could infer [decedent's] reliance on pervasive misleading advertising campaigns . . . for cigarettes in general, and on the false controversy created by the tobacco industry during the years [decedent] smoked aimed at creating doubt among smokers that cigarettes were hazardous to health." Id. at 1069-70 (citing Bullock v. Philip Morris, USA, Inc., 71 Cal. Rptr. 3d 775, 792 (Cal. Ct. App. 2008) (plaintiff was not required to prove actual reliance on tobacco company's specific misrepresentation where there was evidence that the company sustained a broad-based public campaign for many years disseminating misleading information and creating a controversy over the adverse health effects of smoking intending that current and potential smokers would rely on the misinformation); Burton v. R.J. Reynolds Tobacco Co., 208 F. Supp. 2d 1187, 1203 (D. Kan. 2002) (jury could infer plaintiff's reliance where evidence showed [tobacco companies] "represented to the public that they would take it upon themselves to investigate and determine whether

---

[2] Numerous decisions from Florida appellate courts have followed Martin since it was decided in December 2010. See, e.g., Putney, 2013 WL 2494172; Naugle, 103 So.3d 944; Webb, 93 So.3d 331.

there were health consequences of smoking," but despite evidence of cigarettes' harmful effects [Reynolds] "engaged in a publicity campaign telling the public that whether there were negative health consequences from smoking remains an 'open question.'")).

Here, Plaintiff's case is arguably even stronger than Martin, as Plaintiff did present direct evidence that decedent detrimentally relied upon information put out by Defendants omitting scientific findings on the harmful effects of smoking. The jury was presented with testimony from LaSard's daughter and former son-in-law that while LaSard may have known smoking could be harmful to her health, she turned to smoking low-tar and low-nicotine cigarettes because Defendants advertised them as safer and healthier than regular cigarettes. Plaintiff testified that her mother saw cigarette advertising on television and in magazines. Mar. 27, 2013 Trial Tr., at 53:12-54:11 (ECF No. 278-1). James and Cheryl Searcy both testified that LaSard smoked low-tar cigarettes because she thought they were safer and healthier. See Mar. 27, 2013 Trial Tr., at 70:3-22 (ECF No. 278-1); Mar. 26, 2013 Trial Tr., at 134:20-135:9 (ECF No. 2782). James Searcy also testified that LaSard smoked low nicotine cigarettes because she thought she could use them to "wean herself off cigarettes gradually." Mar. 27, 2013 Trial Tr., at 70:2022 (ECF No. 278-1).

The jury was also presented with evidence from expert witnesses regarding the behavior of Defendants. The jury heard testimony that Defendants advertised low-tar cigarettes as healthier, even though they knew they were not, and marketed several brands, including the brands that Mrs. LaSard

smoked (Merit, Carlton, and Doral), as "healthy cigarettes" because they contained less tar and nicotine. See Mar. 26, 2013 Trial Tr., at 13:13-14:20; 19:6-22:3 (ECF No. 278-4); Mar. 26, 2013 Trial Tr., at 134:4 (ECF No. 278-6). Dr. Burns also testified that Defendants developed and marketed low-tar and low-nicotine cigarettes to keep people from quitting. Mar. 26, 2013 Trial Tr., at 13:13-13:20 (ECF No. 278-4). Dr. Cummings explained that Defendants marketed low-nicotine cigarettes to "intercept" smokers like LaSard "before they would quit to give them an excuse and to keep smoking." Mar. 28, 2013 Trial Tr., at 120:310 (ECF No. 278-6). Furthermore, Dr. Cummings testified that the cigarette companies knew smokers were interpreting their advestising claims about low-nicotine cigaretes as meaning smokers were getting lower tar and nicotine when they were not. Mar. 28, 2013 Trial Tr., at 132:3-9 (ECF No. 278-6). Thus, the jury was presented with testimony that Defendants deliberately concealed from smokers, including LaSard, the information that low-tar and low-nicotine cigarettes were not any safer than other cigarettes and continued to market these "light" cigarettes as an alternative to quitting smoking. Mar. 26, 2013 Trial Tr., at 19:6-18 (ECF No. 278-4). Ultimately, the jury heard Dr. Burns offer his ultimate conclusion on whether the omissions and concealment of the Defendants were a cause or one of the causes of LaSard's lung cancer and death: "My conclusion is that their withholding of information was indeed a cause of her lung cancer by continuing her smoking behavior and therefore continuing her increase in risk." Mar. 26, 2013 Trial Tr., at 51:18-21 (ECF No. 278-4). Dr. Cummings also testified that Defendants' fraudulent con-

cealment regarding low nicotine cigarettes substantially contributed to LaSard's addiction, and therefore, her continued smoking. Mar. 28, 2013 Trial Tr., at 133:23–134:2 (ECF No. 278-6).

Accordingly, Plaintiff presented sufficient evidence for a jury to determine that LaSard detrimentally relied upon the misrepresentations and concealment of Defendants regarding the health risks associated with smoking. The jury could reasonably infer from all the record evidence that Defendants' fraudulent concealment and conspiracy were a substantial factor in LaSard's failure to quit smoking successfully in time to avoid injury. For the same reason, the jury's finding of reliance here was not against the great weight of the evidence. Accordingly, the jury's verdict should not be disturbed and Defendants' motion must fail.

C. Defendants' Renewed Motion for Judgment as a Matter of Law or, in the Alternative, for a New Trial

Defendants' third motion is based upon the argument that the Engle findings could not be used to remove Plaintiff's burden to prove the elements of her claims and thus, Plaintiff failed to prove her claims. See generally Defs.' Renewed Mot. (ECF No. 275). Defendants concede that this Court has already considered and rejected the arguments contained in their Motion. See Defs.' Renewed Mot., at 1. Nevertheless, Defendants filed their Motion "in an abundance of caution to ensure that they are preserved for further review." Id. This Court agrees that the numerous arguments made in support of Defendants' Motion have been fully considered by and ruled upon by other

judges of this district. See Waggoner v. R.J. Reynolds Tobacco Co., 835 F.3d 1244 (M.D. Fla. 2011); Smith v. R.J. Reynolds Tobacco Co., et al., Case No. 3:09-cv-10048-J-32JBT (M.D. Fla. Aug. 14, 2013). In a very recent opinion, the Eleventh Circuit also rejected Defendants' arguments. See Walker v. R.J. Reynolds Tobacco Co., Nos. 12-13500, 1214731, 2013 WL 4767017 at *1, 8-11 (11th Cir. Sept. 6, 2013). Thus, with this clear, binding precedent, Defendants' arguments must fail here. Plaintiff was entitled to rely upon the Engle findings to establish the conduct elements of her claim, consistent with due process and Florida preclusion law. See also Waggoner, 835 F.3d at 1279; Philip Morris USA, Inc. v. Douglas, 110 So. 3d 419 (Fla. 2013); R.J. Reynolds Tobacco Co. v. Jimmie Lee Brown, 70 So. 3d 707 (Fla. Dist. Ct. App. 2011); Martin, 53 So. 3d 1060.

As noted by all Parties, Defendants' Motion does not contain novel arguments. The Court in Smith addressed a similar situation, concluding "the Court believes that in ruling on [Defendant's] Rule 50(b) motion it is appropriate to rely on the Court's prior rulings on the same or similar arguments previously made by Reynolds." Smith, Case No. 3:09-cv-10048-J-32JBT, at 1. The Court in Smith subsequently found that Reynolds was not entitled to judgment as a matter of law and denied Reynolds' Rule 50(b) motion. This Court agrees that such a course of action is appropriate in the above-styled case. Accordingly, for purposes of the Rule 50(b) motion, this Court adopts the previously made findings of fact and conclusions of law as they were made in relation to Defendants' prior arguments on these same issues. Defendants

fail to meet their burden that there was no legally sufficient evidentiary basis for the jury's verdict. This Court finds that Defendants are not entitled to judgment as a matter of law or a new trial on this basis either.

III. CONCLUSION

Based on the foregoing, it is hereby

ORDERED AND ADJUDGED as follows:

1. Defendant Philip Morris USA, Inc.'s Renewed Motion for Judgment as a Matter of Law and, in the Alternative, for a New Trial Based on Insufficient Evidence of Brand Usage (ECF No. 273) is DENIED.
2. Defendants' Renewed Motion for Judgment as a Matter of Law on Plaintiff's Fraudulent Concealment and Conspiracy Claims or, in the Alternative, for a New Trial (ECF No. 274) is DENIED.
3. Defendants' Renewed Motion for Judgment as a Matter of Law or, in the Alternative, for a New Trial (ECF No. 275) is DENIED.

DONE AND ORDERED in Chambers at Miami, Florida, this 11th day of September, 2013.

/s/ K. M. Moore
K. MICHAEL MOORE
UNITED STATES DISTRICT JUDGE

cc: All counsel of record

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA JACKSONVILLE DIVISION

Case No. 3:09-cv-13723

CHERYL SEARCY, as Personal Representative of the Estate of Carol LaSard,

Plaintiff,

v.

RJ. REYNOLDS TOBACCO COMPANY, and PHILIP MORRIS USA, INC.,

Defendants.

ORDER

THIS CAUSE came before the Court upon Defendants' Motion for a New Trial or, in the Alternative, Reduction or Remittitur of the Damages Awards (ECF No. 276). Plaintiff responded (ECF No. 280). Defendants then filed a Reply (ECF No. 283), to which Plaintiff filed a Sur-Reply (ECF No. 284). This matter is therefore ripe for review. UPON CONSIDERATION of the Motion, Response, Reply, Sur-Reply, the pertinent portions of the record, and being otherwise fully advised in the premises, this Court enters the following Order.

I. BACKGROUND

On March 25, 2013, this Court commenced a jury trial in the above-styled action. The jury returned a verdict on April I, 2013, finding for Plaintiff on all her tort claims (negligence, strict liability, fraudulent concealment, conspiracy to fraudulently conceal) and awarding Plaintiff $6,000,000.00 in compensatory damages. See Jury Verdict, (ECF No. 251). Phase II of the trial then commenced, and the jury was read instructions on punitive damages. The jury returned a verdict on punitive damages, finding that $10,000,000.00 in punitive damages should be assessed against each Defendant. See Jury Verdict (Phase II), (ECF No. 253). On June 5, 2013, following briefing from the Parties, this Court entered an Order on the Proper Form of Judgment to Be Entered in this Case (ECF No. 267), finding that Defendants are jointly and severally liable for the total amount of compensatory damages found by the jury, and each liable for the amount of punitive damages assessed against them. Final Judgment (ECF No. 268) was entered that same day. On [INSERT DATE], this Court denied the three other post-trial motions filed by Defendants which sought judgment as a matter of law or, in the alternative new trials, on various issues. See Order Denying Defs.' Mots. for J. as a Matter of Law (ECF No. INSERT #). This Court now turns to the instant Motion, which seeks a new trial on all issues or, in the alternative, a reduction or remittitur of the damages award.

II. DISCUSSION

Defendants argue that the verdict in this case is so excessive that it could only have been the result of

passion and prejudice, and the Court should therefore vacate the judgment and order a new trial, or at a minimum, substantially reduce the award. Mot., at 6. A court may grant a new trial "for any reason for which a new trial has heretofore been granted in an action at law in federal court." Fed. R. Civ. P. 59(a)(1)(A). "[A] grossly excessive award may warrant a finding that the jury's verdict was swayed by passion and prejudice . . . thus necessitating a new trial.'" Christopher v. Florida, 449 F.3d 1360, 1368 (11th Cir. 2006) (quoting Simon v. Shearson Lehman Bros., Inc., 895 F.2d 1304, 1310 (11th Cir. 1990)). Nevertheless, "Resolution of a motion for a new trial is committed to the discretion of the trial court." Thornton v. J Jargon Co., No. 8:06-cv-1640-T-27TGW, 2009 WL 980804, at *3 (M.D. Fla. Apr. 9, 2009); see also Johnson v. Clark, 484 F. Supp. 2d 1242, 1246 (M.D. Fla. 2007). A trial court's discretion to order a new trial is very limited: the trial judge must protect against "manifest injustice" in the jury's verdict. Aycock v. R.J. Reynolds Tobacco Co., No. 3:09-cv-10928-J-37JBT, (ECF No. 333, at 2) (M.D. Fla. Aug. 6, 2013) (citing Hewitt v. B.F. Goodrich Co., 732 F.2d 1554, 1559 (11th Cir. 1984)). The Eleventh Circuit has explained, "When ruling on a motion for a new trial, a trial judge must determine if in his opinion, the verdict is against the clear weight of the evidence . . . or will result in a miscarriage of justice, even though there may be substantial evidence which would prevent the direction of a verdict." Peat, Inc. v. Vanguard Research, Inc., 378 F.3d 1154, 1162 (11th Cir. 2004) (citations omitted).

Here, though the jury awarded Plaintiff the full amount of compensatory damages requested by Plaintiff's counsel, the jury also apportioned 40% of fault

that was a legal cause of Carol LaSard's death to LaSard herself, and 30% of fault to each Defendant. See Jury Verdict, at 3 (ECF No. 251). Thus, the jury did not allow LaSard to escape responsibility for her actions in smoking cigarettes. Rather, it is arguable that the jury weighed the evidence presented, listened to the Court's instructions, and rendered a verdict accordingly. See Raulerson v. Wainwright, 753 F.2d 869, 876 (11th Cir. 1985) (it is presumed that juries follow the court's instructions). Defendants contend that several lines of evidence and argument made by Plaintiff's counsel could have inflamed the passion and prejudice of the jury. See Mot., at 19-20. Nevertheless, as noted by Plaintiff, these statements plucked from the lengthy arguments of Plaintiff's counsel were not objected to at the time. Resp., at 5. This Court finds that none of the statements made by Plaintiff's counsel were so inflammatory as to render a new trial necessary. Furthermore, the crux of Defendants' argument that a new trial is warranted comes from Defendants' objecting to the excessiveness of the damages award. In nearly every case cited by Defendants regarding excessive awards in wrongful death cases, the remedy undertaken was remittitur rather than a new trial. See, e.g. R.J. Reynolds Co. v. Webb, 93 So. 3d 331 (Fla. Dist. Ct. App. 2012); Philip Morris USA Inc. et al. v. Putney, Nos. 4D10-3606, 4D10-5244, 2013 WL 2494172, at *3 (Fla, Dist. Ct. App. June 12, 2013). Thus, this Court turns to whether a reduction or remittitur of the damages award is the appropriate remedy.

The Eleventh Circuit has held that the Florida Statutes providing for the review, and potential re-

duction or increase, of a jury's verdict apply in diversity cases in which Florida provides the substantive law. Bravo v. United States, 532 F.3d 1154 (11th Cir. 2008). The Florida Statutes state that it is the court's "responsibility . . . to review the amount of [a damages] award to determine if such amount is excessive . . . in light of the facts and circumstances which were presented to the trier of fact." Fla. Stat. § 768.74(1). The discretion given to a jury's determination of non-economic damages in a wrongful death action in particular is extremely high. Aycock, No. 3:09-cv-10928-J-37JBT, at 5 (citing Waddell v. Shoney's Inc., 664 So. 2d 1134, 1136 (Fla. Dist. Ct. App. 1995); Bould v. Touchette, 349 So. 2d 1181, 1185 (Fla. 1977)). "The trial court does not sit as a seventh juror. Neither does the reviewing court reserve the prerogative to overturn a damages verdict with which it merely disagrees." R.J. Reynolds Co. v. Webb, 93 So. 3d 331, 336 (Fla. Dist. Ct. App. 2012) (quoting Dyes v. Spick, 606 So. 2d 700, 702 (Fla. Dist. Ct. App. 1992)).

"Remittitur cannot be granted unless the amount of damages is so excessive that it shocks the judicial conscience and indicates that the jury has been influenced by passion or prejudice." Putney, 2013 WL 2494172, at *3 (citing Progressive Select Ins. Co. v. Lorenzo, 49 So. 3d 272, 278 (Fla. Dist. Ct. App. 2010) (citations omitted) (internal quotation marks omitted)). "Not every verdict which raises a judicial eyebrow should shock the judicial conscience." Laskey v. Smith, 239 So. 2d 13, 14 (Fla. 1970). The defendant has the burden of proof to demonstrate that the award is "so inordinately large as obviously to exceed the maximum limit of a reasonable range within which the jury may properly operate." Aycock, Case No.

3:09-cv-10928-J-37JBT, at 6 (citing Bould, 349 So. 2d at 1184-85 (citation omitted)).

"Under Florida law an award of noneconomic damages must bear a reasonable relation to the philosophy and general trend of prior decisions in such cases." Putney, 2013 WL 2494172, at *3 (citing Philip Morris USA, Inc. v. Cohen, 102 So, 3d 11, 14 (Fla. Dist. Ct. App. 2012) (quoting Bravo, 532 F.3d at 1162)). "The relevant awards for comparison are those from similar cases that have been challenged and subsequently upheld by appellate courts." Aycock, No. 3:09-cv-10928-J-37JBT, at 6 (citing Bravo, 532 F.3d at 1166-67 ("Focusing on awards that are appealed is also essential to ensuring that the measure is not skewed by phantom awards."); Davis v. United States, No. 08-cv-81447, 2010 WL 2331094, at *29 (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 in similar scenarios, with a particular focus on cases drawn from the state appellate court having jurisdiction over the location where the tort in question occurred.")). "[D]amages are to be measured by the jury's discretion. The court should never declare a verdict excessive merely because it is above the amount which the court itself considers the jury should have allowed." Bould, 349 So. 3d at 1184-85.

A. Compensatory Damages Award

In this action, the jury found in Plaintiff's favor on all tort claims and awarded Plaintiff $6,000,000.00 in compensatory damages. See Jury Verdict, (ECF No. 251). Defendants are jointly and severally liable for

that amount. See Order on the Proper Form of Judgment to Be Entered in this Case (ECF No. 267). Defendants argue that this award is excessive compared to awards sanctioned by Florida appellate courts for surviving adult children and that there is no evidentiary basis for a large compensatory damages award in this case. See generally Mot., at 8-12. As all Parties acknowledge, this is the largest award for an Engle progeny case of those pending in the Middle District of Florida.[1] The damages award is large even for Florida state courts.

The Eleventh Circuit has stated that under Florida law "an award of non-economic damages must 'bear a reasonable relation to the philosophy and general trend of prior decisions in such cases.'" Bravo, 532 U.S. at 1162 (quoting Johnson v. U.S., 780 F.2d 902, 907 (11th Cir. 1986)); see also Aills v. Boemi, 41 So. 3d 1022, 1028 (Fla. Dist. Ct. App. 2010) ("The comparison of jury verdicts reached in similar cases provides one method of assessing [w]hether the amount awarded bears a reasonable relation to the amount of damages proved and the injury suffered.' §768.74(5)(d)."). Two recent Florida appellate court decisions have addressed the difference between a damage award to a decedent's spouse and a damage award to a decedent's adult child or children: Webb, 93 So, 3d 331, and Putney, 2013 WL 2494172. While

---

[1] The next largest post-Engle verdict in the Middle District of Florida is Aycock v. R.J. Reynolds Tobacco Co., No. 3:09-cv-10928-J-37JBT (M.D. Fla. Apr. 18, 2013). In Aycock, the jury awarded Plaintiff, decedent's spouse of over fifty years, compensatory damages in the amount of $5,900,000.00, see Verdict (ECF No. 302), reduced to $4,277,500.00 after comparative fault.

the number of wrongful death cases filed by adult children make up a small percentage of wrongful death cases as a whole, the present action is comparable to Webb and Putney.[2]

In Webb, the Court found an $8,000,000 verdict to the surviving daughter of a smoker excessive, explaining:

> "Of the thirty-five Engle cases we examined in which the jury awarded compensatory damages, the juries awarded compensatory damages as great as $7 million in only eight cases. Of these eight cases, three were cases in which the plaintiff was the cigarette smoker and the verdicts included economic damage awards. In the others, the decedents died at a much younger age than Mr. Homer did, or were survived by a spouse, by spouse and child, or by two or more children. Our research has failed to uncover a single case in which an adult child received a wrongful death award of this magnitude that was affirmed on appeal (either in Engle progeny cases or other wrongful death actions)."

Webb, 93 So. 3d at 337-38. The opinion contained a lengthy recital of the testimony the jury heard regarding the plaintiff, Ms. Webb, and her relationship with her father, the decedent. Ms. Webb, by all accounts, had a very close relationship with her father and lived

---

[2] Putney was not final at the time of the Parties' briefing. As noted in Defendants' Notice of Supplemental Authority (ECF No. 285), Putney is now final. The Florida Fourth District Court of Appeal denied plaintiff-appellee's motion for rehearing or certification of conflict on August 9, 2013. (See ECF No. 285-1.)

with her family across the street from him. Webb, 93 So. 3d at 338-39. Ms. Webb's father helped her as she struggled with hearing problems and helped her care for a young daughter who had numerous medical problems due to being born with a rare chromosomal disorder. Id. After reviewing the record, the court concluded, "The amount of the compensatory damages suggests an award that is the product of passion, an emotional response to testimony regarding difficulties Ms. Webb and her father faced and overcame before cancer befell him, rather than evidence of his illness, subsequent death, and the noneconomic consequences of the death itself." Id. at 339. Furthermore, Ms. Webb was 54 years old when her father died at the age of 78, was married and had her own children and grandchildren, and was not wholly dependent on her father's companionship, instruction and guidance at that time. Id.

In Putney, the Florida appellate court noted, "Appellate decisions that have upheld large consortium awards in tobacco cases involve much closer relationships between the parties and the decedents during the decedent's illness." Putney, at *4; see, e.g. R.J. Reynolds Tobacco Co. v. Townsend, 90 So.3d 307 (Fla. Dist. Ct. App. 2012) (upholding a 10.8 million dollar compensatory award to the wife of decedent, where the couple had been married for thirty-nine years, the wife had to support the family in Florida while her husband traveled to Chicago for treatment, and the wife personally cared for her husband as he lay dying during the final six months); Cohen, 102 So. 3d at 18 (trial court did not abuse its discretion in denying motion for remittitur of 10 million dollar compensatory damage award to wife of deceased smoker); see also

Aycock, No. 3:09-cv-10928-J-37JBT (upholding a $5.9 million compensatory award where the jury heard testimony that the couple had been married for over fifty years, decedent's wife was with her husband when he died, she suffered from depression after her husband died, had to sell her house and move after his death, and has not remarried in the sixteen years since her husband died). In Putney, all of the decedent's children were adults at the time of her diagnosis and death, and none of them testified that they lived with her or relied on her for support. Putney, at *4. The jury in Putney heard testimony about how close the children were to their mother and how her death devastated them. Id. Nevertheless, the Court in Putney found: "While the above testimony may establish that [decedent's] adult children are entitled to a consortium award, we agree with the Tobacco Companies' argument that the loss of consortium awards were excessive compared to those in similar cases and shock the judicial conscience because none of them testified that they lived with her or relied on her for support. The trial court errer in failing to grant remittitur." Id.

Defendants submit that Florida precedent requires that the compensatory award be reduced to an amount no more than $500,000.00. See Mot., at 3-7, 22. In addition to citing Webb and Putney, Defendants direct this Court to several other wrongful death cases, none of which are Engle progeny cases. In MBL Life Assurance Corp. v. Suarez, 768 So. 2d 1129 (Fla. Dist. Ct. App. 2000), the Florida appellate court found

an award of $1 million[3] to each of four adult surviving children to be "excessive," where none of the children were residing with decedent, none were financially dependent on decedent, and there was no evidence presented that the children were suffering from adjustment disorders or depression. See Suarez, 768 So.2d at 1136-37. Another Florida appellate court affirmed an award of $400,000.00[4] to each of several adult surviving children in a train accident case, but noted that the verdict was "indeed a generous award" that "raises a judicial eyebrow." See Nat'l R.R. Passenger Corp. v. Ahmed, 653 So. 2d 1055, 1059 (Fla. Dist. Ct. App. 1995). The jury in Ahmed heard testimony that "each child suffered some mental anguish" from the loss of their father, id. at 1059, and had to witness him live for weeks "gravely injured" with his "head swollen three times its normal size." Id. at 1056.

In response, Plaintiff directs this Court to another Florida appellate court decision, Citrus Cnty. v. McQuillin, 840 So. 2d 343 (Fla. Dist. Ct, App. 2003), in which the court reviewed a damages award by comparing it to awards in other cases for loss of a child, parent, or spouse. In McQuillin, the court affirmed an award of $4.4 million[5] in damages for pain and suffering and loss of parental companionship, to the seven-

---

[3] Taking into account inflation, the award would be over $1,300,000.00 in present value. See www.usinflationcalculator.com (accessed on August 25, 2013).

[4] Over $600,000.00 in present value. See www.usinflationcalculator.com (accessed on August 25, 2013).

[5] Over $5.5 million in present value. See www.usinflationcalculator.com (accessed on August 25, 2013).

year-old child of a decedent killed in car accident, finding that the award, "although on the outer limit in size, [wa]s not so excessive as to shock our composite judicial consciences." Id. at 347. Plaintiff then points to "abundant precedent" supporting awards to a wrongful death survivor in amounts far greater than the $6 million damages award here. Resp., at 13 (citing, e.g., Raphael v. Shecter, 18 So. 3d 1152 (Fla. Dist. Ct. App. 2009) (upholding an award of $6.5 million to a woman whose 73-year-old husband died); GMC v. McGee, 837 So. 2d 1010 (Fla. Dist. Ct. App. 2002) (affirming an award of $15 million for each parent for the loss of a son in an accident); Eagleman v. Korzeniowski, 924 So. 2d 855 (Fla. Dist. Ct. App. 2006) (upholding an award of $7 million for each parent for the loss of a son); Wareen Co, v. Hippely, 29 So. 3d 305 (Fla Dist. Ct. App. 2010) (upholding $6.6 million in noneconomic damages for each of three children for the wrongful death of their mother)). Plaintiff also directs this Court to several other Engle progeny jury verdicts in Florida state courts in awarding compensatory damages of over $1 million to surviving adult children. Resp., at 17-18 (citing Marotta v. R.J. Reynolds, No. CACE07036723 (March 20, 2013) (awarding $2 million in compensatory damages to each of three surviving adult children); Mrozek v. Lorillard, No. 2007-CA-11952 (March 2, 2011) (awarding $2 million in compensatory damages to each of three surviving adult children, post-trial motion for new trial denied, judgment affirmed by the First District Court of Appeals); Allen v. R.J. Reynolds Tobacco Co., No. 16-2007-CA-008311 (Fla. 4th Cir. Ct.) (awarding $3 mil-

lion to surviving child; defendants' motion for remittitur of compensatory damages denied but reversed on other grounds)).[6]

Plaintiff attempts to distinguish Putney, arguing that Cheryl Searcy and her mother, Carol LaSard, had an extraordinarily close relationship because Cheryl was an only child and her father was often traveling due to his career in the Navy. See Sur-Reply, at 3. Plaintiff states, "because Cheryl Searcy was an only child to a widow, her relationship to Carol LaSard is more akin to the relationship of a spouse because she bore the responsibility of being the sole caretaker and family member for her mother." Id. This Court, while acknowledging that Plaintiff and LaSard may have had a close relationship, gives little weight to this argument. The jury here heard testimony that Plaintiff was 41 years old at the time of her mother's death and had moved out of her mother's house 21 years earlier when she was married at age 20. See Mar. 26, 2013 Trial Tr., at 133:14-15 (ECF No. 276-1); Mar, 27, 2013 Trial Tr., at 24:1-3 (ECF No. 276-1). There was no testimony that Plaintiff depended on her mother for care or support at the time of her mother's death, or at any point during the two decades she lived apart from her mother. Plaintiff had two children of her own. See id. The jury heard testimony that Plaintiff and her mother did spend a lot of time together and went shopping together approximately every other week or possibly once a

---

[6] Defendants correctly note that none of those awards have been approved by an appellate court, as the defendant did not make an excessiveness challenge to the compensatory award in Mrozek, and Marotta has not yet been subject to appellate review. Reply, at 3.

month. See Mar. 26, 2013 Trial Tr., at 130:24-25 (ECF No. 280-2). Plaintiff testified that it was "heart-wrenching" seeing her mom smoke the very last cigarette she would smoke before her death. Mar. 26, 2013 Trial Tr., at 136:4-22 (ECF No. 280-2). The jury also heard testimony that Plaintiff took care of her mother through her illness. Mar. 27, 2013 Trial Tr., at 29:18-30:10 (ECF No. 280-3). Plaintiff's ex-husband and daughter both testified that Plaintiff and her mother were very close. Mar, 27, 2013 Trial Tr., at 67:16-21 (ECF No 280-4) and Mar. 27, 2013 Trial Tr., at 25:13-19 (ECF No. 280-3). However, in all, the entire direct and redirect testimony of Plaintiff lasted less than 30 minutes. Mot., at 11. Most of the cross-examination focused on LaSard's smoking history, knowledge of the health effects of smoking, and efforts to quit. Id.

Accordingly, the Court finds the present action more akin to Webb and Putney than to the cases cited by Plaintiff which involve a surviving spouse or a minor child. Therefore, a verdict of $6 million in compensatory damages[7] is more than the evidence at trial

---

[7] This Court finds it is worth mentioning that the $6 million in this case is exactly the numerical amount suggested for a compensatory damage award by Plaintiff's counsel in closing argument, though Plaintiff's counsel also stated that the jury could award a larger or small amount. Apr. 1 Trial Tr., at 35:1-2 (ECF No. 280-1). Defendants did not object to this number at the time, but certainly argued against such an award in their own closing arguments. While a "'jury might properly award damages equal to or in excess of those requested by counsel in closing argument,' . . . 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." Ahmed, 653 So. 2d at 1059 (quoting Lopez v. Cohen,

reasonably supports and "shocks the judicial conscience." See Webb, 93 So. 3d at 338.

Though the Court finds Webb and Putney instructive on whether remittitur is warranted here, they are less helpful in determining the amount of the remittitur. While the Florida appellate court ordered remittitur of the $8 million award in Webb and the $15 million award[8] in Putney, the final compensatory award has not been determined in either case. Putney only became final less than a month prior to this Order so the trial court has yet to decide on what amount of damages are appropriate. On remand in Webb, the trial court remitted the compensatory damages to $4,000,000 and the punitive award to $25,000,000. See Mot., at 10, n.3. That decision is now on appeal and has not yet been set for argument.[9] Id. Thus, while these cases are helpful in determining what is *not* an appropriate amount of damages, there is a dearth of authority on what *is* an appropriate amount

---

406 So. 2d 1253, 1256 (Fla. Dist. Ct. App. 1981)); see also Gresham v. Courson, 177 So. 2d 33, 39 (Fla. Dist. Ct. App. 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. . . .").

8 The jury awarded $5 million to each surviving child.

9 The defendant in Webb contends on appeal that the trial court erred in: "(1) rejecting its demand for a new trial in lieu of remittitur pursuant to Waste Management Inc. v. Mora, 940 So.2d 1105, 1109 (Fla. 2006) (under state statute, either side objecting to the amount of additur or remittitur is entitled to demand a new trial), and (2) remitting the award to an amount that is still excessive." Mot., at 10, n.3.

of damages. This Court finds that the award should be remitted to $1 million, an appropriate amount in light of the facts and circumstances presented to the jury and the factors set forth in Florida Statutes § 768.74(5). Pursuant to Florida Statute § 768.74(4), if Plaintiff does not agree to the remittitur, this Court shall order a new trial on the issue of damages only.

B. Punitive Damages Award

After the jury found for the Plaintiff on all of her claims, Phase II of the trial commenced, and the jury was read instructions on punitive damages. The jury found that $10 million in punitive damages should be assessed against each Defendant. See Jury Verdict (Phase II), (ECF No. 253). As this Court has determined the compensatory damages should be reduced, this Court will now reconsider the punitive damages award. See Chillemi v. Rorabeck, 629 So. 2d 206, 210 (Fla. Dist. Ct. App. 1993) ("Since the amount of compensatory damages is being set aside, the better practice is for the punitive damages award also to be reconsidered at the same time. See Stevens Markets, Inc. v. Markantonatos, 189 So.2d 624 (Fla. 1966).").

Defendants argue that this Court can only award punitives that bear a 1:1 ratio to the compensatory damages award. See generally Mot., at 15-18. The United States Supreme Court has stated, "When compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee. The precise award in any case, of course, must be based upon the facts and circumstances of the defendant's conduct and the harm to the plaintiff." State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408,

425 (2003). Here, although Defendants are jointly and severally liable for the amount of the compensatory damages, this Court must assess the punitive damages award against each Defendant separately. The ratio of punitive damages to compensatory damages for each Defendant initially determined by the jury is $10 million to $6 million, or 1.67:1. As contended by Plaintiff, a ratio of 1.67:1 can hardly be argued to violate due process, especially when ratios much higher than that were affirmed in two other Engle progeny cases in Florida courts, where Defendants' conduct was identical to that here. Sur-Reply, at 4; see also Townsend, 90 So. 3d at 313 (affirming ratio of approximately 7:1 despite $10.8 million in compensatory damages); R.J. Reynolds Tobacco Co. v. Martin, 53 So. 3d 1060, 1072 (Fla. Dist. Ct. App. 2010) (affirming 5:1 ratio despite $5 million in compensatory damages). Accordingly, this Court will maintain the ratio determined by the jury and reduce the punitive damages award in accordance with the remitted amount of compensatory damages.

III. CONCLUSION

Based on the foregoing, it is hereby

ORDERED AND ADJUDGED as follows:

1. Defendants Motion for a New Trial or, in the Alternative, Reduction or Remittitur of the Damages Awards (ECF No. 276) is GRANTED to the extent it seeks remittitur of the damages.

2. The remitted amount of compensatory damages is $1,000,000.00. The punitive damages award in this case is established to be the amount of $1,670,000.00 against each Defendant.

3. Plaintiff has ten (10) days from the date of this Order to consent to the remitted amount of compensatory and punitive damages as set forth hereinabove.
4. If Plaintiff fails timely to consent to the remitted amount of damages as set forth in this Order, this Court shall conduct a new trial on the issue of the amount of compensatory and punitive damages to be awarded to Plaintiff.
5. Defendants are not entitled to a new trial on damages unless it is at the election of Plaintiff.

DONE AND ORDERED in Chambers at Miami, Florida, this 11th day of September, 2013

/s/ K. M. Moore
K. MICHAEL MOORE
UNITED STATES DISTRICT JUDGE

cc: All counsel of record

APPENDIX D

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. amend. V

No person shall . . . be deprived of life, liberty, or property, without due process of law.

Full Faith and Credit Act, 28 U.S.C. § 1738

The Acts of the legislature of any State, Territory, or Possession of the United States, or copies thereof, shall be authenticated by affixing the seal of such State, Territory, or Possession thereto.

The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form.

Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.