Berger v. Philip Morris USA, Inc., Nos. 15-15633/16-10021/16-15957

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

JUDITH BERGER,
Plaintiff-Appellee/Cross-Appellant,

v.

PHILIP MORRIS USA, INC.,
Defendant-Appellant/Cross-Appellee

Appeal from the United States District Court
for the Middle District of Florida
Case No. 3:09-cv-14157-WGY-JBT

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No associations of persons, and no other firms, partnerships, or corporations have an interest in the outcome of this case or appeal.

/s/ Kenneth S. Byrd
Kenneth S. Byrd

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INTRODUCTION

Philip Morris confuses the appellate courtroom with the jury room, and an appellate brief with a closing argument. Reading its brief, one would hardly know that this is an appeal from a jury verdict for the plaintiff. A verdict is "disturb[ed] only when there is no material conflict in the evidence, such that no reasonable person could agree to the verdict reached." *Bhogaita v. Altamonte Heights Condo. Ass'n, Inc.*, 765 F.3d 1277, 1285 (11th Cir. 2014).

That deferential standard of review goes unmentioned. Philip Morris weighs the evidence, relies on cherry-picked snippets of Judith Berger's recall of her teenaged decision-making sixty years ago, and tells the Court which inferences to adopt, and which to disregard. But those determinations are squarely—and exclusively—within the jury's charge: "Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge," nor of a party appealing a jury verdict. *Strickland v. Norfolk S. Ry. Co.*, 692 F.3d 1151, 1154 (11th Cir. 2012) (citation omitted). And Philip Morris insists on viewing the evidence, and the logical inferences, in the light most favorable to itself, turning the standard of review on its head. *See, e.g.*, *Ramirez v. Sec'y, U.S. Dep't of Transp.*, 686 F.3d 1239, 1244 (11th Cir. 2012) (On review of "judgment as a matter of law . . . we view the evidence in a light most favorable to the non-moving party.").

In this case, the jury saw ample evidence connecting Judith Berger's decision to smoke, to continue smoking, and to smoke certain brands to misinformation propagated and facts concealed by Philip Morris and its co-conspirators. In particular, she showed the jury how Philip Morris targeted young girls just like her, aiming to use peer pressure to sell its products. The jury heard the Surgeon General's report describing those tactics in detail and saw—twice—the ad in which a female character is taught how to inhale. And the jury heard her testimony recalling how her teenage friend pressured her to inhale—just like the marketing strategy intended. Philip Morris discounts the import of that evidence, but the jury evidently disagreed—the fourteen cents added onto the verdict matched the young age at which Mrs. Berger began smoking.

Mrs. Berger's proof of reliance was well-grounded in Florida law. Philip Morris gives short shrift to a fundamental tenet of federalism: that federal courts sitting in diversity apply state substantive law. Philip Morris finds reason after reason to disregard controlling Florida cases, arguing, for example, that some cases were wrongly-decided, and others do not stand for the rules of law stated in their holdings. But *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938), means that this Court applies all of Florida law, not just the cases with which Philip Morris agrees.

Separately, Philip Morris objects to the application of an intervening clarification in Florida law permitting the award of punitive damages to be upheld

on the basis of Mrs. Berger's negligence and strict liability judgments alone. But Florida law provides for punitive damages based on intentional misconduct, regardless of the underlying theory of liability. *See Soffer v. R.J. Reynolds Tobacco Co.*, 187 So. 3d 1219, 1233 (Fla. 2016). The same evidence of intentional misconduct would have supported punitive damages on negligence and strict liability claims alone.

Philip Morris claims that reinstating the punitive damages violates due process. But a due process claim must rest on more than mere speculation. The conduct underlying the intentional and non-intentional torts is inextricably intertwined. The Court need not take Mrs. Berger's word for this: that is what Philip Morris successfully argued in convincing the District Court in the *Engle* master docket to adopt a verdict form that limited punitive damages to intentional torts. Judicial estoppel and the invited error doctrine preclude Philip Morris from arguing otherwise here.

Finally, Philip Morris objects to Mrs. Berger's use of the *Engle* findings, but that argument has been foreclosed by *Graham v. R.J. Reynolds Tobacco Co.*, 857 F.3d 1169 (11th Cir. 2017) (en banc), *cert. denied*, 2018 WL 311345 (2018).

The District Court's decision overturning the jury verdict on fraudulent concealment and conspiracy should be reversed. Regardless, under controlling Florida law, the punitive damages award should be reinstated.

ARGUMENT

I. The District Court Erred by Overturning the Jury's Fraudulent Concealment and Conspiracy Verdicts.

Mrs. Berger's opening brief explained how the jury could find that she relied on (1) Philip Morris's concealment of the dangers and addictive nature of smoking; (2) the campaign waged by Philip Morris and its co-conspirators to undermine the credibility of any authority, including the Surgeon General, suggesting a link between cigarettes and addiction and disease; (3) Philip Morris's engineering of peer pressure to smoke; and (4) Philip Morris's "saturation" advertising strategy. Cross-Appellant's Br. at 31-44. Philip Morris challenges the reasonableness of those findings on various grounds, but the deference due both a jury verdict and controlling Florida law renders those arguments meritless.[1]

A. Florida law does not require reliance on a particular statement.

This is not a case about a false stock tip or bogus investment opportunity. Garden-variety fraud cases focus on the content of a small set of affirmative false statements, often a single false statement. Consequently, the reliance inquiry is comparatively simple, asking whether or not the Plaintiff heard the statement, and took action as a result.

[1] Philip Morris does not dispute, and so concedes, that if the intentional tort verdicts are upheld, then the compensatory damages award should not be reduced by comparative fault. *See Schoeff v. R.J. Reynolds Tobacco Co.*, No. SC15-2233, 2017 WL 6379591 (Fla. Dec. 14, 2017).

Mrs. Berger's case is not that case. Philip Morris, along with its co-conspirators, fraudulently concealed material information about its products for *decades*, as proven at both the *Engle* trial and at the trial below. *See* Cross-Appellant's Br. at 6-11. This is not a case about a single statement or even a few statements, but a decades-long fraudulent conspiracy, a campaign of doubt unprecedented in American history.

Nor is Mrs. Berger an investor or business partner who made a one-time decision (as an adult) to enter into a transaction. Mrs. Berger began smoking as a 14-year-old in the 1950s and was only in her early 20s when the first warnings appeared on cigarette packs. It would be extremely difficult and unlikely for a seventy-year-old to recall her teenaged reliance on a particular statement when Philip Morris and its co-conspirators were responsible for thousands or even millions of statements. *See, e.g.*, Trial Tr., Vol. 5 at 754, 761-62 (explaining that "[c]igarette advertising reaches virtually all Americans who can either read or understand the spoken word" and that so "pervasive [was] cigarette advertising that it [was] virtually impossible for Americans of almost any age to avoid" it).

Florida law is not blind to these facts and holds that, although an *Engle* plaintiff must prove detrimental reliance, the facts that support such a finding often will vary from the ordinary fraud case. That Philip Morris's misconduct was of unprecedented scope does not immunize it from fraud liability.

1. Florida law requires only that a plaintiff rely on concealed facts.

To that point, a plaintiff need not prove reliance on any particular statement. *See Philip Morris USA Inc. v. Putney*, 199 So. 3d 465, 469-70 (Fla. 4th DCA 2016) (upholding reliance finding where plaintiff did not prove reliance "on any specific statement from a specific co-conspirator"); *R.J. Reynolds Tobacco Co. v. Calloway*, 201 So. 3d 753, 766 (Fla. 4th DCA 2016) (en banc) (explaining that a plaintiff must prove "a causal connection between the defendant's conduct and the plaintiff's misapprehension," but jury instructions "need not include reliance on 'a statement' unless the facts of the case warrant it") (citation omitted).

In fraudulent concealment cases, Florida courts have specifically rejected the "artificially narrow" concept of reliance advanced by Philip Morris. *Philip Morris USA, Inc. v. Duignan*, No. 2D15-5015, 2017 WL 5471866, at *10-11 (Fla. 2d DCA Nov. 15, 2017). Detrimental reliance in such cases "usually" requires only that the plaintiff provide evidence for the jury to find she "would [not] have behaved in the same way had [s]he known the true facts." *Id.* In other words, she can prove "detrimental reliance as to a concealed or omitted fact" and is not limited to reliance on a particular statement. *Id.*[2]

[2] Philip Morris hints that *Putney*, *Calloway*, and *Duignan* were wrongly-decided in light of the Florida Supreme Court's decision in *Hess v. Philip Morris USA Inc.*, 175 So. 3d 687 (Fla. 2015). But the quotations from *Hess* that Philip Morris cites

[Footnote continued on next page]

2. The jury instructions in this case do not require the Court to ignore Florida law.

Philip Morris makes the eyebrow-raising argument that the jury instructions in this case preclude the appropriate application of Florida law because they required reliance on an "incomplete representation." Cross-Appellee's Br. at 34-35. Philip Morris misstates the record. The jury instructions referred to "incomplete representation***s***," plural. Doc. 94 at 29. Those *same* instructions told the jury that fraudulent concealment meant that "Philip Morris and others concealed or omitted material information . . . or failed to disclose a material fact concerning the health effects and/or addictive nature of smoking cigarettes." *Id.* And the jury found that Mrs. Berger relied on both "the incomplete representations made by Philip Morris" (again, plural) and "the statement(s) made or act(s) done in furtherance of" the conspiracy. Doc. 92 at 2-3. Read accurately and completely, nothing in the instructions limited the jury to a finding of reliance based on a single, specific representation.

In any event, as *Duignan* held, reliance on a concealed or omitted fact *is* reliance on an "incomplete representation," so nothing in the instructions, even as Philip Morris distorts them, contradicted Florida law. Indeed, *Putney* rejected

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are drawn from the underlying jury instructions in that case, not the reasoning of the Court (which is not surprising given that *Hess* was about the statute of repose, not the standard of reliance). *Putney*, *Calloway*, and *Duignan* were all decided after *Hess* and there is no reason to believe that *Hess* undermines their holdings.

similar arguments where the instructions actually said what Philip Morris pretends they said here: "relied to her detriment on a statement." 199 So. 3d at 469-70.

B. Mrs. Berger's testimony about peer pressure supported a finding of reliance.

Mrs. Berger testified that she started smoking as a teenager under pressure from her friend Anita Russo, who taught her how to inhale after her friends mocked her for not doing so, calling her "chicken." Trial Tr., Vol. 8 at 1268-69, 1311. That was powerful evidence that Mrs. Berger never would have started smoking but for Philip Morris's campaign to get young, female "pre smokers," "beginning smokers" and "learners" inhaling deeply—which Philip Morris knew would virtually ensure addiction—indeed, it deliberately engineered its cigarettes to accomplish that very goal. *Id.*, Vol. 11 at 1752-55, 1776-89; Pl. Ex. 31. That campaign was intended to, and did, engineer peer pressure to smoke, efforts that were "worth every penny" to Philip Morris. *Id*, Vol. 13 at 2194.

The jury heard the 2012 Surgeon General report describing how "far from being a completely independent determinant of youth smoking, peer influence is yet another channel for communication on which the industry can capitalize to promote smoking by youth." Trial Tr., Vol. 9 at 1522. The "tobacco industry routinely attributes smoking to peer pressure, but it does not acknowledge the relationship between advertising and peer influence, or the effects of advertising on . . . behavior." *Id.*

This was not conduct merely attributed to the industry as a whole (even though Philip Morris is liable for the acts of its co-conspirators). The jury heard specific evidence showing how *Philip Morris* targeted youths, especially young women, in the 1940s and 50s. *See id.*, Vol. 11 at 1752-55, 1776-89. The jury saw—twice—video of Philip Morris's advertising that targeted young women, asking them, "Do you inhale?" *Id.*, Vol. 8 at 1376-77, Vol. 15 at 2452-54. Philip Morris engineered its cigarettes to maximize addiction via deep inhalation. *Id.*, Vol. 10 at 1690-91. That evidence, paired with the overwhelming evidence that tobacco advertising was pervasive and unavoidable, and that Philip Morris targeted Mrs. Berger's demographic specifically, tied Mrs. Berger's personal experience to the fraudulent messaging spread by Philip Morris.

Philip Morris argues that Mrs. Berger cannot prove reliance through peer pressure for two reasons, neither persuasive. First, Philip Morris says that the causal proof is too "attenuated" under Florida law, citing *Morgan v. W.R. Grace & Co.-Conn.*, 779 So. 2d 503 (Fla. 2d DCA 2000), for the proposition that "various documents aimed at the general public" could not support a finding of reliance. In *Morgan*, the plaintiff failed to allege that she was exposed to fraudulent statements, much less that she relied upon or was harmed by them. *Id.* at 506. *Morgan* has no bearing on the facts of this case because, here, Mrs. Berger proved that, as a teenager, she began smoking as a consequence of an extraordinarily expensive and

specific marketing strategy directly aimed at her peer group.

Second, Philip Morris says that the jury needed to find that Mrs. Berger's childhood friend Anita Russo relied on Philip Morris's misrepresentations. Not so. The claim is not that Ms. Russo relied on Philip Morris's fraud and harmed Mrs. Berger; it is that Ms. Russo and the other teenaged girls were unwitting conduits of Philip Morris's peer pressure campaign. *See, e.g.*, *Philip Morris USA, Inc. v. Naugle*, 103 So. 3d 944, 947 (Fla. 4th DCA 2012) (explaining that "it is immaterial whether" a false message "passes through a direct or circuitous channel in reaching" the victim) (citation omitted).[3]

C. The jury was entitled to disregard portions of Mrs. Berger's testimony.

Philip Morris's argument that the evidence does not support a reliance finding depends on several cherry-picked excerpts of Mrs. Berger's testimony on cross-examination, questions that asked whether she "blame[d]" Anita Russo for her decision to smoke, Trial Tr., Vol. 8 at 1311, and whether she "bought a pack of cigarettes" because of "a single ad," *id.* at 1267. As discussed above, Mrs. Berger's testimony about Anita Russo supports, rather than negates, a finding of reliance, and the governing legal standard is *not* whether she acted because of a

[3] Philip Morris argues that Mrs. Berger failed to raise the peer pressure argument below. Not so—the argument was made to the jury. *See* Trial Tr., Vol. 15 at 2449-55.

single specific ad. Moreover, Philip Morris reads Mrs. Berger's testimony in the light most favorable to Philip Morris, contrary to the standard of review applicable here. But even accepting Philip Morris's arguments at face value, the jury was entitled to disregard those portions of Mrs. Berger's testimony.

"[Q]uestions of witness credibility are the exclusive province of the jury," *United States v. Hernandez*, 743 F.3d 812, 815 (11th Cir. 2014) (internal quotation marks omitted), and the jury was entitled to accept some parts of Mrs. Berger's testimony and reject others. *See, e.g.*, *Moore v. Chesapeake & O. Ry. Co.*, 340 U.S. 573, 576 (1951) ("True, it is the jury's function to credit or discredit all or part of the testimony."); *United States v. Fuertes*, 435 F. App'x 802, 807 (11th Cir. 2011) ("A reasonable jury could have rejected those parts of [a witness's] testimony, but still accepted her [other] assertions.").

In particular, the jury was entitled to reach the unremarkable conclusion that a 70-year-old might not recall exactly what she was thinking when she was 14 and someone offered her a cigarette, or why she ignored the Surgeon General's warnings when she was in her early 20s. *See, e.g.*, *United States v. Rucker*, 766 F.3d 638, 644 (7th Cir. 2014) ("[H]uman memory is imperfect."); *Ren v. Holder*, 648 F.3d 1079, 1086 (9th Cir. 2010) ("[T]he ability to recall precise dates of events years after they happen is an extremely poor test of how truthful a witness's substantive account is.") (citation omitted). Indeed, the jury was specifically

instructed that, "in evaluating the credibility and weight of a witness's testimony," it could consider "[h]ow good the witness's memory seemed to be: was the witness able to remember accurately and completely what happened." Doc. 94 at 10.[4]

D. Separately, Mrs. Berger produced sufficient evidence to find she relied on Philip Morris advertising.

Independently, Mrs. Berger produced sufficient evidence for the jury to find she relied on Philip Morris's pervasive advertising campaign.[5]

1. Under Florida law, the jury was permitted to infer reliance from Philip Morris's pervasive advertising campaign.

As explained in Mrs. Berger's opening brief, she put on substantial evidence that Philip Morris engaged in a pervasive, misleading, and effective advertising campaign. *See* Cross-Appellant's Br. at 8-11. Under Florida law, the jury was permitted to infer reliance from that evidence. *See, e.g.*, *R.J. Reynolds Tobacco*

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[4] Philip Morris also points to testimony that Mrs. Berger was aware of the 1966 Surgeon General's warnings, testimony that, Philip Morris says, constituted "[e]vidence that Plaintiff was aware of the health risks of smoking." Cross-Appellee's Br. at 22-23. But Mrs. Berger also testified that she did not believe the warnings, that she thought "they weren't sure at the time" and "were speculating." Trial Tr., Vol. 8 at 1280 & 1339, which was the intended consequence of the campaign of disinformation waged by Philip Morris and its co-conspirators—in other words, affirmative evidence of reliance. *See* Cross-Appellant's Br. at 31-33. In any event, such general awareness does not defeat a fraud claim. *See Evers v. R.J. Reynolds Tobacco Co.*, 195 So. 3d 1139, 1141 (Fla. 2d DCA 2015); *Naugle*, 103 So. 3d at 947.

[5] Philip Morris states in a footnote that it "cannot be held liable for merely exercising its right to advertise legal products." Cross-Appellee's Br. at 21 n.6. But the First Amendment does not protect misleading or fraudulent commercial speech. *See, e.g.*, *In re R.M.J.*, 455 U.S. 191, 203 (1982).

Co. v. Martin, 53 So. 3d 1060, 1069 (Fla. 1st DCA 2010). This common-sense inference is permissible because "where [] a plaintiff allege[s] exposure to a long-term advertising campaign, the plaintiff is not required to plead with an unrealistic degree of specificity that the plaintiff relied on particular advertisements or statements." *In re Tobacco II Cases*, 207 P.3d 20, 40-41 (Cal. 2009).

Philip Morris argues that the Court should disregard Florida law as articulated in *Martin*, an articulation that reflects the uniform view of the Florida appellate courts. That is wrong.

First, Philip Morris says that "*Martin* does not control in federal court" because federal law controls the "the application of inferences." Cross-Appellee's Answer Br. at 28. Philip Morris relies on *Daniels v. Twin Oaks Nursing Home*, 692 F.2d 1321 (11th Cir. 1982), an unusual case in which the Court rejected Alabama's rule against "pyramiding inferences, i.e., that one inference cannot be based upon another." *Id.* at 1323-24. This is not *Daniels*, which concerned a state's general policy towards how a case is proved, i.e., "the sufficiency of the evidence," which is a question of federal law. The rule in *Martin* is about inferences permissible to satisfy an element of a particular state-law claim. *Those* inferences apply in federal court, as they are wrapped up in the substantive state law at issue. *See, e.g.*, *Neff v. Kehoe*, 708 F.2d 639, 642 (11th Cir. 1983) ("But while intent to deceive is an indispensable element of fraud, under Alabama law

the requisite intent may be inferred from a showing that the representations were made recklessly or mistakenly.").[6] To hold otherwise would mean the outcome of a Florida fraud case would depend on whether it was heard in state or federal court, frustrating one of the "twin aims of the *Erie* rule: discouragement of forum-shopping." *Hanna v. Plumer*, 380 U.S. 460, 468 (1965).

Second, Philip Morris argues that *Martin* was wrongly-decided under Florida law. But court after court has cited *Martin* with approval. *See* Cross-Appellant's Br. at 39 n.5 (listing *eight* appellate cases endorsing *Martin*). Nor is *Martin* inconsistent with *Philip Morris USA, Inc. v. Douglas*, 110 So. 3d 419 (Fla. 2013), in particular *Douglas*'s statement that the Phase I findings were inadequate to permit a later jury to consider issues of individual reliance. Each *Engle*-progeny case will have its own fact pattern, which will permit—or rebut—a *Martin* inference. *See, e.g.*, *Duignan*, 2017 WL 5471866, at *2 (discussing evidence that the smoker "smoked because he liked smoking" and that "significant information about the adverse consequences of cigarette smoking . . . specifically was known to [him] from the time he began smoking"). That is all that *Douglas* meant (or required). Philip Morris asks this Court to strain for justifications to disregard state

[6] Philip Morris argues that the Alabama cases *Neff* cited spoke less in the language of inferences than in the elements of the claims at issue. Cross-Appellee's Br. at 28-29. But that is the point: the inferences at issue in *Neff* and *Martin* are inextricable from the substantive law of the case.

law, rather than apply it faithfully.

Third, Philip Morris argues that the Court should disregard *Martin* (and other *Engle* cases cited by Mrs. Berger) on the basis that the rules of law articulated in those cases apply only where the smoker is deceased. *See* Cross-Appellee's Br. at 19 & n.5. But nothing in *Martin* or the many cases citing it with approval suggests such a limitation. *See, e.g.*, *Artis v. District of Columbia*, No. 16-460, slip. op. at 17 n.13 (U.S. Jan. 22, 2018) (rejecting a characterization of a case where "[t]he opinion itself, however, contains nary a hint of any such understanding"); *see also Naugle*, 103 So. 3d at 947-48 (relying on *Martin* in case involving living smoker). In diversity, this Court "must follow the decisions of [] intermediate courts" on questions of state law, absent "persuasive evidence [] that the highest court would conclude otherwise." *Molinos Valle Del Cibao, C. por A. v. Lama*, 633 F.3d 1330, 1348 (11th Cir. 2011).

2. Regardless of *Martin*, the evidence supported a finding that Mrs. Berger relied on Philip Morris advertising.

In this case, Mrs. Berger's reliance on advertising was affirmatively proven. As discussed in Mrs. Berger's brief, her testimony supported findings that she was exposed to Philip Morris advertising; that she smoked Marlboro Lights because they were less "harsh," reflecting false perceptions generated by Philip Morris marketing; and that she smoked Parliaments because of their recessed filter, a proxy for health and safety claims spread through advertising. Cross-Appellant's

Br. at 39-44. Philip Morris simply ignores how the jury could have connected that testimony to specific Philip Morris advertising techniques used in relation to those cigarette brands. *See* Cross-Appellee's Br. at 25-26.

E. There was evidence of causation.

In a footnote, Philip Morris contends that Mrs. Berger did not prove that her reliance caused her injuries. Cross-Appellee's Br. at 23 n.8. The Court should disregard this barely-there argument. *See, e.g., Black Diamond Land Mgmt. LLC v. Twin Peaks Coal Inc.*, 707 F. App'x 576, 581 n.2 (11th Cir. 2017) (finding argument made in passing in a footnote waived, and citing cases).

Regardless, there was ample evidence for the jury to find causation. Evidence connected Philip Morris's fraudulent messaging to Mrs. Berger's decision to begin smoking, to continue smoking despite the Surgeon General's warnings, and to smoke certain brands. *See* Cross-Appellant's Br. at 31-44. And uncontroverted evidence established that smoking Philip Morris cigarettes was the cause of her COPD, a disease that has left her wheelchair-bound and tethered to oxygen, and will shorten and end her life. Trial Tr., Vol. 7 at 1152-53, 1159-60, 1180-82, Vol. 8 at 1285, 1319, Vol. 9 at 1456, 1460.

II. The Court Should Reinstate the Punitive Damages Award.

Whether or not the Court finds sufficient evidence to support Mrs. Berger's intentional tort claims, it should reinstate the jury's punitive damages award. In

this case, the jury was instructed to award punitive damages only on the intentional torts. That instruction was error: under Florida law, Mrs. Berger could be awarded punitive damages upon a showing of liability for negligence and strict liability. *See Soffer*, 187 So. 3d at 1233. Philip Morris contends that the erroneous jury instruction precludes the Court from reinstating the punitive damages award under *Soffer*, and requires the parties and the court to undergo the time and expense of a new trial on punitive damages. Cross-Appellee's Br. at 42-44. That is wrong.

A. The erroneous jury instruction was harmless because punitive damages are based on intentional misconduct, regardless of the underlying tort.

Under Florida law, punitive damages are awarded based on intentional misconduct, regardless of the underlying tort. Accordingly, the jury would have considered the same evidence of Philip Morris's intentional misconduct had it been correctly instructed it could award punitive damages on the negligence and strict liability claims. *See, e.g.*, *Spakes v. Broward Cnty. Sheriff's Office*, 631 F.3d 1307, 1310 (11th Cir. 2011) (harmless error review applied to civil jury instructions).

It was for just this reason that *Soffer* held that *Engle*-progeny plaintiffs can seek punitive damages on negligence and strict liability claims. The Florida Supreme Court explained that, although the jury must find for the plaintiff on a tort, the "legal standard for establishing entitlement to punitive damages . . . does not vary depending on the underlying legal theory." *Soffer*, 187 So. 3d at 1222.

Even "if negligence or strict liability constitutes the underlying cause of action, the plaintiff must prove that the defendant's conduct was so reckless or wanting in care that it constituted a conscious disregard or indifference to the life, safety, or rights of persons exposed to such conduct." *Id.* (internal quotation marks omitted). What the jury evaluates is the nature of the defendant's conduct. *See id*. at 1232.[7]

Indeed, *Soffer* rejected the precise argument Philip Morris makes here. There, the jury found against the plaintiff on the intentional tort claims, and so (unlike here) did not consider punitive damages. *Id.* at 1223. The Florida Supreme Court remanded for a second trial on punitive damages only, explaining that the new jury would be charged with determining whether the defendant was "personally guilty of intentional misconduct or gross negligence." *Id.* at 1233. (citation omitted). In other words, the second jury was permitted to find punitive damages based on intentional misconduct even though the first jury had found *against* the plaintiff on the intentional torts. In so ordering, *Soffer* rejected the same argument Philip Morris makes here, i.e., that Florida law and due process "require[] the same jury to decide intertwined factual issues," and "any punitive award [must] be based on the same conduct underlying the determination of

[7] *Soffer*'s holding and reasoning are firmly rooted in Florida law. *See, e.g., Ault v. Lohr*, 538 So. 2d 454, 456 (Fla. 1989) (holding that "a finding of liability alone will support an award of punitive damages"); *Wackenhut Corp. v. Canty*, 359 So. 2d 430, 435-36 (Fla. 1978) (explaining that punitive damages can be based on "any interpretation of the evidence favorable to the plaintiff").

compensatory liability." Resp't's Br., *Soffer v. R.J. Reynolds Tobacco Co.*, No. SC13-139, 2014 WL 3699535, at *39-40.

B. Reinstating the punitive damages award does not offend due process.

Philip Morris argues that the punitive damages award may not be reinstated consistent with due process. But a due process claim must be supported by more than mere speculation. *See, e.g.*, *Duke v. N. Tex. State Univ.*, 469 F.2d 829, 834 (5th Cir. 1972) (due process claim "must be based on more than mere speculation and tenuous inferences"); *Powers v. Coe*, 728 F.2d 97, 105 (2d Cir. 1984) (due process claim "requires more than mere speculation, it requires a showing that plaintiff has *in fact* been denied his due process rights") (cleaned up).

Philip Morris finds a due process violation in the instruction that the jury base punitive damages on "the specific conduct" underlying the findings "involving fraudulent concealment and conspiracy to fraudulently conceal." Cross-Appellee's Br. at 46. As explained above, Florida law permits—indeed, requires—that the jury consider intentional misconduct when awarding punitive damages, regardless of the underlying torts. Had the jury been asked whether Philip Morris manufactured and sold defective cigarettes with "actual knowledge of the wrongfulness of the conduct and the high probability that injury or damages to [Mrs. Berger] would result" or in a manner "so reckless or wanting in care that it constituted a conscious disregard or indifference to the life, safety, or rights of

persons exposed" to it, *Soffer*, 187 So. 3d at 1233, it would have considered the *same conduct* underlying Mrs. Berger's intentional tort claims, namely, Philip Morris's and its co-conspirators' 50-year effort to mislead smokers about the health effects and addictive nature of cigarettes.

Philip Morris attempts to distill from *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003), and *Philip Morris USA v. Williams*, 549 U.S. 346 (2007), the principle that due process forbids a finding that punitive damages are warranted based on intentional or fraudulent conduct when only non-intentional torts were proved. Cross-Appellee's Br. at 46-48. Neither case carries the weight Philip Morris places on it.

State Farm held that punitive damages cannot be based on a "defendant's dissimilar acts, independent from the acts upon which liability was premised." 538 U.S. at 422. *State Farm* does *not* "prohibit the consideration of potential public harm in addition to the plaintiff's injury," only "the consideration of conduct that is unrelated to the plaintiff's case." *Brand Mktg. Grp. LLC v. Intertek Testing Servs., N.A., Inc.*, 801 F.3d 347, 365 (3d Cir. 2015). *Williams* is simply an application of *State Farm*, and holds that punitive damages may not "inflict[] punishment for harm caused strangers to the litigation." 549 U.S. at 357. Even that overstates its holding: the Court expressly "recognize[d] that conduct that risks harm to many is likely more reprehensible than conduct that risks harm to only a few [a]nd a jury

consequently may take this fact into account in determining reprehensibility." *Id.* Moreover, the jury may consider the "potential harm the defendant's conduct could have caused [] the plaintiff." *Id.* at 354.

Here, the acts involved in manufacturing defective products are not "independent from" or "unrelated to" how those same products were sold. How Philip Morris promoted its cigarettes—lies and concealed truths—and to whom—youths—is inextricably intertwined with its conduct manufacturing and selling those cigarettes. *See, e.g., Tran v. Toyota Motor Corp.*, 420 F.3d 1310, 1313 (11th Cir. 2005) (under Florida law, explaining that "evidence that the product portrayal and marketing created substantial expectations of performance or safety" was relevant to strict liability claim); Dobbs et al., The Law of Torts § 126 (2d ed.) ("The defendant's knowledge of facts that make his act risky may show that the risk was unreasonable on the objective standard because reasonable people with such knowledge would not have taken the risk."). This is a far cry from *State Farm*, in which the plaintiffs, alleging an insurance company's bad faith, introduced evidence of "business practices for over 20 years, [most of which] bore no relation to third-party automobile insurance claims, the type of claim underlying the [] complaint." 528 U.S. at 415.

Additionally, Philip Morris contends that it "did not have the opportunity to present its defenses to an award of punitive damages with respect to the negligence

and strict liability claims." Cross-Appellee' Br. at 48. In the punitive damages phase below, Philip Morris's defense consisted of one corporate witness who testified that Philip Morris was a changed company. Trial Tr., Vol. 17 at 2671-75. The argument that Philip Morris would have put on different proof is "mere speculation," *Duke*, 469 F.2d at 834, because Philip Morris does not identify *any* unique defenses it might have offered.

C. Philip Morris's previous litigation positions preclude its due process claim here.

This problem with the verdict form was not unanticipated. In the master docket below, the plaintiffs proposed a special verdict form, one that asked the jury to award punitive damages separately for the non-intentional torts, intended to avoid the need for retrials if *Soffer* ultimately came down as it did. *See Engle* Doc. 968. Philip Morris vigorously opposed plaintiffs' request and successfully argued to the District Court for the verdict form that was ultimately used in Mrs. Berger's trial below, one that tied punitive damages only to intentional torts. *Engle* Docs. 943 (memorandum), 994 (order).

Philip Morris prevailed making the opposite argument of the one it now advances. It told the District Court that *Engle*-progeny plaintiffs allege that the "same [ ] conduct underlies, and warrants punitive damages on, each of their causes of action, i.e. Defendants' conduct with respect to filtered cigarettes was negligent, resulted in a product that was defective, constituted fraud by

concealment, and reflected a conspiracy to conceal." *Engle* Doc. 943, at 4.[8] This was not "simple error or inadvertence." *Robinson v. Tyson Foods, Inc.*, 595 F.3d 1269, 1285 (11th Cir. 2010). It was a strategic choice. And it worked.

Having prevailed on the position that the conduct underlying the non-intentional and intentional torts was "the same," *Engle* Doc. 943 at 2-3, Philip Morris may not now contend that the conduct is "not the same," Cross-Appellee's Br. at 42. That is improper because of judicial estoppel, which precludes a party from persuading a court to accept one position, then "changing positions according to the exigencies of the moment" to derive an unfair advantage. *See, e.g.*, *New Hampshire v. Maine*, 532 U.S. 742, 749-50 (2001) (citation omitted). It also implicates the doctrine of invited error, which precludes appellate review of an error invited by the complaining party. *See, e.g.*, *United States v. Love*, 449 F.3d 1154, 1157 (11th Cir. 2006). Whatever the nomenclature, there can be no due process violation where Philip Morris is complicit in the circumstances. As the saying goes, Philip Morris made its bed, now it must lie in it.

[8] Philip Morris characterized the underlying conduct as the "same" or "overlapping" *seven* separate times. *Engle* Doc. 943 at 2 (raising the risk of double punishment for the "same conduct."); *id.* at 3 ("overlapping"); *id.* ("same conduct"); *id.* ("same act or omission (and accompanying state of mind)"); *id.* at 4 ("this same alleged course of conduct"); *id.* ("exactly the same conduct underlying two or more claims"); *id.* at 5 ("the same conduct").

D. If the punitive damages award is not reinstated, the Court should remand for a new trial on punitive damages only.

In *Soffer*, the Court ordered a new trial limited to the issue of punitive damages only. 187 So. 3d at 1233-34. That remedy was required because, there, the jury found against the plaintiff on the intentional torts, so there was no punitive damages award to reinstate. Here, the Court may reinstate the punitive damages found by the jury. If, however, the Court declines to do so, Mrs. Berger is still entitled to the remand for a new trial on punitive damages only.

III. *Graham* Forecloses Philip Morris's Due Process Claims Based on the *Engle* Findings.

To the extent the Court's prior ruling in *Walker v. R.J. Reynolds Tobacco Co.*, 734 F.3d 1278 (11th Cir. 2013), left any opening for Philip Morris's due process argument with respect to Mrs. Berger's fraudulent-concealment and conspiracy claims, *Graham* slammed the door shut.

Graham makes clear the dispositive question on this appeal is not whether the Florida Supreme Court's rulings on preclusion in *Engle v. Liggett Grp., Inc.*, 945 So. 2d 1246 (Fla. 2006), and *Douglas*, 110 So. 3d 419, comport with federal common law on res judicata or are even correct as a matter of Florida law, but rather whether they deprived Philip Morris of "notice and an opportunity to be heard so as to avoid an arbitrary deprivation of property." 857 F.3d at 1184. This Court in *Graham* held they did not. That ruling, which "reaffirm[s] . . . *Walker*,"

id. at 1174, fatally undermines Philip Morris's attempt to limit the reasoning of *Walker*, *Douglas*, and *Engle* to strict-liability and negligence claims.

Nothing about *Graham*'s discussion of due process suggests it applies to certain of the approved *Engle* findings but not to others. This Court explained, for instance, that "[t]he Florida courts provided [Philip Morris] notice that the jury findings would establish the conduct elements of the class's claims," and that "the year-long trial provided [Philip Morris] a full and fair opportunity to litigate the issues of common liability in Phase I." *Id.* at 1184 (internal quotation marks omitted). Those "issues of common liability" were adjudicated as to *all* of the claims for which classwide findings were approved, and *Graham* nowhere suggests the constitutionality of affording preclusive effect to the approved findings is subject to claim-specific parcelization. Indeed, *Graham* could not be clearer: "'the Phase I verdict against the *Engle* defendants resolved all elements of the claims that had anything to do with the *Engle* defendants' cigarettes or their conduct.'" *Id.* at 1179 (quoting *Douglas*, 110 So. 3d at 432).

Graham's recognition of the significance, and limitations, of the *Engle* findings was borne out in this case. The Court explained that while the robust procedure allowing Philip Morris to contest common liability in the *Engle* Phase I trial was critical to due process, equally significant are the *limits* of the *Engle* findings. That is, even with those findings, "no tobacco company can be held

liable to any smoker without proof at trial that the smoker belongs to the *Engle* class, that she smoked cigarettes manufactured by the company during the relevant class period, *and* that smoking was the proximate cause of her injury." *Graham*, 857 F.3d at 1185. Regarding fraudulent-concealment claims, for example, individual plaintiffs must prove they relied to their detriment on Philip Morris's concealment or omission of material information concerning the health effects or addictive nature of smoking cigarettes.

Not only did Philip Morris have the opportunity to contest common-liability issues in *Engle*, it vigorously contested, before the jury *in this case*, whether "smoking was the proximate cause of [Mrs. Berger's] injury," *id.* at 1185, including by testing whether Mrs. Berger relied to her detriment on Philip Morris's concealment or omission of material information. Accordingly, not only does Philip Morris misread *Graham* and *Walker*, but also the premise on which its constitutional challenge rests—that the district court relieved Mrs. Berger of the obligation to prove fraudulent concealment and conspiracy—is demonstrably false.

CONCLUSION

For the foregoing reasons, the District Court's decision overturning the jury verdict on fraudulent concealment and conspiracy should be reversed. Regardless, under controlling Florida law, the punitive damages award should be reinstated. If the award is not reinstated, Mrs. Berger requests a remand for a trial on punitive

damages.

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Respectfully submitted,

/s/ *Elizabeth J. Cabraser*

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On February 2, 2018, I electronically filed this document through the ECF system, which will send a notice of electronic filing to all counsel of record.

/s/ *Elizabeth J. Cabraser*