For Publication

IN THE SUPREME COURT OF THE VIRGIN ISLANDS

R.J. REYNOLDS TOBACCO COMPANY, as successor by merger to LORILLARD TOBACCO COMPANY, and LORILLARD, INC., Appellant/Defendant, v. **JEVON GERALD as lawful successor of the ESTATE OF LUCIEN EVANS ENGLAND, SR.,** and **CHRISTIAN BROWN AS THE EXECUTOR OF THE ESTATE OF PATRICE HALE BROWN,** Appellees/Plaintiffs.	**S. Ct. Civ. Nos. 2019-0049** Re: Super. Ct. Civ. Nos. 631/2010 (STT) & 692/2010 (STT) **Consolidated Cases** S. Ct. Civ. No. 2019-0049 S. Ct. Civ. No. 2019-0050

On Appeal from the Superior Court of the Virgin Islands
Division of St. Thomas & St. John
Superior Court Judge: Hon. Michael C. Dunston

Argued: December 8, 2020
Filed: July 7, 2022

Cite as 2022 VI 14

BEFORE: **RHYS S. HODGE**, Chief Justice; **MARIA M. CABRET**, Associate Justice; and **IVE ARLINGTON SWAN**, Associate Justice.

APPEARANCES:

Gregory H. Hodges, Esq.
Chad C. Messier, Esq.
Dudley Newman Feuerzeig LLP
St. Thomas, U.S.V.I.
Attorneys for Appellant,

Jason T. Burnette, Esq.
Michael A. Carvin, Esq. (Argued)
Brian C. Lea, Esq.
Jones Day

Atlanta, GA
Attorneys for Appellant,

Simone R.D. Francis, Esq. (Argued)
Ogletree, Deakins, Nash, Smoak & Stewart, P.C.
St. Thomas, U.S.V.I
Attorney for Appellant,

Gordon C. Rhea, Esq. (Argued)
Mt. Pleasant, S.C.
Attorney for Appellees,

Meredith Lever, Esq.
Public Health Advocacy Institute
Boston, MA
Attorney for Appellees,

Michael D. Weisman, Esq.
Missouri City, TX
Attorney for Appellees,

Dana M. Hrelic, Esq.
Pullman & Comley, LLC[1]
Hartford, CT
Attorney for Appellees,

Brendon P. Levesque[2]
Horton, Dowd, Bartschi & Levesque, P.C.
Hartford, CT
Attorney for Appellees,

J. Russell B. Pate, Esq.
The Pate Law Firm
St. Croix, U.S.V.I.
Attorney for Appellees.

OPINION OF THE COURT

HODGE, Chief Justice.

[1] Dana M. Hrelic, in an October 26, 2021, filing, advised this Court that she has changed her employment from Horton, Dowd, Bartschi & Levesque, P.C. to Pullman & Comley, LLC.

[2] Brendon P. Levesque withdrew his appearance from the above-captioned case on October 26, 2021.

¶ 1 R.J. Reynolds Tobacco Company ("Reynolds") appeals the judgments of the Superior Court issued in this consolidated case involving two separate actions, *Jevon Gerald, as lawful successor of the Estate of Lucien Evans England, Sr. v. R.J. Reynolds Tobacco Company,* ("*Gerald"*) and *Christian Brown, as the Executor of the Estate of Patrice Hale Brown v. R.J. Reynolds Tobacco Company* ("*Brown"*). In *Gerald,* the Superior Court entered judgment on the jury's award of $1 million in compensatory damages and $30 million in punitive damages. In *Brown*, the Superior Court entered judgment on the jury's award of $70 million in compensatory damages and $12.3 million in punitive damages. Both judgments also awarded pre- and post-judgment interest. Each case involved injuries the Appellees[3] claimed to have suffered from smoking cigarettes produced by the Appellant. For the reasons that follow, this Court will reduce the punitive award in *Gerald* and order a new trial on compensatory damages in *Brown.*

I. STATEMENT OF RELEVANT FACTS AND PROCEDURAL HISTORY

¶ 2 This consolidated case involves two plaintiffs who claim injury from smoking Newport cigarettes made by Lorillard Tobacco Company ("Lorillard").[4] Around 1960, at the age of 9 or 10, Lucien Evans England Sr. began smoking the free Newport cigarette samples distributed throughout his family's apartment building. England testified that he was aware of some warnings that cigarettes were hazardous, but initially concluded smoking was safe. He later unsuccessfully attempted to stop smoking multiple times throughout the 1990s. In October 2005, he was

[3] We refer to Brown and Gerald individually when discussing claims unique to each but refer to Appellees when discussing claims relevant to both.

[4] Lorillard Tobacco Company was merged into R.J. Reynolds Tobacco Company in 2015. Therefore, Reynolds is Lorillard's successor by merger, and the named defendant and appellant herein.

diagnosed with laryngeal cancer, after which he successfully quit smoking. *Gerald v. R.J. Reynolds Tobacco Co.*, 68 V.I. 3, 133 (Super. Ct. 2017). Before quitting smoking, England smoked approximately one pack of cigarettes a day for 45 years. In March 2011, England was diagnosed with bladder cancer and died in November 2012. *Id.* at 124.

¶ 3 England filed his initial complaint against Lorillard in 2010. After his death, his adult son Jevon Gerald, as executor of his father's estate, was substituted as plaintiff. Gerald's final amended complaint included the following claims: (1) strict products liability, (2) negligent performance of a voluntary undertaking, (3) negligence, (4) breach of implied warranty of merchantability, (5) fraudulent concealment and misrepresentation, (6) civil conspiracy, (7) wrongful death,[5] and (8) survival claims, as well as for punitive damages.

¶ 4 The second plaintiff, Patrice Brown, began smoking Newport cigarettes in 1960 when she was sixteen years old. She testified she chose to smoke Newport cigarettes after being persuaded by advertisements claiming that Newport cigarettes were feminine, and that the menthol would freshen her breath. She smoked Newport cigarettes until 1976 when she switched to Merit brand cigarettes, which is not manufactured by the Appellant. At the time of switching brands, Brown was smoking two to three packs of cigarettes a day. She testified she was unsure whether cigarettes were hazardous to her health given conflicting publicized medical reports, but she trusted tobacco companies to inform the public if they found cigarettes to be harmful.

¶ 5 In 1984, Brown received a health scare from what turned out to be a misleading chest X-ray. This inspired her to limit her smoking to less than a pack a day, until 1996, when anxiety over her mother's illness caused her to smoke more. After her mother's death in 1997, she quit smoking

[5] This wrongful death claim was withdrawn shortly before trial.

permanently. She was diagnosed with small cell lung cancer in 2008 and died in 2011. (JA 2, 613, 1923.)

¶ 6 Brown filed her initial complaint against Lorillard in 2010. After her death, Brown's adult son and only child, Christian Brown, as executor of his mother's estate, was substituted as plaintiff. He sought to recover under a survival theory for the pain and suffering of his mother, and wrongful death, for his own pain and suffering. The final, amended complaint included the following claims: (1) strict products liability, (2) negligent performance of a voluntary undertaking, (3) negligence, (4) breach of implied warranty of merchantability, (5) fraudulent concealment and misrepresentation, (6) civil conspiracy, (7) wrongful death, and (8) survival claims, and for punitive damages.

¶ 7 The two cases were partially consolidated for trial by court order. The one-month trial began on July 24 and ended on August 24, 2018. Two separate juries were empaneled, but during portions of the trial both juries sat together to hear evidence common to both plaintiffs. The trial was conducted in two phases. Phase I covered liability and compensatory damages, and Phase II covered punitive damages.

¶ 8 During the trial, the respective juries viewed videotaped deposition testimony of Brown and England. Dr. Anthony Biglan, a research scientist specializing in childhood smoking, testified regarding Lorillard's marketing efforts to children. He testified that England and Brown began and continued smoking because Lorillard marketed Newport cigarettes to children. He also testified to Lorillard's practice of handing out free cigarette samples to the public to attract new young smokers. Other witnesses who lived in the same neighborhood of New York City as England, around the same time, confirmed that they, like England, received free samples of Newport cigarettes. Appellees introduced testimony that Lorillard maintained the nicotine levels

"in the sweet spot of addiction" in its Newport cigarettes. Additionally, Lorillard along with other tobacco companies denied that cigarettes cause lung cancer despite independent studies reflecting the contrary. For example, they created and funded the Tobacco Industry Research Committee, which produced research stating that pollution, genetics, or where you lived caused cancer but never addressing directly whether cigarettes caused cancer.

¶ 9 Dr. Joseph DiFranza, a doctor and researcher specializing in addiction, testified regarding the addictiveness of the nicotine in cigarettes. He testified that Brown was addicted from the time she started smoking at age sixteen until she quit in 1997. Similarly, he testified that England was addicted to cigarettes from age ten until he stopped smoking in 2005.

¶ 10 Tobacco historian, Dr. Robert Neel Proctor, testified about the history of the tobacco industry's conspiracy to conceal the risks of smoking. His testimony recounted the ways in which the tobacco industry publicly denied the harmful health effects of smoking, despite internal industry recognition that smoking causes cancer.

¶ 11 Dr. Proctor coined the phrase, "A, B, C: Anything But Cigarettes" to describe the tobacco companies' practice of denying responsibility for the harmful effects of smoking cigarettes and instead placing the blame on other sources.[6] Later at trial, Appellees incorporated Dr. Proctor's "A, B, C: Anything But Cigarettes" motto in their closing arguments to describe Lorillard's past practices, as well as Reynold's defense strategy in the present case.

[6] Dr. Proctor testified: "It means that in the face of evidence, that cigarettes were causing mass harm: lung cancer, emphysema, laryngeal cancer, all different types of cancer. They mounted a campaign to say, no, it's not cigarettes, it's the food you eat, it's air pollution, it's a chemical in the work place, it's your own genetics, even the month in which you were born, it's sunshine, it's something else, A-B-C, anything but cigarettes, and that's the key to their campaign of doubt." (J.A. 1187.)

¶ 12 At the end of Phase I of the trial, both juries found compensatory liability against Reynolds. The *Gerald* jury returned a plaintiff's verdict on the claims for defective design, failure to warn, negligent marketing, fraudulent concealment, fraudulent misrepresentation, and conspiracy. For England's pain and suffering, the jury awarded his estate $1 million for his laryngeal cancer and $1 million for his bladder cancer. However, the jury found that England did not file his laryngeal cancer claim within the required time period. The jury also found that England was negligent in smoking Newport cigarettes and assigned him 40% comparative fault for his injuries.

¶ 13 The *Brown* jury returned a plaintiff's verdict on the claims for defective design, failure to warn, fraudulent concealment, fraudulent misrepresentation, and conspiracy, but did not find Reynolds liable on the negligent marketing claim. The jury awarded the Brown Estate $50 million for her pain and suffering and $20 million to Christian Brown for his pain and suffering and loss of his mother's companionship. The jury also found that Brown was negligent in smoking Newport cigarettes and assigned her 30% comparative fault for her injuries. Both juries also found that the Appellees were entitled to punitive damages because Lorillard had engaged in outrageous and harmful conduct.

¶ 14 Thereafter, Phase II of the trial began, where the Appellees presented a single unified evidentiary case for punitive damages to both juries. Both juries heard testimony that Reynolds placed disclaimers on its website that "cigarette companies intentionally designed cigarettes with enough nicotine to create and sustain addiction." The website also stated that nicotine changes the brain and makes quitting extremely hard. And that these companies intentionally designed cigarettes to be addictive and they controlled the impact and delivery of nicotine. Specifically, the juries saw four advertisements that were designed to attract young people to smoke. Appellees also demonstrated that Reynolds was still employing the same tactics that Lorillard used in the

1950s and 1960s but now with e-cigarettes. E-cigarettes were promoted through celebrities and "claims of independence to glamorize these addictive products and make them appealing to young people." In addition, a forensic accountant testified that Reynolds' net sales for the years 2013-2017 averaged $12.3 million per day. After Phase II of the trial ended, the *Gerald* jury awarded $30 million in punitive damages and the *Brown* jury awarded $12.3 million in punitive damages.

¶ 15 On December 13, 2018, the Superior Court sustained the verdicts of both juries and entered its final judgments. In the *Brown* case, the court awarded damages of $50 million to plaintiff Christian Brown on behalf of the Estate of Patrice Brown and also $20 million to him in his individual capacity, without reducing these awards for comparative fault. The Court awarded prejudgment interest at nine percent per annum from December 6, 2010, the date of filing the complaint until December 13, 2018, the date of the judgment[7] and post-judgment interest at four percent. The judgment also included $12.3 million in punitive damages. In the *Gerald* case, the court entered judgment for $1 million to the Estate of England without reduction for comparative fault, together with prejudgment interest at nine percent per annum from November 10, 2010, the date of filing the complaint until December 13, 2018, the date of the judgment, as well as post-judgment interest at four percent, and punitive damages of $30 million.

¶ 16 Reynolds filed timely post-trial motions to amend or alter the judgments and for a new trial, on January 10, 2019. The Superior Court did not dispose of these motions, and thus they

[7] According to Appellant, prejudgment interest awarded in *Brown* equals $47.82 million, while prejudgment interest awarded in *Gerald* equals $728,000. (Appellant's Br. 16.)

were deemed denied on May 10, 2019. *See* V.I. R. APP. P. 5(a)(4).[8] Reynolds filed timely appeals to this Court on June 6, 2019.[9]

II. DISCUSSION

A. Jurisdiction and Standard of Review

¶ 17 Pursuant to the Revised Organic Act of 1954, this Court has appellate jurisdiction over "all appeals from the decisions of the courts of the Virgin Islands established by local law[.]" 48 U.S.C. § 1613a(d). Title 4, section 32(a) of the Virgin Islands Code vests this Court with jurisdiction over "all appeals arising from final judgments, final decrees, [and] final orders of the Superior Court." Because the Superior Court's December 13, 2018 judgments in each case resolved all of the claims between the parties, they are final judgments within the meaning of section 32(a), thereby conferring jurisdiction on this Court. *Joseph v. Daily News Publ'g Co., Inc.*, 57 V.I. 566, 578 (V.I. 2012).

¶ 18 This Court exercises plenary review over applications of law and reviews findings of fact for clear error. *See St. Thomas–St. John Bd. of Elections v. Daniel*, 49 V.I. 322, 329 (V.I. 2007). Issues of statutory interpretation are reviewed de novo. *Gov't of the V.I. v. Connor*, 60 V.I. 597, 601 (V.I. 2014).

¶ 19 We review the denial of a motion for a new trial, as well as the denial of a motion to set aside a compensatory award as excessive, under an abuse of discretion standard. *See Daley-Jeffers v. Graham*, 69 V.I. 931, 935 & n.6 (2018); *Gasperini v. Ctr. for Humanities, Inc.*, 518 U.S. 415,

[8] "[T]he failure to dispose of any motion by order entered upon the record within 120 days after the date the motion was filed shall constitute a denial of the motion for purposes of appeal." V.I. R. APP. P. 5(a)(4).

[9] The notice of appeal must be filed within 30 days of the expiration of the 120 day period constituting a denial of the motion. V.I. R. APP. P. 5(a)(4).

435 (1996). This Court reviews the constitutionality of a punitive damages award de novo. *See Brathwaite v. Xavier*, 71 V.I. 1089, 1095 (2019); *see also Cooper Indus., Inc. v. Leatherman Tool Grp., Inc.*, 532 U.S. 424, 443 (2001) (instructing that de novo review is the proper standard for appellate review of punitive damages awards).

B. New Trial

¶ 20 Reynolds argues that it is entitled to a new trial in both the *Brown* and *Gerald* cases for several reasons. It contends that the Superior Court committed reversible error in: (1) failing to order new trials based on Appellees' improper closing arguments; (2) failing to order a new trial in *Brown* due to the excessive award of compensatory damages; (3) failing to order a new trial or remittitur based on the unconstitutionally excessive punitive damages award in *Gerald*; (4) refusing to reduce the verdicts to account for the juries' apportionment of fault; and (5) erring in awarding Plaintiffs prejudgment interest. We will address each of Appellant's assertions of error in turn.

¶ 21 Reynolds raised these issues before the trial court in post-trial motions to alter or amend the judgments and for a new trial. The Superior Court never ruled on these motions within 120 days, and they were therefore deemed denied by operation of Rule 5(a)(4) of the Virgin Islands Rules of Appellate Procedure. That the defendants' motions were deemed denied instead of being ruled on, has no bearing on Reynolds' claim that the damages are excessive or that a new trial is warranted. Typically, when the Superior Court issues a discretionary ruling on a matter for which it receives some degree of deference, yet fails to explain the basis for its ruling, this Court will direct the Superior Court on remand to explain its decision so that this Court can later engage in meaningful appellate review. *See Atlantic Human Res. Advisors v. Espersen*, 2022 VI 11, ¶ 61 ("*Espersen*") *(citing In re Q.G.*, 60 V.I. 654, 664 (V.I. 2014) and *Rieara v. People*, 57 V.I. 659,

668 (V.I. 2012)).[10] However, ordering such a remand in this case would be wholly inconsistent with the policy that led to the adoption of Rule 5(a)(4), which is to ensure that "court business is expedited and to prevent cases from lying dormant in the trial court due to failures to rule on post-trial motions that stifle the prompt administration of justice." *Id.* (citing *Companion Assurance Co. v. Smith*, 66 V.I. 562, 569-70 (V.I. 2017)).

¶ 22 Other jurisdictions with similar rules or statutes providing that a motion will be deemed denied for failure to rule, have coalesced around the view that trial courts are presumed to be aware of the law, and thus are aware of the effect of their failure to rule on a motion within the mandated period. Consequently, when asked to review a post-judgment motion that has been deemed denied that would ordinarily be reviewed only for abuse of discretion, appellate courts presume that the trial court was aware of the motion yet chose to exercise its discretion to deny it and apply the traditional abuse of discretion standard of review based on the assumption that the trial court rejected all the arguments in the motion. *See Espersen*, 2022 VI 11, ¶ 62 (citing *Moore v. State*, 309 P.3d 1242, 1246-47 (Wyo. 2013)); *Bridgewater Quality Meats, LLC v. Heim*, 729 N.W.2d 387, 392 (S.D. 2007); *In re Shepard's Estate*, 34 Cal. Rptr. 212, 215-16 (Cal. Ct. App. 1963)). As we recently decided in *Espersen*, we agree with these decisions and we adopt the same rule. *See Espersen*, 2022 VI 11, ¶ 62.

1. Closing Arguments

¶ 23 Reynolds argues that the Superior Court erred in denying its motion for a new trial based on the Appellees' claimed improper closing arguments in Phase I of the trials in both *Gerald* and

[10] On June 1, 2022, pursuant to Virgin Islands Rule of Appellate Procedure 22(i) Appellants brought to this Court's attention our recent opinion in *Atlantic Human Resource Advisors v. Espersen*, 2022 VI 11 as relevant authority on various issues on appeal in this case. On June 6, 2022, Appellees responded to Appellants' notice pursuant to the same rule.

Brown. Reynolds maintains that the improper comments of Appellees' attorney deprived it of a fair trial by inflaming the jury. Reynolds asserts that it "is well established that courts must grant a new trial when a plaintiff's attorney makes remarks that are 'both improper and prejudicial to a substantial right of the defendant.'" (Appellant's Br. 16 citing *United States v. Garcia*, 405 F.3d 1260, 1272 (11th Cir. 2005)). Appellees, on the other hand, argue that their counsels' arguments were firmly grounded in the trial evidence and were responsive to Reynolds' defense and arguments in closing. Appellees also contend that Reynolds is overlooking "the considerable latitude permitted to 'strike hard blows' in closing arguments based on evidence adduced at trial." (Appellees' Br. 15 citing *United States. v. Vaghari*, 500 Fed. Appx. 139, 144 (3d Cir. 2012) (citing *United States v. Young*, 470 U.S. 1, 7 (1985)).

a. Standard for Attorney Misconduct

¶ 24 Virgin Islands Rule of Civil Procedure 59(a)(1)(A)(vi) provides in relevant part that: "The court may, on motion, grant a new trial on all or some of the issues—and to any party—as follows: [for] attorney or party misconduct that undermined the trial." Additionally, Rule 61 provides that to grant a new trial, an error or defect must affect a party's substantial rights.[11] V.I. R. CIV. P. 61. Although we have specified the standard for issuing a new trial because of improper closing

[11] Virgin Islands Rule of Civil Procedure 61 states, in its entirety:

> Unless justice requires otherwise, no error in admitting or excluding evidence—or any other error by the court or a party—is ground for granting a new trial, for setting aside a verdict, or for vacating modifying, or otherwise disturbing a judgment or order. At every stage of the proceedings, the court must disregard all errors and defects that do not affect any party's substantial rights.

arguments in criminal cases, we have yet to apply Rule 59 in a civil context.[12] However, a similar analysis should apply. This Court must assess whether the closing arguments were both improper and prejudicial, meaning that they impacted the substantial rights of a party. *DeSilvia v. People*, 55 V.I. 859, 872 (V.I. 2011); *Gilster v. Primebank*, 747 F.3d 1007, 1010 (8th Cir. 2014); *Whittenburg v. Werner Enters. Inc.*, 561 F.3d 1122, 1127 (10th Cir. 2009) (Gorsuch, J.); *Mills v. Home Depot U.S.A., Inc.*, 131 Fed. Appx. 67, 69 (6th Cir. 2005) (determining whether closing argument warranted a new trial in a civil context is based on whether the argument was both improper and prejudicial).

¶ 25 This is consistent with the standards of courts in other jurisdictions, which when reviewing attorney misconduct in civil trials determine whether the attorney's statements or comments were improper and had a prejudicial effect in the context of the entire trial. *See Gilster*, 747 F.3d at 1010 (determining whether counsel "made improper remarks that were so plainly unwarranted and clearly injurious"); *Whittenburg*, 561 F.3d at 1127 (reviewing attorney's closing argument for impropriety and whether the improper arguments rose "to the high level [of prejudice] required to merit reversal"); *Johnson v. Washington Cnty.*, 518 N.W.2d 594, 600 (Minn. 1994) ("[T]he primary consideration in determining whether to grant a new trial is prejudice."); *Cohen v. Philip Morris USA, Inc.*, 203 So.3d 942 (Fla. Dist. Ct. App. 2016) ("A trial court should grant a new trial based on improper argument if the argument was so highly prejudicial and inflammatory that it denied the opposing party its right to a fair trial."). We agree and conclude that for a new trial to be granted under V.I. Rule of Civil Procedure 59(a)(1)(A)(vi), a party must show that the conduct

[12] In the criminal context, we have decided that "a claim of prosecutorial misconduct during trial requires a court to resolve two questions: whether the prosecutor's comments were in fact improper and, if so, whether the remarks prejudiced the defendant's right to a fair trial." *Monelle v. People*, 63 V.I. 757, 770 (V.I. 2015) (citing *DeSilvia v. People*, 55 V.I. 859, 872 (V.I. 2011)).

complained of was in fact improper and that the improper argument was so highly prejudicial and inflammatory that it denied the opposing party its right to a fair trial.

b. Preserving Improper Arguments for Appellate Review

¶ 26 Before determining whether the questioned closing arguments in the present trials were improper and prejudicial, we must first decide which arguments were adequately preserved for appellate review. *See Espersen*, 2022 VI 11, ¶¶ 47-48. Appellees argue that for this Court to review the closing argument misconduct under an abuse of discretion standard, the arguments must have been properly preserved, and that Reynolds was required to both contemporaneously object to the closing arguments and move for a mistrial. Since Reynolds failed to do both, they argue that Reynolds did not preserve the errors of which it complains and that these arguments can only be reviewed by this Court for plain error. Appellees rely on *Augustine v. People*, 55 V.I. 678 (V.I. 2011) to support their argument.

¶ 27 Appellees are correct that, in principle, *Augustine*[13] supports the contention that when a party objects to improper argument and that objection is sustained, the objecting party must also move for additional curative relief or a mistrial in order to preserve the issue for appeal. *See Companioni v. City of Tampa*, 51 So. 3d 452, 456 (Fla. 2010); *Pheil v. S. Bell Tel. & Tel. Co.*, 412 S.E.2d 609, 610 (Ga. Ct. App. 1991) ("[I]t is well-settled that a sustained objection to improper argument of counsel cannot serve as the basis for reversal unless it is contemporaneous with a

[13] In *Augustine*, a criminal case, the defendant objected to a witness's testimony and the Superior Court sustained the objection and struck it from the record. *Augustine v. People*, 55 V.I. 678, 685 (V.I. 2011). This Court reviewed the issue in *Augustine* only for plain error because the defendant declined the court's offer to give a curative instruction and defendant did not request a mistrial. *Id*. However, *Augustine* does not stand for the proposition advanced by Appellees that *every* objection, regardless of the court's ruling thereon, must be accompanied by a motion for a mistrial in order to preserve the objection for appellate review.

denied motion for mistrial[.]"); *Coats v. Hickman*, 11 S.W.3d 798, 805 (Mo. Ct. App. 1999) ("[W]hen a trial court sustains an objection to improper argument and no further remedial action is requested by the objecting party, no error is preserved for appellate review."). Thus, in a civil trial, when the trial court sustains an objection to improper argument, the objecting party must also move for a mistrial or other curative relief in order to preserve the objection for appeal.

¶ 28 However, if the objection to the improper argument is overruled, there would be no basis to move for a mistrial because the court has ruled that the argument is not improper and nothing else is needed to preserve the issue for appeal. *See Newton v. S. Florida Baptist Hosp.*, 614 S.2d 1195, 1196 (Fla. Dist. Ct. App. 1993) ("If a contemporaneous objection is overruled . . . there is no reason for a party to seek a mistrial . . . . Once the court makes that determination, there is no basis for the court to grant a mistrial, even if a party were to request one."); *Bowers v. Watkins Carolina Exp., Inc.*, 192 S.E.2d 190, 192 (S.C. 1972) ("When the court, in effect, overruled a defendant's objection to the argument, it would have been futile to move for a mistrial based upon the same objection); *Logan v. State*, 773 S.W.2d 413, 415 (Ark. 1989) ("To require [defendant] to move for a mistrial after the [trial] court had already overruled the objection would be to require a vain and useless act, and the law does not require vain and useless acts.").

¶ 29 Finally, if an argument complained of was not objected to during trial, any impropriety will be considered waived unless it affects a party's substantial rights. *See* V.I. R. APP. P. 22(m) ("Issues that were not raised or objected to before the Superior Court . . . are deemed waived for purposes of appeal, except that the Supreme Court, at its option, may notice an error not presented that affects substantial rights."); V.I. R. APP. P. 4(h) ("Only issues and arguments fairly presented to the Superior Court may be presented for review on appeal."); *see also Espersen*, 2022 VI 11, ¶47 (citing *Better Bldg. Maint. of the V.I., Inc. v. Lee*, 60 V.I. 740, 752 n.6 (V.I. 2014)); *St. Thomas-*

St. John Bd. of Elections, 49 V.I. at 335 ("Absent exceptional circumstances, an issue not raised in the trial court will not be heard on appeal."). This Court has further explained that an error may affect substantial rights when it "is so serious and flagrant that it goes to the very integrity of the trial." *Madir v. Daniel*, 53 V.I. 623, 635 (V.I. 2010). However, even then, this Court has discretion on whether it will review for plain error. *Id.*

¶ 30 Although the *Brown* and *Gerald* cases were consolidated, each case ended Phase 1 of the trial with a separate closing argument to each jury. Therefore, we will discuss each closing argument separately.

i. Closing Argument in Gerald

¶ 31 In *Gerald*, Reynolds did not make any objections during the opening closing argument, where (it now claims) Gerald attempted to discredit Reynolds' trial defense by tying it to Dr. Proctor's coined term, "A-B-C, Anything But Cigarettes," which described the alleged history of past fraud by the tobacco companies – Lorillard included. Because these statements were not objected to, claims of error predicated upon them have been waived. *See* V.I. R. APP. P. 4(h), 22(m); *Espersen*, 2022 VI 11, ¶47; *Marsh-Monsanto v. Clarenbach*, 66 V.I. 366, 379-80 (V.I. 2017). Reynolds only objected twice during Gerald's rebuttal closing argument, and these objections were overruled and thus were preserved for appellate review.[14] Therefore, we will only review the following two preserved closing argument statements in *Gerald*:

> Attorney Rhea [Gerald's attorney]: "Attack the victim. Attack the other side. Is that the action that a company would take if it were blameless? If it were innocent or had nothing to hide? I'm gonna get into some details. But let me take a couple of minutes if I could just to bring you back into the big picture because cases are

[14] Reynolds, in its appellate brief, also takes issue with another comment made during Gerald's rebuttal argument, comparing Reynolds' defense to that of a con man. (J.A. 2374.) However, because Reynolds failed to object to this remark, the objection to that argument is waived and not preserved for review on appeal. V.I. R. APP. P. 4(h), 22(m).

> big pictures. We can get lost in the details. The big picture here is what counts. And the big picture here is that cigarettes are a horrific product. They inflict painful debilitating disfiguring diseases." (J.A. 2351-52.)
>
> . . . .
>
> Attorney Rhea: It takes a big man to say I'm sorry. Lucien England did that. One party that you haven't heard accept responsibility . . . One thing we have not heard is the other party, in this case, Lorillard, accept responsibility for its 60 years of lies and the death and suffering it's caused. Who is the bigger man, Lucien England or Lorillard? (J.A. 2380.)

¶ 32 Reynolds argues that Gerald's "attack the victim" and the failure to accept responsibility statements improperly criticized Reynolds for exercising its right to refuse to accept any responsibility for England's injuries and its right to instead offer a valid defense of the lawsuit. "Every individual and entity has the right to mount a non-frivolous defense against allegations of negligence or other misconduct." *Whittenburg*, 561 F.3d at 1129. Likewise, a defendant has no obligation to accept responsibility and may vigorously defend against claims brought against it, and it is improper to attack a defendant at trial for not accepting responsibility. *See R.J. Reynolds Tobacco Co. v. Robinson*, 216 So. 3d 674, 682 (Fla. Dist. Ct. App. 2017) ("A plaintiff may not suggest to the jury that a defendant is somehow acting improperly by defending itself at trial or that a defendant should be punished for contesting damages."); *Cohen*, 203 So. 3d at 948 (holding that suggestions that tobacco companies never admitted guilt and never apologized were egregious and unacceptable).

¶ 33 Generally, courts have considered that arguments disparaging the opposing party for defending itself are likely to divert the jury's attention from issues properly before it. *Sowers v. R.J. Reynolds Tobacco Co.*, 975 F.3d 1112, 1124 (11th Cir. 2020) ("Arguing that it is reprehensible for the defendant you are suing to defend itself serves no proper purpose and can sometimes be the basis for a new trial.") (citing *Whittenburg*, 561 F.3d at 1130). However, the impropriety of an argument needs to be viewed in its context and whether it was invited by the defendant's

remarks during its closing arguments. If it was invited, "the law indulges a liberal attitude toward argument . . . [if] the comment complained of is of fair retort or responds to prior argument of opposing counsel." *Boshears v. Saint-Gobain Calmar, Inc.*, 272 S.W.3d 215, 277 (Mo. App. 2008); *see also Alexander v. Carlisle Corp.*, 674 A.2d 268, 271 (Pa. Super. Ct. 1996) ("When reviewing objectionable remarks made by trial counsel in closing argument, they must not be viewed in isolation, but rather, in the context of opposing counsel's closing argument.").

¶ 34 The "attack the victim" statements came in response to Reynolds' argument that England had a choice in deciding to smoke, that England was responsible for his actions, and that no one put a gun to England's head to make him smoke cigarettes. Reynolds stated in its closing:

> No one put a gun to Mr. England's head and told him to smoke cigarettes, and that's one of the most important reasons that your verdict should be for Reynolds in this case . . . . Mr. England was the one who reached into that pack, pulled out a cigarette and lit it. Warnings don't matter to people who choose not to listen to them. (J.A. 2263-64.)

¶ 35 In effect, Reynolds, in its closing argument, accused England of causing his own death by continuing to smoke its cigarettes. Thus, Gerald was entitled to counter such argument and even hit hard blows in his rebuttal closing as long as the argument was based on the evidence. *See Vaghari*, 500 Fed. Appx. at 144. And based on the evidence in the record, Lorillard planted free cigarettes in housing communities to get African Americans like England addicted to its cigarettes at a very young age and undertook specific efforts to keep him and other consumers addicted by selecting and maintaining addictive levels of nicotine in the cigarettes. It was Gerald's contention that this purposefully and intentionally produced addiction to harmful cigarettes caused England to put cigarettes to his lips and that this act was not a free choice. Therefore, Gerald's "attack the victim" rebuttal, although using language sometimes criticized as improper in other cases, was a

permissible response provoked by Reynolds' arguments.[15] Similarly, it was not improper for Gerald to emphasize that England was willing to accept some responsibility for his continued smoking, praise him for accepting some comparative responsibility for smoking, and point out that Reynolds was the "one party that you haven't heard accept responsibility" for causing the addiction to cigarettes and denying responsibility for the injury caused by its cigarettes. (J.A. 2379-80.) The failure to accept responsibility "for its 60 years of lies and the death and suffering it's caused" statement was a response to Reynolds' argument that it was England who was the one solely responsible for his own illness, injuries and death by continuing to smoke its cigarettes. Gerald's response was justified by ample evidence in the record that Lorillard purposefully caused and maintained England's decades long addiction to its cigarettes and that its deceptive actions were responsible for his continued smoking cigarettes, which caused his cancer and death. *See Boshears*, 272 S.W.3d at 277.

¶ 36 Therefore, we conclude that, in context, the two challenged arguments in Gerald's rebuttal closing argument for which alleged error was preserved by objection did not rise to the level of being so improper as to warrant consideration of their prejudicial effect on the trial, which is required for the granting of a new trial. Any error arising therefrom is thus properly deemed harmless. *See* V.I. R. CIV. P. 61. Even if we were to address that issue, we would conclude that no prejudice occurred to the level that would taint the entire trial and thus, substantially sway the

[15] Gerald may have gone beyond responding to Reynolds' defense by questioning whether Reynolds' actions were those of a blameless party. (J.A. 2352.) That remark appeared to improperly attack Reynolds for contesting exactly what was in dispute at trial – legal causation, comparative fault, and damages. *See Robinson*, 216 So.3d at 682. Regardless, Reynolds has not argued or shown any alleged prejudice because of this remark. Nor do we discern any. The remark was only two sentences in a closing rebuttal argument that spanned 50 transcript pages. *See Whittenburg*, 561 F.3d at 113.

judgment.[16] *Nieves-Villanueva v. Soto-Rivera*, 133 F.3d 92, 102 (1st Cir. 1997). Accordingly, the Superior Court did not abuse its discretion in overruling Reynolds' objections to the challenged statements and in denying its motion for a new trial based on Gerald's allegedly improper closing argument.

ii. Closing Argument in Brown

¶ 37 Unlike the closing arguments in *Gerald*, Reynolds vigorously objected to statements it deemed improper during Brown's initial closing argument. Specifically, Reynolds took issue when Brown's attorney stated: "They want you to believe, in spite of the evidence from reports of numerous other doctors, besides Reynolds' doctors, that Patrice had something called atypical carcinoma, not small cell lung cancer. Dr. Proctor told us Lorillard will build their case around A, B, C, Anything But Cigarettes." (J.A. 2442, Appellant's Br. at 11.) Reynolds argues that Brown continued disparaging its defense by stating: "Dr. Proctor used an acronym to describe Reynolds' defense strategy that they use *in every case* . . . ." Reynolds objected to this argument. (J.A. 2447. Emphasis added.) The Superior Court sustained the objection, but Brown resumed the argument stating: "Dr. Proctor summed up Lorillard's defenses *in this case* in three letters." (J.A. 2447. Emphasis added.) Reynolds again objected and requested a sidebar; the objection was overruled, and the sidebar request was denied. After Brown's attorney concluded the initial closing argument, Reynolds moved for a mistrial, and argued that Brown was impermissibly arguing that "our

[16] For example, during closing arguments, Gerald requested the jury to award "tens of millions of dollars" in damages (J.A. 2227), but the jury only awarded $1 million, a fraction of what was requested. The jury also found in favor of Reynolds in determining that England failed to file his claim for laryngeal cancer within the applicable statute of limitations. Finally, the jury accepted Reynolds' plea and found that England was 40% negligent in smoking Newport cigarettes. (J.A. 2228.) These jury findings indicate that the jury was not swayed by Gerald's alleged improper arguments.

defense of this very case was an example of the conspiratorial conduct that Dr. Proctor described." (J.A. 2464-65.) Reynolds' motion for a mistrial was denied. Since the objection was sustained and Reynolds moved for a mistrial, the objection to these statements was properly preserved for appeal.[17]

¶ 38 Brown's attorney expanded on the A, B, C argument during his rebuttal closing argument stating:

> Now, A, B, C, Anything But Cigarettes, has another meaning. I think of it as also meaning "always blame the consumer," and that's what Lorillard, again, has been doing in this trial. You didn't hear them talk too much about Lorillard. You heard them talk about Miss Brown and how much at fault she was. Well, it's like the con man blaming the sucker." (J.A. 2643.)

Reynolds' attorney objected to this statement arguing that Brown was comparing defense counsel to a con man and stating, "I'm not conning anyone." (J.A. 2643.) The objection was overruled. (JA 2643.) Gerald's attorney continued:

> Attorney Rhea: You're dumb enough to trust me is what the con man said. I did everything possible to prevent you from having a choice. I've addicted you. I've persuaded you that smoking was cool. I helped create a world that you live in where smoking is all around. It helps me sell cigarettes, and you fell for it. Now, you're dying. Too bad you sucker. It's all your fault. (J.A. 2643–44).

Because Reynolds' objection to this portion of the argument was overruled, it was preserved, and we review for abuse of discretion.[18]

---

[17] Brown concedes that objection to this argument was preserved and that these statements may be reviewed under an abuse of discretion standard. (Appellee Br. at 17.)

[18] Reynolds, in its appellate brief, also takes issue with other comments made during Brown's rebuttal argument, including calling Reynolds "a merchant of death, the [sic] profits, by addicting young people," "blam[ing]" the smoker, (J.A. 2611) and Reynolds' failure to "bite the bullet" and accept responsibility. (J.A. 2630.) However, because Reynolds failed to object to these remarks, they are waived and not preserved for appeal. V.I. R. APP. P. 4(h), 22(m).

¶ 39 Reynolds argues that Brown disparaged its defense by improperly linking its trial defense to Dr. Proctor's testimony "of historical fraud, thereby accusing Reynolds' counsel of perpetuating a fraud in court rather than admitting responsibility." (Appellant's Br. 19.) Although a party can legitimately "mold the facts given during trial in the light most favorable to one's client," *James v. People*, 59 V.I. 866, 888 (V.I. 2013), it cannot attack the other party for putting forward a defense. *See Sowers*, 975 F.3d at 1125. Furthermore, a defendant is not required to accept responsibility. *See Phillip Morris USA, Inc., v. Tullo*, 121 So. 3d 595, 598, 601 (Fla. Dist. Ct. App. 2013) (holding that it was improper to suggest that Philip Morris was not "man enough" or "business-like enough" to honor its obligations); *Cohen*, 203 So. 3d at 948 (holding that counsel's remarks during closing arguments "suggest[ing] that tobacco companies never admitted guilt and never apologized and failed to do either during the course of the trial[,]" were "egregious and unacceptable").

¶ 40 We agree with Reynolds that it does not have to accept any responsibility and has the absolute right to aggressively defend against the claims brought against it by Brown. *See id.* However, this is not entirely what Brown was doing in her closing argument. Brown was not attacking Reynolds merely for asserting a defense but was addressing the actual defenses raised by Reynolds against her claims. Brown had the burden of establishing the elements of conspiracy, fraud, negligence and willful or reckless conduct of Reynolds. In order to do so, Brown introduced extensive evidence, including testimony from Dr. Proctor, which established the tobacco companies' conspiratorial actions to conceal the addictive and harmful health effects of smoking cigarettes. And Dr. Proctor introduced the "Anything But Cigarettes" (A-B-C) phrase at trial to describe how Lorillard and other tobacco companies acted to accomplish this. Brown was entitled to reference this evidence during closing argument in relation to Lorillard's *past* fraudulent behavior and *past* failure to accept responsibility as there was evidence that alluded to Lorillard's

knowledge of the harmful effects of smoking that it concealed from consumers and instead attributed all adverse effects to other causes. *See James*, 59 V.I. 866 at 888 ("[T]he cardinal rule of closing argument [is] that counsel must confine comments to evidence in the record and to reasonable inferences from that evidence.").

¶ 41 Likewise, Brown was entitled to use the "Anything But Cigarettes" (A-B-C) description to point out that despite all the evidence at trial from many medical doctors that Brown had small cell cancer, known to be caused by cigarettes, Reynolds' defense in her case was to continue its denial and blame her cancer on a different cancer (atypical carcinoma), not known to be caused by cigarettes. While we recognize that Reynolds has the absolute right to contest the cause (and form) of the cancer and that the constant use of Dr. Proctor's "A-B-C's" testimony could result in casting its valid defenses as a continuation of Reynolds' historical fraud, holding that such argument was automatically improper would impede a plaintiff from being able to properly contradict and contest a defendant's defense claims. Just as a defendant is entitled to present a defense, a plaintiff is also entitled to respond to that defense as long as the arguments are rooted in the evidence. *Sowers*, 975 F.3d at 1125.

¶ 42 Based on a pretrial motion *in limine* filed by Reynolds to preclude such arguments, the trial court was fully cognizant of the potential for improper argument attacking the defendant for not accepting responsibility or for merely putting on a defense, and the court was prepared to address objections on these issues as they arose.[19] Consistent with its pretrial ruling, when Brown failed

[19] In its ruling on the motion *in limine*, the court stated:

> While the Court agrees that argument that the defense of this lawsuit, in and of itself, is a basis for imposing liability or damages that Defendant has failed to apologize for its conduct would both be improper, the issue of whether Reynolds historically refused to admit proven harm caused by particular conduct is

to restrain its argument and attacked how Reynolds defended *every* case, (J.A. 2447), the Superior Court properly sustained Reynolds objection and when Brown thereafter modified the argument to refer to Reynolds' defense in *this* case, Reynolds' renewed objection was overruled. These rulings demonstrate that the trial court carefully monitored the use by the Appellees of the alleged historical fraud of Lorillard in the *Brown* case. Thus, the court did not abuse its discretion in overruling Reynolds' objection. *See e.g.*, *Sowers,* 975 F.3d at 1125 (trial court properly overruled tobacco company's objections because the closing argument was criticizing the substance of the company's defense, and not the fact of its defense); *Cote v. R.J. Reynolds Tobacco Co.*, 909 F.3d 1094, 1105 (11th Cir. 2018) (finding that trial court properly overruled objection and "instructed counsel to make clear that [he was] talking about past history and conduct that the defendant engaged in the past.").

¶ 43 Likewise, Brown's comparison of Reynolds blaming the consumer to a con man blaming the sucker during her rebuttal closing, while possibly objectionable, was also not clearly an improper argument. "[C]losing argument need not, nor should, be a sterile exercise devoid of passion . . . . Counsel may 'resort to poetry, cite history, fiction, personal experiences, anecdotes, biblical stories or tell jokes.'" *Whittenburg*, 561 F.3d at 1133 (quoting Jacob Stein, Closing Arguments, §1:14 (2d ed. 2005)). Brown's con man statement came during her rebuttal closing argument in response to Reynolds' closing argument that Brown's cancer was not caused by smoking cigarettes, that Brown made the choice to put the cigarette to her lips, and that "she enjoyed smoking and no one put a gun to her head and made her smoke." (J.A. 2575.) Brown

---

> permissible. The Court will permit fair argument, but it will not permit inflammatory appeals to sympathy or outrage.

J.A. 168–69.

retorted with an appropriate, though unflattering, comparison to the con man blaming the sucker example, in light of the overwhelming evidence established at trial that Lorillard was aware that smoking cigarettes caused cancer but had engaged in fraudulent and deceptive behavior by hiding the known – and purposefully intended and achieved – addictiveness and true health risks of smoking its cigarettes, resulting in Brown's continued addiction to and use of its cigarettes; but now that she has developed cancer, it was her fault for relying on its deception. The con man comparison was therefore an appropriate rebuttal argument and the characterization was supported by the evidence.

¶ 44 Reynolds also argues that the con man comparison was an *ad hominem* attack on it and its attorney. An *ad hominem* attack occurs when counsel attacks a party's or opposing counsel's character or morals. *R.J. Reynolds Tobacco Co. v. Gafney*, 188 So. 3d 53, 59 (Fla. Dist. Ct. App. 2016); *see also Whittenburg*, 561 F.3d at 1130 ("[I]t is not the function of closing argument to debase, degrade or impugn the veracity of a litigant or opposing counsel.") (internal quotation marks omitted); *Draper v. Airco, Inc.*, 580 F.2d 91, 96 (3d Cir. 1978) (finding that "repeated vituperative or insulting references to defendants and defendants' counsel" were improper). In viewing Brown's overall closing arguments, including the argument comparing Reynolds' defense of the causation of the cancer to that of a con man blaming the victim, the various expressions cannot be regarded as an *ad hominem* attack on Reynolds' attorney or as insinuating that Reynolds' own counsel was personally engaged in a conspiracy with defendant to mislead the jury.[20] Nor

[20] It is generally established that corporations must be represented by counsel in court proceedings. *See Rowland v. Cal. Men's Colony*, 506 U.S. 194, 202 (1993) ("[A] corporation may appear in the federal courts only through licensed counsel.") (citations omitted); *Downtown Disposal Servs. v. City of Chi.*, 979 N.E.2d 50, 54 (Ill. 2012). In legal proceedings, it is counsel's duty to advance arguments in support of their client's position. When opposing counsel addresses or refers to these

does Reynolds' counsel's statement "I am not conning anyone" in his objection transform this argument into an unacceptable *ad hominem* attack on counsel. *See Gafney*, 188 So. 3d at 58. Instead, Brown was making a permissible argument based on analysis of the evidence of Lorillard's conduct in promoting its cigarettes to minors such as Brown, getting and keeping her addicted, and being fully aware of the health dangers of cancer and observing that when Brown became afflicted with cancer its response was to blame her for continuing smoking its product and developing cancer, in the same way as a con man would. Although characterizing a part of Reynolds' defense in terms of a "con man" carries a sinister connotation and would be better to avoid in most contexts, it was nevertheless a permissible analogy in describing the evidence of Reynolds' conduct and was therefore not an *ad hominem* attack.[21] *See, e.g.*, *Craig v. State*, 510 So. 2d 857, 865 (Fla. 1987) (finding that prosecutor's closing argument remarks characterizing defendant himself as being a "liar" did not exceed the bounds of proper argument in view of the record evidence); *Murphy v. Int'l Robotic Sys., Inc.*, 766 So. 2d 1010, 1029 (Fla. 2000) ("If the evidence supports [a] characterization, counsel is not impermissibly stating a personal opinion about the credibility of a witness, but is instead submitting to the jury a conclusion that reasonably may be drawn from the evidence."); *Forman v. Wallshein*, 671 So. 2d 872, 874 (Fla. Dist. Ct. App. 1996) (finding that counsel's closing argument characterization of plaintiff as being a liar was not

---

arguments during closing argument, the remarks do not become an improper *ad hominem* attack. *See United States v. Kravchuk*, 335 F.3d 1147, 1154 (10th Cir. 2003) (stating that calling a defendant a liar is improper but that it is not per se improper to refer to testimony as a lie); *Hayes v. SkyWest Airlines, Inc.*, 401 F.Supp.3d 1194, 1203 (D. Colo. 2019) (arguments as to the believability of the positions counsel advanced in support of his client's position are not an improper *ad hominem* attack).

[21] We, however, caution counsel to be vigilant in crafting their closing arguments to avoid denigrating the defendant's defense. *Tullo*, 121 So. 3d at 602.

improper where "there was an ample evidentiary basis on which to dispute the credibility of the plaintiff"); *but see R.J. Reynolds Tobacco Co. v. Neff*, 325 So. 3d 872, 882 (Fla. Dist. Ct. App. 2021) (finding that it was improper to compare Reynolds' counsel as a "scoundrel"). Thus, although the closing arguments of Brown's counsel utilized arguments questioning Reynolds' defense tactics, emphasized its failure to apologize and used degrading characterizations, those arguments were tethered to the evidence of record and were not so outrageous as to amount to improper closing.

¶ 45 Having concluded that the closing argument in *Brown* was not clearly improper, we need not evaluate the prejudicial effect of the closing arguments on the verdict.[22] The claimed objectionable arguments do not fit the character or rise to the objectionable level of the closing arguments found in cases justifying the granting of a new trial. See *Whittenburg*, 561 F.2d at 1128 (plaintiff's counsel read an imaginary letter about the plaintiff's children and the defendant's conduct, which was not based on any evidence adduced at trial); *Robinson*, 216 So. 3d at 682 (stating that plaintiff's argument that the tobacco company's failure to take responsibility was similar to the banking industry's strategy during the financial crisis did more to stir up the jury's imagination than draw a reasonable inference based on the record evidence); *Cohen*, 203 So. 3d at

[22] While we conclude that the trial court did not abuse its discretion in refusing to grant a new trial in *Brown* based on Brown attorney's closing arguments, we nevertheless conclude *infra*, that the jury awarded grossly excessive compensatory damages in *Brown* that were not supported by the evidence and that prejudice can be presumed from the size of the verdict. *See Veitch v. S. Ry. Co.*, 126 So. 845, 846 (Ala. 1930); *see also Allen v. Lindeman*, 148 N.W.2d 610, 619 (Iowa 1967); *Gilster*, 747 F.3d at 1012; *Robinson*, 216 So. 3d at 683 (holding that the unprecedented punitive verdict was evidence of the prejudice caused by improper comments). Had we concluded that the objected to closing arguments were improper and proceeded to evaluate the prejudicial effects of those improper remarks, we might well have concluded that the improper closing contributed to the grossly excessive compensatory damages verdicts rendered in *Brown*.

946 (plaintiff's counsel made broad and vague statements about the tobacco defendant's failure to accept responsibility for a large list of faults that were not linked to evidence in the record).[23] Therefore, the Superior Court did not abuse its discretion in denying Reynolds' motion for a new trial on the basis of improper closing argument by Brown's attorney.

C. The Compensatory Damages Awarded in *Brown*

¶ 46 Reynolds argues that the $70 million in compensatory damages awarded in *Brown* is excessive for the following reasons: (1) the award is much larger than amounts awarded in similar cases, (2) the jury was improperly swayed by Brown's erroneously admitted diary excerpts, (3) the *Gerald* and *Brown* cases were erroneously consolidated exposing the *Brown* jury to inflammatory *Gerald*-only evidence, and (4) the award violates its due process rights. (Appellant's Br. 23-32.) Reynolds requests a new trial, or at minimum, a reduction of the *Brown* compensatory awards. Appellees counter that the Virgin Islands does not allow the use of remittitur, thus rendering most of Reynolds' arguments moot; that the award is not excessive given Ms. Brown's and her son's excruciating suffering; and that no federal cases have found compensatory damages awards excessive on due process grounds. Before considering Reynolds' damages-related claims,

[23] Additionally, the *Brown* jury found her 30% negligent in smoking Newport cigarettes, indicating that the jury carefully evaluated the issue of liability. (J.A. 217). And while no curative instruction was requested by Reynolds, the court instructed in its final instructions that counsel's arguments are not evidence and that "those arguments may be accepted or rejected as [the jury] see fit". (J.A. 2664.) The Superior Court also instructed that "[a]ctions taken to defend against litigations, no matter how vigorous, or requests for legal advice, cannot, without more, form the basis of liability in this case." (J.A. 2662.) We assume juries follow instructions and that the jury did not hold Reynolds liable because of its defense of the case or for failing to accept responsibility. *See Frett*, 66 V.I. at 413 ("This court must assume that juries for the most part understand and faithfully follow instructions.").

we will first consider the state of Virgin Islands law with respect to judicial review of damage awards rendered by a jury.

¶ 47 As we recently recounted in *Atlantic Human Resources Advisors v. Espersen*. 2022 VI 11, ¶¶ 47-54, this Court has previously declined to recognize the remittitur remedy, a reduction of a jury's compensatory damages award by the judge combined with a conditional new trial. *Antilles Sch., Inc. v. Lembach*, 64 V.I. 400, 437-38 (V.I. 2016). The Court based its rejection of remittitur on the fact that it could not recognize additur[24] and long-standing deference to jury determinations on matters of fact. *Id*. at 433.

¶ 48 While *Antilles School* rejected the remittitur remedy, that decision had no effect on the judicial standard of review of motions for a new trial, as it was limited to motions for a new trial predicated on remittitur. This Court acknowledged that challenges to a damages award on grounds other than remittitur, such as claims "that the evidence is insufficient to support the jury's damages award," that the verdict is against the weight of the evidence, or that "the damages awarded by the jury are so excessive as to violate the Due Process Clause of the Fifth or Fourteenth Amendments to the United States Constitution," remained permissible. 64 V.I. at 438.

¶ 49 Prior to *Antilles School*, Virgin Islands courts required that in evaluating whether an award is so excessive as to justify a new trial, the court must "find that no rational jury, acting on the basis of the full evidentiary record, and without being inflamed by passion or prejudice or other improper consideration, could have awarded such a large sum as damages." *Creative Minds, LLC*

[24] The U.S. Supreme Court abolished additur in *Dimick v. Schiedt*, 293 U.S. 474, 484-85 (1935). Unlike the Virgin Islands, states are not subject to the Seventh Amendment, and many have chosen to retain additur. *See* Irene Deaville Sann, *Remittiturs (and Additurs) in the Federal Courts: An Evaluation With Suggested Alternatives*, 38 CASE W. RES. L. REV. 157, 164 n.25 (1988) (collecting cases).

v. Reef Broad., Inc., 2014 WL 4908588, at *11 (V.I. Super. Ct. 2014) (unpublished); *Thomas Hyll Funeral Home, Inc. v. Bradford,* 233 F. Supp. 2d 704, 708–09 (D.V.I. App. Div. 2002); *Shillingford v. V.I. Port Auth.*, 2006 WL 8418677, at *4 (V.I. Super. Ct. Sept. 8, 2006) (unpublished) ("A trial judge must be extremely reluctant to interfere with the power of a jury to assess damages, and a verdict will not be set aside unless it is clear to the court that the decision of the jury was the product of passion, prejudice or otherwise irrational behavior."); *Henry v. Hess Oil V.I. Corp.*, 33 V.I. 163, 171 (D.V.I. 1995) ("The mere fact that the judge believes the jury to be unduly generous is not sufficient to warrant a new trial or remittitur. Rather, the judge must find that no rational jury, acting on the basis of the full evidentiary record, and without being inflamed by passion or prejudice or other improper consideration, could have awarded such a large sum as damages.") (citations omitted); *see also Gumbs v. Pueblo*, 823 F.2d 768, 773 (3d Cir. 1987). *Antilles School* did not change this standard and it recognized that the Seventh Amendment as well as the public policy of the Virgin Islands, "express[] a strong policy preference for civil cases to be adjudicated by a jury rather than a judge," and that judges should not be permitted to usurp the role of the jury by "having the final word on damages . . . not because the damages award was legally insufficient . . . but simply because the court thinks that the verdict is too large." 64 V.I. at 437 (internal quotation marks omitted).

¶ 50 In addition, Rule 59(a)(1)(A)(iv) of the Virgin Islands Rules of Civil Procedure supports this conclusion, providing that the court may grant a new trial on some or all of the issues presented if the damages are excessive or inadequate. *See In re Adoption of the Virgin Islands Rules of Civil Procedure*, S. Ct. Prom. Order No. 2017-001 (V.I. Apr. 3, 2017). The Advisory Committee Comment to Rule 59(a) further explains that "[w]hile remittitur is not valid in the Virgin Islands, subpart (a)(iv) is retained to allow for other non-remittitur defects to be remedied." Therefore,

while Virgin Islands courts should avoid displacing the factfinding of the jury, when called upon, the court must examine a jury's damages award for excessiveness or inadequacy and set aside the verdict and grant a new trial where appropriate. *See Espersen*, 2022 VI 11, ¶¶ 51-52; *Gumbs*, 823 F.2d at 772 (citing *Murray v. Fairbanks Morse*, 610 F.2d 149 (3d Cir.1979)). Courts in jurisdictions with similar rules have adopted a similar interpretation. *See e.g., Quick v. Crane*, 727 P.2d 1187, 1197 (Or. 1986) ("[If] the trial judge discovers that his determination of damages is so substantially different from that of the jury that he can only explain this difference as resulting from some unfair behavior, or what the law calls 'passion or prejudice,' on the part of the jury against one or some of the parties, then he should grant a new trial."); *see also Thomas Hyll Funeral Home*, 233 F. Supp. 2d at 708–09 ("Virgin Islands courts have found that under Rule 59, a trial court's finding that the verdict is against the weight of the evidence is grounds for a new trial."). As the United States Supreme Court has explained, American courts have a long history of reviewing the amount of jury awards and inferring "passion, prejudice, or partiality from the size of the award." *Honda Motor Co. v. Oberg*, 512 U.S. 415, 425-26, (1994). Such courts have ordered a new trial when juries award outrageous damages. *Id.* We similarly approved such remedy in *Atlantic Human Resources Advisors v. Espersen*, 2022 VI 11, ¶ 56 (noting that "it remains proper for a court to set aside a jury verdict because it is excessive, inadequate, or otherwise against the weight of the evidence. The reason is to protect litigants and the judicial process from so-called 'invisible error,' that is, 'error that arises from improper jury decision-making that hides behind the shroud of deliberative secrecy.'").

¶ 51 Translating emotional pain and suffering into a monetary award is something particularly within the responsibility of a jury. Such awards are highly subjective and should be committed to the discretion of the jury. *See Eich v. Bd. of Regents for Cent. Missouri State Univ.*, 350 F.3d 752,

763 (8th Cir. 2003). But just because it may be difficult to determine whether damages for emotional distress are excessive, does not mean courts should not review them. Such review should be restrained, however, and the jury's findings must be given significant weight and deference.

¶ 52 As an appellate court, our review is more limited than that of the trial court, and we review the trial court's denial or grant of a motion for a new trial only under an abuse of discretion standard. This is because "[t]he trial court is in a far better position to weigh the demeanor, credibility, and testimony of witnesses, and the persuasiveness of all the evidence." *Quick*, 727 P.2d at 1198. Moreover, when reviewing the denial of a motion for a new trial, we will review the trial court's decision with even more deference than when the motion is granted. *See Philip Morris USA Inc. v. Danielson*, 224 So. 3d 291, 293 (Fla. Dist. Ct. App. 2017). With these principles in mind, we review the compensatory damages awarded by the jury in *Brown*.

1. Excessiveness of the compensatory damage awards in Brown

¶ 53 Reynolds claims that the *Brown* compensatory damage award is excessive and not supported by the evidence. It does so by comparing the *Brown* non-economic compensatory awards to non-economic damages awards in similar cases in other jurisdictions. Brown argues that the cases Reynolds cites for comparability are inapposite because those cases come from states that use the "shocks the judicial conscience test" in determining excessiveness of jury verdicts, which Brown claims was rejected by this Court in *Antilles School*, and that those states recognize remittitur, which the Virgin Islands does not. Furthermore, Brown argues that inferring juror partiality from the size of verdicts is just an argument for remittitur in disguise. (Appellee's Br. 34.). Brown also argues that jury passion is not a basis for finding insufficiency of the evidence under *Antilles School*.

¶ 54 Although we agree that a damages award by a jury in any case should be evaluated on its own facts, we nevertheless recognize that comparability analysis of similar cases can be a useful tool that a court may employ in determining whether an award is excessive. *See Gumbs*, 823 F.2d at 773 ("Although we do not rely on verdicts in other cases to determine whether the verdict in this case is excessive, the rationale of the court in determining the excessiveness of verdicts with comparable injuries offers us some guidelines"); *Trainor v. HEI Hosp.*, LLC, 699 F.3d 19, 32–33 (1st Cir. 2012); *see also Nairn v. Nat'l R.R. Passenger Corp.*, 837 F.2d 565, 568 (2d Cir. 1988) (holding that each judgment depends on a unique set of facts, but that looking at awards in cases involving similar injuries is useful); *R.J. Reynolds Tobacco Co. v. Webb*, 93 So. 3d 331, 336 (Fla. Dist. Ct. App. 2012) ("In reviewing an award of damages for excessiveness, the court may consider the philosophy and general trend of decisions in comparable cases."); *Smith v. Katz*, 2013 WL 1182074, at *14 (D.V.I. 2013), *aff'd*, 696 Fed. Appx. 582 (3d Cir. 2017) ("A mainstay of the excessiveness determination is comparison to awards for similar injuries.") (citing *Salinas v. O'Neill*, 286 F.3d 827, 830 (5th Cir. 2002)).

¶ 55 We also disagree with Brown's argument that such comparability analysis is merely remittitur in disguise. As explained above, *Antilles School* should be read as having no effect on the law relating to motions for a new trial other than banning the judicial remedy of remittitur. While this Court rejected remittitur, it preserved the remedy of a new trial for excessive or inadequate verdicts rendered against the great weight of the evidence. Looking to awards in other cases for factually similar injuries, while not determinative, can help inform a court's decision in determining whether a jury's verdict is against the great weight of the evidence. *See Wakefield v. United States*, 765 F.2d 55, 59-60 (5th Cir. 1985) (comparison with other awards could serve as a point of reference in determining an award's excessiveness); *Lampley v. Onyx Acceptance Corp.*,

340 F.3d 478, 483-84 (7th Cir. 2003) ("When assessing the propriety of compensatory damages award, relevant inquiries may include . . . whether the award is roughly comparable to awards in similar cases.").

¶ 56 Many of the cases Reynolds cites for comparison are similar tobacco cases from the state of Florida, which recognizes and applies the remittitur remedy. However, Florida's standard for reviewing excessive jury verdicts is similar to the weight of the evidence standard employed by courts in this jurisdiction. Florida courts have explained that:

> [a]n award of damages may not be declared excessive merely because it is above the amount which the trial court itself may believe the jury should have awarded. . . . The verdict should be disturbed only when it is so inordinately large as obviously to exceed the maximum limit of a reasonable range within which the jury may properly operate.[25]

Philip Morris USA, Inc. v. Ledoux, 230 So. 3d 530, 539 (Fla. Dist. Ct. App. 2017). This is similar to the standard expressed in the Virgin Islands cases. *See Gumbs*, 823 F.2d at 772 ("Nevertheless, there is a limit beyond which an appellate court must reverse an award as grossly excessive."); *Creative Minds, LLC*, 2014 WL 4908588, at *11 ("The judge must find that no rational jury, acting on the basis of the full evidentiary record, and without being inflamed by passion or prejudice or other improper consideration, could have awarded such a large sum as damages."). Regardless of the exact language used, these standards, "passion and prejudice," "gross excessiveness," or whether the verdict was "against the great weight of the evidence," are all rough equivalents of the question whether "no rational trier of fact" could have reached the same verdict. *Honda Motor Co. v. Oberg*, 512 U.S. 415, 432 n.10 (1994).

[25] In determining whether an award exceeds a reasonable range of damages, Florida considers, among other criteria, whether the award was indicative of prejudice, passion or corruption. *See R.J. Reynolds Tobacco Co. v. Townsend*, 90 So.3d 307, 311 (Fla. Dist. Ct. App. 2012).

¶ 57 Here, the jury awarded Brown's estate $50 million for her pain and suffering. Based on the evidence presented at trial, Brown was diagnosed with small cell lung cancer in 2008 and was given only six months to live. She surpassed the six-month prognosis and lived for an additional two and half years with the effects of her cancer. Brown's pain and suffering, while substantial, does not appear to be significantly different from that of other smokers who developed small cell lung cancer and endured its painful effects for approximately three years.[26]

¶ 58 For Brown's son, Christian, the jury awarded $20 million for his pain and suffering and loss of his mother's companionship. Christian was Brown's only child, who she raised as a single parent, and they were extremely close; she was the person he contacted when he needed advice. They spoke on the phone practically every day. Although Christian was close to his mother, he only visited her on St. Thomas three to four times between 2005 and 2011. He lived in California with his wife and children, a far distance from his mother in the Virgin Islands. Christian was also not actively involved in caring for his mother during her illness. It was Brown's partner who was her primary caregiver. Nor did Christian accompany her to medical treatments in New York. Christian was not present with his mother on St. Thomas when she passed away.

[26] Brown underwent courses of radiation and chemotherapy for five months. (J.A. 1950-51.) However, she decided to stop treatments as it was ineffective, and she felt it was poisoning her body. *Id.* In the early stages of her cancer diagnosis and treatment, Brown remained active, took walks on the beach, and went out to restaurants. A year before her death she started experiencing increasing levels of pain and for which she took medication. Her capacity to stay active deteriorated; her bones hurt, and she could barely tolerate being touched. She started experiencing shortness of breath and limited her outings as she didn't have the energy. Her vision also began to deteriorate. Two months before her passing, she became bedridden and required assistance feeding and bathing herself. *See e.g., Whiteley v. R.J. Reynolds Tobacco Co.*, No. A119345, A121027, 2009 WL 3299595 (Cal. Ct. App. Oct. 14, 2009) (unpublished) (affirming jury award of $2.3 million for wrongful death of plaintiff who lived two years after being diagnosed with lung cancer).

¶ 59 Reynolds points out that, if affirmed, the $50 million award for Brown's estate would be the highest ever compensatory award in the nation in a tobacco death case. *See, e.g.*, *Boeken v. Philip Morris, Inc.*, 26 Cal. Rptr. 3d 638 (Cal. Ct. App. 2005) (affirming a $5.5 million compensatory damage award); *R.J. Reynolds Tobacco Co. v. Townsend*, 90 So. 3d 307, 311 (Fla. Dist. Ct. App. 2012) (affirming a $5.5 million compensatory damage award, reduced from $10.8 million for comparative fault); *Lorillard Tobacco Co. v. Alexander*, 123 So. 3d 67, 70 (Fla. Dist. Ct. App. 2013) (affirming $8 million award, reduced from a $20 million award after remittitur and apportionment); *R.J. Reynolds Tobacco Co. v. Smith*, 131 So. 3d 18, 18 (Fla. Dist. Ct. App. 2013) (per curiam) (affirming a $7 million compensatory award); *Philip Morris USA, Inc. v. Cuculino*, 165 So. 3d 36, 39-40 (Fla. Dist. Ct. App. 2015) (affirming $5 million compensatory award); *Philip Morris USA Inc. v. Boatright*, 217 So. 3d 166, 170 (Fla. Dist. Ct. App. 2017) (affirming a $12.5 million award); *Evans v. Lorillard Tobacco Co.*, 990 N.E.2d 997, 1037-38 (Mass. 2013) (affirming $25 million award, reduced from the jury's award of $50 million after remittitur).[27] The $50

[27] Brown argues that we should compare this award to the non-tobacco case *Munn v. Hotchkiss Sch.*, 165 A.3d 1167, 1186 (Conn. 2017) (reinstating jury verdict and reversing remittitur to $10 million on award of $41.5 million of which $31.5 million was for noneconomic damages). In addition, after oral arguments, pursuant to Virgin Islands Rule of Appellate Procedure 22(i) Brown brought to this Court's attention the Pennsylvania case *A.Y. v. Janssen Pharms. Inc.*, 224 A.3d 1, 29 (Pa. 2019), re-argument denied (Jan. 30, 2020), appeal denied sub nom., *Yount v. Janssen Pharms. Inc.*, 238 A.3d 341 (Pa. 2020), and cert. denied, 141 S. Ct. 2658 (2021) (upholding non-economic award of $70 million). *Munn* involved a young plaintiff who suffered a serious brain injury and *A.Y.* involved a young plaintiff who suffered from gynecomastia. *Munn*, 165 A.3d at 1187-90; *A.Y.*, 224 A.3d at 29. Because both plaintiffs suffered permanent injuries at young ages and would experience pain and suffering from these injuries for many years, we do not consider these cases comparable to the case before us.

million compensatory damages verdict to Brown also appears to be one of the largest such Virgin Islands tort jury awards.[28]

¶ 60 In addition, to the comparison of cases from other jurisdictions, we have in this very trial a more relevant comparison in the companion *Gerald* case. Both the *Brown* and *Gerald* cases involve two smokers who began smoking the same brand of cigarettes, Newport, at approximately the same time in 1960, at young ages, 9 or 10 for England and 16 for Brown. Both smoked cigarettes for many decades before being diagnosed with cancer, in 2005 and 2011 for England and 2008 for Brown. Both Brown and England were ashamed of what their day-to-day lives had become. For example, Brown became bedridden, could barely talk or see, and required assistance in feeding and bathing herself. Similarly, England discussed how he felt he was in good shape before being diagnosed with cancer but later could only go to the bathroom using a colostomy bag

[28] The following is a non-exhaustive list of reported Virgin Island jury compensatory damage awards above $1 million for tort injuries: *Feuerstein v. Simpson*, No. CV 04-134, 2013 WL 5431723, (D.V.I. Sept. 30, 2013) (unpublished), *aff'd*, 582 Fed. Appx. 93 (3d Cir. 2014) (jury award of $6.6 million in compensatory damages for defamation, remitted to $1.175 million); *Abdulghani v. Virgin Islands Seaplane Shuttle, Inc.*, 746 F. Supp. 583, 584 (D.V.I. 1990) (jury awarded $5.5 million for plane crash personal injury, which court reversed and remanded for new trial); *Matta v. Majestic Const., Inc.*, No. ST-07-CV-109, 2011 WL 3855463, at *1 (V.I. Super. Ct. July 26, 2011) (unpublished) ($4.7 million award of which $1 million was for noneconomic losses, later reversed as to portion of award related to future damages); *Constable v. Kmart Corp.*, No. CV 936/1995, 2000 WL 36724497 (Terr. V.I. July 26, 2000) (Cabret, J.) (unpublished) ($2.9 million award for pain and suffering from fall, vacated and remanded for new trial); *Antilles Sch., Inc. v. Lembach*, 64 V.I. 400, 408 (V.I. 2016) (upholding $1.5 million award for pain and suffering from fall); *Wycoff v. Gabelhausen*, 2018 WL 1527826 (D.V.I. 2018) (unpublished) ($1.35 million damages for negligently maintained premises causing injuries); *Dunn v. HOVIC*, 1 F.3d 1362 (3d Cir. 1993) (jury awarded $1.3 million in compensatory damages later remitted to $500,000 for asbestos-related injury); *Henry v. Hess Oil Virgin Islands Corp.*, 33 V.I. 163 (D.V.I. Aug. 25, 1995) ($1.1 million award for injury from fall, remitted to $200,000 on the pain and suffering portion of the award); *Brown v. McBro Plan. & Dev. Co.*, 660 F. Supp. 1333 (D.V.I. 1987) ($1 million for personal injury from fall, remitted to $200,000).

and had trouble swallowing food and water as a result of the valve in his throat.[29] As a result, he felt like "giving up" and wished he were dead.

¶ 61 Each experienced tremendous suffering as a result of their respective cancers before dying a few years later, in 2012 for England and 2011 for Brown. In fact, this factual similarity of the cases is why the Superior Court chose to consolidate the two cases. Both juries in this case heard heavily overlapping evidence related to Lorillard's misconduct in promoting cigarettes and hiding the harmful health effects on smokers. The Superior Court believed that consolidating the cases would produce a fairer outcome. However, the *Brown* jury awarded Brown's estate fifty times what the companion *Gerald* jury awarded his estate for compensatory damages, despite the high degree of similarity between the damages evidence presented in both cases.

¶ 62 Similarly, Reynolds claims that the $20 million award to Brown's son, Christian, is excessive as one of the highest affirmed compensatory awards in the nation for either a surviving spouse or an adult child in a tobacco death case. *See, e.g.*, *Philip Morris USA Inc. v. Putney*, 199 So. 3d 465, 471 (Fla. Dist. Ct. App. 2016) (rejecting $5 million compensatory award to each of three surviving adult children as excessive because they did not have the type of unique and close relationship with their mother that supports such an award); *R.J. Reynolds Tobacco Co. v. Grossman*, 211 So.3d 221, 229 (Fla. Dist. Ct. App. 2017) (affirming compensatory award of $7.5 and $4 million to surviving minor children) *partially rev'd on other grounds*, 2018 WL 3097036 (Fla. June 25, 2018); *R.J. Reynolds Tobacco Co. v. Schleider*, 273 So. 3d 63, 74 (Fla. Dist. Ct.

[29] Even though we are not considering England's laryngeal cancer damages due to it being time barred, the jury heard evidence that England suffered from laryngeal cancer for five years before his bladder cancer was discovered. That was a longer duration of suffering than the approximate three years Brown suffered from her small cell lung cancer and the jury nevertheless only awarded England's estate $1 million for the laryngeal cancer.

App. 2018), (affirming compensatory award of $6 million to twenty-two year old daughter who continually saw her father and took care of him); *Odom v. R.J. Reynolds Tobacco Co.*, 254 So. 3d 268, 272, 281 (Fla. 2018) (affirming $6 million compensatory award to surviving adult child who had a very close relationship to her mother, spent considerable time with her mother and supported her during her cancer treatment), *cert. dismissed*, 139 S. Ct. 1311 (2019); *Evans*, 990 N.E.2d at 1038 (affirming an award of $10 million (remitted from the jury's $21 million award) to adult surviving son). The highest awards that have been upheld for adult children have mostly been for those who had a unique and close relationship with their smoker parent and were continuously present during the smoker's cancer treatment and illness. Although Christian had a close relationship with Brown, he lived far away and was not her primary caretaker or otherwise involved in her medical treatment and care.

¶ 63 Lastly, it is highly significant that the awards in *Brown* significantly exceed what Brown's own attorneys evaluated the damages in this case to be worth and what they asked the jury to award. In closing arguments, Brown's counsel requested the jury to award $20 million for the Estate of Patrice Brown and $10 million for her son, Christian Brown, for a total of $30 million. In rebuttal closing, Brown's co-counsel reiterated to the jury that he agreed with his co-counsel's monetary suggestion. Despite this specific request by the attorneys, the jury awarded $50 million to the Estate of Patrice Brown and $20 million to Christian Brown for a total of $70 million, more than twice the sum requested from the jury. Brown, recognizing the large discrepancy between what was requested and the jury's awards, cites to *Odom*, 254 So. 3d at 277–78, to argue that even if a verdict exceeds the party's jury request, it is not automatically unreasonable, especially when the appellant, as the litigant against whom the award operates, offered no assistance to the jury in determining its award.

¶ 64 We agree that a jury may award more than counsel requested without the verdict being thereby automatically rendered excessive. *See Schoeff v. R.J. Reynolds Tobacco Co.*, 232 So. 3d 294, 308 (Fla. 2017)*; Kerrivan v. R.J. Reynolds Tobacco Co*., 953 F. 2d 1196, 1107 (11th Cir. 2020); *Kaiser v. Johnson & Johnson*, 334 F. Supp. 3d 923, 945 (N.D. Ind. 2018), *aff'd*, 947 F.3d 996 (7th Cir. 2020) (holding that an award approximately 10-25% more than requested was not monstrously excessive). However, in *Odom*, the jury award ($6 million) was relatively proportionate to the requested amount ($5 million). *Id.* at 273. That was not the case in *Brown*, where the jury awarded 133% more than what Brown's attorneys requested. *See, e.g.*, *Jutzi-Johnson v. U.S.*, 263 F.3d 753, 761 (7th Cir. 2001) (reversing verdict in favor of plaintiff and noting that $1.6 million award was improper in light of plaintiff only requesting $300,000 to $600,000); *Webb*, 93 So. 3d at 339 (vacating plaintiff's compensatory award noting that it was "double the amount of compensatory damages requested by [plaintiff's] counsel"). Although a jury has no obligation to award what the attorney requests and may award more or less than what is requested, the evidence in this case does not provide any logical basis for the jury exceeding the attorney's request to such a large extent. *See id.*

¶ 65 As discussed above in Section II.C., this Court affords great deference to a jury's determination of compensatory damages, especially those for noneconomic damages, and we are reluctant to disturb such awards. However, the *Brown* compensatory award of a total of $70 million is meaningfully larger than what juries in other jurisdictions examining factually similar injuries believed was fair, what another contemporaneous Virgin Islands jury believed was fair for a factually very comparable case, what other Virgin Islands juries have awarded for tort injuries, and what Brown's own attorneys believed was fair compensation and requested the jury to award. And importantly, it is significantly more than what is supported by the evidence. Weighing these

factors and evaluating the evidence of the noneconomic damages in the record in the light most favorable to the verdicts, we conclude that the $50 million to Brown's estate and $20 million to Christian for a total of $70 million non-economic compensatory damages award in *Brown* is grossly excessive and against the weight of the evidence. The damages awarded are so excessive and beyond what is supported by the evidence that the only reasonable explanation is that the jury was biased, inflamed by passion, or engaged in some other inappropriate behavior. *See Espersen*, 2022 VI 11, ¶ 56 (stating that it is proper for a court to set aside a jury verdict because it is excessive, inadequate, or otherwise against the weight of the evidence, to protect against error that arises from improper jury decision-making); *Veitch v. S. Ry. Co.*, 126 So. 845, 846 (Ala. 1930); *see also Allen v. Lindeman,* 148 N.W.2d 610, 619 (Iowa 1967); *Gilster*, 747 F.3d at 1012; *Honda Motor Co.*, 512 U.S. at 425-26 (discussing how courts have reviewed the amount of jury awards and inferred "passion, prejudice, or partiality from the size of the award"). Accordingly, we hold that the Superior Court abused its discretion when it denied Reynolds' motion for a new trial on account of the grossly excessive compensatory damages awards of $50 million and $20 million to Brown's estate and Christian Brown, respectively.[30] We will therefore vacate the jury's award of noneconomic compensatory damages awarded in *Brown* and remand for a new trial.

2. The proper remedy in Brown

[30] We do not address Reynolds' due process arguments for the granting a new trial for excessive compensatory damages or Brown's contention that no federal court has found compensatory damages excessive based on due process grounds, (J.A. 35,) because we are ordering a new trial on other grounds. *See Balboni v. Ranger Am. of the V.I.*, Inc., 70 V.I. 1048, 1058 (V.I. 2019), *cert. denied*, 140 S. Ct. 651 (2019) ("[T]his Court has adopted the doctrine of constitutional avoidance, which cautions against gratuitously deciding federal constitutional issues when a party may receive the same relief on non-constitutional grounds.").

¶ 66 In ordering a new trial in *Brown* we must also determine what issues the new trial will encompass. Reynolds argues that a completely new trial is required because – if passion or prejudice influenced the jury's damages award – then it likely affected its decision on liability as well. *See, e.g., Dossett v. First State Bank*, 399 F.3d 940, 946-47 (8th Cir. 2005) (holding that it is generally inappropriate to order only a partial new trial on the issue of damages when the court concludes the damages award was motivated by passion and prejudice). We conclude, however, that a completely new trial is not required in this instance, and that the new trial will not revisit the jury's finding on liability or entitlement to punitive damages but will be limited solely to the issue of noneconomic compensatory damages to Brown's estate and to Christian Brown individually.

¶ 67 A partial retrial on only a subset of issues from the first trial is appropriate when "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." *Gasoline Prods. Co. v. Champlin Ref. Co.*, 283 U.S. 494, 500 (1931). In other words, a new trial limited solely to damages is improper only if "the question of damages . . . is so interwoven with that of liability that the former cannot be submitted to the jury independently of the latter without confusion and uncertainty, which would amount to a denial of a fair trial." *Id.* However, if a jury reached a proper verdict upon one issue, then a new trial is not compelled on that issue even though another separable issue must be tried again. *Id.* at 499.

¶ 68 If liability is clear, and the prejudice taints only the damages award and not the issue of liability, then the proper remedy is a new trial addressed to damages only. *See Roboserve, Ltd. v. Tom's Foods, Inc.*, 940 F.2d 1441, 1447 (11th Cir. 1991) (because liability issues were properly and clearly decided by the jury, the remedy was to remand the case for a new trial on the amount of damages only); *see also Westbrook v. Gen. Tire & Rubber Co.*, 754 F.2d 1233, 1242 (5th Cir.

1985) (same); V.I. R. CIV. P. 59 ("The court may, on motion, grant a new trial on all or some of the issues.").

¶ 69 Here, the evidence of liability was strong and no reversible error has been shown on this appeal regarding that issue. *See Nicholson v. Bates*, 544 F. Supp. 256, 257 (E.D. Tex. 1982) (explaining that a jury's assessment of damages may be influenced by impermissible factors even though it reaches an acceptable verdict on liability).

¶ 70 There is also no reason to conclude that the verdict in *Brown* was a compromise among jurors with different views on liability. *See Diamond D Enters. USA, Inc. v. Steinsvaag*, 979 F.2d 14, 17 (2d Cir. 1992). Instead, the extremely high damages award demonstrates the jury's confidence that Reynolds should be held liable. *See Westbrook*, 754 F.2d at 1242 ("There is no indication here of a compromise verdict. To the contrary, the extremely high amount of the award and the jury's willingness to give plaintiffs all they asked for suggests the jury had little doubt that [the defendant] should be held responsible for the manufacturing defect which was found to have caused [the plaintiff's] injuries."). Finally, although generally requesting a completely new trial, the errors complained of by Reynolds as to *Brown* relate almost entirely to the excessiveness of the noneconomic compensatory damages award and not to the finding of liability. The damages and liability questions are therefore not so interwoven in the *Brown* appeal that a complete retrial on all issues would be appropriate.

¶ 71 Nor do we conclude that the new trial should encompass the issue of punitive damages. It is well-established in the Virgin Islands that punitive damages are not a stand-alone cause of action, *Bonelli v. Gov't of the V.I.*, 67 V.I. 714, 726 (2017) (citing *Molloy v. Indep. Blue Cross*, 56 V.I. 155, 176 n.5 (V.I. 2012)), and "well recognized that no award for punitive damage may be made where actual damage has not been suffered." *Brandy v. Flamboyant Inv. Co.*, 772 F. Supp. 1538,

1543 (D.V.I. 1991) (citing *Hilbert v. Roth*, 149 A.2d 648, 652 (Pa. 1959)). In *Brandy*, the court reversed the jury's punitive award of $50,000 because the jury had awarded $0 in compensatory damages and "compensatory or nominal damages must accompany an award of punitive damages." 772 F. Supp. at 1544; *see also Cheque v. Cintron*, 17 V.I. 69, 72 (V.I. Super. Ct. 1980) ("[A]ny award of nominal damages in the Virgin Islands is sufficient to support a further award of punitive damages"); RESTATEMENT (SECOND) OF TORTS § 908, cmt. b (1979) ("[A] cause of action for a particular tort must exist, at least for nominal damages"); *Lawrence v. Risen*, 598 S.W.2d 474, 476 (Ky. Ct. App. 1980) ("[I]f the plaintiff has suffered an injury for which compensatory damages might be awarded, although nominal in amount he may in a proper case recover punitive damages."); *Sandel v. Cousins*, 211 S.E.2d 111, 112 (S.C. 1975).

¶ 72 This case is clearly distinct from those where a jury makes an affirmative finding of $0 in compensatory damages or finds no entitlement to compensatory damages. In *Brown*, by contrast, the jury correctly determined that Brown and Christian were each owed an award of compensatory damages but erred in awarding an excessive amount. The fact that the compensatory damages award is being vacated and remanded for a new trial to permit a new jury to set the proper amount of such damages, does not render the previous jury's punitive damages award a nullity. Other courts that have considered whether a punitive damages award can stand despite a new trial being ordered solely on compensatory damages, have upheld the punitive damages award.[31] *See Phillip*

[31] *See, e.g., Soffra v. Shieldsboro Dev., Inc.*, 314 So.3d 129, 144 (Miss. Ct. App. 2020) (remanding the case for a new determination of compensatory damages, but not punitive damages)*; see also Christensen v. Walia*, 1988 Wisc. App. LEXIS 492, at *4-*5 (Wis. Ct. App. 1988) (reversing the compensatory damage award, but not the punitive award and remanding for a new trial on compensatory damages only); *Westway Trading Corp. v. River Terminal Corp.*, 314 N.W.2d 398, 403 (Iowa 1982) (reversing the compensatory award, but not the punitive award because there was substantial evidence that the plaintiff suffered actual damages); *Decker v. Bayless*, 595 N.E.2d

Morris USA Inc. v. Danielson, 224 So. 3d 291, 297 (Fla. 2017) ("[T]he rule . . . is not that punitive damages awards must be vacated every time some facet of the compensatory damages award must be retried. Rather, a jury's punitive damages award should survive, irrespective of problems with the compensatory damages award, if there remains an adequate starting point for comparing the amount of punitive damages to the compensatory damages and determining that the punitive damages award is not excessive").[32]

¶ 73 Because no reversible error is shown on the question of liability decided by the jury in *Brown* and the punitive damages award can be upheld despite the remand for a new trial on compensatory damages, the proper remedy is to affirm the punitive damages award and remand for a new trial on noneconomic compensatory damages only. Limiting the retrial to compensatory damages will also save judicial resources. A new trial limited to damages avoids relitigating issues already decided and respects results that are not in error. *See Torres v. Auto. Club of S. California*, 937 P.2d 290, 292 (Cal. 1997).[33] Therefore, we affirm the jury's finding on liability and Brown's punitive damages award of $12.3 million. We vacate Brown's and Christian's compensatory

385, 388 (Ohio Ct. App. 1991) (ordering a retrial on compensatory damages, but not punitive damages because the record did not indicate any confusion by the jury on issues of liability or punitive damages, nor that the issues were so entwined as to require retrying them both).

[32] Reynolds has not argued that the punitive damages awarded in *Brown* are constitutionally defective or are otherwise excessive. The punitive damage award is reasonable and properly supported by the evidence. It is a fraction of the compensatory award and based on the expert evidence at trial, is the exact amount of a single day's earnings of Reynolds.

[33] As much liability phase evidence from the first trial as deemed necessary, and as permitted by the trial court, may be used in the retrial. *See Watts v. Laurent*, 774 F.2d 168, 181 (7th Cir. 1985) (advising the trial judge to apply a strong presumption that evidence from the liability phase may be relevant to damages on a partial new trial).

damages award of $50 and $20 million respectively and remand for a new trial to be held on the sole issue of noneconomic compensatory damages.

3. Admission of Diary Entries

¶ 74 Reynolds asserts that the jury's compensatory damages awards in *Brown* are excessive and not supported by properly admitted evidence relying, in part, on its contention that the jury was inappropriately swayed by emotional evidence in the form of Brown's erroneously admitted diaries. Since we are vacating the compensatory damages award in *Brown* and remanding for a new trial on the issue of compensatory damages, it ordinarily would not be necessary to address this evidentiary issue in the present appeal. *See Governor Juan F. Luis Hosp. & Med. Ctr. v. Titan Med. Grp., LLC*, 69 V.I. 873, 878 (V.I. 2018) (declining to reach appellant's other arguments because one argument was dispositive); *Phillip v. Marsh-Monsanto*, 66 V.I. 612, 628 n.8 (V.I. 2017) (declining to reach issues where result would remain the same); *Ambrose v. People of the V.I.*, 56 V.I. 99, 106 (V.I. 2012) (declining to reach other issues where new trial was granted). However, because the evidentiary issues of Brown's emotional recorded testimony and the admission of her diary entries will likely reoccur at the new trial on remand, we will exercise our discretion to address Reynolds' arguments and objections to the diary related testimony. *See Garcia v. Garcia*, 53 V.I. 758, 772 (V.I. 2013) ("[T]his Court, in the interests of judicial economy, may resolve issues that will likely recur on remand in order to provide guidance to the Superior Court."); *Tremcorp Holdings, Inc. v. Harris*, 67 V.I. 601, 608 n.4 (V.I. 2017) (the Supreme Court has the authority to address issues likely to occur on remand).

¶ 75 Reynolds first argues that because Brown and her son cried during portions of their testimony and that this inappropriately swayed the jury to arrive at a conclusion on an improper, emotional basis. (Appellant's Br. 28). The fact that Brown and her son cried during testimony

does not naturally lead to the conclusion that the jury verdict was therefore the result of passion rather than a weighing of the evidence. *See, e.g., Morga v. Fedex Ground Package System, Inc.*, 420 P.3d 586, 599-600 (N.M. Ct. App. 2018); *Hamner v. Edmonds*, 36 S.W.2d 929, 936 (Mo. 1931). Emotional distress is necessarily subjective and difficult to quantify so the testimony of the plaintiff and family members about how plaintiff's injury affected them is a relevant consideration for the jury in determining their credibility and awarding damages for emotional distress. *See id.*

¶ 76 Reynolds' second argument that the diary entries were inadmissible, relies on the hearsay exception for recorded recollections. *See* V.I.R.E. 803(5).[34] Reynolds filed a pre-trial motion to exclude the diary evidence. The Superior Court ruled that it would permit the use of specific, separately identified entries that it determined qualified under the hearsay exception, and which were not unduly prejudicial. In addition, the court expressed some doubt as to the admission of the diary, noting that the diary had not begun until after the suit was filed, and "appears to the Court that it was prepared in contemplation of, and perhaps solely for use in, this litigation." (J.A. 176.) The diary was begun on December 9, 2010, just three days after Brown filed her complaint and ends on July 12, 2011, one week before her deposition was taken. No entries were written in

[34] The following are not excluded by the rule against hearsay, regardless of whether the declarant is available as a witness:
(5) Recorded Recollection. A record that:
(A) is on a matter the witness once knew about but now cannot recall well enough to testify fully and accurately;
(B) was made or adopted by the witness when the matter was fresh in the witness's memory; and
(C) accurately reflects the witness's knowledge.
If admitted, the record may be read into evidence but may be received as an exhibit only if offered by an adverse party.

the four-month period between her deposition and her death. Ultimately, the court allowed videotaped testimony of Brown reading nine specific diary entries to be played for the jury. In addition, the jury received the actual physical pages of those entries from the diary for use during their deliberations.

¶ 77 In order for the Recorded Recollection hearsay exception to apply, three requirements must be met: (1) that the record relates to a matter the witness once had knowledge about but cannot accurately remember now; (2) that the record was made when the matter was fresh in the witness' memory; and (3) that the record accurately reflects the witness' understanding of the matter. *See* V.I.R.E. 803(5) and n. 34 herein. Before reading each diary entry Brown testified that she could not recall the contents of each diary entry, but that she made the entries when the events were fresh in her mind, and that the entries honestly reflected her knowledge. (*e.g.*, J.A. 2097.) Normally, this would be sufficient to satisfy the three requirements of the hearsay exception and allow the use of this otherwise prohibited hearsay testimony. *See Greger v. Int. Jensen, Inc.*, 820 F.2d 937, 943 (8th Cir. 1987); *Collins v. Kibort*, 143 F.3d 331, 338 (7th Cir. 1998); *see also LPP Mort. Ltd. v. Quetel*, No. CIV. 4/2003, 2004 WL 6026174, at *4-5 (V.I. Super. Ct. June 18, 2004) (unpublished). However, as pointed out by Reynolds, the end of the first entry, dated December 9, 2010, describes an event that took place two years prior to when she was diagnosed with small cell lung cancer. This is arguably not "fresh" under Rule 803(5)(B). In addition, Brown seemed able to recall at least some of the details of that day at an earlier part of her testimony, thus possibly violating Rule 803(5)(A)'s requirement that the record be on a matter that the witness cannot recall well enough to testify on fully and accurately.

¶ 78 However, it was not an abuse of discretion for the Superior Court to admit the video presentation of the nine diary entries as most entries do in fact describe recent events, and Brown's

testimony met the three requirements of Rule 805. Furthermore, the evidence was relevant to Brown's quality of life, and thus to damages. While the jury may have been more emotionally moved by Brown's suffering, her suffering is a factor the jury must weigh, not the reviewing court. *See Antilles Sch., Inc.*, 64 V.I. at 438.

¶ 79 Finally, Reynolds, relying on Rule 803(5), argues that it was error to allow the actual diary pages to be submitted to the jury. Rule 803(5) provides that evidence allowed in under the Recorded Recollection exception "may be read into evidence but may be received as an exhibit only if offered by an adverse party." Therefore, it was a violation of the rule to allow the jury to receive the actual physical pages when offered by Brown, and if the evidence on remand presents a similar context, the diary pages themselves will be inadmissible after being read into the record.

4. Prejudicial Consolidation of Cases

¶ 80 Reynolds also asserts that the erroneous consolidation of the trials contributed to the *Brown* jury's excessive damages verdict by improperly allowing the *Brown* jury to hear inflammatory evidence relevant only to the *Gerald* case. Since we have vacated the compensatory damages award in *Brown*, it is unnecessary to address Reynolds' claim that the excessive compensatory damages awarded in *Brown* was partly the result of the prejudicial consolidation of the *Gerald* and *Brown* cases. On remand, the trial will occur only on the issue of compensatory damages in the *Brown* case and there will not be a recurrence of issues concerning consolidation. Accordingly, it is not necessary to address the consolidation issues in this proceeding. *See Machado v. Yacht Haven U.S.V.I.*, 61 V.I. 373, 399 n.10 (V.I. 2014).

E. Punitive Damages in *Gerald*

¶ 81 Reynolds argues that the $30 million punitive damages award in *Gerald* is excessive and so disproportionate to the amount of compensatory damages as to constitute a violation of the Due

Process Clauses of the Fifth and Fourteenth amendments.[35] Gerald counters that the $30 million in punitive damages is not excessive, and that it is comparable to other punitive damages award in other cases and should be affirmed.

¶ 82 "Punitive damages are damages awarded in cases of serious or malicious wrongdoing to punish or deter the wrongdoer or deter others from behaving similarly." *Cornelius*, 67 V.I. at 824 (internal quotation marks omitted). "Punitive damages must be based upon conduct that is not just negligent but shows, at a minimum, reckless indifference to the person injured—conduct that is outrageous and warrants special deterrence." *Id.* (collecting cases). While compensatory damages are designed to "redress the concrete loss that the plaintiff has suffered by reason of the defendant's wrongful conduct . . . punitive damages serve a broader function; they are aimed at deterrence and retribution." *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 416 (2003) (citing RESTATEMENT (SECOND) OF TORTS § 903 (1979) and *Cooper Indus.*, 532 U.S. at 432). Each jurisdiction has considerable flexibility in determining the appropriate level of punitive damages to allow in different classes of cases and in any particular case. *Id.* "Courts must ensure that the measure of punishment is both reasonable and proportionate to the amount of harm to the plaintiff and to the general damages recovered." *State Farm Mut. Auto. Ins. Co.*, 538 U.S. at 426. The amount of punitive damages only offends due process under the Fourteenth Amendment as arbitrary if the award is "grossly excessive" in relation to the state's legitimate interests in punishment and deterrence. *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 568 (1996); *see also State Farm Mut. Auto. Ins. Co.*, 538 U.S. at 416-417; *Bullock v. Phillip Morris USA, Inc.*, 131 Cal. Rptr. 3d 382, 393 (Cal. Ct. App. 2011); *see also Espersen*, 2022 VI 11, ¶ 59. Due process requires that

[35] These clauses are applicable to the Virgin Islands through section 3 of the Revised Organic Act. 48 U.S.C. § 1561.

a person receive fair notice of the possible severity of the punishment they may face and notice is inadequate when that penalty is grossly excessive. *Gore,* 517 U.S. at 573.

¶ 83 To aid in the due process determination, the United States Supreme Court has provided three guideposts for reviewing punitive damages: "(1) the degree of reprehensibility of the defendant's misconduct; (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award (*i.e.*, the ratio of compensatory to punitive damages); and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases." *State Farm Mut. Auto. Ins. Co.*, 538 U.S. at 418 (citing *Gore*, 517 U.S. at 575); *see also Espersen*, 2022 VI 11, ¶77 (applying *State Farm's* three guideposts for reviewing punitive damages). In deciding whether an award of punitive damages is excessive under the due process clause, we review the award de novo, making an independent assessment that is based on the three guideposts. *State Farm Mut. Auto. Ins. Co.*, 538 U.S. at 419. We now apply these guideposts to the *Gerald* punitive damages award.

1. The degree of reprehensibility of the defendant's conduct

¶ 84 The United States Supreme Court has stated that the degree of reprehensibility is the most important factor in evaluating the reasonableness of punitive damages. *Id.* at 419. Compensatory damages presumably make a plaintiff whole, thus punitive damages should only be awarded if the defendant behaved so reprehensibly that further sanctions are necessary. *Id*. The Supreme Court has articulated five factors for use in evaluating the reprehensibility of a defendant's conduct by considering whether:

> (1) the harm caused was physical as opposed to economic; (2) the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; (3) the target of the conduct had financial vulnerability; (4) the conduct involved repeated actions or was an isolated incident; and (5) the harm was the result of intentional malice, trickery, or deceit, or mere accident.

Id. (citing *Gore*, 517 U.S. at 576-77); *see also Espersen*, 2022 VI 11, ¶79.

¶ 85 In this case, England suffered physical harm and not economic harm from Lorillard's tortious acts. He suffered bladder cancer, causing him great suffering, pain and death. The first reprehensibility factor, whether the harm caused was physical as opposed to economic, therefore weighs in favor of high reprehensibility.

¶ 86 As to the second reprehensibility factor, Reynolds evinced an indifference and reckless disregard of the health and safety of others in its promotion of cigarettes. The company was aware that tobacco was addictive and that many smokers would suffer serious injury and death from smoking cigarettes. It chose to conceal these facts and in fact denied them, attacking those who warned about the danger of smoking in order to create doubt in the public's mind. This type of behavior demonstrates a high level of indifference and reckless disregard to the health of smokers and therefore this second factor weighs in favor of high reprehensibility. *See Kerrivan*, 953 F.3d at 1209 (finding that "tobacco companies demonstrated a high level of indifference and reckless disregard for the health and safety of smoker" by concealing that cigarettes were addictive and caused serious health conditions); *Schoeff*, 232 So. 3d at 307 (same); *Izzarelli v. R.J. Reynolds Tobacco Co.*, No. 3:99-CV-2338 (SRU), 2018 WL 6575458, at *7 (D. Conn. Dec. 13, 2018) (unpublished).

¶ 87 As to the third factor, whether the target of the conduct had financial vulnerability, Reynolds employed marketing practices aimed at teenagers, a group that is financially vulnerable. Its goal was to addict children at a young age so they would become lifelong smokers and customers. We agree that – while the vulnerability mentioned in the Supreme Court's synthesis refers to "financial" matters – "in a case involving physical harm, the physical or physiological

vulnerability of the target of the defendant's conduct is an appropriate factor to consider in determining the degree of reprehensibility, particularly if the defendant deliberately exploited that vulnerability." *Bullock*, 131 Cal. Rptr. 3d at 396. Nicotine is an addictive drug that makes smokers vulnerable to rationalization and therefore Lorillard's concerted effort to exploit that weakness shows high reprehensibility. *Id.* at 397.

¶ 88 The fourth factor is whether the conduct involved repeated actions or was an isolated incident. Lorillard's campaign to mislead the public into thinking there was scientific uncertainty regarding the health effects of tobacco lasted decades and affected many smokers nationwide. This is sustained and repeated conduct and a "recidivist may be punished more severely than a first offender [because] repeated misconduct is more reprehensible." *Gore*, 517 U.S. at 577. This fourth factor also weigh in favor of high reprehensibility.

¶ 89 The fifth and final factor is whether the harm was the result of intentional malice, trickery, or deceit, or mere accident. The evidence produced in this case demonstrates that Reynolds conduct was intentional. Lorillard engaged in a wide range of intentional, deliberate and purposeful misconduct to mislead and deceive smokers and the public about the dangers of smoking. The scientific community began to reach general agreement in the 1950s that cigarette smoking caused cancer. However, Lorillard, along with other tobacco companies, issued a full-page advertisement in 1954 in newspapers around the country entitled "A Frank Statement to Cigarette Smokers" in which it sowed doubt on the dangers of smoking cigarettes. This advertisement also announced the formation of the Tobacco Industry Research Committee, which assured the public that the committee would keep the public informed about the health risks of smoking. Despite this public statement, Lorillard was aware that cigarette smoking was harmful,

that nicotine was addictive, and it deliberately concealed that information from the public. Thus, intentionally marketing a product knowing it may cause harm is highly reprehensible.[36]

¶ 90 Since all five factors of reprehensibility weigh in favor of high reprehensibility, we conclude that Reynolds' conduct in this case was extremely reprehensible. *See Myers v. Cent. Fla. Invs., Inc.*, 592 F.3d 1201, 1219 (11th Cir. 2010) ("While there is no requirement that a certain number of the five *State Farm* factors be present in order to support a finding of reprehensibility, reprehensibility grows more likely as more factors are present."). This conclusion is in line with other courts that have also found similar behavior highly or extremely reprehensible. *See Schoeff*, 232 So. 3d at 307 ("These factors lead to the conclusion that this conduct is among the most

---

[36] Reynolds argues that the jury, in assessing the reprehensibility of its behavior, inappropriately considered harm to non-parties based on Appellees' presentation of statistics of the number of people killed by smoking and pointing out that those people had not been compensated. Reynolds preserved this issue by making numerous objections which were all overruled.

"[T]he Constitution's Due Process Clause forbids a State to use a punitive damages award to punish a defendant for injury that it inflicts upon nonparties . . . i.e., injury that it inflicts upon those who are, essentially, strangers to the litigation." *Philip Morris USA v. Williams*, 549 U.S. 346, 353 (2007). Therefore, to make sure that the jury does not go further than this and actually punish the defendant directly for harm to nonparties, courts must ensure juries consider "a nexus to the specific harm suffered by the plaintiff." *State Farm Mut. Auto. Ins. Co.*, 538 U.S. at 422; *id.* Reynolds is correct in noting that in evaluating a defendant's behavior, the court cannot "expand the scope of the case so that a defendant may be punished for any malfeasance." *State Farm Mut. Auto. Ins. Co.*, 538 U.S. at 424. However, in this case, the conduct that injured England was also directed at other smokers in the United States; this is relevant to the jury's reprehensibility analysis as to the amount of punitive damages.

We agree with other courts that evidence of Lorillard's national campaign to promote smoking has a sufficient nexus to Lorillard's conduct in regard to an individual smoker's claim. *See Boeken*, 26 Cal. Rptr. 3d at 680; *see also Jacobson v. R.J. Reynolds Tobacco Co.*, No. 1:12-CV-23781-UU, 2013 WL 12094893, at *4 (S.D. Fla. Sept. 12, 2013) (unpublished). In any event, to the extent there was any violation of the Supreme Court's doctrine that an award of punitive damages may not be imposed for harm to nonparties, the jury in this case was properly instructed that it could not punish Reynolds for conduct to others. (JA 2748.). *Williams*, 549 U.S. at 350-51; *see also Cascen v. Virgin Islands*, 60 V.I. 392, 414 (2014) (it is presumed that juries follow instructions).

reprehensible"); *Bullock,* 131 Cal. Rptr. 3d at 386-87 (finding similar behavior by cigarette manufacturer extremely reprehensible); *Boeken*, 26 Cal. Rptr. 3d at 680 (same).

¶ 91 Having concluded that Reynolds' conduct is "extremely reprehensible," and that there is sufficient evidence supporting all five reprehensibility factors under *State Farm,* a higher ratio and substantial punitive damage award is justified.

2. The disparity between harm and punitive damages

¶ 92 The second guidepost is that punitive damages must bear a "'reasonable relationship'" to compensatory damages or to the actual or potential harm to the plaintiff. *Gore* 517 U.S. at 575, 580; *accord*. *State Farm Mut. Auto. Ins. Co.*, 538 U.S. at 424–426. "[C]ourts must ensure that the measure of punishment is both reasonable and proportionate to the amount of harm to the plaintiff and to the general damages recovered." *State Farm Mut. Auto. Ins. Co.,* 538 U.S.at 426.

¶ 93 The United States Supreme Court has been reluctant to employ a "simply mathematical formula" or to impose a "bright-line ratio" of punitive to compensatory damages. *Id.* at 424-25; *see also Espersen,* 2022 VI 11, ¶85. However, the Court has indicated that "in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process." *State Farm Mut. Auto. Ins. Co.*, 538 U.S. at 425. Furthermore, the Supreme Court has stated that a punitive award more than four times the compensatory award "might be close to the line of constitutional impropriety." *Id*. But "these ratios are not binding." *Id*.; *see Espersen,* 2022 VI 11, ¶ 87. That is, the ratio by itself does not violate the Constitution, but instead alerts the court to pay special attention. *See Williams v. ConAgra Poultry Co.*, 378 F.3d 790, 799 (8th Cir. 2004); *Simon v. San Paolo U.S. Holding Co., Inc.*, 113 P.3d 63, 71-72 (Cal. 2005).

¶ 94 A higher ratio may comport with due process where "a particularly egregious act has resulted in only a small amount of economic damages." *State Farm Mut. Auto. Ins. Co.*, 538 U.S. at 425. Conversely, if a compensatory award is already substantial, then a high ratio may not be justified. *Cf. Romo v. Ford Motor Co.*, 6 Cal. Rptr. 3d 793, 810–11 (Cal. Ct. App. 2003). This is because a large compensatory award may already sufficiently punish the defendant and a lower ratio, perhaps equal to the substantial compensatory damages award, may reach the outermost limit of the due process guarantee. *State Farm Mut. Auto. Ins. Co.*, 538 U.S. at 425; *Williams v. First Advantage LNS Screening Sols. Inc*, 947 F.3d 735, 766 (11th Cir. 2020). The Supreme Court has instructed that "[t]he 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.*, 538 U.S. at 425.

¶ 95 In *Gerald*, the jury awarded $30 million in punitive damages and $2 million in noneconomic compensatory damages. However, the recoverable amount of compensatory damages was only $1 million for the bladder cancer, as the jury also found that the claim for laryngeal cancer was barred by the statute of limitations.

¶ 96 Gerald claims that the authorities are split over whether the ratio should be considered based upon the $2 million in compensatory damages found by the jury or the $1 million ultimately recoverable but has not provided any legal authority establishing the claimed split of authorities. Gerald cites only to the case of *R.J. Reynolds Tobacco Co. v. Townsend*, 118 So. 3d 844, 847 (Fla. Dist. Ct. App. 2013) as specifying the "unreduced compensatory damages award as the proper benchmark". (Appellee's Br. 49, n. 14.) However, the Florida intermediate appellate court limited its holding to that specific case based on the "law of the case" doctrine, which was established by the holding and mandate of the appellate court in a prior appeal of the same case and does not

establish a standard that the unreduced compensatory damages is the proper benchmark for the ratio analysis. *Id.* (referring to the prior appeal in *R.J. Reynolds Tobacco Co. v. Townsend*, 90 So. 3d 307, 316 (Fla. Dist. Ct. App. 2012)). Moreover, the cited appeal in *Townsend* addressed the issue of reduction of damages when the jury attributes comparative fault to the plaintiff, an issue not applicable to this case,[37] where the damages for the laryngeal cancer were not included in the recoverable compensatory damages because they were awarded for a time barred cause of action. Rather, Reynolds is correct that courts generally use the recoverable amount of compensatory damages when conducting their ratio analysis. *See e.g.*, *Clark v. Chrysler Corp.*, 436 F.3d 594, 606 n. 16 (6th Cir. 2006) (stating that using full compensatory damages in its ratio analysis would improperly punish defendant); *Auerback v. Great W. Bank*, 88 Cal. Rptr. 2d 718, 731 (Cal. Ct. App. 1999) ("[P]unitive damages must be proportional to recoverable compensatory damages."); *Lorillard Tobacco Co. v. Alexander*, 123 So.3d 67, 81-82 (Fla. Dist. Ct. App. 2013) (same); *Danielson*, 224 So.3d at 297. Therefore, the proper compensatory damages award for the ratio analysis in this case is the $1 million recoverable compensatory damages, for a 30:1 ratio.

¶ 97 Gerald claims that we must consider the particular facts of this case and include the harm represented by the $1 million award related to the laryngeal cancer in the ratio of the harm to the punitive damages calculation even though he is not entitled to recover that award. By considering the uncompensated harm of $1 million, determined by the jury for the laryngeal cancer, Gerald contends that the appropriate ratio for use in the punitive damages to harm ratio is 15:1; and argues that such ratio does not violate due process.

[37] As determined in Section F *infra*, because the award includes recovery for intentional conduct, the compensatory damages are not subject to apportionment for comparative fault.

¶ 98 Despite our conclusion that only the $1 million recoverable compensatory damages may be included in the compensatory damages ratio calculation, we find merit in Gerald's argument that the harm caused by the laryngeal cancer should also be considered and therefore do not conclude that the time-barred $1 million compensatory damages award for the laryngeal cancer should be totally ignored and play no role in the required punitive damages to harm ratio calculation.

¶ 99 A review of the United States Supreme Court precedents discloses that, in certain circumstances, the use of measures of harm beyond the compensatory damages award is appropriate. Discussing the second *Gore* "guidepost," the Supreme Court in *State Farm* referred repeatedly to proportionality between punitive damages and *the harm or potential harm* suffered by the plaintiff. *State Farm Mut. Auto. Ins. Co.*, 538 U.S. at 418, 424. Also in *State Farm*, the Supreme Court referred to the relationship between punitive damages and both "*the amount of harm*" *and* "*the general damages recovered*," thereby recognizing that these two items are not always identical. *Id.* at 426; *Simon*, 113 P. 3d 63, 71 (emphasis added). More explicitly, in *State Farm*, the Supreme Court reiterated its recognition in *Gore* that in some cases compensatory damages are not the definitive quantification of harm because "'the injury is hard to detect or the monetary value of noneconomic harm might have been difficult to determine.'" *State Farm Mut. Auto. Ins. Co.*, 538 U.S. at 425 (quoting *Gore*, 517 U.S. at 582.) Relying on these Supreme Court precedents many courts have, in a variety of factual contexts, considered uncompensated or potential harm as part of the predicate for a punitive damages award ratio calculation. *See Simon*, 113 P.3d at 71 n.3 (collecting cases); *Romo v. Ford Motor Co.*, 6 Cal. Rptr. 3d 793, 810-11 (Cal. Ct. App. 2003) (considering harm to decedents that cannot be compensated under California law). In making our independent de novo review of the relationship between the harm done to the

plaintiff and the amount of the punitive damages award, as we are required to do, we will consider the harm done to England by the laryngeal cancer, caused by Lorillard's fraudulent conduct, in the punitive damages ratio calculation. [38]

¶ 100 Gerald's complaint sought recovery for damages for his bladder cancer combined with the laryngeal cancer suffered as a result of Reynolds' tortious conduct. (J.A. 26, Gerald's Amended Complaint para. 33) ("As a result of defendant's negligence, Lucien England received, smoked and addicted to Newport cigarettes . . . and as a result developed two distinct cancers in his throat and bladder.") Notably here, England developed bladder cancer five years after being diagnosed with laryngeal cancer and lived with the pain, suffering and humiliation of both: having a valve in his throat where he had difficulty to swallow and unable to drink in public due to visible leaking of the fluid caused by his laryngeal cancer and having to wear a colostomy bag to use the bathroom as a result of his bladder cancer. Just as aggravation of a pre-existing injury may in some cases properly be considered in assessing the total harm caused to a plaintiff, here recognition of the harm caused by the combined effects of both cancers suffered by England is appropriate given the jury's determination that the defendant actually caused the pre-existing laryngeal cancer injury. *See Rowe v. Munye*, 702 N.W.2d 729, 736-37 (Minn. 2005) (citing RESTATEMENT (SECOND) OF TORTS §433); *Bartley v. Allendale Cty. Sch. Dist.*, 709 S.E. 2d 619, 623-24 (S.C. 2011) ("There is

[38] Had the jury verdict form asked the question No. 20: "Do you find that Lorillard has proven by a preponderance of the evidence that Jevon Gerald did not file his laryngeal cancer claim within the time period provided by law?" as the first question on that subject of the laryngeal cancer and instruct the jury that if the answer is "Yes" to skip the other questions and sign the verdict form, this issue of the relevance of the damages awarded for the laryngeal cancer would not be an issue. However, it is noteworthy that the jury did in fact find that Lorillard's tortuous conduct caused England's laryngeal cancer and at the time of awarding the $30 million in punitive damages did so knowing that it had in Phase I of the trial awarded $2 million in compensatory damages to England's estate.

no requirement that claimant's pre-existing condition aggravated injury or that the injury aggravated the pre-existing condition, so long as there is a greater disability simply from the 'combined effects of injury' and the pre-existing condition.").

¶ 101 Accordingly, based on the jury's findings and the unique facts of this case, all or a portion of the $1 million uncompensated harm determined by the jury to be attributable to the laryngeal cancer caused by this defendant will be considered as part of the harm sustained by England, in addition to the $1 million recoverable compensatory damages relating to his bladder cancer in making the punitive damages to actual or potential harm calculation. *See Simon,* 113 P.3d at 72-74 (citing *Neal v. Farmers Ins. Exchange*, 582 P.2d 980 (Cal. 1978) (in an insurance bad faith case, a statute barred recovery of damages actually caused by the defendant's tortious acts, where the plaintiff died before judgment, precluding her estate's recovery of damages for emotional distress)); *Romo,* 6 Cal. Rptr. 3d at 810-11. For example, in *Neal,* the California Supreme Court considered it "likely that absent this [statutory] limitation plaintiff would have recovered a substantial additional amount in compensation for emotional distress," and held that the disparity between the relatively small compensatory damages award and the significant award of punitive damages did not require nullification of the latter. *See Simon,* 113 P.3d at 73; CAL. CIV. CODE §377.34 (West 2022).[39]

[39] The same can be said of the award in this case for England's laryngeal cancer. The jury was asked to determine the cause of his laryngeal cancer and unanimously decided that it was caused by Lorillard's tortuous conduct and awarded $1 million in damages, the exact same as for his bladder cancer claim. But a Virgin Islands statute, 5 V.I.C. § 31(5), prevented recovery on the laryngeal claim as it was brought outside of the statute of limitations. We recognize that the statute in *Neal* and section 31(5) are different in that the former precluded the recovery of specific damages while the latter prevented even the filing of the action. But in this case the jury was asked to determine liability and damages caused by the laryngeal cancer and made that determination. Thus, we do not have to speculate as to the value of the harm caused by Lorillard's tortious conduct

¶ 102 The measure of the uncompensated harm to be included in the harm to punitive damages calculation is limited to the harm actually caused by the defendant's tortious conduct. *Id*. In this case, the $1 million award attributable to the laryngeal cancer must be considered in terms of Lorillard's proportional fault in its causation. The jury determined that Lorillard was responsible for 60% of England's laryngeal cancer and we will therefore utilize the $600,000 that represents the uncompensated harm to England for purposes of the punitive damages ratio calculation.[40] Therefore, under the peculiar facts of this case, the appropriate measure of the harm plus the actual damages for use in the ratio to punitive damages calculation is $1.6 million, which results in a ratio of 18.75:1 ($30 million punitive to $1.6 million harm); a ratio that exceeds single digits and is thus constitutionally suspect. *Compare State Farm Mut. Auto. Ins.,* 538 U.S. at 425 *with: TXO Production Corp. v. All. Res. Corp.*, 509 U.S. 443, 459, 462 (1993) (punitive damages award "over 526 times as large as the actual damages award" did not, under the facts presented, "jar one's constitutional sensibilities" and was not "so grossly excessive as to be beyond the power of the State to allow").

¶ 103 Having determined that the 18.75:1 ratio of punitive damages to harm to be analyzed is constitutionally suspect, we must determine whether the $30 million punitive damages award falls

---

due to the laryngeal cancer. *See Simon*, 113 P.3d at 72. (stating that the court defers to a jury's finding supported by the evidence). Thus, while Gerald may not recover damages for the time barred laryngeal cancer claim, the harm to England from the laryngeal cancer caused by Lorillard's tortuous conduct may still be used in the punitive damage to harm ratio calculation. *See, Simon*, 113 P.3d at 71 ("United States Supreme Court precedents appear to contemplate, in some circumstances, the use of measures of harm beyond the compensatory damages."); *Schoeff*, 232 So. 3d at 307 ("[T]he punitive award is compared to the actual or potential harm suffered, not actual harm alone.").

[40] The analysis in Section F, *infra*, does not apply here because the uncompensated or potential harm analysis requires consideration of harm *actually caused* by the defendant's tortious conduct. *See Simon*, 113 P.3d at 73.

into a rare exception to the single digit ratio or is otherwise justified. As determined above in the analysis of the *Gore* factors for the degree of reprehensibility guidepost, Lorillard's behavior was "extremely reprehensible." Additionally, as previously indicated, the Supreme Court has instructed that when compensatory damages are low, but the degree of reprehensibility is high, a higher ratio might comport with due process (especially where the injury is hard to detect, or the monetary value of noneconomic harm is difficult to determine). *State Farm Mut. Auto. Ins. Co.*, 538 U.S. at 425. But "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." *Id.* Therefore, to determine whether the $30 million punitive damages award is unconstitutionally excessive in this case depends on whether the $1.6 million compensatory and uncompensated damages award is substantial in the context of this case. Since the Supreme Court has not defined "substantial" in the context of compensatory damages, we must determine its meaning from how it has been applied. *See Lompe v. Sunridge Partners, LLC*, 818 F.3d 1041, 1069 (10th Cir. 2016).

¶ 104 Reynolds contends that the $1 million (or the resulting $1.6 million recoverable and nonrecoverable) noneconomic compensatory damages is a substantial award and is not small enough to permit a larger punitive damages ratio. Some courts, including the United States Supreme Court, have considered a compensatory damages award of $1 million to be substantial. *See State Farm Mut. Auto. Ins. Co.*, 538 U.S. at 426 (holding $1 million to the plaintiffs to be substantial for a year and a half of emotional distress due to a transaction that was in the economic realm and did not result from physical assault or trauma); *see also Lompe*, 818 F.3d at 1069 (observing that many cases have considered compensatory damages of $1 million or above to be substantial while others find awards of less than $1 million, such as $630,307, also to be substantial).

¶ 105 Gerald, on the other hand, argues that what may be substantial in one context may not be substantial in another. He correctly distinguishes the $1 million compensatory damages award in *State Far*m from the $1 million compensatory damages award in this case. In *State Farm*, the damages arose from a transaction in the economic realm, and not from some physical assault or trauma, and was without physical injuries. Gerald argues that the compensatory damages awarded in this case are not substantial in the context of damages awarded in wrongful death litigation cases involving cigarettes. Many courts do not consider a million-dollar award substantial, especially those involving physical injuries resulting in painful suffering and death. *See, e.g.*, *Flax v. DaimlerChrysler Corp.*, 272 S.W.3d 521, 538-40 (Tenn. 2008) (holding that a $2.5 million award in compensatory damages for wrongful death was not so substantial as to require a ratio of punitive to compensatory damages of 1:1, and affirming a punitive award in a ratio of 5.35:1); *Aleo v. SLB Toys USA, Inc.*, 995 N.E.2d 740, 757 (Mass. 2013) (holding that "while $2,640,000 may be a substantial sum of money by many measures, its significance pales when viewed not as compensation for economic loss or emotional distress but for the loss of a young woman's life" and affirming awards with a punitive to compensatory ratio of 7:1); *Bullock*, 131 Cal. Rptr. 3d at 400 (holding that $850,000 in compensatory damages was a relatively small award, particularly where only $100,000 of that was for pain and suffering and upholding a punitive to compensatory ratio of 16:1).[41] Other courts have added that in wrongful death cases, the state has a particularly

[41] *See also Schoeff* , 232 So. 3d 294 ($10.5 million compensatory damages vs. $30 million punitive damages*); R.J. Reynolds v. Buomo*, 138 So. 3d.1049 (Fla. Dist. Ct. App 2013) ($5.235 million compensatory vs. $25 million punitive); *R.J. Reynolds Tobacco Co. v. Martin*, 53 So. 3d 1060 (Fla. Dist. Ct. App. 2010) ($3.3 million compensatory vs. $25 million punitive); *R.J. Reynolds Tobacco Co. v. Townsend*, 90 So. 3d 1060 (Fla. Dist. Ct. App. 2012) ($10.8 million compensatory vs. $40.8 million punitive); *Boeken vs. Philip Morris, Inc.*, 26 Cal. Rptr. 3d 638 (Cal. Ct. App. 2005) ($5.54 million compensatory vs. $50 million punitive)

high interest in adequately punishing conduct that causes death that is "particularly egregious." *Romo*, 6 Cal. Rptr. 3d at 810-11. Therefore, a $1 million or $1.6 million compensatory award might not be considered substantial for an injury resulting in painful injury and death. Thus, while the award of $1 million or $1.6 million is not a small sum, it is certainly not in the category of substantial damages found by the Supreme Court as requiring a reduction of the punitive damages to a lesser ratio in the 1:1 ratio range. *See State Farm Mut. Auto. Ins. Co.*, 538 U.S. at 426.

¶ 106 Another reason a higher compensatory to punitive ratio may also be justified is if "the injury is hard to detect or the monetary value of noneconomic harm might have been difficult to determine." *State Farm Mut. Auto. Ins. Co.*, 538 U.S. at 425. Similarly, a high ratio may be justified if the "the harms are primarily dignitary, or if there is a risk that limiting recovery to barely more than compensatory damages would allow a defendant to act with impunity." *Saccameno v. U.S. Bank Nat'l Ass'n*, 943 F.3d 1071, 1089–90 (7th Cir. 2019), *cert. denied sub nom. Saccameno v. Ocwen Loan Servicing*, LLC, 140 S. Ct. 2674 (2020).

¶ 107 England only discovered he had bladder cancer when he exhibited physical symptoms, after the cancer was at an advanced stage. And Lorillard had successfully confused the public and created a false sense of safety regarding the health concerns that could result from smoking. In addition, the proper amount of noneconomic damages to award in this case is difficult to determine as the jury had to quantify the amount of pain and suffering England endured. *See Aleo v. SLB Toys USA, Inc.*, 995 N.E.2d 740, 756–58 (Mass. 2013) (holding that the value of injury in a wrongful death action is difficult to determine). The amount also takes into account how England's dignity was affected. *See e.g.*, *Bullock*, 131 Cal. Rptr. 3d at 401. Here, England had a valve in his throat making it difficult to drink in public and was reduced to using colostomy bag to use the bathroom and was so helpless that he wished he was dead. These factors therefore weigh in favor

of a higher ratio of punitive to compensatory damages. *See Dean v. Olibas*, 129 F.3d 1001, 1007 (8th Cir. 1997) (finding a higher ratio between punitive damages and compensatory damages was proper because plaintiff's emotional damage was humiliating and great).

¶ 108 Reviewing similar tobacco death cases, we note that few punitive damage awards exceed a single-digit ratio, while many tobacco compensatory damage awards exceed $3 million. *See, e.g.*, *Schoeff v. R.J. Reynolds Tobacco Co.*, 232 So. 3d 232, 307 (Fla. 2017); (upholding an award of $30 million punitive damages and $10.5 million compensatory damages for a 2.8:1 ratio); *R.J. Reynolds Tobacco Co. v. Martin*, 53 So. 3d 1060, 1070 (Fla. Dist. Ct. App. 2010) (upholding an award of $25 million punitive damages and $3.3 million compensatory damages for a 7.6:1 ratio). Gerald also points to *Kerrivan v. R.J. Reynolds Tobacco Co.*, 953 F.3d 1196, 1210 (11th Cir. 2020), which affirmed a punitive damages award of $25.3 million. However, in *Kerrivan*, the compensatory damages was $15.8 million pre-apportionment, making the ratio 1.6:1 or nearly 2:1 after apportionment. *Id.* In *Boeken*, 26 Cal. Rptr. 3d at 645, 687, the court affirmed the award of $5.5 million in compensatory damages and $50 million in punitive damages for a ratio of 9:1, while in *Bullock*, 131 Cal. Rptr. 3d at 386, the court upheld a punitive damages award of $13.8 million and $850,000 compensatory damages for a ratio of 16:1.[42]

[42] Gerald cites to two tobacco cases that have approved punitive to compensatory damage award ratios higher than 30:1. An Oregon court affirmed a punitive award of $25 million and compensatory damages of $168,514 for a ratio of 148:1. *Schwarz v. Philip Morris USA, Inc.*, 355 P.3d 931, 932 (Or. Ct. App. 2015). However, in the *Schwarz* case, the court determined that $170,000 in compensatory damages was too small for the death of a human being, thereby justifying the higher ratio. *Id.* at 943. In the other case, the court went above a 30:1 ratio to affirm a punitive damage award of $79.5 million and a compensatory damage award of $821,000 for a ratio of 97:1. *See Williams v. Philip Morris Inc.*, 340 Or. 35, 44 (2006), *vacated sub nom. Philip Morris USA v. Williams*, 549 U.S. 346, and *adhered to on reconsideration*, 344 Or. 45 (2008). There, the total compensatory damage award was lowered to $521,000 after applying a $500,000 statutory cap. *See Williams v. Philip Morris Inc.*, 127 P.3d 1165, 1171, *vacated sub nom. Philip*

¶ 109 Accordingly, it appears that on balance, while not considered "breathtaking" as in *Gore* (97:1) or in *State Farm* (145:1), the ratio of 18.75:1 is still unusually high compared to similar cases that have decided constitutionally acceptable ratios of punitive awards. *See, e.g., Williams v. First Advantage LNS Screening Sols. Inc.*; 947 F.3d 735, 765-66 (11th Cir. 2020) (finding that a ratio of 13:1 was unconstitutionally excessive); *Bardis v. Oates*, 14 Cal. Rptr. 3d 89 (Cal. Ct. App. 2004) (holding that a ratio of 42 to 1 is unconstitutionally excessive); *see also Hollock v. Erie Ins. Exch.*, 842 A.2d 409, 422 (Pa. Super. Ct. 2004) (holding that a ratio of 10 to 1, which "barely exceeds the 'single digit ratio'" was not excessive); *Martin*, 53 So. 3d at 1070 (Fla. Dist. Ct. App. 2010) (upholding 7.6:1 post-apportionment ratio); *Kerrivan*, 953 F.3d at 1210 (11th Cir. 2020) (affirming 2:1 ratio after apportionment); *Boeken*, 26 Cal. Rptr. 3d at 687 (upholding a 9:1 ratio); *Bullock*, 131 Cal. Rptr. 3d at 386 (upholding a ratio of 16:1). Therefore, analyzing the second *Gore* guidepost of harm to punitive damages, we conclude that the 18.75:1 ratio in this case is constitutionally excessive.

3. The disparity between the punitive award and civil penalties authorized or imposed in comparable cases

---

Morris USA v. Williams, 549 U.S. 346, (2007), and *adhered to on reconsideration*, 176 P.3d 1255 (Or. 2008). However, it was the U.S. Supreme Court that vacated the punitive award. On remand, the Oregon Supreme Court reaffirmed the punitive-damages award because the defendant waived its substantive challenge to the size of the award, and did not decide whether the award complied with due process. *See Williams v. Philip Morris Inc.*, 176 P.3d 1255, 1263 (Or. 2008).

Gerald also cites a non-tobacco case, *In re Actos (Pioglitazone) Prods. Liab. Litig.*, 2014 WL 5461859, at *3 (W.D. La. Oct. 27, 2014) (unpublished), in which the jury awarded $9 billion punitive damages on a $1.5 million compensatory damage award (6000:1 ratio) for marketing a diabetes drug it knew caused bladder cancer. However, the court reduced the punitive damages as a matter of law to $37 million (25:1 ratio) because although the jury's award was reasonable in light of the need to deter the company's reprehensible conduct based on the profits and wealth of the company, the award was not proportional to the harm done to plaintiff. The court found that the jury's punitive damages award "must bow down to the weight of the Due Process Clause." *Id.* at **36-38; *53-55.*

¶ 110 The third and final *Gore* guidepost requires examination of the disparity between the punitive award and the "civil penalties authorized or imposed in comparable cases." *State Farm Mut. Auto. Ins. Co.*, 538 U.S. at 428. Reynolds correctly acknowledges that this guidepost is not very relevant in this case since actions based on common law torts do not easily lend themselves to comparison with statutory penalties, and no Virgin Islands statute addresses penalties comparable to the claims of this case. *See Inter Med. Supplies, Ltd. v. EBI Med. Sys., Inc*., 181 F.3d 446, 468 (3d Cir. 1999); *Cont'l Trend Res., Inc. v. OXY USA Inc.,* 101 F.3d 634, 641 (10th Cir. 1996). Gerald's appellate brief does not address this third factor. Therefore, the third guidepost factor "is accorded less weight in the reasonableness analysis than the first two guideposts." *Kerrivan*, 953 F.3d at 1210 (citing *Kemp v. Am. Tel. & Tel. Co*., 393 F.3d 1354, 1364 (11th Cir. 2004)).

¶ 111 A search of Virgin Islands law has not revealed any convincing analogous civil or criminal penalties and therefore we consider this third guidepost factor relatively neutral in assessing the reasonableness of the jury's punitive damages award in *Gerald*.[43] *See Boeken*, 26 Cal. Rptr. 3d at 683; *Alabama River Grp. v. Conecuh Timber, Inc.*, 261 So. 3d 226, 275 (Ala. 2017) (finding that this third *Gore* guidepost was neutral in the reasonableness analysis of punitive damages awarded).

¶ 112 Because no Virgin Islands statutes appear to address situations comparable to the facts of the *Gerald* case to provide guidance as to what size of punitive damages award would be constitutional, we therefore look to other cases awarding punitive damages to determine whether

[43] In the Virgin Islands, a class action suit may be brought for deceptive trade practices and damages may be trebled if awarded. 12A V.I.C. § 331. However, we note that England's second amended complaint contained a count for deceptive and unfair business practices, before being dropped prior to trial. *Gerald v. R.J. Reynolds Tobacco Co.*, 67 V.I. 441, 449 n.6 (Super. Ct. 2017).

Reynolds had reasonable notice that its tortious actions could result in a punitive award of $30 million. *See, e.g.*, *Cont'l Trend Res., Inc. v. OXY USA Inc.,* 101 F.3d 634, 641 (10th Cir. 1996) (stating that "a violation of common law tort duties [does] not lend [itself] to a comparison with statutory penalties" and reviewing cases with large punitive damages awards instead). Based on our survey of punitive damage awards in the Virgin Islands, the *Gerald* award appears to be the largest approved punitive amount ever awarded.[44] While it appears that no Virgin Island jury has awarded punitive damages this high, as described above, other similar tobacco cases in other jurisdictions have been as high as the punitive award in this case, thus putting Reynolds on notice of the possibility of a large punitive award being imposed upon it. *See e.g.*, *Boeken*, 26 Cal. Rptr. 3d 638 (affirming $50 million in punitive damages); *Schoeff*, 232 So. 3d 294 (affirming punitive damages award of $30 million); *Martin*, 53 So. 3d at 1072 (affirming $25 million in punitive damages award).

4. Determining the Appropriate Maximum Punitive Damages Award

¶ 113 Having determined that the punitive damages award in *Gerald* is constitutionally excessive, we must now determine a constitutionally acceptable punitive damages award. Measurement of damages is, of course, far from exact, a fact reflected in the Supreme Court's qualification of its single-digit presumption: only awards exceeding that level "to a significant degree" are constitutionally suspect. *State Farm Mut. Auto. Ins. Co.* 538 U.S. at 425; *Simon*, 113 P. 3d at 77. As due process does not entitle a tortfeasor to notice of the precise amount of the

[44] Our research indicates that the award in *Dunn v. HOVIC*, 1 F.3d 1371 (3d Cir. 1993) at $25 million in punitive damages is the largest Virgin Islands punitive jury award, prior to the $30 million punitive damages award in *Gerald*. That $25 million punitive damage award in *Dunn* was remitted to $1 million. *Id*. at 1391.

penalty that may be imposed, "[t]he judicial function is to police a range, not a point." *Id.* (citing *Mathias*, 347 F.3d at 678). In making this determination, an appellate court should keep in mind, that its constitutional mission is only to find a level higher than which an award may not go; it is not to find the "right" level in the court's own view. While we must assess independently the wrongfulness of a defendant's conduct, *Cooper Indus.*, 532 U.S. 424, our determination of a maximum award should allow some leeway for the possibility of reasonable differences in the weighing of culpability. *Simon*, 113 P.3d at 81. In enforcing federal due process limits, an appellate court does not sit as a replacement for the jury but only as a check on arbitrary awards. *See Gore*, 517 U.S. at 568 ("States necessarily have considerable flexibility in determining the level of punitive damages they will allow . . . in any particular case".); *Simon*, 113 P.3d at 81.

¶ 114 We have already explained the reasons for our evaluation of Reynolds' reprehensibility, the most important guidepost, as extremely reprehensible, and the admonition against punitive damages awards significantly exceeding a single-digit ratio of the actual or potential harm inflicted. (*See* Subsections E.1. & E.2, *ante.*) In *State Farm*, the Supreme Court made clear that due process permits a higher ratio between punitive damages and a small compensatory award for purely economic damages containing no punitive element than between punitive damages and a substantial compensatory award for emotional distress; the latter may be based in part on humiliation flowing from the defendant's act and may be so large as to serve, itself, as a deterrent. *State Farm Mut. Auto. Ins. Co.*, 538 U.S. at 425–26.

¶ 115 Here, the $1.6 million was for purely noneconomic damages, an award that may already contain a punitive element and is neither a small award, nor an overly substantial one. The nature and size of the $1.6 million compensatory damages amount, including the uncompensated harm portion of the award, militates for a maximum punitive award at the top end of the single-digit

range. We therefore conclude that a maximum penalty of $14,400,000, a 9:1 ratio, which is within a single-digit ratio amount ($14.4 million punitive damages versus $1.6 million harm), is in absolute size not extraordinary for the harm caused by Reynolds' extremely reprehensible fraudulent conduct. *See* n. 44 *supra*; *Boeken*, 26 Cal. Rptr. 3d at 645, 687 (approving an award of $50 million in punitive damages and a 9:1 ratio).

¶ 116 Thus, after careful and thorough de novo review of the facts and circumstances of this case and applying our analysis of the *Gore* and *State Farm* guideposts from the Supreme Court of the United States, we conclude that the highest range of constitutionally acceptable punitive damages in this case is $14.4 million. This penalty furthers the legitimate interests of the Virgin Islands in punishing and deterring the extremely reprehensible fraudulent conduct exhibited by Lorillard on its residents, acknowledges the jury's verdict, is consistent with punitive damages awards found to be constitutionally sufficient in similar cases and is within range of the $12.3 million punitive damages award we approved in *Brown*. We will therefore reduce the excessive $30 million punitive damages award to the constitutionally acceptable sum of $14.4 million.

5. The proper remedy in Gerald is to reduce the punitive award without a new trial

¶ 117 Because we are reducing the punitive damages award to a constitutionally acceptable sum, we must also determine whether a new trial is necessary and whether the compensatory award in *Gerald* should be upheld. As discussed above, *Antilles School* ended the judicial practice of remittitur. However, it left open, as required by the United States Supreme Court, the judicial review of damages and in particular punitive damages. *See Antilles Sch.*, 64 V.I. at 438-39 (citing *Honda Motor Co., Ltd.*, 512 U.S. at 432)).

¶ 118 The United States Supreme Court has held, in the context of reducing compensatory damages based on the weight of the evidence, that the Seventh Amendment prohibits a reduction

of the compensatory damages to an amount determined by a judge without affording the option of a new trial before a jury. *Hetzel v. Prince William Cnty.*, 523 U.S. 208, 210 (1998). However, the consent of the plaintiff is not required here for a judicial reduction in punitive damages because this is a constitutional requirement, and as such is a matter of law and not of facts. *See Espersen,* 2022 VI 11, ¶ 58 (citing *Ross v. Kansas City Power & Light Co.*, 293 F.3d 1041, 1049-50 (8th Cir. 2002) (holding that the plaintiff's consent to a constitutional reduction of a punitive damages award is irrelevant)).

¶ 119 The Seventh Amendment prohibits the re-examination of facts tried by a jury; however, punitive damages are not facts tried by the jury. *Cooper Indus.*, 532 U.S. at 437. As explained by the Eleventh Circuit:

> A remittitur is a substitution of the court's judgment for that of the jury regarding the appropriate award of damages . . . A constitutional reduction, on the other hand, is a determination that the law does not permit the award. Unlike a remittitur, which is discretionary with the court . . . a court has a mandatory duty to correct an unconstitutionally excessive verdict so that it conforms to the requirements of the due process clause.

Johansen v. Combustion Eng'g, Inc., 170 F.3d 1320, 1331–32 (11th Cir. 1999); *see also Sony BMG Music Entm't v. Tenenbaum*, 660 F.3d 487, 513–14 (1st Cir. 2011) (holding that a punitive damages award can be reduced on due process grounds without offering plaintiffs a new trial, without running afoul of the Seventh Amendment); *Kimzey v. Wal-Mart Stores, Inc.*, 107 F.3d 568, 578 (8th Cir. 1997) (holding that the plaintiff need not be given the option of a new trial before reduction of punitive damages). We agree that the proper remedy is to review a punitive damages award for its constitutionality and if found to be constitutionally excessive, to reduce it to a constitutionally acceptable amount. *See Espersen*, 2022 VI 11, ¶ 59; *Simon,* 113 P.3d at 80. Such

constitutional reduction of punitive damages is not a remittitur and does not conflict with our holding in *Antilles School*.

¶ 120 The $1 million in recoverable compensatory damages award in *Gerald* is reasonable and neither party has complained that it is excessive or inadequate. We will therefore not disturb the compensatory damages award in *Gerald* because "[a] jury's reasonable findings of liability and compensatory damages are not rendered unreasonable simply on the basis that it awarded an excessive amount of punitive damages." *Atlas Food Sys. & Servs., Inc. v. Crane Nat. Vendors, Inc.*, 99 F.3d 587, 599 (4th Cir. 1996). Therefore, in *Gerald* the only action necessary is to affirm the $1 million compensatory damages award, reduce the punitive damages award to the constitutionally acceptable amount of $14.4 million as determined herein and affirm the resulting total of $15,400,000 in damages.

F. Comparative Fault

¶ 121 The Superior Court entered judgment in both cases on the jury awards without reduction for the respective jury's comparative fault determinations.[45] Reynolds argues that the Superior Court erred when it failed to reduce the judgments in both cases to account for the juries' comparative fault determinations.[46] The Appellees argue that the judgments should not be reduced for comparative fault because the verdicts are based on intentional as well as negligent conduct. At issue is whether the Superior Court should have reduced the judgments for comparative fault

[45] The jury assigned 40% of fault to Gerald and 30% of fault to Brown for their respective injuries. (JA 210, 216.)

[46] Gerald prevailed on his two product liability claims (defective design, failure to warn), one negligence claim (negligent marketing), and three intentional act claims (fraudulent concealment, fraudulent misrepresentation, and conspiracy) (JA 205-09). Brown prevailed on identical claims, except for negligent marketing. (JA 212-216.)

where, in *Gerald*, the damages awarded did not distinguish between an unsevered negligence claim and multiple intentional tort claims; or in *Brown*, where Brown only prevailed on her intentional tort claims.

¶ 122 The Virgin Islands' legislature enacted the current comparative fault statute, 5 V.I.C. § 1451, in 1973 to abolish the harsh common law rule "that a plaintiff's contributory negligence barred recovery." *Monk v. V.I. Water & Power Auth.*, 32 V.I. 425, 431 (3d Cir. 1995). The purpose of the statute was to adopt a theory of comparative negligence that apportioned fault between the plaintiff and defendant. *Id*. Section 1451 provides in relevant part:

> (a) In any action *based upon negligence* to recover for injury to person or property, the contributory negligence of the plaintiff shall not bar a recovery, but the damages shall be diminished by the trier of fact in proportion to the amount of negligence attributable to the plaintiff.

5 V.I.C. § 1451 (emphasis added).

¶ 123 Subsection (b) of section 1451 provides an exception for "any action based upon a statute the violation of which imposes absolute liability, whether or not such statute comprehends negligent conduct." 5 V.I.C. § 1451(b). Reynolds argues that this subsection (b) implies that subsection (a) should be read to apply to the nature of the case as a whole because if subsection (a) only applied to negligence claims there would be no need to make an exception for absolute liability claims. (Appellant's Br. 34.) According to Reynolds, this Court should analyze "the essential nature" of the lawsuits to determine if the general gist of the suits pertained to negligence, and if so, reduce the damages according to the apportionment of fault. (Appellant's Br. at 33.)

¶ 124 "When interpreting the meaning of a statute, we first look to its plain text. This is because courts, as a general rule, should not adopt an interpretation of a statute that contradicts its plain text." *Haynes v. Ottley*, 61 V.I. 547, 561 (2014) (internal citation omitted). In addition, we assume

"that when a legislature adopts a statute, it does so with knowledge of existing law." *Id*. at 564. Here, the most natural reading of the statute is that the exception in subsection (b) merely clarifies that even when a statute involves negligent conduct, if the statute imposes absolute liability, then no comparative negligence offset is applied. And nowhere does the text suggest that courts or juries must consider the "essential nature" of the action as a whole. Nor is such an interpretation of the statute supported by any relevant case law in the Virgin Islands.

¶ 125 The majority of jurisdictions to address this issue have held that there can be no apportionment of damages where an intentional tort was involved.[47] Allan L. Schwarz, *Applicability of Comparative Negligence Principles to Intentional Torts*, 18 A.L.R. 5th 525 (1994). Moreover, states with comparative fault statutes similar to that in the Virgin Islands, have consistently held that such statutes do not extend to intentional torts.[48] This rationale "rests on the general assumption that comparative negligence evolved to provide compensation to tort victims

---

[47] See *Greycas, Inc. v. Proud*, 826 F.2d 1560, 1566 (7th Cir. 1987); *Bell v. Mickelsen*, 710 F.2d 611, 617 (10th Cir. 1983); *Whitlock v. Smith*, 762 S.W.2d 782, 783 (Ark. 1989); *Godfrey v. Steinpress*, 128 Cal. App. 3d 154, 176 (Ct. App. 1982); *Carman v. Heber*, 601 P.2d 646, 648 (Co. Ct. App. 1979); *Terrell v. Hester*, 355 S.E.2d 97, 98 (Ga. App. Ct. 1987); *Fitzgerald v. Young*, 670 P.2d 1324, 1326 (Idaho Ct. App. 1983); *State v. Wagner*, 484 N.W.2d 212, 216 (Iowa Ct. App. 1992); *Sieben v. Sieben*, 646 P.2d 1036, 1037 (Kan. 1982); *McLain v. Training & Dev. Corp.*, 572 A.2d 494, 497 (Me. 1990); *Flood v. Southland Corp.*, 616 N.E.2d 1068, 1071 (Mass.1993); *Melendres v. Soales*, 306 N.W.2d 399, 403 (Mich. Ct. App. 1981); *Florenzano v. Olson*, 387 N.W.2d 168, 175 (Minn. 1986); *Graves v. Graves*, 531 So. 2d 817, 820 (Miss. 1988); *Schellhouse v. Norfolk & W. Ry. Co*., 575 N.E.2d 453, 457 (Ohio 1991); *Frey v. Kouf*, 484 N.W.2d 864, 868 (S.D. 1992); *City of Garland v. White*, 368 S.W.2d 12 (Tex. Civ. App.1963); *Erdelyi v. Lott*, 326 P.3d 165, 177 (Wyo. 2014); *Stephan v. Lynch*, 136 Vt. 226, 230, 388 A.2d 376, 379 (1978) (declining to apportion comparative fault in cases of intentional tort). *But see Blazovic v. Andrich*, 590 A.2d 222, 231 (N.J. 1991) (holding that comparative fault could be assigned to compensatory damages for intentional torts but not punitive damages).

[48] *See, e.g.*, *Carman v. Heber*, 601 P.2d 646, 648 (Co. Ct. App. 1979); COLO. REV. STAT. ANN. §13-21-111 (West 2021); *Erdelyi v. Lott*, 326 P.3d 165, 177 (Wyo. 2014); WYO. STAT. ANN. § 1-1-109 (West 2021).

who were barred by the harsh doctrine of contributory negligence, and should not be used to diminish recovery where the common law had previously treated an intentional tort victim's contributory fault as irrelevant to damage recovery where an intentional tort was inflicted." *Id*. Applying comparative fault to "reduce a plaintiff's damages under comparative fault for his 'negligence' in encountering the defendant's deliberately inflicted harm" is "contrary to sound policy." *McLain v. Training & Dev. Corp.*, 572 A.2d 494, 497 (Me. 1990) (internal quotation marks and citations omitted). Further, "[w]here the defendant's conduct is actually intended to inflict harm upon the plaintiff, there is a difference, not merely in degree but in the kind of fault; and the defense never has been extended to such intentional torts." *Graves v. Graves*, 531 So. 2d 817, 820 (Miss. 1988).

¶ 126 Some comparative fault statutes are written more broadly, and have been interpreted to include intentional torts. *See, e.g., Field v. Boyer Co., L.C.*, 952 P.2d 1078, 1080 (Utah 1998) (holding that the term "fault" in the comparative negligence statute contemplated both negligent and intentional conduct); *see also Flood v. Southland Corp.*, 616 N.E.2d 1068, 1072 (Mass. 1993) ("The strong majority view across the country is that comparative fault statutes do not apply to intentional tort claims, with exceptions arising especially where the statute uses terms broader than negligence, such as 'culpable conduct' or 'fault.'"). Because here section 1451 only applies to actions based on "negligence," it cannot be read as applying to intentional conduct. Therefore, a finding of intentional wrongdoing on the part of the defendant—as was found in *Brown* and *Gerald*—renders comparative fault inapplicable. *See* PROSSER & KEATON ON TORTS § 67, at 477-78 (5th ed. 1984) (stating that "contributory negligence never has been considered a good defense to an intentional tort").

¶ 127 We also assume that the legislature is aware of the common law,[49] and statutes in derogation of the common law are strictly construed. *Hansen v. O'Reilly*, 62 V.I. 494, 520–21 (2015). The legislature could have chosen to apply comparative fault to intentional torts as well, but it chose not to. Therefore, we conclude that the legislature only overruled the traditional common law rule that contributory negligence barred a plaintiff's recovery and did not overrule the traditional common law rule that contributory negligence does not bar or result in apportionment of damages in an intentional tort claim.

¶ 128 Furthermore, in *Gerald* where the jury returned verdicts on both negligence and intentional tort claims,[50] it is not possible to sever the negligence claim—which can be apportioned for comparative fault—from the intentional tort claims which, as discussed, cannot be apportioned for comparative fault. *See Schoeff*, 232 So. 3d at 299, 305, 309. Applying a similar comparative statute, the Florida Supreme Court held that where the jury found the plaintiff 25% liable for their injuries and the award resulted from both negligence and intentional torts, the entire judgment could not be reduced by the plaintiff's comparative fault. *Id*. This is because where the individual claims each arise from "the same injuries [*i.e.*,] a smoker's illness or death or a survivors' damages," the damages award for the entire action must be unitary. Severing these claims would be erroneous because if recovery was allowed for each separate claim, an impermissible double recovery would occur, as this would require defendants to pay twice for the same element of

[49] At the time, pursuant to 1 V.I.C. § 4, the Restatements provided the rules of decision, absent local law to the contrary. Under the Restatements, contributory negligence by a plaintiff did not bar recovery against a defendant for an intentional tort. Restatement (Second) of Torts § 481 (1965).

[50] In *Brown*, the jury found Lorillard liable on Brown's intentional tort claims but not for her negligence claims and the damages award was therefore not subject to apportionment for comparative fault. (J.A. 212 -218.)

damages. *Id.* at 302; *see also Bellard v. Am. Cent. Ins. Co.*, 980 So. 2d 654, 668 (La. 2008) (prohibiting plaintiffs from recovering damages for two claims with the same damage element by reasoning this constituted double recovery); *Bell v. Mickelsen*, 710 F.2d 611, 617 (10th Cir. 1983) (holding that when damages are caused by a defendants' negligence and intentional wrongful conduct, the award may become unitary). Likewise, if a reduction were applied, it would reduce damages arising from an action based on an intentional tort, in violation of the common law.

¶ 129 Because the claims and corresponding damage awards in *Gerald* and *Brown* are unitary, and comparative fault cannot be assigned to intentional torts, the entire award cannot be apportioned. We therefore hold that a judgment that includes only intentional torts or unsevered claims of intentional tort and negligence cannot be reduced for comparative fault, and the Superior Court committed no error in declining to reduce the judgments for the comparative fault in both cases.

G. Prejudgment Interest

¶ 130 Reynolds' final argument is that the Superior Court erred in awarding prejudgment interest as a component of both judgments. The Superior Court awarded prejudgment interest at a rate of nine percent per annum on the noneconomic compensatory damages awarded in *Brown* and *Gerald*. The Superior Court further held that the interest would accrue from the date of the filing of the complaint of each plaintiff until the December 13, 2018, judgment date. Reynolds argues that prejudgment interest is improper in these cases. The Appellees counter that the Virgin Islands' statute governing interest provides for prejudgment interest or alternatively, that the common law provides for an award of prejudgment interest.

1. The Virgin Islands statutory pre-judgment interest

¶ 131 The Superior Court did not expressly state the authority for awarding prejudgment interest, but considering the nine percent interest rate awarded, 11 V.I.C. § 951(a) is the likely source of the authority for awarding the prejudgment interest in these cases. This statute provides for prejudgment interest in the following circumstances:

> (a) The rate of interest shall be nine (9%) per centum per annum on-
> (1) all monies which have become due;
> (2) money received to the use of another and retained beyond a reasonable time without the owner's consent, either express or implied;
> (3) money due upon the settlement of matured accounts from the day the balance is ascertained; and
> (4) money due or to become due where there is a contract and no rate is specified.

11 V.I.C. §951(a). The only potentially applicable category that interest on compensatory damages in these cases could fall within is the first, subsection (a)(1): "all monies which have become due." Because the statute does not define what type of "monies" are included within this category, we must determine whether the compensatory damages at issue are included. Where the statutory language is ambiguous, the legislative intent may be "discerned by looking to the [statute's] text, context, and relevant historical treatment." *Brady v. Cintron*, 55 V.I. 802, 815 (V.I. 2011); *see also Ottley v. Estate of Bell*, 61 V.I. 480, 493 (V.I. 2014) (reasoning that this Court must look to the "context surrounding each statute" to determine the Legislature's intent).

¶ 132 Section 951(a) is based on the 1921 Codes. *See*, History, 11 V.I.C. § 951. The 1921 Codes were largely taken from the codes of the Territory of Alaska. *Greer v. People*, 2021 V.I. 7, ¶13 n.24. That appears to be true for section 951(a) as the Alaska and Virgin Islands original provisions

are identical.[51] Therefore, we examine early judicial decisions from the Alaska Supreme Court interpreting the Alaska interest statute to aid our interpretation. *Haynes v. Ottley*, 61 V.I. 547, 568 (2014). Prior to 1965, Alaska interpreted its interest statute "as allowing prejudgment interest only in those instances where the amounts claimed were liquidated." *State v. Phillips*, 470 P.2d 266, 273 (Alaska 1970) (citing *Chirikoff Island Cattle Corp. v. Robinette*, 372 P.2d 791, 795 (Alaska 1962)). After the Alaska Legislature amended one of its statutes awarding interest at the suggestion of the Court, the Alaska Supreme Court altered its interpretation of its general interest statute to discard the liquidated-unliquidated damages distinction. *Id*. at 272-73. However, because the Virgin Islands Legislature has not amended its interest statutes in any such manner, we rely on the Alaska Supreme Court's original interpretation of its interest statute in our interpretation and agree that section 951(a) only permits interest when the amounts claimed are liquidated.

¶ 133 In addition, the language of section 951(a) indicates that prejudgment interest is authorized "only where the amount due is in money and therefore is easily ascertainable." *Remole v. Sullivan*, No. CIV. 554/1980, 1984 WL 998141, at *3 (Terr. V.I. June 7, 1984) (unpublished). Prior decisions in the Virgin Islands courts have explained that this statute "only applies to interest due on breached contracts, as a form of money damages." *Messer v. Gov't of the V.I.*, No. CV 344/1994, 1996 WL 35048114, at *4 (Terr. V.I. Oct. 29, 1996) (unpublished); *Bookworm, Inc. v. Tirado*, 44 V.I. 300, 305 (Terr. V.I. July 1, 2002) ("[S]ection 951(a) is not a proper mechanism for

[51] Compare "the rate of interest shall be six per cent per annum on all moneys after the same become due" Section 25–1–1 A.C.L.A.1949; *Chirikoff Island Cattle Corp. v. Robinette*, 372 P.2d 791, 795 (Alaska 1962), with "the rate of interest in the District shall be six per centum per annum, on all moneys after the same become due." Title II, Chapter Twenty-One, Sections 1, 1921 Code for Municipality of St. Thomas and St. John.

seeking prejudgment interest arising from a non-contractual tort"). "Damages are merely the remedy to which the plaintiff is entitled. As such, it is not 'money' within the meaning of § 951(a)." *Trocki v. Mendoza*, 15 V.I. 256, 259 (Terr. V.I. 1978). This Court agrees with those courts that interpret section 951 as applying only to ascertainable sums but disagrees with those courts that read section 951 so narrowly as to apply it only to contractual claims. As explained in *Addie v. Kjaer*, 836 F.3d 251, 257 (3d Cir. 2016), with which we concur, the Virgin Islands statute is broader than similar statutes in other states limiting prejudgment interest to contractual damages only. Section 951(a) refers to "all monies which have become due," as opposed to just money due under a contractual theory of recovery. *Id.*

¶ 134 Regardless, this Court need not precisely delineate the reach of section 951(a) in this proceeding. For purposes of this case, section 951 cannot be read as broadly as the Appellees suggest, such that the statute includes intangible personal injury damages. The mere fact that a jury has determined an award does not mean it is automatically "money due," thus falling under the purview of section 951. Otherwise, every jury award would be entitled to prejudgment interest.[52] *Pollara v. Ocean View Inv. Holding LLC*, No. 9-60, 2015 WL 4735205, at *5 (D.V.I. May 21, 2015) (unpublished). Instead, we conclude that Section 951(a) does not apply to

[52] It may well be correct that limiting the prejudgment interest in these personal injury cases is an injustice to plaintiffs and does nothing to incentivize prompt disposition of cases, however, such change must come from the Legislature and not by the courts. *See Wright Truck & Tractor Serv., Inc. v. State*, 398 P.2d 216 (Alaska 1965). *See also Poleto v. Consolidated Rail Corp*., 826 F.2d 1270, 1273-1279 (3d Cir. 1987) (discussing the history of disallowing prejudgment interest for bodily injury damages, the criticism of the liquidated/unliquidated differentiation and modern justifications for allowing prejudgment interest on bodily injury claims, but ultimately declining to award prejudgment interest because the interpretation disallowing prejudgment interest on FELA cases has existed for over 100 years and Congress has not sought to change the law to allow prejudgment interest to such cases).

intangible damages in a personal injury case. Because that is the only type of damages present in this case,[53] section 951 cannot provide a basis or justification for an award of pre-judgment interest to the Appellees. *See e.g.*, RESTATEMENT (SECOND) OF TORTS § 913(2) (1979); Restatement (First) of Torts § 913(2) (1939) ("Interest is not allowed upon an amount found due for bodily harm, for emotional distress or for injury to reputation.").

¶ 135 In addition, the wrongful death statute, 5 V.I.C. § 76, and the survival of tort actions statute, § 77, do not provide a direct basis for awarding prejudgment interest in this case. Section 76(e)(1) provides that survivors may recover "the value of *lost support and services* from the date of the decedent's injury to his death, *with interest*"[54] (emphasis added) and pursuant to section 76(e)(6) the decedent's estate may recover the loss of earnings "from the date of injury to the date of death, less lost support of survivors excluding contributions in kind, with interest." This language appears to support interest *only* for economic damages that can be determined with specificity, and which would be proved at trial and already be included in the jury award. Section 77 makes no mention of interest at all.

¶ 136 The Appellees acknowledge that these statutes may not provide a direct justification for an award of prejudgment interest. (Appellee's Br. 56.) The Appellees did not seek economic

[53] Regarding the survival claims, the juries were asked what amounts would compensate the estates of England and Brown for their "pain, suffering, disfigurement, mental anguish, and loss of enjoyment of life" during their lifetimes. (J.A. 209, 216). And regarding the wrongful death claim, the jury was asked what amount would compensate Christian Brown for the "pain, suffering, mental anguish, and loss of his mother's companionship, instruction and guidance he suffered as a result of his mother's illness and death." (J.A. 216.)

[54] The statute defines "support" as "contributions in kind as well as money", 76(b)(3), and "services" as "tasks, usually of a household nature, regularly performed by the decedent that will be a necessary expense to the survivors of the decedent." 76(b)(4).

damages and specifically waived any claim to such damages at trial. Therefore, these statutes do not support an award of prejudgment interest in these cases and the Superior Court erred in awarding prejudgment interest as a component of both judgments.

2. Common law prejudgment interest

¶ 137 Appellees argue that even if the Virgin Islands' prejudgment interest statute does not support an award of interest, the common law does allow the Superior Court to make such an award in its discretion. (Appellee's Br. 57.) Reynolds counters claiming that Appellees waived this common law issue and alternatively presented a *Banks* analysis to argue that common law equitable prejudgment interest should not be allowed in these cases. (Appellant's Br. 55-56.)

¶ 138 We decline to reach this issue in this proceeding. Appellees never raised the issue of a common law or equitable power as a basis to award prejudgment interest in the Superior Court and have therefore waived this issue.[55] *See* V.I. R. APP. P 4(h) ("Only issues and arguments fairly presented to the Superior Court may be presented for review on appeal"); V.I. R. APP. P. 22(m) ("Issues that were not raised or objected to before the Superior Court . . . are deemed waived"); *Stewart v. V.I. Bd. of Land Use Appeals*, 66 V.I. 522 (V.I. 2017). Additionally, there is absolutely no indication in the record that the Superior Court ever invoked any such common law equitable power in awarding prejudgment interest in these cases. If it had done so, the court would have set forth its findings and reasoning justifying the exercise of its equitable common law power to award

[55] Appellees admit that they did not raise the common law authority as a basis for awarding prejudgment interest in the trial court but argue that because Reynolds briefed the issue in its appellate brief, it waived waiver. However, the case cited for the "waiver of waiver" doctrine, *Simpson v. Golden*, 56 V.I. 172, 181 n. 6 (V.I. 2012) is inapposite. Moreover, Reynolds in its appellate brief specifically asserted that the common law interest issue was waived by Appellees. (Appellant Br. 55.) (arguing that "Plaintiffs waived any claim to prejudgment interest under the common law: Plaintiffs never even hinted to the Superior Court that the common law might be a basis for an award of pre-judgment interest."). Thus, Reynolds did not waive waiver.

prejudgment interest at nine percent, which would have permitted meaningful appellate review. Accordingly, we reject the invitation of Appellees to address the waived issue of the Superior Court's discretionary common law authority to award prejudgment interest in these cases.

¶ 139 The Superior Court erred in awarding prejudgment to the *Brown* and *Gerald* judgments, and we reverse and vacate the Superior Court's award of prejudgment interest in both cases.

III. CONCLUSION

¶ 140 Having concluded that the jury awarded grossly excessive compensatory damages in *Brown* and constitutionally excessive punitive damages in *Gerald*, this court affirms the $12.3 million punitive damages award in *Brown* and vacates the $50 million compensatory award to Brown's estate and $20 million to Christian Brown in *Brown*. We remand for a new trial on compensatory damages only in *Brown*. We affirm the $1 million compensatory award in *Gerald* but reduce the punitive damages award from $30 million to $14.4 million and direct the entry of a total judgment of $15.4 million in *Gerald*. We vacate the awards of prejudgment interest in *Brown* and *Gerald* and affirm the denial of apportionment for comparative fault in both cases.

Dated this 7th day of July, 2022.

BY THE COURT:

/s/ Rhys S. Hodge
RHYS S. HODGE
Chief Justice

ATTEST:

VERONICA J. HANDY, ESQ.
Clerk of the Court

By: /s/ Natasha Illis
Deputy Clerk

Dated: July 7, 2022