

[Products Liability Law Daily Wrap Up, TOP STORY—TOBACCO PRODUCTS—Fla. Dist. App.: \\$55M in punitive damages award against four tobacco companies overturned due to attorney misconduct, \(Sept. 27, 2016\)](#)

Products Liability Law Daily Wrap Up

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By Pamela C. Maloney, J.D.

The Florida Court of Appeal for the Fourth District issued a new opinion overturning a nearly \$55 million punitive damages award against four tobacco companies and ordering a new trial based primarily on its finding that the cumulative effect of plaintiff counsel's improper statements and arguments was highly prejudicial to the tobacco companies and impacted the outcome of the jury's findings. The new opinion, which replaces the court's January 5, 2016 [decision](#), reversed its earlier finding that these comments did not constitute sufficient basis for a mistrial but retained its finding that the trial court's jury instructions on the fraudulent concealment and conspiracy to commit fraudulent concealment claims were insufficient in that they did not address the element of detrimental reliance. The trial court also should have reduced compensatory damages awards to the smoker's wife and daughter based on the jury's finding that the smoker was 20.5 percent at fault ([R.J. Reynolds Tobacco Co. v. Calloway](#), September 23, 2016, Klingensmith, M.).

A long-time, three-pack-a-day cigarette smoker was diagnosed in 1992 with bladder cancer and died of septic shock. A doctor connected his cancer and death to his smoking. His wife brought claims for strict liability, negligence, fraudulent concealment, and conspiracy to commit fraud by concealment against four tobacco companies. Throughout the trial, counsel for the plaintiffs made numerous statements to which the defense counsel objected; the trial court sustained the objections and instructed the jury to disregard them but denied the tobacco companies' motions for mistrial.

Verdicts. Following the Phase I portion of the trial, the jury found that the smoker was an *Engle* class member, and after the Phase II portion, the jury determined that the tobacco companies' individual fraudulent concealment and conspiracy to commit fraudulent concealment were legal causes of the smoker's death. The smoker's wife was awarded \$9 million in non-economic damages and his daughter was awarded \$7.1 million in non-economic damages. Philip Morris was found to be 25 percent at fault, R.J. Reynolds 27 percent, Lorillard 18 percent, Liggett 9.5 percent, and the smoker himself 20.5 percent. In Phase III, the jury awarded punitive damages to the plaintiff in the amount of \$17.4 million against Philip Morris, \$17.25 million against R.J. Reynolds, \$12.6 million against Lorillard, and \$7.6 million against Liggett. The trial court denied various post-trial motions brought by the tobacco companies, including motions for a new trial based upon their claims of improper argument by counsel for the plaintiff, errors in the jury instructions, and a request for a reduction in the compensatory damages awarded. The tobacco companies appealed and the wife cross-appealed.

Comments by counsel. The Florida Supreme Court had abandoned the "harmless error" test used to determine whether comments or arguments made by counsel were sufficiently egregious to warrant a new trial in favor of a "no reasonable possibility standard." Under the new standard, the beneficiary of the error must prove there was no reasonable possibility that the error contributed to the verdict. The court of appeal found that the comments and arguments made by plaintiff's counsel in this case, when taken as a whole and considered in the aggregate, led to the inescapable conclusion that they created a "negative synergistic effect," which exacerbated the degree of unfairness to the tobacco companies.

The fact that the trial court correctly sustained the objections to these comments and occasionally gave curative instructions did not undo the prejudicial effect of plaintiff's counsel's repeated improprieties. Instead, it was

probable that the cumulative effect of the repeated objections was to prejudice the jurors even more by casting doubts on the tobacco companies' credibility and on the integrity of their counsel. The prejudicial effect of the comments was compounded further by the trial court's failure to attempt any real intervention to curb them. The court of appeal admonished that the trial judge should have responded to the improper arguments in a timely and consistent manner and should have issued proportional rebukes when the repeated instances took place. The trial court failed to do so in this case and, thus, a new trial was warranted.

Fraud/detrimental reliance. The trial court's refusal to instruct the jury on the detrimental reliance element of the claims for fraudulent concealment and conspiracy to commit fraudulent concealment was erroneous and warranted a new trial on these claims. Florida courts have consistently included detrimental reliance in fraudulent concealment instructions, and the appellate court noted that *Engle* had reiterated the need for a plaintiff to prove detrimental reliance upon the misinformation of a defendant. The trial court's failure to cover this element in the jury instructions prejudiced the tobacco companies' defense. Because the punitive damages awards were based on these claims, they were also reversed and remanded for a new trial.

Compensatory damages/comparative negligence. The compensatory damages awards to the smoker's wife and daughter should have been reduced by the 20.5 percent that the smoker was comparatively negligent. In *R.J. Reynolds Tobacco Co. v. Schoeff*, which was issued after the trial court's decision in the present case, the Florida Court of Appeal held that comparative negligence applies in a tobacco action regardless of whether a defendant's conduct is negligent or intentional [see *Products Liability Law Daily's* November 5, 2015 [analysis](#)]. The trial court instructed the jury that comparative fault findings applied only to non-intentional torts and that the compensatory awards would not be reduced if the jury found for the wife on her intentional tort claims, as it did. However, the appellate court found that the trial court failed to look to the substance of the action as required by Florida law. Pursuant to *Schoeff*, the present case was grounded in negligence and, therefore, the smoker's comparative negligence must be applied to the fraud-based claims. Because these claims were reversed, the comparative negligence must be applied to the remaining negligence claims; if the wife chooses upon remand to retry the intentional tort claims, comparative fault also will be applied to them.

The case is No. [4D12-3337](#).

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Companies: R.J. Reynolds Tobacco Co.; Philip Morris USA Inc.; Liggett Group LLC

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