

**[Products Liability Law Daily Wrap Up, TOP STORY—FlaCtApp: Tobacco companies liable for entire \\$1 million judgment in smoker’s death, in spite of jury’s finding smoker partially at fault, \(Jun. 25, 2013\)](#)**

Products Liability Law Daily

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By Susan Lasser, J.D.

The assertion by two tobacco companies that the representative of a deceased smoker had waived a jury award of unreduced damages was properly rejected by a Florida trial court, according to a ruling by the Florida Court of Appeal (*R. J. Reynolds Tobacco Co. v. Sury*, June 24, 2013, Clark, N.). The appellate court upheld the jury’s \$1 million damages award for the representative jointly and severally against the tobacco companies.

**Background.** Dr. Robert Sury, on behalf of the estate of his deceased father who was a smoker, commenced an action in November, 2007, along with several other plaintiffs, against the two tobacco companies, R. J. Reynolds Tobacco Co. and Lorillard Tobacco Co. Although the elder Mr. Sury died in 1997, Dr. Sury and the other plaintiffs brought their suit as authorized by *Engle v. Liggett Group, Inc.*, 945 So.2d 1246, 1274 (Fla. 2006). Dr. Sury proceeded to trial on his third amended complaint, seeking damages for the wrongful death of his father due to lung cancer resulting from the deceased smoker’s addiction to cigarettes containing nicotine. The estate asserted claims including strict liability, negligence, fraud and fraudulent concealment, civil conspiracy, breach of express and implied warranties, successor liability, and punitive damages. Dr. Sury acknowledged in his complaint that his father shared some fault for his smoking-related injuries. As such, the representative sought “potential apportionment of fault and damages on all counts other than those alleging intentional torts.”

Following the trial, the jury returned a verdict for the representative and specifically found that both tobacco companies were negligent and strictly liable for placing their defective product—cigarettes—in the market. In its consideration of the intentional torts of fraudulent concealment and civil conspiracy to fraudulently conceal, the jury made particular findings that both companies’ fraudulent acts were the legal cause of the smoker’s death. The jury assigned contributory fault, finding the decedent 60 percent at fault, R. J. Reynolds 20 percent at fault, and Lorillard Tobacco 20 percent at fault. The jury determined that Dr. Sury suffered \$1 million in damages for the loss of his father, but declined to award punitive damages.

**Apportionment of damages.** The parties argued the issue of apportionment of the damage award. The representative contended that the tobacco companies should be jointly and severally liable for the entire award because the jury found liability on both the negligent tort counts and the intentional tort counts. The cigarette manufacturers argued that the representative waived any objection to the award’s apportionment because Dr. Sury had acknowledged throughout the trial that the decedent shared some fault for his choice to smoke cigarettes as well as his failure to overcome his addiction. In addition to waiver, the companies argued that essentially the case was a products liability claim and that section 768.81 of the Florida Statutes required the reduction of the award according to the contributory fault found by the jury.

The trial court concluded that the Florida statute did not require apportionment of damages for intentional torts (such as fraudulent concealment and civil conspiracy to fraudulently conceal), and the court also rejected the companies’ waiver argument. The court’s final judgment awarded the estate the full \$1 million against the tobacco companies jointly and severally.

**Joint and several liability affirmed.** The Florida appellate court agreed with the trial court’s rejection of the companies’ claim that the representative waived the award of unreduced damages, noting that in spite of acknowledging the decedent’s partial responsibility for his injuries and death resulting from his smoking behavior and failure to overcome his addiction to cigarettes containing nicotine, the complaint clearly and specifically

sought “potential apportionment of fault and damages on all counts other than those alleging intentional torts.” Dr. Sury never argued to the jury or the court that the damages for his father’s terminal illness should be reduced by his portion of fault; and the companies had notice, from the date of the complaint, that Dr. Sury alleged intentional torts as well as negligent torts. The court of appeal referenced case law in its observation that the jury was properly tasked with determining liability and the particular legal theory or theories under which it determined liability. The jury was requested to determine a total damage amount, and was not (and need not have been, the court said) instructed about the legal consequences attached to the classification of each tort in terms of the damages awarded. The application of the law to the facts determined by the jury, including any apportionment of the actual award, was properly left to the court, the court of appeal stated.

The appellate court found that the trial court, in its application of the law to the facts found by the jury, properly ruled that section 768.81 of the Florida Statutes did not require reduction of the damages awarded by the jury which had found the tobacco companies liable under both negligent and intentional tort theories. Under section 768.81(2), in a negligence action, contributory fault that is chargeable to the claimant “diminishes proportionately the amount awarded as economic and noneconomic damages for an injury attributable to the claimant’s contributory fault, but does not bar recovery.” According to the appellate court, the statute allows for some discretion in the determination of whether an action is “a negligence action,” because section 768.81(1) (c) defines “negligence action” as a “civil action for damages based upon a theory of negligence, strict liability, products liability ... or breach of warranty and like theories. The substance of an action, not conclusory terms used by a party, determines whether an action is a negligence action.”

The court of appeal determined that section 768.81 did not require a reduction of the damages awarded when the action included multiple causes of action, both negligent torts, as listed in the statute, and intentional torts, such as fraudulent concealment and civil conspiracy to fraudulently conceal. The state’s rules of civil procedure, the court said, allowed plaintiffs to plead multiple and alternative causes of action. The appellate court found no abuse of discretion in the trial court’s finding that although the representative pled negligence and strict liability, the additional allegations of the intentional torts and the proof of affirmative, calculated misrepresentations in the tobacco companies’ advertising and other publications supported the conclusion that the action “actually had at its core an intentional tort.”

The court of appeal also approved of the trial court’s reliance on a prior case in which the jury, as in the current case, found the defendants liable for both negligence and intentional torts and the court did not reduce the plaintiff’s damage award by the percentage of the plaintiff’s liability as a consequence of the jury’s verdict on the intentional tort count. Applying the same reasoning in that case, and considering the representative’s consistent pleading and assertion that he agreed to “apportionment of fault and damages on all counts other than those alleging intentional torts,” and considering the companies’ agreement to the verdict form at trial, the court of appeal found no abuse of the trial court’s discretion in concluding that section 768.81 of the Florida Statutes did not require reduction of the damage award by the percentage of fault that the jury had found attributable to the representative’s decedent.

The case number is [1D12-2110](#).

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Companies: R. J. Reynolds Tobacco Co.; Lorillard Tobacco Co.

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