

## [Products Liability Law Daily Wrap Up, DAMAGES—TOBACCO PRODUCTS—Fla. Dist. App.: Tobacco companies' appeal of \\$10M jury verdict rejected, \(Feb. 27, 2017\)](#)

Products Liability Law Daily Wrap Up

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By Kathleen Bianco, J.D.

A \$10 million jury verdict in favor of the personal representative of a deceased smoker against two cigarette manufacturers was upheld by a Florida Court of Appeals based on the fact that the proper standards for comparative fault and the awarding of punitive damages had been applied by the trial court and a finding that the manufacturers had failed to establish sufficient juror misconduct to support a new trial ([R.J. Reynolds Tobacco Co. v. Allen](#), February 24, 2017, Bilbrey, R.).

The personal representative and spouse of a smoker who died from chronic obstructive pulmonary disease (COPD) filed suit against two cigarette manufacturers—R.J. Reynolds Tobacco Company and Philip Morris USA Inc.—for wrongful death. Following a reversal of a directed verdict in favor of the estate and an order for a new trial [see *Products Liability Law Daily's* May 13, 2013, [analysis](#)], a subsequent jury found both cigarette manufacturers liable under theories of negligence; strict liability; fraudulent concealment of health effects and addictive nature of cigarette smoking; and conspiracy to conceal or omit relevant information concerning health effects or addictive nature of smoking cigarettes. The jury awarded the estate's representative \$3.094 million in compensatory damages and \$7.755 million in punitive damages. The cigarette manufacturers appealed, raising several issues in their challenge to the final judgment.

**Comparative fault.** The manufacturers argued that the trial court had erred by failing to reduce the compensatory damages awarded following the jury's determination that the decedent had been 70 percent at fault. Recognizing a split of authority on the issue of comparative fault, the appellate panel concluded that the trial court was not required to apportion fault in this case because the jury found that the manufacturers had committed intentional torts of fraudulent concealment and conspiracy to fraudulently conceal. Thus, the trial court did not err when it refused to apportion fault.

**Punitive damages.** As to the punitive damages, the manufacturers asserted that the trial court had applied the incorrect version of the punitive damages statute. The manufacturers claimed that the post-1999 version of the statute applied because the wrongful death action had not accrued until the smoker's death in 2009. However, because the decedent was a member of the *Engle* class, the wrongful death claim related back to the date of the *Engle* class for purposes of determining the applicable statutory law. Accordingly, the post-1999 punitive damages statute did not apply; therefore, the trial court had applied the proper statute in directing the jury on the punitive damages issue.

**Jury misconduct.** Finally, the manufacturers contended that they were entitled to a new trial due to juror misconduct related to the alleged failure of the jury foreman to disclose his bias against tobacco companies. After reviewing the relevant information under the three-part test adopted by the Florida Supreme Court, a majority of the appellate panel opined that no error had occurred because the juror had not concealed his personal or family history with cigarettes and had answered questions on the jury questionnaire with enough information to have elicited follow-up questions. The failure of the defendants to ask those follow-up questions evidenced a lack of due diligence. Because two of the three prongs of the three-part standard were lacking, the trial court's refusal to dismiss the juror or grant a new trial was not erroneous.

**Dissent.** Justice Osterhaus dissented, reasoning that the foreman's failure to fully disclose his contempt for cigarette companies when asked directly during voir dire denied the manufacturers a proper jury and warranted a new trial.

The case is No. [1D15-4197](#).

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

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