IN THE DISTRICT COURT OF APPEAL OF FLORIDA
FOURTH DISTRICT

CASE NO. 4D09-2472

R.J. REYNOLDS TOBACCO COMPANY,

APPELLANT/CROSS-APPELLEE,

VS.

MELBA SHERMAN, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF **JOHN SHERMAN,**

APPELLEE/CROSS-APPELLANT.

ANSWER AND CROSS-INITIAL BRIEF OF MELBA SHERMAN

ON FINAL APPEAL FROM THE
SEVENTEENTH JUDICIAL CIRCUIT
IN AND FOR BROWARD COUNTY

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STATEMENT OF THE CASE AND FACTS

We now know that smoking causes lung cancer. [T73:1616, T74:1860] But this was not always known. [T69:987-88] Cigarette smoking in the United States was rare before 1900. [T67:641, 651] The lung cancer rate increased only twenty to thirty years after the rise in cigarette smoking. [T67:653] It was in the 1950s that the link between smoking cigarettes and cancer become apparent. [T67:655]

In the early 1950 studies began to show that smokers were much more likely to get lung cancer than people who hadn't smoked, and that tobacco tar caused cancer in animals. [T67:657-58, 665-66; ex. 31; ex. 214] These studies caused a panic. [T67:667-69] Tobacco stock prices fell up to ten percent the day one of the studies was released. [T67:667-69]

The tobacco industry understood the truth of the new scientific findings. A research director of one tobacco company said, "Boy! wouldn't it be wonderful if our company was first to produce a cancer free cigarette," while another took solace in the addictive nature of cigarettes: "it's fortunate for us that cigarettes are a habit they can't break." [T67:677; ex. 153]

The industry also understood the significance of the research. As one internal industry memo stated at the time, "This is. . . perhaps most challenging problem that ever faced a great industry. . . ." [Ex. 153]

A. The tobacco industry's conspiracy

The tobacco industry responded to the challenge by entering into a conspiracy to fraudulently conceal the dangers of smoking. Defendant R.J. Reynolds Tobacco Company (RJR) was part of the conspiracy.

1. 1953-1954: The conspiracy begins

Within days of publication of a study linking tobacco to cancer, the President of American Tobacco Company sent a telegram to the head of RJR and the other tobacco companies, seeking to organize a meeting of all the heads of the tobacco companies.[1] [T67:670-71; ex. 47] At the meeting in December 1953, the tobacco company heads decided to wage a public relations campaign against the claim that smoking was hazardous. [T67:672-74]

The companies retained a public relations firm, Hill and Knowlton, which evaluated the situation facing the tobacco companies and prepared a public rela-

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[1]At that time, three of the largest tobacco companies were RJR, Brown and Williamson, and American Tobacco. The latter two companies have since merged into RJR, and at trial RJR was responsible for the conduct of the other two companies. [T80:2829]

tions strategy which was to guide the industry's actions for decades. [T67:673-74; Ex. 153] Hill and Knowlton proposed a strategy for the tobacco companies with the purpose of "reassurance of the public." [T67:681; ex. 108] "It is important that the public recognize the existence of weighty scientific views which hold there is no proof that cigarette smoking is a cause of lung cancer." [T67:681; ex. 108] It suggested that a "Tobacco Research Committee" be created whose first public statement should be designed to "reassure the public that: (a) the industry's first and foremost interest is the public health; (b) there is no proof of the claims which link smoking and lung cancer; and (c) the industry is inaugurating a joint plan to deal with the situation." [T67:681; ex. 108, at 4] The strategy was agreed to by RJR, Brown and Williamson, American Tobacco, and other tobacco companies. [T67:678-79]

That first public statement by the Tobacco Industry Research Committee was an advertisement widely placed in newspapers and magazines in January 1954. [T67:681; ex. 431] The ad, entitled "A Frank Statement to Cigarette Smokers," expressed a concern for public health, but never directly denied that cigarettes caused cancer. Instead, it merely stated that it had not been proven that smoking causes cancer. The ad stated:

> Distinguished authorities point out:
>
> 1. That medical research in recent years indicates many possible causes of lung cancer.
>
> 2. That there is no agreement among the authorities regarding what the cause is.
>
> 3. That there is no proof that cigarette smoking is one of the causes.
>
> 4. That statistics purporting to link cigarette smoking with the disease could apply with equal force to any one of many other aspects of modern life. Indeed the validity of the statistics themselves is questioned by numerous scientists.

[T67:682-83; ex. 431] The tobacco industry reassured people that "We accept an interest in people's health as a basic responsibility, paramount to every other consideration in our business." *Id*.

This ad was the start of a decades-long campaign to create doubt and uncertainty about the hazards of cigarettes. [T70:1063, T68:852]

2. 1954-1957: Tobacco's campaign of doubt, asserted through the Tobacco Industry Research Council and the Tobacco Institute

In 1954 and the following years, the tobacco industry worked hard to convince people to continue smoking and to doubt the medical research linking smoking to cancer. The effort was carried out by the tobacco industry organizations.

According to a tobacco industry lawyer, the Tobacco Industry Research Council (TIRC) "was set up as an industry 'shield.'" [Ex. 430; T67:694-96] It was a "public relations effort." [Ex. 11; *see also* T67:693-94] The industry told the

world that the organization "would look at the diseases which were being associated with smoking. There was even a suggestion by our political spokesmen that if a harmful element turned up the industry would try to root it out." [*Id.*]

The TIRC (later known as the Council for Tobacco Research-U.S.A.) and another industry organization, the Tobacco Institute, played a crucial role in the campaign of doubt. The president of American Tobacco explained that the Tobacco Institute was to "defend the tobacco industry against attacks from whatsoever source on tobacco as an alleged health hazard." [Ex. 3, at 2-4]

A particularly clear example of the way that the industry worked can be seen from a report on a television show. The reporter explained, "We asked Philip Morris, R.J. Reynolds, Brown & Williamson, and Lorillard to appear on this program. None would. They told us to talk to the Tobacco Institute." [Ex. 803; T71:1183]

The TIRC hired as the director of its scientific program a noted cancer researcher. [Ex. 323] Using this credential, the industry had the man speak out in defense of tobacco and in criticism of the new scientific evidence. "We need more facts," he said. [Ex. 323] In 1956, he stressed the campaign of doubt: "We have learned much during the past two years, but perhaps the most important thing we have learned is how much more must be done before definitive answers can be given." [Ex. 672] In 1957, after another study showed an "excessively high" asso-

ciation between smoking and death from lung cancer, the TIRC again stressed that "the causes of cancer and heart disease are not yet known to medical science." [Ex. 334]

The tobacco industry organizations were effective in influencing media coverage of cigarettes. In late 1954 a respected science and health writer complained that the industry seemed "always to be trying to knock down completely any story or report that says there is a causal connection between smoking and cancer and heart disease." [T70:1086] The writer complained, "Some of the material from the Tobacco Industry seems to have come in here through 6 or 8 channels—coming to everyone from the publisher down to the office boy." [T70:1087] In 1954 the TIRC helped a writer prepare a low-priced book called "Smoke Without Fear." [Ex. 271, at 10] The book expressed the view, "You don't have to give up smoking." [Ex. 271, at 10]

The tobacco industry organizations published their own materials disputing the ties between smoking and cancer. Beginning in 1958 the Tobacco Institute published *Tobacco and Health Reports*, which featured stories that cast doubt on the "cause and effect theory of disease and smoking." [T67:709-11; T714; ex. 126, at 2]

A 1955 industry report concluded that the emphasis on doubt was succeeding: "There is a greater and growing expression of the position that cigarettes do not and should not stand convicted." [Ex. 110, at 2] The success in creating doubt led to the desired profits. In 1958 the head of a major tobacco company told the *New York Times* that "the cigarette industry is strong and is showing good growth. The health scare is receding—the worst is over." [T70:1108; ex. 339]

All the while, the tobacco industry knew that science had returned its verdict about the health hazards of smoking. In an internal memo, an employee at RJR admitted the truth: "Obviously, the amount of evidence accumulated to indict cigarette smoke as a health hazard is overwhelming. The evidence challenging this indictment is scant." [T67:721; ex. 5, at 4]

3. The doubt campaign continues even after the Surgeon General's Report

The tobacco industry faced a still greater challenge in 1964 when a committee led by the Surgeon General issued a report concluding that cigarette smoking caused lung cancer. [T1117-18] Despite the evidence, the tobacco industry continued with its campaign of—in the words of a Tobacco Industry memo—"creating doubt about the health charge without actually denying it." [T67:734; ex. 112] For

example, the head of the Tobacco Institute stated on *Face the Nation* in 1971 that "We do not believe that cigarettes are hazardous." [T70:1169-70; ex. 813]

To further the campaign of doubt, the Tobacco Institute funded research by leading scientists. [T67:689-90] The purpose of these scientific grants was *not* to gain scientific understanding. Rather, it was "extremely important that the industry continue to spend their dollars on research to show that we don't agree that the case against smoking is closed." [Ex. 430, at 3] Because of the continued funding, the industry could argue that, "After millions of dollars over 20 years of research, the question about smoking and health is still open." [T67:737; Ex. 165; *see also* Ex. 113, at 1]

Although the industry publicly proclaimed doubt about the safety of cigarettes, internal memos reveal that the industry understood perfectly well that their product caused cancer. A 1969 Brown and Williamson memo explained, "Doubt is our product since it is the best means of competing with the 'body of fact' that exists in the minds of the general public." [T67:731; ex. 77, at 4] But the memo's author admitted that "[d]oubt is also the limit of our 'product.' Unfortunately, we cannot take a position directly opposing the anti-cigarette forces and say that cigarettes are a contributor to good health. No information that we have supports such a claim." [*Id.* at 5]

A Vice President of the Tobacco Institute was even more blunt: "Our basic position in the cigarette controversy is subject to the charge, and may be subject to a finding, that we are making false or misleading statements to promote the sale of cigarettes." [T70:1150-51; ex. 122]

4. 1970s and 1980s: To retain wavering smokers, the tobacco industry continues to encourage doubt

As the decades passed, more people came to understand that cigarettes cause cancer. [T70:1172] But the industry continued with the doubt campaign. In the 1980s a Tobacco Institute representative, asked whether smoking was harmful, stated that "It may be or it may not be. We don't know." [T70:1183; ex. 803] Another Tobacco Institute representative stated on television that "I don't think that there is a causal relationship established between cigarette smoking and any disease." [T71:1185-86; ex. 807]

Why did the tobacco industry continue with its doubt campaign for almost fifty years after the scientific consensus that smoking causes lung cancer, and almost forty years after the Surgeon General's Report? It continued with the doubt campaign because the campaign worked, at least on some smokers. [T71:1186-87] The doubt campaign preyed on smokers who were addicted and who were struggling with whether they should quit smoking. [T71:1186] It provided a psychologi-

cal crutch for smokers to keep on smoking. [T71:1186] Smokers were *less* likely than non-smokers to believe that cigarettes were harmful. [T70:1157; *see also* ex. 152] Smokers tended to prefer the industry "doubt" position to the scientific proof that smoking was hazardous. The doubt campaign helped keep smokers smoking.

5. The tobacco industry's dependence on the addictive powers of nicotine

In the 1940s and 1950s smoking was viewed as a habit. [T70:1054] People did not view smoking as an addiction, or understand that there was any sort of physical dependence. [T70:1054] This continued for many years. The Surgeon General's 1964 Report, for example, concluded that nicotine was *not* addictive, but rather was only a habit. [T67:703-04]

But while the public did not know that nicotine was addictive, the tobacco industry had long known this. Even before the Surgeon General's 1964 Report, a 1963 tobacco industry memo plainly acknowledged that "[n]icotine is addictive. . . . We are, then, in the business of selling nicotine, an addictive drug effective in the release of stress mechanisms." [T68:754; ex. 19]

A 1969 RJR memo said that it "must be assumed that nicotine is the *sine qua non* of smoking." [T68:756; ex. 6] Another RJR internal memo explained that "for the typical smoker nicotine satisfaction is the dominant desire, as opposed to flavor

and other satisfactions." [T68:763; ex. 22] Yet another memo explained that "[i]n a sense, the tobacco industry may be thought of as being a specialized, highly ritualized and stylized segment of the pharmaceutical industry." [T68:766; ex. 38] It explained that "a tobacco product is, in essence, a vehicle for delivery of nicotine, designed to deliver the nicotine in a generally acceptable and attractive form." [T68:767] RJR recognized that it was the beneficiary of the addictive powers of nicotine, as it kept people smoking against their will. [T68:787; ex. 18] An employee wrote in 1982 that "we cannot ever be comfortable selling a product which most of our customers would stop using if they could." [T68:783]

While the tobacco companies understood the addictive powers of nicotine, they were fully aware that smokers did *not* understand. A 1978 memo acknowledged that "[v]ery few consumers are aware of the effects of nicotine, e.g., its addictive nature and that nicotine is a poison." [T68:780; ex. 13] In 1982 only one in four smokers believed that smoking was an addiction. [T71:1193-94; ex. 293]

In 1988 the Surgeon General issued a report which stated that nicotine was profoundly addictive. [T68:805-06, T71:1194, 1207; ex. 838, 769] The industry had long known that nicotine was addictive, yet they continued to deny it. [T71:1200-01; ex 114] As late as 1994, the heads of the tobacco companies testi-

fied under oath before Congress that nicotine was not addictive. [T68:809-11; ex. 460]

6. The tobacco industry's use of filters to falsely reassure people of the safety of cigarettes

Another way that tobacco companies convinced people to continue smoking was by improperly suggesting that filtered cigarettes significantly lowered a smoker's risk of lung cancer.

In 1950 filtered cigarettes were an insignificant portion of the cigarette industry. [T70:1102] Then, in the mid 1950s, at a time of concern about the safety of cigarettes, RJR introduced a filtered cigarette—Winston. A typical ad spoke of Winston's "pure white filter." [T70:1103; ex. 758] A decade later, most cigarettes sold were filtered. [T70:1102] By 1975, 87% of all cigarettes sold were filtered. [Ex. 165]

Smokers believed that filters made smoking safer. [T68:797] As early as 1953, an RJR employee noted that smokers attached great significance to the filter after smoking a cigarette. [T72:1343-44; ex. 1] If the filter was darkened, smokers would "automatically" judge it to be effective. [*Id.*; *see also* T70:1160-62; ex. 369]

Industry representatives encouraged the belief that filters made smoking safer. [T70:1140-42] An industry leader, interviewed after the release of the 1964 Sur-

geon General's Report, said that "obviously a filter takes out certain tar and nicotine." [T70:1132; ex. 283] When a report found that many filtered cigarettes were at least as hazardous as non-filtered brands, the industry called the report "deceptive, distorted and unreliable." [T70:1141; ex. 355]

But once again, behind closed doors, the industry admitted that what it publicly suggested was not true. The head of Brown and Williamson acknowledged in an internal memo that smokers abandoned the nonfiltered brands "on the ground of reduced risk to health," but he admitted that "[i]n most cases . . . a smoker of a filter cigarette was getting as much or more nicotine and tar as he would've gotten from a regular cigarette." [T67:734-38; ex 165; *see also* T72:1343-44; ex. 1]

7. The doubt campaign worked for fifty years

This is how things went for decades—the tobacco industry denied that cigarettes were harmful or addictive. [T67:740] The effects of the campaign of doubt have been devastating. Lung cancer is by far the most common cause of cancer in the United States, and over 95% of lung cancer deaths are the result of cigarettes. [T69:919-21, 953] Lung cancer kills more people than the next four types of cancer deaths *combined*. [T69:919]

Only at the end of the century, in about 2000, did the industry finally admit that its product was both hazardous and addictive. [T68:812, T75:1978-79] RJR now admits that smoking cigarettes is the leading cause of preventable deaths in the United States. [T75:1983]

B. THE ENGLE CLASS ACTION

In 1994 a group of smokers and their survivors filed a class action in Miami-Dade County against various tobacco companies and the tobacco industry organizations (The Tobacco Institute and the Council for Tobacco Research). The class was eventually defined as Florida residents and their survivors "who have suffered, presently suffered or who have died with diseases and medical conditions caused by their addiction to cigarettes that contain nicotine." *Engle v. Liggett Group,* 945 So. 2d 1246, 1256 (Fla. 2006).

In 1998 the trial court held a year-long trial on liability issues. The jury considered common issues relating exclusively to the defendants' conduct and the general health effects of smoking. The jury rendered a verdict for the class and against the defendants on practically all counts. 945 So. 2d at 1256-57.

The case went up on appeal, and the Supreme Court of Florida eventually held that the case should not continue as a class action, as the remaining issues (in-

cluding individual causation, apportionment of fault, and damages) did not lend themselves to class action treatment. 945 So. 2d at 1254. However, the court held that the individual class members could file lawsuits within a year, and that certain findings from the class action would be "given res judicata effect in any subsequent trial between individual class members and the defendants." 945 So. 2d at 1277.

The Court specified eight findings which would be given preclusive effect. Most relevant to this appeal, the Supreme Court approved for purposes of preclusion the jury's findings that the each and every defendant concealed or omitted information concerning health effect and addiction. 945 So. 2d at 1277. This included RJR, the Tobacco Institute, and the Council for Tobacco Research. [Initial brief, Appendix 1, at 5-6] The Supreme Court also gave preclusive effect to the jury's findings that each and every defendant—again including RJR and the tobacco industry organizations—agreed to conceal or omit information regarding the health effects of cigarettes or their addictive nature with the intention that smokers and the public would rely on this information to their detriment. 945 So. 2d at 1277. [Initial brief, Appendix 1, at 7-8]

C. JOHN SHERMAN

After the *Engle* decision, thousands of Floridians filed lawsuits against the tobacco companies. One of them was filed by Melba Sherman, based on the wrongful death of her husband, John Sherman.

John Sherman, born in 1927, first smoked a cigarette when he was 12 or 13. [T71:1273, T72:1358] He became a regular smoker when he was 15 or 16. [T72:1358] For a while he smoked Lucky Strike, which were made by a company now owned by RJR. [T71:1274] But in about 1954—when research about the dangers of smoking was first publicized—he switched to RJR's new filtered cigarette, Winston. He switched to Winston "[b]ecause it had a filter and he thought it was better for his health." [T71:1275-76] John would show his wife the darkened filters, and told her that they should "take care of whatever bad stuff was in there." [T71:1314]

Mr. Sherman became a very heavy smoker, consuming three or four packs of cigarettes a day. [T66:532, T71:1274, 1277] He smoked at this level for 53 years, until he died of lung cancer in 2000. [T69:922-23; ex. 904]

D. THE TRIAL

The trial court, interpreting the Supreme Court's *Engle* opinion, determined that the Plaintiff would be entitled to the preclusive effect of the verdict in the year-

long class action trial only if the Plaintiff proved that Mr. Sherman had been a member of the *Engle* plaintiff class. Based on this interpretation, the trial court divided the trial into two phases.

In the first phase, the trial court had the jury determine whether Mr. Sherman had been a member of the plaintiff class, which turned on whether Mr. Sherman's death was as a result of addiction to cigarettes that contained nicotine. [T65:373-74] The jury determined that John Sherman had been addicted to cigarettes containing nicotine, and that the the addiction was a legal cause of Mr. Sherman's death. [T77:2363]

Based on this finding, in the second phase the trial court gave the Plaintiffs the benefit of certain of the jury findings in *Engle*, as instructed by the Supreme Court. The judge instructed the jury that it was now bound by four of the *Engle* findings: that RJR was negligent, that RJR placed cigarettes on the market that were defective and unreasonably dangerous, that RJR and the other *Engle* defendants concealed or omitted material information not otherwise known or available knowing that the material was false or misleading or failed to disclose material facts concerning the health effects and/or the addictive nature of smoking cigarettes, and that RJR entered into an agreement with other cigarette companies to conceal or omit information regarding the health effects of cigarettes or the addictive nature of

smoking cigarettes with the intention that smokers and members of the public rely to their detriment. [T78:2430; *see also* T79:2830-36]] The court did *not* instruct the jury that it had to find for the Plaintiffs on those four claims, but simply stated these jury findings from the year-long *Engle* trial.

The trial took three weeks, with abundant evidence presented on the tobacco industry's conduct over the last sixty years. The facts described above are a sample of the overwhelming evidence against RJR.

The jury's verdict demonstrates that it did not view itself as being compelled to find for the Plaintiff. The jury—although instructed that RJR was negligent—found that the negligence of RJR was *not* a legal cause of John Sherman's death. [T80:2872-73] Similarly, the jury—although instructed that RJR placed cigarettes on the market that were defective and unreasonably dangerous—found that the defective and unreasonably dangerous cigarettes were *not* a legal cause of John Sherman's death. On another claim the jury—although instructed that RJR concealed or omitted material information not otherwise known or available knowing that the material was false or misleading or failed to disclose material facts concerning the health effects or addictive nature of smoking cigarettes—found that such acts were *not* a legal cause of John Sherman's death. ***On each of these***

counts, the jury found for RJR, despite being instructed on the Engle findings. Only on the conspiracy claim did the jury find for the Plaintiff.

The jury awarded compensatory damages of $1.55 million dollars. The jury found that Mr. Sherman and RJR were each 50% at fault. [R58:10870] The trial court reduced the award of damages by Mr. Sherman's 50% fault, and entered judgment for $775,000.00. [R62:11762]

E. Facts relating to specific trial issues

RJR asserts that in addition to error in applying the *Engle* findings, the trial court committed three errors during the trial.

1. Facts relating to claim of an inconsistent liability verdict

RJR argues that the liability verdicts are inconsistent because the jury found in its favor on the fraudulent conspiracy claim, but found for the Plaintiff on the conspiracy claim based on fraudulent concealment.

The trial court, immediately after hearing the verdict, addressed the issue and concluded that the two verdicts were entirely consistent. [T80:2875-76] The court noted that the jury could find for RJR on the fraudulent concealment claim, based on the conclusion that "there may not have been any direct statement made by Reynolds, per se, relied upon by the plaintiff." *Id.* The court explained that the jury

could have concluded that Mr. Sherman relied on "the overall acts of the industry working through its various organizations, iterations of those organizations, over the decades." *Id.* The court therefore held that the verdicts were not "inherently inconsistent." [T80:2875-76]

In any event, while RJR argued that the verdicts were inconsistent, it never asked that the alleged inconsistency be sent back to the jury for resolution. Instead, it merely asked that the conspiracy claim be dismissed. [T80:2876]

2. Facts relating to claim of abuse of discretion in jury instruction

RJR raises an issue concerning this jury instruction:

> Turning now to the claims and defenses in this case and related issues and instructions. I instruct you that the Defendant, R.J. Reynolds Tobacco Company, is the successor by merger to two other tobacco companies, Brown & Williamson Tobacco Company and the American Tobacco Company and, therefore, is also responsible for their actions. In addition, Reynolds Tobacco Company is responsible for the conduct of its agents and employees acting within the scope and course of their employment.

[T80:2828-29] RJR claims that the last sentence of the paragraph denied it a fair trial.

During the charge conference, there had been a discussion of a jury instruction on RJR's responsibility for the acts and omissions of its agents. [T79:2657-58] The issue was discussed in relation to the tobacco industry organizations found in

Engle to have been conspirators, as well as Hill & Knowlton, the public relations firm which had been hired by the tobacco companies to provide advice on how to handle the challenge presented by the adverse publicity on smoking. [T79:2657-58] The discussion ended without a clear resolution of the issue. *Id.*

The next morning the parties gave closing arguments. The Plaintiff, discussing the fifty-year conspiracy to mislead the American people, mentioned Hill & Knowlton precisely one time during closing argument: "So the TIRC and R.J. Reynolds and Hill and Knowlton, all their agents and co-conspirators went on this plan of trying to rewrite science in the case, just tried to move forward and change what was going on and change public opinion. And you know what? It actually worked." [T80:2713]

After closing arguments were completed, there was further discussion of the jury instructions. RJR's counsel explained to the court, "We are 98 percent of the way. There is some typos, edits that we didn't make that we can fix very quickly, but we are just about there. . . ." [T80:2812-13] Reviewing the instructions, the judge noted that one instruction had been changed from what he had seen earlier in the morning: "Number 12 is . . . different from the number 12 I had this morning. Number 12 as originally offered to me this morning included not only Brown & Williamson and American Tobacco Company, but also included Hill and Knowl-

ton, the TICR and CTR. Now those additional companies are eliminated. I need an explanation." [T80:2816-17]

The court noted that the Plaintiff had requested an instruction that named the specific entities, but that RJR objected to that on various grounds. The court said that it would give a "generic instruction" on agency, without naming any entities. [T80:2816-17]

RJR never suggested that it was prejudiced by the timing of this decision, and never requested that it be permitted to reopen closing argument to address the issue.

The court therefore gave the instruction, which said simply that "Reynolds is responsible for the conduct of its agents and employees acting within the scope and course of their employment." [T80:2828-29]

3. Facts relating to jury's award of damages

After the jury reached a verdict in the second phase of the trial, the jurors returned to the courtroom and the trial court read the verdict, including the following:

> Question 7: What is the amount of any damages sustained by Melba Sherman in the loss of her husband's companionship and protection and in pain and suffering as a result of John Sherman's death? $1,550,000.

[T80:2873]

The court asked each juror whether this was their verdict. "Henrietta Allen, is this your verdict, ma'am?" "George Monroe, is this your verdict, sir?" "Maria Robledo, is this your verdict, ma'am?" "Ruth Alexandre, is this your verdict, ma'am?" "Gerard Sainvilus, is this your verdict, sir?" "Cynthia Malena, is this your verdict, ma'am?" [T80:2873-74] Each juror, individually, answered, "Yes." *Id*.

Each juror thus confirmed that the damages to be $1,550,000. The number which the jury wrote on the verdict form was entirely consistent—$1,550,000. Despite this, RJR argues for a new trial on the basis that the jurors wrote out in words the amount of damages. As if writing a check, the jurors wrote "One Million Five Hundred Fifty Dollars only." [R58:10869-71]

After the jury was discharged and after reviewing the verdict form, RJR argued that there was a fatal inconsistency in the verdict. It argued that the jury may have intended to award $1,000,550 in noneconomic damages, and that the entire case had to be retried. The Plaintiff pointed out that it was exceedingly unlikely that the jury intended to award $550 more than a million dollars in noneconomic damages. In any event, the trial court—by reading the number on the verdict form

($1,550,000 million) and by asking each juror whether that was their verdict—determined the intent of the jury. The trial court denied RJR's motion for new trial.

SUMMARY OF THE ARGUMENT

RJR has not established any basis for ordering a new trial.

The trial court applied the *Engle* findings as instructed by the Supreme Court. The jury was instructed that the various *Engle* defendants had been found to have engaged in certain tortious conduct. The jury in the present case found that one type of conduct—conspiring to fraudulently conceal—caused Mr. Sherman's death. RJR may not like the *Engle* findings, but they are binding, as the Supreme Court instructed. The *Engle* jury found that each tobacco defendant had fraudulently concealed information, and the jury in this case found that the Mr. Sherman was harmed by the fraudulent concealment of a conspirator. There was thus necessarily a finding that one of the conspirators committed the tort of fraudulent concealment.

The jury's finding that there was a conspiracy to commit fraud was not inconsistent with its finding that RJR's fraudulent concealment was not the cause of Mr. Sherman's death. A party can be held liable for conspiracy even if it did not

personally commit the wrong which harmed the plaintiff. Furthermore, the issue was not preserved for appeal, since RJR did not ask that the alleged inconsistency be resolved by the jury.

The trial court's generic instruction on agency is not a reason for reversal. RJR never argued that it was prejudiced by the timing of the instruction, so it has not preserved the timing issue for appeal. Further, the instruction was a proper statement of the law—parties are responsible for the acts of their agents and employees acting within the scope of employment. The complaint contained allegations of agency concerning the tobacco industry organizations. In any event, the instruction was harmless, since there is nothing in the record to suggest that the agency instruction influenced the jury, where the jury found that RJR's liability was only by virtue of its status as co-conspirator.

The trial court did not abuse its discretion in determining that the jury intended to award $1,550,000 in damages, rather than $1,000,550.

On the cross appeal, the trial court erred in reducing the Plaintiff's compensatory damages because of comparative fault. Comparative fault does not apply where the defendant is found liable for an intentional tort.

ARGUMENT

Notably absent from RJR's initial brief is any argument that a jury cannot find that it was part of a decades-long conspiracy to mislead the American people about the health-effects of smoking. Indeed, such an assertion at this late date is no longer tenable. *See, e.g., Engle v. Liggett Group,* 945 So. 2d 1246, 1256 (Fla. 2006); *United States v. Philip Morris, USA, et al.*, 566 F.3d 1095 (D.C. Cir. 2009) (upholding finding that cigarette manufacturers and trade organizations engaged in a RICO conspiracy to deceive the American public about health effects of smoking, addictiveness of nicotine, and benefits from light cigarettes), *pet. cert. filed*, 78 USLW 3501 (Feb 19, 2010)(No. 09-976).

Instead, RJR argues that it was denied a fair trial. For the reasons that follow, its arguments should be rejected.

I. THE TRIAL COURT DID NOT ERR IN FOLLOWING THE SUPREME COURT'S INSTRUCTION THAT THE FINDINGS IN *Engle* HAVE PRECLUSIVE EFFECT

RJR's brief is virtually bereft of the factual matters which were the subject of this trial. Ignoring what happened at the trial, RJR has created a straw man, suggesting that the jury found it liable to Mrs. Sherman based principally on the findings from the *Engle* case. This simply isn't true—the facts noted on in the preceding pages are merely a sample of the overwhelming evidence presented at trial. The

jury, presented with this abundant evidence (as well as the *Engle* findings approved by the Supreme Court), found for the Plaintiff on one claim, and for RJR on four claims. There is no basis for reversal.

The preclusive effect of the Engle trial and verdict. Reynolds suggests that it was entitled to try this case as if nothing had happened previously. But RJR had a year-long trial with the Plaintiff class (of which, we now know, Mr. Sherman was a member). RJR and the other defendants lost that trial—the *Engle* jury, after hearing the evidence, found among other things that each of the major tobacco manufacturers and the tobacco industry organizations engaged in fraudulent concealment, and that each tobacco manufacturer and the industry organizations agreed to conceal or omit information about the health effects or addictive nature of smoking cigarettes. RJR may not avoid the preclusive effect of the *Engle* jury verdict.

This is what the Supreme Court has instructed us. It approved the *Engle* jury's verdicts on fraudulent concealment and conspiracy to fraudulently conspire, and instructed that these verdicts shall apply in individual lawsuits brought by class members:

> We approve the Phase I findings for the class as to Questions . . . 4(a) (that the defendants concealed or omitted material information not otherwise known or available knowing that the material was false or misleading or failed to disclose a material fact concerning the health

> effects or addictive nature of smoking cigarettes or both), [and] 5(a) (that the defendants agreed to conceal or omit information regarding the health effects of cigarettes or their addictive nature with the intention that smokers and the public would rely on this information to their detriment), . . . Therefore, ***these findings in favor of the Engle Class can stand***.

945 So. 2d at 1276-77 (emphasis added).

The Supreme Court held that these findings would give rise to *res judicata* effect against the defendants, including RJR:

> Individual plaintiffs within the class will be permitted to proceed individually with the findings set forth above given res judicata effect in any subsequent trial between individual class members and the defendants. . . . [945 So. 2d at 1276-77]

> Class members can choose to initiate individual damages actions and the Phase I common core findings we approved above will have res judicata effect in those trials. [945 So. 2d at 1269]

The Supreme Court made clear the issues to be resolved in the individual trials. The plaintiffs in the individual claims would *not* have to establish all issues of liability. Instead, the Court stressed that individual trials were to focus on legal causation, apportionment of fault, and damages. These issues had not been resolved in the year-long class trial and could not be resolved in a continuing class action. It noted the "remaining issues, including individual causation and appor-

tionment of fault among the defendants." 945 So. 2d at 1254. *See also id.* at 1268 ("individualized issues such as legal causation, comparative fault, and damages").

This is what the Supreme Court held, and it is binding precedent which Florida courts must follow. *System Components Corp. v. Florida Department of Transportation*, 14 So. 3d 967 (Fla. 2009).

The trial court followed the Supreme Court's instructions in Engle. The trial court closely followed the *Engle* holding. After the jury determined that Mr. Sherman was a member of the class, and was therefore entitled to the benefit of the *Engle* findings, the court informed the jury of those findings. [T2430] The court explicitly entrusted to the jury the remaining issues: causation, apportionment of fault, and damages.

At trial the jury was presented with abundant evidence about the industry's conduct, as well as the causal link between that conduct and Mr. Sherman. That evidence during the three-week trial, combined with the few sentences of instruction on the *Engle* findings, was proper under the Supreme Court's *Engle* decision. The trial court carefully crafted a verdict form which both respected the *Engle* findings, yet still entrusted the final decision on causation to the jury. For example, the negligence question stated: "Was the negligence of R.J. Reynolds Tobacco Com-

pany a legal cause of John Sherman's death?" [T80:2872] This question assumed that RJR was negligent, since that was the *Engle* jury had found. But the question left it to the jury to decide whether the negligence caused Mr. Sherman's death.

Indeed, the jury's verdict demonstrated that it did not feel bound by the *Engle* verdict. The jury found that the negligence of Reynolds did *not* cause Mr. Sherman's death, and that the defective and unreasonably dangerous cigarettes placed on the market were *not* a legal cause of Mr. Sherman's death. It also answered "no" to the question whether Mr. Sherman "reasonably rel[ied] to his detriment on any statement by R.J. Reynolds Tobacco Company that omitted material information, and, if so, was such reliance a legal cause of his death?" [T80:2872-73] Only on the conspiracy to fraudulently conceal did the jury find against Reynolds. The jury demonstrated that it was not bound by the *Engle* findings to find causation.

RJR's arguments on preclusion. RJR argues for many pages against the trial court's use of the *Engle* findings, but the arguments are little more than the suggestion that in *Engle* the Supreme Court did not intend what it plainly said. For example, it argues that "[b]ecause the *Engle* Phase I findings are not specific, it is 'impossible to ascertain with any reasonable degree of certainty . . . what issue was

adjudicated in' the Phase I proceedings." [Initial brief, at 28, ellipsis in original, citation omitted] But RJR made the same argument to the Supreme Court, which obviously rejected it. [Respondents' Motion for Rehearing[2], at 16 ("the preserved Phase I findings cannot be treated as res judicata or collateral estoppel because they lack specificity.").] Similarly, while RJR now argues that there can be no preclusive effect on the fraudulent concealment or conspiracy claims, it unsuccessfully made the same argument to the Supreme Court. [*Id*. at 5-8]

RJR claims that the jury's verdict in this case was insufficient because of a lack of a finding that one of the other conspirators committed fraudulent concealment. But this ignores what was determined in *Engle* and in the present case. The *Engle* jury found that each of the tobacco defendants engaged in fraudulent concealment, and each entered into a conspiracy to fraudulently conceal. The jury in this case found that an act taken in furtherance of that conspiracy was a legal cause of John Sherman's death. [R58:10870] In making this finding, the jury *necessarily* found that an act by one of the conspirators caused Mr. Sherman's death. The jury thus necessarily concluded that one of the conspirators committed the tort of fraudulent concealment.

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[2]This Motion is on a DVD-ROM on page 2229 of Appellant's Supplemental Record Appendix. The documents is the "briefs" subdirectory, under the file name 20060810120748A00004581.pdf.

To the extent that RJR is contending that the jury should have been asked precisely which conspirator's act was the cause of Mr. Sherman's death, that issue is not preserved for appeal. The verdict form submitted by RJR did not include any such interrogatory. [R57:10718-24] Having failed to request one in the trial court, RJR may not object now.

RJR also argues that the use of the *Engle* findings violated due process. Once again, it made that argument to the Supreme Court, and the Supreme Court rejected it. [Respondents' Motion for Rehearing, at 12, 15] RJR had a year-long trial in *Engle*, and due process doesn't require that the findings of that trial be discarded. Further, the facts of this case do not suggest an unfair proceeding. Despite overwhelming evidence of wrongdoing extending over a half century, the jury found in favor of RJR on most claims, and awarded a modest amount in compensatory damages. There was no denial of due process.

II. THE TRIAL COURT DID NOT ERR IN REJECTING THE DEFENDANT'S CLAIM THAT THE VERDICT WAS INCONSISTENT

RJR claims that "the jury's verdict on conspiracy is inconsistent with its verdicts on comparative fault and fraudulent concealment." [Initial brief, at 35] There was no inconsistency. Furthermore, the issue was not preserved for appeal.

The verdict was not inconsistent. This Court recently explained that "an inconsistent verdict is when two findings of fact are mutually exclusive." *Smith v. Florida Health Kids Cor*p., 27 So. 3d 692, 695 (Fla. 4th DCA 2010). The Court further explained:

> Where the findings of a jury's verdict in two or more respects are findings with respect to a definite fact material to the judgment such that both cannot be true and therefore stand at the same time, they are in fatal conflict. In such circumstances, contradictory findings mutually destroy each other and result in no valid verdict, and a trial court's judgment based thereupon is erroneous.

Id. (quoting *Crawford v. DiMicco*, 216 So. 2d 769, 771 (Fla. 4th DCA 1968)).

Here, the verdicts for conspiracy and fraudulent concealment are not mutually exclusive. They are not contradictory. They do not destroy each other.

It is fundamental that if there is a conspiracy, all co-conspirators can be held liable, even if only one of the conspirators committed an overt act. "Each co-conspirator need not act to further a conspiracy; each 'need only know of the scheme and assist in it in some way to be held responsible for all of the acts of his co-conspirators." *Charles v. Florida Foreclosure Placement Center,* 988 So. 2d 1157, 1160 (Fla. 3d DCA 2008) (citation omitted). *Accord Donofrio v. Matassini,* 503 So. 2d 1278 (Fla. 2d DCA 1987); *Nicholson v. Kellin*, 481 So. 2d 931 (Fla. 5th DCA 1985).

Here, the jury found that an "act taken in furtherance of R.J. Reynolds Tobacco Company's agreement to conceal or omit information regarding the health effects or addictive nature of cigarettes [was] a legal cause of John Sherman's death." [R58:10870]. The jury merely concluded that the conspiracy to conceal or omit caused Mr. Sherman's death. That conclusion does not in the slightest conflict with the jury's separate answer of "no" to the question whether Mr. Sherman "reasonably relied to his detriment on any statement by R.J. Reynolds Tobacco Company that omitted information and if so was such reliance a legal cause of his death." Both statements could be entirely true—Mr. Sherman's death was caused by acts in furtherance of the conspiracy, but those acts were by an entity other than RJR.

Since the two jury findings are not mutually exclusive, there is no inconsistency. They are entirely reconcilable. Indeed, the trial judge—who has extensive experience in and knowledge of tobacco cases—immediately recognized this. He concluded that while there may not have been any direct statement made by RJR which Mr. Sherman relied on, the jury could conclude that Mr. Sherman relied on "the overall acts of the industry working through its various organizations. . . ." [T80:2875-76] He therefore concluded that the verdicts were not "inherently inconsistent." *Id.*

In support of its inconsistency argument, RJR suggests that there is no legal basis on which the tobacco industry organizations could be held liable for fraudulent concealment. This suggestion is without merit. First, the *Engle* jury found that these organizations had fraudulently concealed the truth about smoking. Second, the evidence established that the tobacco companies (including RJR) established these tobacco industry organizations precisely to mislead the American people about the dangers of smoking. The industry concluded that these purportedly neutral organizations could be more effective concealers of the truth about cigarettes. [Ex. 11, 430, 803; T67:693-96; T71:1183] Under these facts, RJR's suggestion that the industry organizations had no duty and could not be held liable for fraudulent concealment can be quickly rejected. *See generally Gutter v. Wunker*, 631 So. 2d 1117 (Fla. 4th DCA 1994); *Nicholson v. Kellin*, 481 So. 2d 931 (Fla. 5th DCA 1986).

Issue was not preserved. The verdict was not inconsistent. Even if it was, RJR failed to preserve the issue for appeal.

In the trial court, RJR did not ask that the claimed inconsistency be sent back to the jury. Instead, it specifically asked that the trial court resolve the alleged inconsistency by dismissing the conspiracy claim:

> [RJR]: All right. And with respect to question number five, our position is that, you know, under Florida law, you can't have a conspiracy claim without an underlying fraud claim, and this court, therefore, would have to dismiss number five as a result.
>
> THE COURT: Dismiss what?
>
> [RJR]: The claim that is set forth in number five.

[T80:2876-77]

This failed to adequately preserve the alleged inconsistency for appeal. The purpose of the contemporaneous objection requirement for inconsistent verdicts is to allow the jury to further deliberate to cure the claimed inconsistency. *Nissan Motors Co. v. Alvarez*, 891 So. 2d 4, 8 (Fla. 4th DCA 2005). "[T]he societal interest in furnishing only a single occasion for the trial of civil disputes would be entirely undone by the granting of second trials for reasons which could have been addressed at the first." *Moorman v. American Safety Equipment*, 594 So. 2d 795, 799 (Fla. 4th DCA 1992).[3]

This Court has noted that "[a] party's failure to seek jury reconsideration is often viewed as a conscious choice of strategy." *Nissan Motors Co. v. Alvarez*, 891 So. 2d at 8. This Court in *Nissan* cited *Adorno Marketing v. Da Silva*, 623 So. 2d

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[3]This is a particularly important concern in this case. The *Engle* case has been pending since 1994. Mr. Sherman died in 2000, and his widow is elderly. Time is working strongly against the *Engle* plaintiffs, and in favor of the tobacco companies.

542 (Fla. 3d DCA 1993), which is instructive. In that case, the defendant argued that the verdict was inconsistent, but did not ask the trial court to permit reconsideration by the jury. The appellate court concluded that the defendant, "having not requested the jury be permitted to reconsider its verdict in light of the inconsistency, cannot now seek reversal on that basis." 623 So. 2d at 543.

The same conclusion applies here. If there was an inconsistency, RJR should have asked that the verdict be sent back to the jury. Having clearly not requested that, the alleged inconsistency is not preserved for appeal. *Cf. Lucas v. Orchid Island Properties*, 982 So. 2d 758 (Fla. 4th DCA 2008) (noting narrow exception where defendant argues on appeal for judgment as a matter of law).[4]

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[4]RJR in passing suggests that the jury's verdict on comparative fault demonstrates that there is some sort of inconsistency which fatally undermines the conspiracy verdict. The jury found that "other person or entity" was without fault (0%). RJR suggests that this verdict demonstrates that the jury found the tobacco industry organizations to be without fault. [Initial brief, at 39-40] This is incorrect. The "other person or entity" on the verdict form referred to cigarette manufacturers. [*See, e.g.,* T75:2049, T77:2412-13, T78:2423, T78:2455-58, T80:2813-14] The trial court specifically instructed the jury that the "other person or entity" referred to someone who "manufactured the cigarettes that caused Mr. Sherman's addiction and death." [T80:2837] Furthermore, RJR's reliance on the comparative fault verdict was not preserved, since it never argued to the trial court that the comparative fault verdict was inconsistent with the conspiracy verdict.

III. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN THE JURY INSTRUCTIONS

RJR's argument that the three-week long trial should be overturned because of a generic jury instruction—that "Reynolds Tobacco Company is responsible for the conduct of its agents and employees acting within the scope and course of employment"—should be rejected. [T80: 2828-29]

Standard of review. Trial courts are accorded broad discretion in their decisions to give a particular jury instruction, and any such decision will not be reversed absent prejudicial error." *Nason v. Shafranski*, 2010 WL 1687631 (Fla. 4th DCA April 28, 2010). The discretion given to the trial courts in general should be particularly broad in a difficult case such as this.[5]

RJR's unpreserved attack of the timing of the instruction. The heart of RJR's argument against the generic instruction is that the trial court's final decision

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[5]The tobacco companies try cases in a way that seems to deliberately challenge the patience and skills of trial judges. They routinely file lengthy pleadings and memos, often times at the last minute. In this case, the trial court expressed displeasure at RJR's submission of 76 pages of jury instructions:

> That is extraordinary. I've read them, and we will go through them relatively quickly. They are argumentative and misstate or ignore controlling law in many instances, but I will go through them one at a time. But that really is a tough use of my mental energy in doing that. It's very tough to drop it on me this morning.

[T79:2635] The industry strategy has a purpose: A trial judge flooded with paperwork is more likely to make a mistake, which tobacco companies can then use to seek reversal in a case in which they have little to say on the merits.

to give the instruction came after closing arguments. But if RJR thought that the *timing* of the decision on the instruction was problematic, then it should have mentioned this to the trial court. The trial court could have evaluated the issue, and perhaps allowed RJR to reopen closing argument to address the instruction which it now claims was so prejudicial. But since RJR did not make the point, there was no chance to address the issue. RJR failed to preserve the point for appeal. *See Aills v. Boemi*, 29 So. 3d 1105 (Fla. 2010) (appellate review is "limited to the specific grounds for objection raised at trial").

Instruction was correct. The instruction as given was correct. A defendant is of course responsible for the conduct of its agents and employees acting within the scope and course of their employment. While RJR claims that the Plaintiff did not plead agency, this isn't correct. The complaint alleged that the Council for Tobacco Research and the Tobacco Institute "were involved in promotion" and other activities "*on behalf of the Defendants*" (including RJR). [R4-5, emphasis added] Agency must be pleaded, but all that is required is that the "complaint set forth any ultimate facts that establish either actual or apparent agency or any other basis for vicarious liability. . . ." *Goldschmidt v. Holman*, 571 So. 2d 422, 423 (Fla. 1990). That was done.

We acknowledge that the complaint did not allege that Hill & Knowlton was an agent for RJR. But the instruction did not say that. It merely said that RJR was responsible for "the conduct of its agents and employees acting within the scope and course of employment." While the Plaintiff's counsel in closing argument did refer to Hill and Knowlton as an agent of RJR, RJR did not object to this. [T80:2713]

Harmless. In any event, RJR has not shown that it was harmed by the instruction.

The *Engle* jury established that there was a conspiracy to commit fraud. The jury in this case found that Mr. Sherman was harmed by the conspiracy, rather than by RJR directly. This conclusion by the jury would not have been affected by the agency instruction. The tobacco organizations were co-conspiractors, as established by the *Engle* verdict. While Hill & Knowlton was not a co-conspirator, its role was behind-the-scenes. It was the public relations firm which helped develop the industry's public relations campaign. But it was not the public speaker which fraudulently concealed the truth about smoking. The public speakers were the tobacco companies and the tobacco industry organizations.

There is nothing in the record to suggest that the jury's conclusion that the Plaintiff was injured by the conspiracy was the result of the instruction on agency.

That causal link, found by the jury, would have been the same with or without the agency instruction. There is no prejudice, and no reason for reversal. *See Franklin Life Insurance Co. v. Davy*, 753 So. 2d 581, 587 (Fla. 1st DCA 2000)(giving of jury instruction on agency was harmless error); *Rety v. Green*, 546 So. 2d 410, 424 (Fla. 3d DCA 1989)(same); *Smith v. State*, 743 So. 2d 1141 (Fla. 1st DCA 1999) (change in jury instructions after closing argument does not automatically require reversal); *Whitaker v. State*, 952 So. 2d 1258 (Fla. 4th DCA 2007).

A defendant is entitled to a fair trial, not a perfect trial. *Bell v. State*, 930 So. 2d 779, 783 (Fla. 4th DCA 2006); *General Motors Corp. v. McGee*, 837 So. 2d 1010, 1033 (Fla. 4th DCA 2002). RJR received a fair trial, and has shown no basis for overturning the verdict.

IV. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN FINDING THAT THE JURY AWARDED THE AMOUNT STATED ON THE VERDICT FORM AND AFFIRMED BY EACH MEMBER OF THE JURY

The trial court did not abuse its discretion in concluding that the jury intended to award Mrs. Sherman damages in the amount of $1,550,000.

The jury entered the amount of $1,550,000 on its verdict form. [R58:10871] The trial judge read the verdict, and asked each juror whether that was the juror's verdict. Each juror agreed that the award was its verdict.

RJR argues that it is entitled to a new trial, because the jurors—deciding to write out the amount of damages in words, as if it were a check—wrote out "One Million Five Hundred Fifty Dollars only."

What was apparent to all, including the trial court, was that the jury did *not* intend to award $1,000,550 in noneconomic damages. No one has ever seen an award of noneconomic damages in an amount like that. What obviously happened is that the jurors made a mistake in writing out the number in words. Any doubt about this was resolved by each juror affirming that the verdict which was read—$1,550,000—was the correct verdict.

Where a jury makes a clerical error in recording its verdict, the court may cure the error, and such a ruling is within the discretion of the trial court. *See Cory v. Greyhound Lines*, 257 So. 2d 36, 40-41 (Fla. 1971)(where jury transposed amounts or "made other clerical errors in rendering the verdicts," it is within the sound discretion of the trial court to conform the verdict to the jury's intent); *McElhaney v. Uebrich*, 699 So. 2d 1033, 1036 (Fla. 4th DCA 1997)(noting that where "there are no math experts on the jury" there is a risk of calculation error, and "the award should be affirmed if the jury's intent is apparent is essential to avoid unnecessary new trials"); *Capital Bank v. MVB, Inc.*, 644 So. 2d 515, 522

(Fla. 3d DCA 1994); *Phillips v. Ostrer*, 481 So. 2d 1241, 1246 (Fla. 3d DCA 1985); *Latner v. Preusler & Associates*, 11 So. 3d 388, 392 (5th DCA 2009) (Evander, J., concurring).

The trial court also properly considered the jurors' responses to questioning about the verdict. *Robbins v. Graham*, 404 So. 2d 769, 770 (Fla. 4th DCA 1981). Here, six jurors were asked whether the verdict of $1,550,000 was their verdict, and each answered yes. While RJR complains about how the polling of the jurors was conducted, this was a matter within the discretion of the trial court, and the discretion was not abused here. And there certainly is no reason to order a new trial on damages and liability, where the situation involved merely how a verdict was written, rather than a compromise verdict.

CROSS-APPEAL

ARGUMENT

THE TRIAL COURT ERRED IN REDUCING THE VERDICT BASED ON THE FAULT OF THE DECEDENT, WHERE THE DEFENDANT WAS FOUND LIABLE FOR AN INTENTIONAL TORT

The trial court's reduction of the compensatory damages awarded to the Plaintiff was error. RJR was found liable for the intentional tort of conspiracy to fraudulently conceal. Comparative fault does not apply where the plaintiff recovers from the defendant for such an intentional tort. The standard of review is *de novo*. *Petit-Dos v. School Board*, 2 So. 3d 1022, 1024 (Fla. 4th DCA 2009).

Under Florida common law, the negligence of a plaintiff (or decedent in a wrongful death action) does *not* reduce the plaintiff's recovery where the defendant is found liable for an intentional tort. *Cruise v. Graham,* 622 So. 2d 37 (Fla. 4th DCA 1993) (comparative negligence not a defense to fraudulent misrepresentation); *Mazzilli v. Doud*, 485 So. 2d 477 (Fla. 3d DCA 1986).

Similarly, under Florida's comparative fault statute there is no reduction for comparative fault where the defendant is liable for an intentional tort. Florida's comparative fault statute is explicitly limited to "negligence cases." § 768.81(4)(a), Fla. Stat. The statute specifically provides that it "does not apply to . . . any action based upon an intentional tort." § 768.81(4)(b). Since the jury found RJR liable for

an intentional tort, the comparative fault statute does not apply. *See Meyer v. Thompson*, 861 So. 2d 1256 (Fla. 4th DCA 2003) (error to reduce verdict for fraudulent concealment because of the comparative negligence of plaintiff); *Merrill Crossings Associates v. McDonald*, 705 So. 2d 560 (Fla. 1998); *Petit-Dos v. School Board*, 2 So. 3d 1022 (Fla. 4th DCA 2009).

It is unclear what the legal basis was for the trial court's application of comparative fault to reduce the verdict by 50%. RJR argued that the "Plaintiff made a strategic decision to apply a contributory fault finding to her entire case." [R62:11688-11702] But this is not correct. The Plaintiff's complaint alleged comparative fault, but specifically stated that she "requests that the jury apportion fault between the Plaintiff and the Defendant(s) on all counts, *other than those alleging intentional torts*." [R50:9485-86, R51:9623-58, R62:11757-61] At trial the Plaintiff's counsel accepted responsibility for Mr. Sherman's conduct, but that did not constitute a waiver of the rule that comparative fault does not apply where the jury finds the defendant liable for an intentional tort.

Since comparative negligence is not a defense to the intentional tort for which the jury found that RJR liable, the Plaintiff is entitled to entry of a judgment in the full amount of the verdict.

CONCLUSION

The trial court's denial of RJR's request for a new trial should be affirmed. On the cross-appeal, the reduction of the verdict based on comparative fault should be reversed, with instructions that judgment be entered in the full amount of the jury verdict.

Respectfully submitted,

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CERTIFICATE OF SERVICE AND COMPLIANCE

We hereby certify that a copy of this document was served by U.S. Mail on this 10th day of May, 2010, to Gordon James III, Esq., and Eric L. Lundt, Esq., Sedgwick, Detert, Moran & Arnold, LLP, 2400 E. Commercial Boulevard, Suite 1100, Fort Lauderdale, FL 33308; and Stephanie E. Parker, Esq., John F. Yarber, Esq., and John M. Walker, Esq., Jones Day, 1420 Peachtree Street, N.E., Suite 800, Atlanta, GA 30309-3053.

We hereby certify that this brief is in Times Roman 14 point, and in compliance with the type requirements of the Florida Rules of Appellate Procedure.

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