Real Property and Business Litigation Report

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Manuel Farach

In Re: Standard Jury Instructions In Civil Cases—Report 17-01, Case No. SC17-451 (Fla. 2017).
Standard Civil Instruction 201.2 is amended to include language regarding communication with court personnel outside the courtroom, and Standard Civil Instruction 202.4 is amended to clarify that jurors must ask questions of a witness before the witness leaves the witness stand.

Philip Morris USA, Inc. v. Duignan, Case No. 2D15-5055 (Fla. 2d DCA 2017).
A jury instruction requiring "detrimental reliance on a statement" may not be proper in a fraudulent concealment or fraudulent omission case.

Tramontana v. Bank of New York Mellon, Case No. 2D16-2990 (Fla. 2d DCA 2017).
An appellate court will not reverse on an issue involving trial testimony absent a trial transcript or fundamental error.

Echeverry v. Deutsche Bank National Trust Company, Case No. 4D16-3611 (Fla. 4th DCA 2017).
A certificate of sale issued under Florida Statute sec. 45.0315 divests a borrower of her equity of redemption, and thus a bankruptcy filed after this certificate of sale does not bar the issuance of a certificate of title.

Nationstar Mortgage, LLC v. Martins, Case No. 4D16-3735 (Fla. 4th DCA 2017).
A lender's unilateral decision to leave a note and mortgage with the Clerk of the Court in the file of a previously filed foreclosure does not establish standing.

Williams v. Skylink Jets, Inc., Case No. 4D16-4170 (Fla. 4th DCA 2017).
"Technical admissions" to Requests for Admissions will turn unliquidated sums into liquated sums for purposes of a final judgment.

Green Emerald Homes LLC v. Green Tree Servicing LLC, Case No. 4D17-983 (Fla. 4th DCA 2017).
A party seeking to effect substitute service on a limited liability company must comply with Florida Statute section 48.062(3) if the party has already exerted diligent but unsuccessful efforts to serve under subsections (1) and (2), and must also comply with section 48.161(1) by sending notice to the defendant, via certified or registered mail,

that substitute service has been effected through the Secretary of State, (ii) filing the return receipt from the defendant, and (iii) filing an affidavit of compliance.

Supreme Court of Florida

No. SC17-451

IN RE: STANDARD JURY INSTRUCTIONS IN CIVIL CASES—REPORT 17-01.

[November 16, 2017]

PER CURIAM.

The Supreme Court Committee on Standard Jury Instructions in Civil Cases (Committee) has submitted proposed changes to the standard jury instructions and asks that the Court authorize the amended standard instructions for publication and use. We have jurisdiction. See art. V, § 2(a), Fla. Const.

The Committee proposes amending instruction 201.2 (Introduction of Participants and Their Roles) and instruction 202.4 (Juror Questions). The Committee published its proposals in The Florida Bar News. No comments were received. The Court did not publish the Committee's proposals.[1]

1. Minor, technical changes to the instructions are not elaborated upon.

Instruction 201.2 is amended to include the following language pertaining to the paragraph addressing communications with court personnel, including the judge: "This means, if you are outside the courtroom, any communication with me must be in writing, unsigned, and handed directly to the bailiff. Do not share the content of the writing with anyone, including other jurors."

Instruction 202.4 is amended to clarify that jurors must ask questions of a witness before the witness leaves the witness stand, by adding the following language: "It is important to know that if you have a question you believe should be asked of a witness, you must raise your hand and request that I ask the witness the question before the witness leaves the witness stand. You will not have an opportunity to ask the witness a question once the witness leaves the courtroom."

Having considered the Committee's report, we authorize the Committee's proposals for publication and use as set forth in the appendix to this opinion. New language is indicated by underlining, while deleted language is struck-through. In authorizing the publication and use of these instructions, we express no opinion on their correctness and remind all interested parties that this authorization forecloses neither requesting additional or alternative instructions nor contesting the legal correctness of the instructions. We further caution all interested parties that any comments associated with the instructions reflect only the opinion of the Committee and are not necessarily indicative of the views of this Court as to their

correctness or applicability. The instructions as set forth in the appendix shall become effective when this opinion becomes final.

It is so ordered.

LABARGA, C.J., and PARIENTE, LEWIS, QUINCE, CANADY, POLSTON, and LAWSON, JJ., concur.

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED.

Original Proceeding – Supreme Court Committee on Standard Jury Instructions in Civil Cases

Rebecca Mercier Vargas, Chair, Supreme Court Committee on Standard Jury Instructions in Civil Cases, West Palm Beach, Florida; and Laura K. Whitmore, Vice Chair and Subcommittee Chair, Filing Subcommittee of the Supreme Court Committee on Standard Jury Instructions in Civil Cases, Tampa, Florida,

for Petitioner

APPENDIX

201.2 INTRODUCTION OF PARTICIPANTS AND THEIR ROLES

Who are the people here and what do they do?

Judge/Court: **I am the Judge. You may hear people occasionally refer to me as "The Court." That is the formal name for my role. My job is to maintain order and decide how to apply the rules of the law to the trial. I will also explain various rules to you that you will need to know in order to do your job as the jury. It is my job to remain neutral on the issues of this lawsuit.**

Parties: **A party who files a lawsuit is called the Plaintiff. A party that is sued is called the Defendant.**

Attorneys: **The attorneys have the job of representing their clients. That means they speak for their client here at the trial. They have taken oaths as attorneys to do their best and to follow the rules for their profession.**

Plaintiff's Counsel: **The attorney on this side of the courtroom,** (introduce by name)**, represents** (client name) **and is the person who filed the lawsuit here at the courthouse. [His] [Her] job is to present [his] [her] client's side of things to you. [He] [She] and [his] [her] client will be referred to most of the time as "the plaintiff."** (Attorney name)**, will you please introduce who is sitting at the table with you?**

[Plaintiff without Counsel: (Introduce claimant by name)**, on this side of the courtroom, is the person who filed the lawsuit at the courthouse.** (Claimant) **is not represented by an attorney and will present [his] [her] side of things to you [himself] [herself].]**

Defendant's Counsel: **The attorney on this side of the courtroom,** (introduce by name)**, represents** (client name)**, the one who has been sued. [His] [Her] job is to present [his] [her] client's side of things to you. [He] [She] and [his] [her] client will usually be referred to here as "the defendant."** (Attorney name)**, will you please introduce who is sitting at the table with you?**

[Defendant's Counsel: **The attorney on this side of the courtroom,** (introduce by name)**, represents** (client name)**, the one who has been sued. [His]**

[Her] job is to present [his] [her] client's side of things to you. [He] [She] and [his] [her] client will usually be referred to here as "the defendant." [His] [Her] client (defendant uninsured or underinsured motorist carrier) **is** (claimant's name) **motor vehicle insurance company and provided [him] [her] [uninsured] [underinsured] motorist coverage, which may be available to pay some or all of the damages that may be awarded.]***

**Use the bracketed paragraph above when the case involves an uninsured or underinsured motorist carrier.*

[Defendant without Counsel: (Introduce defendant by name)**, on this side of the courtroom, is the one who has been sued.** (Defendant) **is not represented by an attorney and will present [his] [her] side of things to you [himself] [herself].]**

Court Clerk: **This person sitting in front of me,** (name)**, is the court clerk. [He] [She] is here to assist me with some of the mechanics of the trial process, including the numbering and collection of the exhibits that are introduced in the course of the trial.**

Court Reporter: **The person sitting at the stenographic machine,** (name)**, is the court reporter. [His] [Her] job is to keep an accurate legal record of everything we say and do during this trial.**

Bailiff: **The person over there,** (name)**, is the bailiff. [His] [Her] job is to maintain order and security in the courtroom. The bailiff is also my representative to the jury. Anything you need or any problems that come up for you during the course of the trial should be brought to [him] [her]. However, the bailiff cannot answer any of your questions about the case. Only I can do that.**

Jury: **Last, but not least, is the jury, which we will begin to select in a few moments from among all of you. The jury's job will be to decide what the facts are and what the facts mean. Jurors should be as neutral as possible at this point and have no fixed opinion about the lawsuit.**

In order to have a fair and lawful trial, there are rules that all jurors must follow. A basic rule is that jurors must decide the case only on the evidence presented in the courtroom. You must not communicate with anyone, including friends and family members, about this case, the people and places involved, or your jury service. You must not disclose your thoughts

about this case or ask for advice on how to decide this case.

I want to stress that this rule means you must not use electronic devices or computers to communicate about this case, including tweeting, texting, blogging, e-mailing, posting information on a website or chat room, or any other means at all. Do not send or accept any messages to or from anyone about this case or your jury service.

You must not do any research or look up words, names, [maps,], or anything else that may have anything to do with this case. This includes reading newspapers, watching television or using a computer, cell phone, the Internet, any electronic device, or any other means at all, to get information related to this case or the people and places involved in this case. This applies whether you are in the courthouse, at home, or anywhere else.

Many of you may have cell phones, tablets, laptops, or other electronic devices with you here in the courtroom.**

***The trial judge should select one of the following two alternative instructions explaining the rules governing jurors' use of electronic devices, as explained in Note on Use 1.*

Alternative A: **[All cell phones, computers, tablets, or other types of electronic devices must be turned off while you are in the courtroom. Turned off means that the phone or other electronic device is actually off and not in a silent or vibrating mode. You may use these devices during recesses, but even then you may not use your cell phone or electronic device to find out any information about the case or communicate with anyone about the case or the people involved in the case. Do not take photographs, video recordings, or audio recordings of the proceedings or of your fellow jurors. After each recess, please double check to make sure your cell phone or electronic device is turned off. At the end of the case, while you are deliberating, you must not communicate with anyone outside the jury room. You cannot have in the jury room any cell phones, computers, or other electronic devices. If someone needs to contact you in an emergency, the court can receive messages and deliver them to you without delay. A contact phone number will be provided to you.]**

Alternative B: **[You cannot have any cell phones, tablets, laptops, or other electronic devices in the courtroom. You may use these devices during recesses, but even then you may not use your cell phone or electronic device to**

find out any information about the case or communicate with anyone about the case or the people involved in the case. Do not take photographs, video recordings, or audio recordings of the proceedings or your fellow jurors. At the end of the case, while you are deliberating, you must not communicate with anyone outside the jury room. If someone needs to contact you in an emergency, the court can receive messages and deliver them to you without delay. A contact phone number will be provided to you.]

What are the reasons for these rules? These rules are imposed because jurors must decide the case without distraction and only on the evidence presented in the courtroom. If you investigate, research, or make inquiries on your own outside of the courtroom, the trial judge has no way to make sure that the information you obtain is proper for the case. The parties likewise have no opportunity to dispute or challenge the accuracy of what you find. That is contrary to our judicial system, which assures every party the right to ask questions about and challenge the evidence being considered against it and to present argument with respect to that evidence. Any independent investigation by a juror unfairly and improperly prevents the parties from having that opportunity our judicial system promises.

Any juror who violates these restrictions jeopardizes the fairness of these proceedings, and a mistrial could result that would require the entire trial process to start over. A mistrial is a tremendous expense and inconvenience to the parties, the court, and the taxpayers. If you violate these rules, you may be held in contempt of court, and face sanctions, such as serving time in jail, paying a fine or both.

All of your communications with courtroom personnel, or me, will be part of the record of these proceedings. That means those communications shall either be made in open court with the court reporter present or, if they are in writing, the writing will be filed with the court clerk. This means, if you are outside the courtroom, any communication with me must be in writing, unsigned, and handed directly to the bailiff. Do not share the content of the writing with anyone, including other jurors. I have instructed the courtroom personnel that any communications you have with them outside of my presence must be reported to me, and I will tell the parties [and their attorneys] about any communication from you that I believe may be of interest to the parties [and their attorneys].

However, you may communicate directly with courtroom personnel

about matters concerning your comfort and safety, such as [juror parking] [location of break areas] [how and when to assemble for duty] [dress] [what personal items can be brought into the courthouse or jury room] [list any other types of routine ex parte communications permitted].

If you become aware of any violation of these instructions or any other instruction I give in this case, you must tell me by giving a note to the bailiff.

NOTES ON USE FOR 201.2

1. Florida Rule of Judicial Administration 2.451 directs trial judges to instruct jurors on the use of cell phones and other electronic devices. During the trial, the trial judge may remove the jurors' cell phones or other electronic devices. The trial judge also has the option to allow the jurors to keep the cell phones and electronic devices during trial until the jurors begin deliberations. Rule 2.451 prohibits jurors from using the cell phones or electronic devices to find out information about the case or to communicate with others about the case. The jurors also cannot use the electronic devices to record, photograph, or videotape the proceedings. In recognition of the discretion rule 2.451 gives trial judges, this instruction provides two alternatives: (A) requiring jurors to turn off electronic devices during court proceedings and removing their cell phones and electronic devices during deliberations; or (B) removing the cell phones and electronic devices during all proceedings and deliberations. These instructions may be modified to fit the practices of a trial judge in a particular courtroom. These instructions are not intended to limit the discretion of the trial court to control the proceedings.

2. The portion of this instruction dealing with communication with others and outside research may be modified to include other specified means of communication or research as technology develops.

3. ~~*Fla.R.Civ.P.*~~Florida Rule of Civil Procedure 1.431(i)(2) requires the court, by pretrial order or statement on the record with opportunity for objection, to set forth the scope of routine, ex parte communications. Rule 1.431(i)(3) mandates an instruction during voir dire regarding the limitations on jurors' communications with the court and courtroom personnel. The court should make sure that courtroom personnel are also aware of the limitations on their communications with jurors.

4. The introduction of the uninsured/underinsured motorist carrier is required because the plaintiffs are entitled to have the jury know that the joined

carrier is the plaintiffs' uninsured/underinsured carrier. *Lamz v. Geico General Insurance Co.*, 803 So. 2d 593 (Fla. 2001); *Medina v. Peralta*, 724 So. 2d 1188 (Fla. 1999).

202.4 JUROR QUESTIONS

Questions for the court or courtroom personnel:

During the trial, you may have a question about these proceedings. If so, please write it down and hand it to the bailiff, who will then hand it to me. I will review your question with the parties [and their attorneys] before responding.

Questions for witnesses:

You also may have a question you think should be asked of a witness. If so, there is a way for you to request that I ask the witness a question. After all the attorneys have completed their questioning of the witness, you should raise your hand if you have a question. I will then give you sufficient time to write the question on a piece of paper, fold it, and give it to the bailiff, who will pass it to me. Do not put your name on the question, show it to anyone or discuss it with anyone.

<u>It is important to know that if you have a question you believe should be asked of a witness, you must raise your hand and request that I ask the witness the question before the witness leaves the witness stand. You will not have an opportunity to ask the witness a question once the witness leaves the courtroom.</u> I will then review the question with the attorneys. Under our law, only certain evidence may be considered by a jury in determining a verdict. You are bound by the same rules of evidence that control the attorneys' questions. If I decide that the question may not be asked under our rules of evidence, I will tell you. Otherwise, I will direct the question to the witness. The attorneys may then ask follow-up questions if they wish. If there are additional questions from jurors, we will follow the same procedure again.

By providing this procedure, I do not mean to suggest that you must or should submit written questions for witnesses. In most cases, the lawyers will have asked the necessary questions.

NOTES ON USE FOR 202.4

1. ~~*Fla.R.Civ.P.*~~Florida Rule of Civil Procedure 1.431(i)(3) requires an instruction that jurors' questions must be submitted in writing to the court, which will review them with the parties and counsel before responding. Rule 1.431 does not prevent jurors from asking the bailiff about routine matters affecting comfort and safety. The committee notes to rule 1.431 recognize that this instruction may need to be modified to reflect that individual trial judges may have reasonable differences regarding the type of communications considered routine.

2. ~~*Fla.R.Civ.P.*~~Florida Rule of Civil Procedure 1.452 mandates that jurors be permitted to submit written questions directed to witnesses or the court.

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING
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IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

SECOND DISTRICT

PHILIP MORRIS USA, INC.; R.J. REYNOLDS TOBACCO COMPANY; LORILLARD TOBACCO COMPANY; and LORILLARD, INC.,	)	
Appellants,	)	
v.	)	Case No. 2D15-5055
KEVIN DUIGNAN, as personal representative of the Estate of Douglas Clarence Duignan, deceased,	)	
Appellee.	)	

Opinion filed November 15, 2017.

Appeal from the Circuit Court for Pinellas County; Jack Day, Judge.

Cathy A. Kamm, Terri L. Parker, Daniel F. Molony, and Razvan Axente of Shook, Hardy & Bacon, L.L.P., Tampa; Geoffrey J. Michael and Daphne O'Connor of Arnold & Porter LLP, Washington, District of Columbia; Gregory G. Katsas of Jones Day (withdrew after briefing), Washington, District of Columbia; and Charles R.A. Morse of Jones Day, New York, New York, for Appellants.

David J. Sales, Daniel R. Hoffman of David J. Sales, P.A., Jupiter; Gary M. Paige, Robert E. Gordon of Gordon & Doner, P.A., Davie; James W. Gustafson,

Jr. of Searcy Denney Scarola Barnhart &
Shipley, P.A., Tallahassee, for Appellee.

SALARIO, Judge.

Philip Morris USA, Inc. (PM) and R.J. Reynolds Tobacco Company (Reynolds) appeal from a final judgment entered in favor of Kevin Duignan, the personal representative of the Estate of Douglas Clarence Duignan (the Estate).[1] Douglas Duignan smoked cigarettes made by PM and Reynolds and later died of cancer, which led to the filing of this Engle[2] progeny suit by the Estate. We reverse and remand for a new trial primarily because in responding to a note from the jury concerning the testimony of Dennis Duignan, the decedent's brother and an important witness for the defense, the trial court gave an answer improperly calculated to prevent the jury from requesting a readback of that testimony. With respect to the Estate's claims for fraud by concealment and conspiracy to commit fraud by concealment, we further conclude that the trial court erroneously instructed the jury on the element of detrimental reliance.

The Trial Of This Engle Progeny Case

Background. For the benefit of the reader unfamiliar with tobacco litigation in Florida, Engle progeny cases differ from ordinary product defect or wrongful death cases in that they go to trial with certain factual matters having been conclusively established as a result of the supreme court's decision in Engle v. Liggett Group, 945

[1]Lorillard Tobacco Company is also named as an appellant here. Lorillard, however, has been merged into Reynolds, and Reynolds' liability in this case includes liability as a successor-by-merger to Lorillard.

[2]Engle v. Liggett Grp., 945 So. 2d 1246 (Fla. 2006).

So. 2d 1246 (Fla. 2006). Engle was a class action brought against several tobacco companies—PM and Reynolds included—on behalf of Florida-resident smokers who developed smoking-related illnesses caused by addiction to cigarettes containing nicotine. Trial verdicts established liability, compensatory damages for the class representatives, and the entitlement to and the amount of punitive damages for the class. The tobacco companies appealed, and the case reached the Florida Supreme Court. The supreme court decertified the class and vacated the punitive damages award—with the result being that individual members of the Engle class must pursue individual damages actions in order to recover for smoking-related illnesses. Id. at 1254.

Although it decertified the class, the supreme court nonetheless held that certain liability findings—so-called Phase I findings—made by the Engle jury could stand and govern in individual actions by Engle class members. Id. at 1254-55. The retained Phase I findings include findings that smoking cigarettes causes certain diseases (including lung cancer), that nicotine is addictive, that the tobacco companies placed cigarettes on the market that were defective and unreasonably dangerous, that the tobacco companies were negligent, and that the tobacco companies concealed or omitted material information about the health effects and addictive nature of cigarettes and also conspired with one another to do so. Id. at 1257 n.4, 1276-77. To take advantage of these findings in an individual suit, a plaintiff must establish membership in the Engle class by proving that before November 21, 1996, the plaintiff had developed one of the illnesses found by the Engle jury to be caused by smoking and that the plaintiff's illness was caused by an addiction to cigarettes containing nicotine.

Id. at 1256, 1277. If an individual plaintiff demonstrates class membership, the retained Phase I findings are taken as conclusively established for purposes of the individual's action. Id. at 1277.

This particular Engle progeny case proceeded to trial on an amended complaint which alleged that before November 21, 1996, Douglas Duignan developed lung cancer as a result of having been addicted to cigarettes containing nicotine. It asserted claims for strict liability, negligence, fraud by concealment, and conspiracy to commit fraud by concealment and sought compensatory and punitive damages. The Estate acknowledged that Douglas Duignan bore some responsibility for his smoking and asked for an apportionment of fault and damages on his nonintentional tort claims—i.e., the claims for strict liability and negligence.

The trial evidence. The trial court held a two-phase trial. The first phase was to determine the issues of Engle class membership, comparative fault, legal causation on the Estate's fraud and conspiracy claims, and the Estate's entitlement—if any—to punitive damages. The Estate presented evidence that Douglas Duignan began smoking at fourteen and had become a regular smoker by his midteens. It also presented evidence that he exhibited behaviors consistent with nicotine addiction, that he made several unsuccessful attempts to quit smoking, and that he smoked light and filtered cigarettes because he believed them to be safer alternatives. In 1992, when he was forty-two years old, doctors discovered a cancerous tumor in Douglas Duignan's lung and later found that there was cancer elsewhere in his body. He died thereafter.

As to the fraud and conspiracy claims, the Estate put on evidence that PM and Reynolds, together with many other tobacco companies, conspired over several

decades to conceal what they knew about the addictive properties and health effects of smoking cigarettes. This included evidence of tobacco company advertising that depicted cigarette smoking as glamorous and even healthy, the tobacco companies' creation of a false controversy in the public debate designed to prolong doubt as to the addictive properties and health effects of cigarette smoking, the promotion of the idea that smoking light and filtered cigarettes reduced the risks associated with smoking, and internal tobacco company documents showing what the tobacco companies actually knew about nicotine addiction and smoking-related disease.

PM and Reynolds' defense, in contrast, focused substantially on a theory that Douglas Duignan smoked because he liked smoking rather than because he was addicted to nicotine or because he was misinformed about the risks. This theory put the following items at issue: (1) Engle class membership (Douglas Duignan's affinity for smoking, rather than his addiction to cigarettes, was the legal cause of his cancer), (2) legal causation on the fraud and conspiracy claims (he knew the material health risks of smoking and did not rely on any concealed or omitted facts), and (3) comparative fault (his decision to keep smoking was his own).

PM and Reynolds put on evidence that significant information about the adverse consequences of cigarette smoking generally was known to the public and specifically was known to Douglas Duignan from the time he began smoking. They also offered the testimony of Dennis Duignan, who lived in Washington State. Although he did not appear in person at trial, portions of his deposition testimony were read to the jury as evidence by the parties, with the trial lawyers playing the parts of questioner and witness. Dennis Duignan testified that he and his brother referred to cigarettes using

slang terms including "cancer sticks" and "coffin nails." He further testified about a conversation with his brother that occurred sometime in the 1970s, during which Douglas Duignan said that his doctor had told him "that if he didn't quit smoking, he'd be dead in five years." When Dennis Duignan asked his brother whether he planned to quit, Douglas Duignan replied that he did not plan to quit because he liked smoking. The Estate questioned both the veracity of this testimony and the timing of the conversation. Both sides addressed it in opening statements and closing arguments.

The instructions on fraud and concealment. At the close of the trial, the jury was instructed to determine whether Douglas Duignan was a member of the Engle class and, if he was, that it "must accept [certain] previously determined matters as true . . . just as if you had determined them yourselves." A finding that Douglas Duignan was a member of the Engle class coupled with the preclusive effect of the retained Phase I findings on strict liability and negligence resolved the Estate's claims for strict liability and negligence, with the exception of the issues of comparative negligence and damages, as to which the jury was also instructed.

As relevant to the claims for fraud and conspiracy, the jury was instructed that the retained Phase I findings conclusively established both that PM and Reynolds each "concealed or omitted material information" about the adverse effects of smoking and also that they "entered into an agreement" with other tobacco companies "to conceal or omit information" regarding those matters. Those findings alone did not resolve the claims for fraud and conspiracy, however, and the jury was required to determine legal causation, which centered on the issue of detrimental reliance.

PM and Reynolds requested an instruction that required the jury to find that Douglas Duignan detrimentally and reasonably relied on "a statement" by each of them (with respect to the fraud claim) and by a member of the conspiracy (with respect to the conspiracy claim) and that such reliance was the cause of his cancer. The trial court rejected that instruction and gave the jury a different special instruction concerning the reliance element of the fraud claim:

> The issue for your determination on Plaintiff's claims for concealment is whether the concealment or omission of material information regarding the health effects of cigarettes or their addictive nature by [PM and Reynolds] was a legal cause of Douglas Duignan's lung cancer because Mr. Duignan reasonably relied to his detriment that [PM and Reynolds] would not conceal or omit disclosure of such material information.

(Emphasis added.) The court gave a similar special instruction with respect to the conspiracy claim:

> The next issue for your determination will be whether the agreement to conceal or omit material information previously described was a legal cause of Douglas Duignan's lung cancer because Mr. Duignan reasonably relied to his detriment that [PM and Reynolds] would not conceal or omit disclosure of such material information either alone or in conjunction with others . . . .

(Emphasis added.)

The jury note. During its Phase I deliberations, the jury sent the court a note about how to locate specific portions of the evidence to review, asking as follows: "Is there a key for the evidence? We are having trouble finding things in the evidence boxes. If not, can we have the number for Dennis Duignan's deposition?" During a discussion with counsel over a potential response to this question, the parties and court considered whether and how to advise the jury about the possibility that the deposition

testimony read to the jury during the trial could be read back to the jury upon request. The trial court expressed concern that allowing a readback of Dennis Duignan's testimony would open a "Pandora's box" and perhaps give "undue influence" to that testimony. The trial court proposed to instruct the jury that "[t]estimony is not generally read back to a jury. There is a possibility under some circumstances." PM and Reynolds objected to that instruction and proposed simply advising the jury that a readback was possible.

The court declined. It brought the jury in, explained that no transcript was available, and told the jury as follows:

> [T]here's sort of a magic that happens with the six of you putting your recollections together, it's called collective recollection, and you are urged, in regard to all testimony in the case, to use your collective recollection.
>
> It is not impossible to read testimony back to a jury, but it is not generally done. And part of that is to—so that no witness's testimony gets a—more focus or attention than anybody's, gets undue emphasis that way.

The verdicts and judgment. The jury then returned a verdict that, in essence, determined that Douglas Duignan was a member of the Engle class and found in the Estate's favor on all claims. It awarded $6,000,000 in compensatory damages and found that the Estate was entitled to punitive damages. It apportioned fault as follows: 37% to PM, 30% to Reynolds, and 33% to Douglas Duignan. After the second phase of the trial, the jury awarded punitive damages of $3.5 million against PM and $2.5 million against Reynolds.

The trial court entered a judgment against PM and Reynolds finding them jointly and severally liable for the entire compensatory damage award, irrespective of

the jury's comparative fault allocation, because the Estate had prevailed on its intentional tort claims and damages on such claims are not apportioned based on comparative fault. PM and Reynolds requested that the trial court apply a credit to the punitive damages award based on a "Guaranteed Sum Stipulation" entered into by the parties in the original Engle litigation regarding the punitive damage award in that case. The trial court denied that request, and its judgment included the punitive damages awards the jury made. PM and Reynolds timely appeal the judgment.

The Issues On Appeal

PM and Reynolds raise four issues.[3] First, they assert that the trial court's response to the jury note concerning Dennis Duignan's testimony both improperly discouraged the jury from requesting a readback and, by advising the jury that a readback would give "undue influence" to the testimony, improperly commented on the evidence. Second, they argue that the trial court's instructions to the jury on the reliance element of the Estate's fraud-based claims were erroneous because they failed to require the jury to find that Douglas Duignan relied on "a statement" by one of the tobacco companies. Third, they claim that the trial court erred by failing to reduce the compensatory damages award based on the jury's comparative fault allocation because Engle progeny cases are grounded in negligence, not intentional torts, and principles of

[3]They also seek to preserve for review in the United States Supreme Court their arguments that it violates due process to allow an Engle progeny plaintiff to establish the conduct elements of his or her claims and that federal law impliedly preempts strict liability and negligence claims based on the Engle findings. The first of those arguments was rejected by the Florida Supreme Court in Philip Morris USA, Inc. v. Douglas, 110 So. 3d 419, 430-36 (Fla. 2013), and the second was rejected by the Florida Supreme Court in R.J. Reynolds Tobacco Co. v. Marotta, 214 So. 3d 590, 605 (Fla. 2017).

comparative fault therefore apply notwithstanding the Estate's assertion of claims for fraud by concealment and conspiracy. And fourth, they contend that they are entitled to a credit against the punitive damage award based on the Guaranteed Sum Stipulation between the tobacco companies and the Engle class in the original Engle litigation.

After oral argument in this case, this court issued an opinion in another case deciding the issues of whether comparative fault applies when an Engle defendant is found liable for intentional torts and whether the Guaranteed Sum Stipulation in the original Engle litigation requires application of a credit to a punitive damages award adversely to PM and Reynolds. See Philip Morris USA Inc. v. Boatright, 217 So. 3d 166 (Fla. 2d DCA 2017), appeal filed, No. SC17-894 (Fla. May 12, 2017). We therefore find no merit in PM and Reynolds' third and fourth issues. As to the third issue concerning comparative fault, we certify conflict, as we did in Boatright, with R.J. Reynolds Tobacco Co. v. Schoeff, 178 So. 3d 487 (Fla. 4th DCA 2015), review granted, No. SC15-2233, 2016 WL 3127698, *1 (Fla. May 26, 2016), and the line of cases relying on it.[4] We further address PM and Reynolds' first two issues concerning the readback and the reliance instructions below.

The Trial Court's Readback Instruction

We review a trial court's decision regarding readbacks of trial testimony for abuse of discretion, State v. Barrow, 91 So. 3d 826, 835 (Fla. 2012), and we also apply that standard to review a trial court's response to a jury question, Cannon v. State, 180

[4]Philip Morris USA Inc. v. McKeever, 207 So. 3d 907 (Fla. 4th DCA 2017); R.J. Reynolds Tobacco Co. v. Grossman, 211 So. 3d 221 (Fla. 4th DCA 2017); R.J. Reynolds Tobacco Co. v. Calloway, 201 So. 3d 753 (Fla. 4th DCA 2016), review denied, No. SC16-1937, 2017 WL 1023712, *1 (Fla. Mar. 16, 2017), cert. denied, No. 16-1507, 2017 WL 1023712 (Oct. 2, 2017).

So. 3d 1023, 1036 (Fla. 2015). The trial court's response in this case—that although a readback was "not impossible," it "is not generally done" and that the jury should rely on its "collective recollection"—was an abuse of discretion because it was calculated to prevent the jury from asking for a readback and thereby interfered with the jury's ability to discharge its duties as the finder of fact in this case.[5]

The leading case on readbacks of trial testimony in Florida is Hazuri v. State, 91 So. 3d 836 (Fla. 2012). In Hazuri, a jury in a criminal trial sent the judge a note asking to see trial transcripts. The defendant argued that the right response to the request was to tell the jury that transcripts were not available but that it could have read back to it whatever testimony it wanted. The trial court disagreed and told the jury only that transcripts were not available and that it should rely on its "collective recollection" of the evidence to decide the case. Id. at 839. The defendant appealed his subsequent conviction, arguing that the trial court erred when it refused to tell the jury that it could have parts of the transcript read back. After the Third District affirmed, Hazuri v. State, 23 So. 3d 857 (Fla. 3d DCA 2009), the supreme court accepted jurisdiction.

The supreme court quashed the Third District's decision and held that the trial court abused its discretion in failing to inform the jury of its right to request a readback. 91 So. 3d at 846-47. It began by observing that the jury did not request a readback—it only requested transcripts—but decided that the trial court was required to inform the jury of the possibility of a readback nonetheless. Id. at 845. It tethered this holding to the core function of the jury, explaining that "the role of a jury as a factfinder

[5]To the extent the Estate contends that this error was either unpreserved or waived, the contention is, on our review of the record, without merit.

is of utmost importance" and that "a jury cannot properly fulfill its constitutionally mandated role if it cannot recall or is confused about the testimony presented in a case." Id. Because "[a] jury is composed of laypersons often unfamiliar with legal terms of art," the court explained, "there should be no magic words required for a read-back request." Id. "Failing to require further instruction concerning a read-back after a jury has requested transcripts leaves the jury without the means to refresh its memory of witness testimony—testimony that could be critical to the outcome of the verdict." Id.

The court thus adopted "the following two rules: (1) a trial court should not use any language that would mislead a jury into believing read-backs are prohibited, and (2) when a jury requests trial transcripts, the trial judge should deny the request, but inform the jury of the possibility of a read-back." Id. at 846; see also Barrow, 91 So. 3d at 834 (restating rules announced in Hazuri). "A trial judge can respond to a request for transcripts in the following manner: 'Transcripts are not available, but you can request to have any testimony read back to you, which may or may not be granted at the court's discretion.' " Hazuri, 91 So. 3d at 846.

We recognize that Hazuri is a criminal case, as are the vast majority of published decisions on readbacks in Florida. We also recognize that readbacks in criminal cases are expressly regulated by rule 3.410 of the Florida Rules of Criminal Procedure, see Hazuri, 91 So. 3d at 844, to which the civil rules contain no analog. At the time Hazuri was decided, rule 3.410 contained a one-sentence, discretion-conferring provision that a trial court "may" read back trial testimony to a jury.[6] Fla. R. Crim. P.

[6]The criminal rule has since been amended to regulate a trial court's communication with a jury concerning readbacks in more detail and in a manner consistent with Hazuri. See Fla. R. Crim. P. 3.410 (2017). Although adoption of a

3.410 (2012); see also Avila v. State, 781 So. 2d 413, 415 (Fla. 4th DCA 2001) (holding that rule 3.410 confers "wide latitude in the area of the reading of testimony to the jury"), approved by Hazuri, 91 So. 3d at 847.

Those distinctions do not, however, mean that Hazuri should not apply in civil cases. Although no rule of procedure governs readbacks in the civil context, a trial judge in a civil case must, to carry out his or her responsibility to order and facilitate the jury's deliberations, enjoy a similar discretion about readbacks to that given a trial judge in a criminal case under rule 3.410. See Broward Cty. Sch. Bd. v. Ruiz, 493 So. 2d 474, 479-80 (Fla. 4th DCA 1986) (noting that no rule of civil procedure governs readbacks but analogizing to rule 3.410); see also Fla. Std. Jury Instr. (Civ.) 801.2, note 1 ("In civil cases, the decision to allow read-back of testimony lies within the sound discretion of the trial court."). As such, our analysis of a trial court's readback decisions in a civil case starts in the same place as it would in a criminal case: the trial court's ability to permit or reject a request for a readback in its discretion based on the facts and circumstances of the case.

Moreover, in deciding to regulate what a trial judge should and should not say about the jury's ability to ask the trial judge to allow a readback, Hazuri relied on

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similar civil rule to address readbacks was contemplated, no changes to the civil rules were made; instead, a standard jury instruction in civil cases to govern the discretion afforded a trial court when a jury requests a readback was adopted. In re Amendments to the Fla. Rules of Civil Procedure, 967 So. 2d 178, 183 (Fla. 2007). Following Hazuri, the standard civil readback instruction, Fla. Std. Jury Instr. (Civ.) 801.2, which contains an express statement for the trial court to use in addressing jury requests for readbacks, was amended to include a note to reflect some limits on the trial court's discretion similar to those in the criminal context. In re Standard Jury Instructions in Civil Cases-Report No. 12-02, 115 So. 3d 208, 209 (Fla. 2013). Although the trial court acknowledged that this standard instruction existed, it did not employ it in responding to the jury note in this case.

considerations that are also present in the civil context. In particular, the court emphasized the jury's constitutional provenance and its centrality in determining facts when they are the subject of dispute. Hazuri, 91 So. 3d at 845. Both considerations are implicated in civil cases as well. See amend. VIII, U.S. Const.; art. I, § 22, Fla. Const. A jury in a civil case is thus no more able to "properly fulfill its constitutionally mandated role if it cannot recall or is confused about the testimony presented," see Hazuri, 91 So. 3d at 845, than a jury in a criminal case is. Because Hazuri's rules concerning the possibility of a readback when transcripts are requested seek to ameliorate that confusion and permit the jury to perform its core function as a trier of fact, we see no reason why those rules should not be applied in civil cases as well.

In this case, the trial court's response to the jury note seeking a transcript of Dennis Duignan's testimony, at a minimum, violated Hazuri's rule that a trial court should not use language that would mislead a jury into believing that a readback is prohibited. To be sure, the trial court did not explicitly say that a readback was prohibited; indeed, it acknowledged that a readback was "not impossible." But whether the trial court did or did not say that a readback was prohibited is not the question Hazuri asks. The question is whether what the trial court did say "would mislead" a jury into believing that a readback was prohibited. Hazuri, 91 So. 3d at 846; see also Roper v. State, 608 So. 2d 533, 535 (Fla. 5th DCA 1992) (finding error where "the trial judge's response to the jury's question may well have led the jury to conclude" that a readback was prohibited), approved by Hazuri, 91 So. 3d at 847. The focus, then, is on what the likely effect of the trial court's statements on a reasonable jury might have been. Here, the answer is that a reasonable jury would have thought a readback prohibited.

Four facets of the trial court's response to the jury note inform that conclusion. First, the trial court advised the jury that readbacks, although "not impossible," are "not generally done." Second, it told the jury that the reason readbacks are "not generally done" is to prevent any witness's testimony from having undue influence by getting more attention than any other witness's testimony. Third, the trial court never told the jury that it had the option to ask for a readback; in other words, although the trial court said that readbacks are "not impossible," the jury was never told that it had the option to make that which was "not impossible" possible by asking for it. And finally, the court instructed the jury to rely on its "collective recollection" of all of the testimony in the case because of the "magic that happens" when a jury does so.

It takes no feat of imagination to see how this response might lead reasonable lay jurors to think that asking for a readback would be a fool's errand. In substance, the trial court communicated to them that a readback was something extraordinary, that it was extraordinary because it gave the witness whose testimony was read back undue influence, and that the jurors instead should rely on their collective recollection of the testimony. The trial court's remarks, combined with its silence on the jury's right to at least ask for the testimony to be read back, in essence and effect, informed the jurors "that their only recourse was to rely upon their 'collective recollections and remembrances' as to" Dennis Duignan's testimony because transcripts were unavailable and a readback would not be forthcoming. See Roper, 608 So. 2d at 535. That was error. See Avila, 781 So. 2d at 416 (reversing where the trial judge's response to transcript request "may have confused the jury as to whether a readback of testimony was permissible"); Biscardi v. State, 511 So. 2d 575, 581 (Fla.

4th DCA 1987) (reversing where "the judge's words may reasonably have conveyed to the jurors that to ask for . . . rereading of testimony would be futile"), approved by Hazuri, 91 So. 3d at 847. Based on the trial court's stated concern about reading back Dennis Duignan's testimony, this appears to have been the result its instruction was calculated to produce.

The Estate argues that a Hazuri-type analysis is inapplicable in this case because Hazuri deals with a trial court's response to a jury's request to see a transcript of trial testimony, and the jury here sought only a transcript of Dennis Duignan's deposition testimony. That distinction might be material in other cases—we need not discuss it—but it is not in this one. Here, Dennis Duignan's deposition testimony was his trial testimony. It was read by the lawyers to the jury as substantive evidence at the trial. When deposition testimony is presented in this way, it is presented "as though the witness was present and testifying" in person at the trial. Castaneda v. Redlands Christian Migrant Ass'n, 884 So. 2d 1087, 1090 (Fla. 4th DCA 2004); see also Fla. R. Civ. P. 1.330(a) (stating that, where authorized by this rule, a deposition may be used "so far as [it is] admissible under the rules of evidence applied as though the witness were then present and testifying").

Because Dennis Duignan's deposition testimony was presented to the jury as his trial testimony, the jury's request for his deposition transcript should have been interpreted as a request for the transcript of the deposition testimony that was read aloud at trial.[7] See Hazuri, 91 So. 3d at 845 (explaining that because jurors are

[7]The cases upon which the Estate relies are not applicable because none involved consideration of a jury's request to examine transcripts of deposition testimony read aloud to the jury during trial as substantive evidence. See Adams v. State, 122 So.

laypersons, a court should liberally construe a request for transcripts, "especially when the intent of the jury[] . . . is clear"). Indeed, the record in this case reflects that this is precisely how the trial court, the tobacco companies' counsel, and the Estate's counsel interpreted the request at the time it was made. The rules announced in Hazuri apply to this case.

The Estate also argues that even if the trial court was mistaken in its response to the jury note, any error was harmless. Trial court error is regarded as harmless when "the beneficiary of the error proves that there is no reasonable possibility that the error contributed to the verdict." Special v. W. Boca Med. Ctr., 160 So. 3d 1251, 1256-57 (Fla. 2014).

The inferences PM and Reynolds sought to draw from Dennis Duignan's testimony—inferences the testimony reasonably, although not exclusively, supports—were that Douglas Duignan knew early on that cigarettes caused cancer and other diseases and that he continued smoking notwithstanding this knowledge, not because he was addicted but because he did not intend to quit smoking. These inferences were

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3d 976, 978-80 (Fla. 2d DCA 2013) (holding, without discussing whether the depositions were read at trial or the distinction between deposition and trial testimony, that the trial court's failure to inform the jury of the possibility of a readback in response to a request for "all the depositions" and "transcripts of all the testimony" was not remediable on appeal in the absence of a contemporaneous objection in the trial court); Bannister v. State, 132 So. 3d 267, 278-80 (Fla. 4th DCA 2014) (holding that where a jury requested the depositions in a case where trial witnesses read from them during parts of their live testimony, "the jury was not requesting a read-back of the witness's testimony, but rather hard copies of the depositions" themselves); Delestre v. State, 103 So. 3d 1026, 1027-28 (Fla. 5th DCA 2012) (holding that the trial court's failure to inform the jury of the possibility of a readback in response to a request for "all the testimony" was not fundamental error); see also Armstrong v. Dwyer, 155 F.3d 211, 214 (3d Cir. 1998) (involving circumstances where it was clear that "the jury sought transcripts of depositions, rather than transcripts of the deposition testimony read during trial or a readback of such testimony").

significant in this case because they bore directly on PM and Reynolds' argument that Douglas Duignan was not a member of the Engle class because this cancer was not caused by addiction, on their argument that Douglas Duignan was comparatively negligent by continuing to smoke even when he was aware of the risk of cancer and other disease, and on their argument that Douglas Duignan did not rely on any information about addiction or the health effects of smoking that the tobacco companies fraudulently concealed. The Estate and PM and Reynolds addressed Dennis Duignan's testimony in opening statements and again in closing arguments. The fact that the jury asked for a transcript of his testimony suggests that it may have found it significant as well. Under these circumstances, there is at least a reasonable possibility that had the jury been permitted to ask for a readback of Dennis Duignan's testimony, it might have resolved one or more of the determinative issues in the case differently than it ultimately did. See, e.g., Barrow, 91 So. 3d at 835 (concluding that trial court's use of language that may have misled the jury into believing readbacks were prohibited was harmful where the facts showed that "a review of the testimonies could have been most helpful to the jury"); Roper, 608 So. 2d at 536 (holding that, where there were discrepancies between the testimony requested and other testimony in the case, "the trial court's refusal to even consider the reading of this crucial cross-examination" was not harmless).

The trial court abused its discretion in addressing the jury's request for Dennis Duignan's deposition, and the Estate has not met the burden to show that error was harmless. Accordingly, we must reverse and remand for a new trial. In light of this result, we need not further address PM and Reynolds' argument that the trial court also

improperly commented on the evidence in its response to the jury's note. We do, however, address one other issue raised on appeal because it relates to a matter that rests within the scope of our remand and therefore requires our consideration.

The Trial Court's Instruction on Reliance

PM and Reynolds also argue that the trial court erred in instructing the jury on the reliance elements in the claims for fraud by concealment and conspiracy because it failed to tell the jury that Douglas Duignan was required to have relied on "a statement" by PM or Reynolds in order for the Estate to prevail. We review a trial court's decision to give or withhold a jury instruction for abuse of discretion, ITD Indus., Inc. v. Bus. Res. Grp., 779 So. 2d 532, 543 (Fla. 2d DCA 2000), but will find such an abuse of discretion and reverse when an instruction is misleading and may have caused the jury to reach a result it otherwise would not have reached, Citizens Prop. Ins. Corp. v. Salkey, 190 So. 3d 1092, 1095 (Fla. 2d DCA 2016), quashed on other grounds, No. SC16-784, 2017 WL 2709776, at *1 (Fla. June 23, 2017). While we do not read the reliance requirement as narrowly as PM and Reynolds do—we do not think it categorically requires reliance on "a statement"—the instruction in this case was an abuse of discretion because it inaccurately told the jury to determine whether Douglas Duignan generally relied on PM and Reynolds to disclose material facts rather than telling the jury to determine whether he relied on a misapprehension concerning a material fact that PM and Reynolds concealed from him.

Our analysis begins with what the Engle Phase I findings conclusively established in this case. As concerns fraud by concealment, they established that PM and Reynolds "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." See Engle, 945 So. 2d at 1257 n.4, 1277. For the conspiracy claims, they established that PM and Reynolds "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." Id.

The fact that the concealment or omission of material information with the intention that it would be relied on was a given, however, does not mean that it caused Douglas Duignan any harm unless he is shown actually to have relied on it. In a claim founded in fraud, the link between a defendant's conduct and the plaintiff's harm is supplied in part by the requirement that the plaintiff detrimentally and reasonably relied on something the defendant said or failed to say. See Humana Inc. v. Castillo, 728 So. 2d 261, 265 (Fla. 2d DCA 1999) ("If a plaintiff claims to be misled, but cannot demonstrate a causal connection between the defendant's conduct and the plaintiff's misapprehension, the plaintiff cannot recover."); see also Calloway, 201 So. 3d at 766 ("Florida's written opinions have consistently included detrimental reliance as an element in fraudulent concealment instructions."). Thus, it is settled that "Engle-progeny plaintiffs must . . . prove detrimental reliance in order to prevail" on claims for fraudulent concealment and conspiracy to fraudulently conceal. Hess v. Philip Morris USA, Inc., 175 So. 3d 687, 698 (Fla. 2015).

PM and Reynolds say that an Engle progeny plaintiff must show his reliance on a direct statement by a defendant (in the case of fraudulent concealment) or a member of the conspiracy (in the case of conspiracy), but that understanding of

reliance is artificially narrow. It is true that fraud claims are commonly based on an affirmative statement by the defendant and that in such circumstances the law speaks of reliance on a statement or a representation. See, e.g., Butler v. Yusem, 44 So. 3d 102, 105 (Fla. 2010) (discussing reliance on such representations). But the cases' use of the formulation "detrimental reliance on a statement" or something similar should not obscure the nature of the inquiry: when we ask about detrimental reliance, we are asking whether the plaintiff would have behaved in the same way had he known the true facts. See, e.g., Lance v. Wade, 457 So. 2d 1008, 1011 (Fla. 1984) (holding that individual issues of reliance generally preclude fraud class actions because "[w]hat one purchaser may rely on in entering into a contract may not be material to another purchaser"), distinguished on other grounds in KPMG Peat Marwick LLP v. Barner, 799 So. 2d 308, 309 (Fla. 2d DCA 2001). Depending on the facts presented in a claim involving reliance, a statement is not the only way in which the claimant may prove it.

Consider a fraud claim based on an affirmative misrepresentation. A seller of a car tells a buyer that "this car has never been in an accident." In fact, the car has been in five of them. The seller's statement is false. Doubtless, a trial court would properly instruct a jury to determine whether the plaintiff relied on a statement in deciding to buy the car. See, e.g., Fla. Std. Jury Instr. (Civ.) 409.7. But it is the fact that statement conveys—that the car had never been in an accident—that really mattered to the buyer. An instruction that the buyer must prove reliance on a statement is correct because the statement conveys the fact the buyer misapprehended.

In cases involving concealment or omission, however, the link between a statement by the defendant and the plaintiff's misapprehension may be less direct.

Suppose our car seller assured the buyer that "this car's transmission has always worked fine." Suppose also that the statement was literally true but failed to note that the seller had just discovered a defect in the transmission that will become a serious problem within a year. Although the seller's statement was true, the plaintiff might still claim fraud on the theory that having chosen to speak about the condition of the transmission, the seller had a duty to disclose the transmission defect that had not yet manifested itself to the buyer. See, e.g., ZC Ins. Co. v. Brooks, 847 So. 2d 547, 551 (Fla. 4th DCA 2003) ("Florida law recognizes that fraud can occur by omission[] and places a duty on one who undertakes to disclose material information to disclose that information fully."); Mukamal v. Gen. Elec. Capital Corp. (In re Palm Beach Fin. Partners, L.P.), 517 B.R. 310, 335 (Bankr. S.D. Fla. 2013) ("Fraudulent concealment is common law fraud by means of actively concealing a material fact in the fact [sic] of a duty to disclose that fact to the plaintiff."). In this circumstance, the statement itself only expressed the material fact that the transmission had worked fine in the past—a historical fact that may not have mattered to the buyer and, even if it did, cannot have operated to the buyer's detriment because it was true. The buyer here was not misled by the content of a statement; he was misled regarding an unstated truth the seller became obligated to disclose by virtue of having decided to speak. A jury instruction that the buyer must have detrimentally relied on the seller's statement would be appropriate in this circumstance because the seller's statement triggered his disclosure obligation. But it would be more precise to ask whether he relied on a misapprehension as to the fact concealed or omitted.

And then, of course, there can be concealment or omission with no statement at all, such as when the car's seller, knowing the trunk is severely rusted inside, parks the car so as to prevent the buyer from opening it fully and finding the damage. See, e.g., Restatement (Second) of Torts § 550, cmt. a (Am. Law. Inst. 2016) (providing similar example of fraudulent concealment); see also Joiner v. McCullers, 28 So. 2d 823, 824-25 (Fla. 1947) (explaining that "[t]he rule that fraud cannot be predicated of a failure to disclose facts . . . does not apply where a party[,] in addition to non-disclosure[,] uses any artifice to throw the other party off his guard" or on "any . . . act . . . which tends affirmatively to a suppression of the truth" (quoting 12 Ruling Case Law, Fraud and Deceit § 80, 319-20 (William M. McKinney & Burdette A. Rich, eds. (1916), a now out-of-print legal treatise). Alternatively, the seller stands in a fiduciary relationship to the buyer and, although obligated by that relationship to make disclosure of the rusted trunk, fails to do so. See TransPetrol, Ltd. v. Radulovic, 764 So. 2d 878, 880 (Fla. 4th DCA 2000) (holding that a duty of disclosure exists where there is a fiduciary or other relationship of trust and confidence between plaintiff and defendant (quoting State v. Mark Marks, P.A., 654 So. 2d 1184, 1189 (Fla. 4th DCA 1995))). In either circumstance, it would be inaccurate to instruct a jury to look for reliance on a statement to fulfill the obligation of proof because no statement was made. The buyer's reliance, if any, was on the mistaken belief that there was nothing wrong with the trunk. In this circumstance, it would be incorrect to instruct the jury that it had to find reliance on a statement because there was not one on which the buyer could rely.

The point of these hypotheticals is not to catalog every variation of the facts upon which a reliance instruction might be given. It is to show that whether an

instruction that a jury must find reliance on "a statement" is necessary or proper will depend on the nature of the claims presented and the evidence at trial. See Calloway, 201 So. 3d at 766 (holding, in an Engle progeny case, that "[t]he instruction need not include reliance on 'a statement' unless the facts of the case warrant it"). It also is to show that when the facts involve concealment or omission, an instruction requiring detrimental reliance on a misapprehension as to the fact concealed or omitted will usually accurately inform the jury of what it must find with respect to the element of detrimental reliance essential to that claim. That is the case here.

PM and Reynolds argue, however, that reliance on "a statement" is necessary in an Engle progeny case because the concealment claim in the original Engle trial was predicated on statements by the tobacco company defendants in that case. They point to language in the Engle jury instructions showing that the concealment claim hinged on statements that the Engle plaintiffs contended required the tobacco companies to make complete disclosure of what they knew about the health consequences of smoking and to arguments made by Engle class counsel to similar effect. Assuming for argument's sake that PM and Reynolds have accurately construed the concealment claim litigated in the Engle trial—a matter we need not decide—that still would not command a hard-and-fast rule that an instruction in an Engle progeny case must include a requirement that the plaintiff detrimentally relied on "a statement."

The excerpts of the Engle trial to which PM and Reynolds point depict a theory of concealment based on circumstances in which a defendant has spoken on a subject—i.e., has made a statement about it—and thereby became obligated to make a fuller disclosure and, by failing to do so, concealed or omitted material facts. As

described above, it is at least equally accurate to say that the plaintiff's reliance must be on a misapprehension as to the material facts or information concealed or omitted by the defendant, rather than on any specific statement it made.

This is consistent with the way Florida courts have evaluated the legal sufficiency of a plaintiff's evidence of reliance in the context of the fraudulent concealment and conspiracy claims in an Engle progeny case. An Engle plaintiff's proof in such cases typically includes, as it did in this case, extensive evidence of the tobacco company defendants' participation in a decades-long pervasive advertising campaign and creation of a false controversy about the addictive nature and health effects of cigarettes that operated to conceal the adverse consequences of smoking from cigarette consumers. In such circumstances, the courts have refused to hold that an Engle progeny plaintiff must identify specific statements that he read or heard and relied upon in making a decision regarding cigarette smoking in order to prevail. See Philip Morris USA, Inc. v. Kayton, 104 So. 3d 1145, 1149 (Fla. 4th DCA 2012), quashed on other grounds, 41 Fla. L. Weekly S113 (Fla. Feb. 1, 2016) (table decision); R.J. Reynolds Tobacco Co. v. Martin, 53 So. 3d 1060, 1069-70 (Fla. 1st DCA 2010). The reason is that the very pervasiveness of the advertising campaign and false controversy and uniqueness of the facts concealed or omitted permits an Engle progeny jury to infer reliance. See Philip Morris USA, Inc. v. Hallgren, 124 So. 3d 350, 353 (Fla. 2d DCA 2013) (discussing Martin, 53 So. 3d at 1069-70). But see Berger v. Phillip Morris USA, Inc., 101 F. Supp. 3d 1228, 1238-39 (M.D. Fla. 2015) (criticizing reasoning of these cases and predicting that the Florida Supreme Court will not follow them), appeal filed, 101 F. Supp. 3d 1228 (11th Cir. Jan. 5, 2016). This is not to say that a tobacco

company cannot show otherwise. Cf. Evers v. R.J. Reynolds Tobacco Co., 195 So. 3d 1139, 1141 (Fla. 2d DCA 2015) (reversing entry of a directed verdict and rejecting defendant's sufficiency challenge on reliance element where "the tobacco company has pointed to no evidence that Ms. Loyd was aware that the nicotine in cigarettes was addictive, nor has it conclusively demonstrated that despite some awareness on Ms. Loyd's part that smoking could cause health problems, that she was not reassured by the controversy the tobacco companies generated to keep people smoking"). But the cases do seem to establish that reliance on "a statement" is not required to prevail in an Engle progeny case.

PM and Reynolds also argue that without an instruction that requires the plaintiff to have relied on a statement, they risk being held liable for a pure nondisclosure unaccompanied by a misleading statement, misleading conduct, or duty to disclose. They correctly observe that silence, unaccompanied by a duty to disclose, is not actionable as fraud. See TransPetrol, 764 So. 2d at 879-80. And it is logically true that if a jury were to look solely at the Engle Phase I finding of "omissions" and a reliance instruction that allowed it to find fraud if the plaintiff relied on the fact omitted, then there is at least a theoretical possibility that PM or Reynolds could be held liable in fraud for pure silence about the health effects or addictive properties of cigarettes.[8] But to the extent this is a problem, it is not a problem for the element of reliance to solve.

[8]Whether this logical possibility extends beyond theory to a real-world application is an open question that we need not address. The Estate argues that this possibility is wholly theoretical because the proof in this case includes evidence of decades-long advertising campaigns and the creation of a false controversy over the effect of smoking that by its nature included statements rendered misleading by the concealment or omission of material facts.

The question of whether a defendant has a duty to make a disclosure is legally and factually distinct from the question of whether a plaintiff relied on a nondisclosure. The question of duty to disclose hinges on whether the defendant has done something toward the plaintiff or occupies a status with respect to the plaintiff that obligates the defendant to make a disclosure. See, e.g., Metcalf v. Johnson, 113 So. 2d 864, 868 (Fla. 2d DCA 1959) ("Where persons sustain towards another a relation of trust and confidence, their silence when they ought to speak, or their failure to disclose what they ought to disclose, is as much a fraud in law as an actual affirmative false representation."). The question of reliance, in contrast, asks whether a misapprehension as to the undisclosed fact took on significance in the mind of the plaintiff and influenced his decision-making with respect to the matter at issue to his detriment. See, e.g., Raymond, James & Assocs., Inc. v. Zumstorchen Inv., Ltd., 488 So. 2d 843, 845-46 (Fla. 2d DCA 1986) (holding that plaintiff satisfactorily alleged detrimental reliance where it alleged that it entered into the transaction based on its belief in the defendants' representations). In other words, reliance is not focused on the defendant's duty but rather on the plaintiff's reaction to a misstated, concealed, or omitted fact.

PM and Reynolds' concern about the absence of the words "a statement" from the jury instructions is actually linked to the question of duty, not the question of reliance. See, e.g., Marriott Int'l, Inc. v. Am. Bridge Bahamas, Ltd., 193 So. 3d 902, 908 (Fla. 3d DCA 2015) ("A duty to disclose may arise where a party undertakes to disclose certain facts, such that the party must then disclose the entire truth known to him. Such a claim, however, must be supported by some evidence of a statement that would

trigger the further duty to disclose all known material facts." (emphasis added) (citation omitted)). The risk of PM's or Reynolds' being held liable for an omission in the absence of a duty to disclose is thus not the result of a failure to require reliance on a statement but rather is the result of one of two possible conditions: (1) that the Phase I Engle findings necessarily embrace a disclosure obligation that cannot be relitigated in every Engle progeny case or (2) that a jury instruction directed to the question of an Engle defendant's disclosure obligations may be proper if requested and implicated by the evidence in the case. We express no opinion on either possibility because they are not before us. We hold only that the element of reliance cannot do the work that PM and Reynolds ask of it here.

Having determined that a special jury instruction demanding reliance on "a statement" was not required in this case, we consider the special instruction the trial court gave—namely, that the jury could find the reliance element satisfied if the evidence showed that Douglas Duignan "reasonably relied to his detriment that [PM and Reynolds] would not conceal or omit disclosure of such material information." This instruction was both inaccurate and misleading. It in essence told the jury that it could find reliance if it found that Douglas Duignan generally relied on the tobacco companies to disclose all material information, without requiring it to find that the material information the tobacco companies concealed or omitted was in fact important to his decisions to begin or continue smoking. Because the very purpose of the reliance requirement is to determine whether the plaintiff acted differently because of PM's or Reynolds' concealment or omission of facts, this instruction was misleading.

It also may have made a difference to the outcome. As described above, the notion that Douglas Duignan started or continued smoking because he enjoyed smoking and not because of anything PM or Reynolds said or failed to say was a key element of their defense. A proper instruction—one that required reliance on either a statement or on a misapprehension as to a concealed or omitted fact—would have required the jury to consider that possibility and determine whether the tobacco companies were correct as to the reasons for Douglas Duignan's actions. The instruction the trial court gave, in contrast, allowed the jury to ignore this aspect of PM and Reynolds' defense because, if Douglas Duignan's general reliance on them to disclose everything is sufficient to prove reliance, there was no reason for the jury to consider whether any particular undisclosed fact would have made a difference to his decisions about smoking. Accordingly, the error in these instructions might reasonably have misled the jury and constitutes reversible error. See, e.g., Fla. Power & Light Co. v. McCollum, 140 So. 2d 569, 569 (Fla. 1962) (concluding that the proper "inquiry is whether the jury might reasonably have been misled" and concluding that such constitutes a miscarriage of justice under the civil harmless error statute in effect at the time); Gerard v. Kenegson, 151 So. 2d 26, 28 (Fla. 2d DCA 1963) ("In view of the fact that instruction . . . was erroneous[,] and since the instruction can be reasonably calculated to confuse and mislead the jury, the giving of the instruction was error."); Veliz v. Am. Hosp., Inc., 414 So. 2d 226, 228 (Fla. 3d DCA 1982) ("An instruction which tends to confuse rather than enlighten the jury is cause for reversal if it may have misled the jury and caused them to arrive at a conclusion that otherwise they may not have reached."); see also § 59.041, Fla. Stat. (2015) (setting forth the civil harmless error

standard for appellate review and containing the same miscarriage of justice language as that cited in Florida Power & Light).

At oral argument, the Estate contended that this defect in the reliance instruction was harmless because the trial court, at PM and Reynolds' request, also instructed the jury on materiality, telling it that "material information is that which is of such importance that it would have made a difference in Douglas Duignan's actions if it had been disclosed."[9] Thus, according to the Estate, the materiality instruction effectively required the jury to answer the question that the reliance instruction should have asked. We disagree. Neither the jury instructions nor the verdict form required the jury to determine materiality. On the contrary, the jury was instructed to take materiality as a given. It was told that the Engle Phase I findings conclusively

[9]This instruction appears to be based on a standard instruction in civil cases. See Fla. Std. Jury Instr. (Civ.) 409.5 ("A material fact is one that is of such importance that (claimant) would not have [entered into the transaction] [acted], but for the false statement."). There may be reason to question whether this standard instruction is legally correct. Materiality is generally evaluated under an objective test—inquiring whether a misrepresented or omitted fact would have taken on significance in the mind of a reasonable person. See Moustafa v. Omega Ins. Co., 201 So. 3d 710, 715 (Fla. 4th DCA 2016) (holding that materiality, as used in statute regarding false representations in an insurance policy application, is to be determined under an objective test); Silverman v. Pitterman, 574 So. 2d 275, 276 (Fla. 3d DCA 1991) ("A material fact is generally defined as one to which a reasonable person would attach importance in determining a choice of action."); see also Basic Inc. v. Levinson, 485 U.S. 224, 240 (1988) (holding, under federal securities fraud statute, that "materiality depends on the significance the reasonable investor would place on the withheld or misrepresented information"); Dan B. Dobbs, The Law of Torts § 476 at 1363 (West 2001) ("Representations are material if a reasonable person would want to consider the fact represented in determining whether to enter the transaction in question, and also if a reasonable person would not care about the fact represented but the plaintiff attaches her own idiosyncratic importance to it and the defendant knows it."). But see Atl. Nat'l Bank of Fla. v. Vest, 480 So. 2d 1328, 1332 (Fla. 2d DCA 1985) ("A fact is material if, but for the alleged nondisclosure or misrepresentation, the complaining party would not have entered into the transaction.").

established that PM and Reynolds concealed or omitted material information related to the health effects and addictive properties of cigarettes, and the trial court's specific instructions on the fraudulent concealment and conspiracy claims assumed materiality rather than putting it to the jury to decide. Simply put, because the jury was told both expressly and by implication to assume materiality rather than to decide it, the Estate cannot establish a reasonable probability that the instructional error did not affect the verdict on the fraud by concealment and conspiracy claims. See Special, 160 So. 3d at 1256-57. The instructional error here was not harmless.

At a minimum, the error would require a new trial on the Estate's claims for fraudulent concealment and conspiracy to fraudulently conceal. The parties disagree, however, about whether it also requires a new trial with respect to punitive damages. While the error itself is one worthy of articulation so that it is not repeated in the second trial, we need not reach a determination on what the scope of that error alone would be on remand because we reverse and remand for a new trial on all issues based on the trial court's readback instruction.

Conclusion

For the foregoing reasons, the final judgment is reversed and this case is remanded for a new trial. We certify conflict with Schoeff, Calloway, McKeever, and Grossman with respect to the comparative fault issue in this case.

Reversed and remanded; conflict certified.

KELLY and BLACK, JJ., Concur.

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING
MOTION AND, IF FILED, DETERMINED

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

SECOND DISTRICT

CARLOS TRAMONTANA, individually and as trustee under a trust agreement, and known as Trust No. 440, dated August 31, 2012, Appellant, v. BANK OF NEW YORK MELLON f/k/a The Bank of New York, as trustee, on behalf of the holders of the Alternative Loan Trust 2005-51, Mortgage Pass-Through Certificates Series 2005-51; and 440 WEST, INC., Appellees.	)	Case No. 2D16-2990

Opinion filed November 15, 2017.

Appeal from the Circuit Court for Pinellas County; Pamela A.M. Campbell, Judge.

Ian P. Hudson of The Law Office of Francis M. King, St. Petersburg, for Appellant.

Sarah T. Weitz of Weitz & Schwartz, P.A., Fort Lauderdale, for Appellee Bank of New York Mellon.

LaROSE, Chief Judge.

Carlos Tramontana appeals the final judgment of foreclosure entered in favor of Bank of New York Mellon (BNYM). He maintains that BNYM failed to establish the amounts due and owing. We have jurisdiction. See Fla. R. App. P. 9.030(b)(1)(A). We affirm the judgment.

Mr. Tramontana argues that the trial court erred in admitting BNYM's loan payment history, which included records from prior loan servicers. He contends that BNYM failed to prove that the records qualified as business records under the evidence code. See § 90.803(6), Fla. Stat. (2014). BNYM could have established these documents as business records either by "providing evidence of a business relationship or contractual obligation between the parties that ensures a substantial incentive for accuracy" or "establish[ing] trustworthiness by independently confirming the accuracy of the third-party's business records upon receipt." Bank of New York v. Calloway, 157 So. 3d 1064, 1072 (Fla. 4th DCA 2015). Mr. Tramontana argues that the record fails to show that BNYM verified the prior servicers' records or offered any witness testimony to establish such verification.

Fatally, there is no trial transcript. Without a transcript, and in the absence of fundamental error on its face, an appellate court will affirm a trial court's decision. See Applegate v. Barnett Bank of Tallahassee, 377 So. 2d 1150, 1152 (Fla. 1979) ("Without a record of the trial proceedings, the appellate court can not [sic] properly resolve the underlying factual issues so as to conclude that the trial court's judgment is not supported by the evidence or by an alternative theory."); see also 1321 Whitfield, LLC v. Silverman, 67 So. 3d 435, 437 (Fla. 2d DCA 2011) (affirming final judgment of

foreclosure where, due to absence of hearing transcript, this court was unable to meaningfully review the trial court's findings).

In this case, there is no record of the trial testimony, any objections, or the trial court's rulings on such objections. The record simply reflects that the trial court admitted the loan payment history into evidence. Further, the record is devoid of any evidence introduced by Mr. Tramontana to disprove the amounts reflected in the loan payment history. Without a transcript, Mr. Tramontana cannot prove that BNYM failed to establish amounts due and owing or that the trial court reversibly erred. See Snowden v. Wells Fargo Bank, 172 So. 3d 506, 507-08 (Fla. 1st DCA 2015).

Affirmed.

LUCAS and BADALAMENTI, JJ., Concur.

DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT

MARTHA ECHEVERRY,
Appellant,

v.

DEUTSCHE BANK NATIONAL TRUST COMPANY, AS TRUSTEE ASSET-BACKED CERTIFICATES, SERIES 2006-3,
Appellee.

No. 4D16-3611

[November 15, 2017]

Appeal from the Circuit Court for the Seventeenth Judicial Circuit, Broward County; Joel T. Lazarus, Senior Judge; L.T. Case No. CACE08001920 (11).

Martha Echeverry, Pembroke Pines, pro se.

Michele L. Stocker of Greenberg Traurig, P.A., Fort Lauderdale; Kimberly S. Mello and Julie A. Girard of Greenberg Traurig, P.A., Tampa, for appellee.

PER CURIAM.

We affirm the order directing the clerk to issue the certificate of title to appellee at the end of this mortgage foreclosure proceeding. Appellant's claim that the order was void as a result of the automatic stay of bankruptcy, after the filing of her seventh petition for bankruptcy, is without merit. Because she did not file her bankruptcy petition until after issuance of the certificate of sale of the property, her right of redemption had terminated and her interest in the property was already extinguished. *See* § 45.0315, Fla. Stat. (2014); *Household Fin. & Mortg. Co. v. Osta*, 862 So. 2d 885, 886 (Fla. 5th DCA 2003).

Affirmed.

WARNER, GROSS and TAYLOR, JJ., concur.

* * *

Not final until disposition of timely filed motion for rehearing.

DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT

NATIONSTAR MORTGAGE, LLC,
Appellant,

v.

JOSELITO L. MARTINS a/k/a **JOSELITO MARTINS, MARTIN'S CROSSING HOMEOWNERS ASSOCIATION, INC., MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC., AS NOMINEE FOR CTX MORTGAGE COMPANY, LLC,** and **UNKNOWN TENANT IN POSSESSION OF THE SUBJECT PROPERTY,**
Appellees.

No. 4D16-3735

[November 15, 2017]

Appeal and cross-appeal from the Circuit Court for the Nineteenth Judicial Circuit, Martin County; Lawrence M. Mirman, Judge; L.T. Case No. 2014-CA-000635.

Nancy M. Wallace of Akerman LLP, Tallahassee, William P. Heller of Akerman LLP, Fort Lauderdale, and Celia C. Falzone of Akerman LLP, Jacksonville, for appellant.

W. Trent Steele of Steele Law, Hobe Sound, for Appellee Joselito Martins.

PER CURIAM.

Affirmed. See Partridge v. Nationstar Mortg., LLC, 224 So. 3d 839 (Fla. 2d DCA 2017) (holding that mortgage loan servicer's unilateral decision to leave original note and mortgage with trial court did not establish standing to foreclose, where original note was filed with trial court long before servicer commenced foreclosure action). In light of this disposition, we need not reach the issue raised on cross-appeal.

WARNER, GROSS and TAYLOR, JJ., concur.

* * *

Not final until disposition of timely filed motion for rehearing.

DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT

ADRIAN S. WILLIAMS,
Appellant,

v.

SKYLINK JETS, INC.,
Appellee.

No. 4D16-4170

[November 15, 2017]

Appeal from the Circuit Court for the Seventeenth Judicial Circuit, Broward County; John B. Bowman, Judge; L.T. Case No. CACE15-013943.

Robin F. Hazel and Jesmany Jomarron of Jomarron Lopez, Miami, for appellant.

Bruce D. Green of Bruce D. Green, P.A., Fort Lauderdale, for appellee.

FORST, J.

Appellant Adrian S. Williams appeals an order denying his motion to vacate a default final judgment brought under Florida Rule of Civil Procedure 1.540. In addition to challenging the trial court's finding of default, Appellant also argues that the specific damages requested by Appellee Skylink Jets, Inc. and awarded by the trial court were unliquidated and, thus, notice and the opportunity to be heard prior to entry of default final judgment was required.

As discussed below, we summarily affirm the trial court's decision to deny Appellant's motion to vacate the default final judgment entered against him. Further, we hold that Appellee provided a precise damages figure and, although Appellee failed to attach proof of the specific expenses incurred to arrive at the damages requested, Appellant "admitted" that this figure was accurate, converting unliquidated damages into liquidated damages. Finally, we hold the attorney's fees and costs are unliquidated and must be determined by the trial court after notice and hearing.

Background

Appellant, an aircraft pilot, was hired by Appellee on October 2, 2014. As part of his engagement with Appellee, Appellant executed a Pilot Training Expense Agreement ("Agreement"). The Agreement required Appellant to reimburse Appellee for all expenses incurred in pilot training if Appellant terminated his employment without cause or was terminated for cause within twenty-four months of his hiring. The Agreement provided a specific explanation of what constituted "training expenses."

On July 3, 2015, Appellant's employment was terminated. Subsequently, Appellee notified Appellant of the $15,176.52 incurred for Appellant's training expenses and demanded repayment pursuant to the Agreement. Due to Appellant's failure to repay the training expenses (or offer any response to Appellee's demand letter), Appellee filed a complaint for breach of contract and unjust enrichment. Appellee listed damages of $15,176.52 in the complaint. Shortly thereafter, Appellant was served with a summons, complaint, interrogatories, and request for admissions. Appellant failed to respond to any of the discovery requests.

Due to Appellant's failure to respond to the complaint, a default was entered against him on January 7, 2016. Appellee next filed a motion for default final judgment. Appellee requested damages of $15,176.52, court costs of $547.23, interest of $1,042.29, and attorney's fees of $2,565.00. A hearing was scheduled on Appellee's motion, and Appellant, again, failed to appear. A default final judgment was entered, and Appellee was awarded its requested damages. Appellant finally responded, filing a motion to vacate the default final judgment. At the hearing on his motion, the trial court found the damages to be liquidated and as such, notice was not required. Further, the trial court found that the default was properly served on Appellant.

On appeal, Appellant argues the trial court committed fundamental error by denying his motion to vacate the default final judgment where the judgment grants unliquidated damages and Appellant was not given notice before entry of the default. He asserts that the mailing addresses on the certificates of service for the motion for default final judgment and the notice of hearing on the motion were incorrect. Appellant also argues that, although the trial court did not address the clerk's default, it should also be vacated, or the case should be remanded with instructions for the trial court to consider his arguments for vacating the clerk's default.

In response, Appellee argues the trial court correctly denied Appellant's motion because the damages were liquidated; thus, Appellant was not entitled to notice. Nevertheless, Appellee argues that notice was given. In

addition, Appellee contends that Appellant failed to demonstrate excusable neglect, meritorious defenses, and diligence.

Analysis

This Court reviews an order denying a motion to vacate a default judgment for abuse of discretion. *Mullne v. Sea-Tech Const., Inc.*, 84 So. 3d 1247, 1248 (Fla. 4th DCA 2012). However, "[w]hether damages alleged are liquidated or unliquidated is a question of law subject to de novo review." *Talbot v. Rosenbaum*, 142 So. 3d 965, 967 (Fla. 4th DCA 2014).

In order to vacate a default final judgment, a party must demonstrate:

> (1) the failure to file a responsive pleading was the result of excusable neglect; (2) the moving party has a meritorious defense; and (3) the moving party acted with due diligence in seeking relief from the default.

Fla. Eurocars, Inc. v. Pecorak, 110 So. 3d 513, 515 (Fla. 4th DCA 2013) (quoting *Wells Fargo Bank, N.A. v. Jidy*, 44 So. 3d 162, 164 (Fla. 3d DCA 2010)). On appeal, Appellant did not argue the necessary requirements to vacate a default final judgment, but rather solely relies on his argument that the trial court improperly awarded unliquidated damages in the final judgment. This Court will not make arguments for an appellant. *See Hammond v. State*, 34 So. 3d 58, 59 (Fla. 4th DCA 2010) ("Claims for which an appellant has not presented any argument, or for which he provides only conclusory argument, are insufficiently presented for review and are waived."); *Polyglycoat Corp. v. Hirsch Distribs., Inc.*, 442 So. 2d 958, 960 (Fla. 4th DCA 1983) ("It is the duty of counsel to prepare appellate briefs so as to acquaint the Court with the material facts, the points of law involved, and the legal arguments supporting the positions of the respective parties. . . . [I]t is not the function of the Court to rebrief an appeal."). As such, we affirm the trial court's decision to deny Appellant's motion to vacate the default final judgment entered against him, without further discussion on the issue of Appellant's liability for damages.

Pursuant to Florida Rule of Civil Procedure 1.440(c), "[i]n actions in which the damages are not liquidated, the order setting an action for trial shall be served on parties who are in default in accordance with rule 1.080." Rule 1.440(c) requires strict compliance. *Ciprian-Escapa v. City of Orlando*, 172 So. 3d 485, 488 (Fla. 5th DCA 2015). "Indeed, it is fundamental error to set unliquidated damages without the notice, proof, and hearing required by rule 1.440(c)." *Id.*

Appellee argues that the notice requirement set by Rule 1.440(c) is not applicable because the damages at issue are liquidated. Appellant disagrees. "Liquidated damages are those damages that are determinable with exactness from the cause of action as pleaded, by an arithmetical calculation or by application of definite rules of law." *Boulos v. Yung Sheng Xiamen Yong Chem. Indus. Co.*, 855 So. 2d 665, 667 (Fla. 4th DCA 2003). "[L]liquidated damages may exist in a contractual setting 'when a specific sum of money has been expressly stipulated or agreed to by the parties for recovery by either party following a breach of the contract by the other.'" *Bodygear Activewear, Inc. v. Counter Intelligence Servs.*, 946 So. 2d 1148, 1150 (Fla. 4th DCA 2006) (quoting *Hartford Fire Ins. Co. v. Controltec, Inc.*, 561 So. 2d 1334, 1335 (Fla. 5th DCA 1990)). On the other hand, "damages are not liquidated if a court must consider testimony or evidence 'to ascertain facts upon which to base a value judgment.'" *Id.* (quoting *Bowman v. Kingsland Dev., Inc.*, 432 So. 2d 660, 663 (Fla. 5th DCA 1983)).

As noted above, Appellee failed to attach proof (such as receipts) of the specific expenses incurred. Normally, this would be fatal to Appellee's argument that the damages were liquidated. *See Maggiano, D.O., P.A. v. Whiskey Creek Prof'l Ctr., LLC*, 160 So. 3d 535, 537 (Fla. 2d DCA 2015) (although the complaint alleged a specific amount of unpaid rent, "the accounting to determine the damages in this case is somewhat involved," and thus, testimony was required to establish the exact amount of damages due to the "conclusory" nature of the plaintiff's pleading). However, Appellant failed to respond to Appellee's request for admissions, one of which was that "Appellee had incurred the sum of $15,176.52 in training expenses for Appellant." Pursuant to Florida Rule of Civil Procedure 1.370(a), "[t]he matter is admitted unless the party to whom the request is directed serves upon the party requesting the admission a written answer or objection addressed to the matter within 30 days after service of the request or such shorter or longer time as the court may allow . . . ." Paragraph (b) of this Rule states that "[a]ny matter admitted under this rule is conclusively established unless the court on motion permits withdrawal or amendment of the admission." Fla. R. Civ. P. 1.370(b). The exceptions set forth in the Rule are not applicable here, as there is no indication that Appellant ever moved to rectify his non-response to the request for admissions and Appellant's appellate brief fails to address his "technical admission."

Due to the aforenoted "technical admission" to damages in the amount of $15,176.52, we can conclude that Appellee set forth an amount of damages that "can be determined with exactness from the cause of action as pleaded." What might otherwise have been unliquidated damages due

to the lack of documentation to support "an arithmetical calculation" is converted to liquidated damages by virtue of Appellant's "admission."[1]

In addition to the $15,176.52 damages, the trial court also awarded attorney's fees and costs. These damages in a contract dispute are generally unliquidated. *See Ciprian-Escapa*, 172 So. 3d at 490; *West v. West*, 534 So. 2d 893, 895 (Fla. 5th DCA 1988). Thus, the trial court erred in awarding attorney's fees and costs without conducting a trial for which Appellant was properly noticed.

Conclusion

"A judgment rendered without a trial on unliquidated damages and without notice to the defaulting party is void as to any unliquidated damages, but remains valid as to any liquidated damages." *Ciprian-Escapa*, 172 So. 3d at 488-89. In the instant case, due to Appellant's "technical admission" as to the amount of damages, the trial court's award of $15,176.52 constitutes an award of liquidated damages, which is affirmable notwithstanding any argument on the part of Appellant that he did not receive notice of the hearing at which the default final judgment was entered. Accordingly, as to liability (judgment in favor of Appellee due to the default judgment) and the damages, the trial court properly denied Appellant's motion to set aside the default judgment.

As discussed above, the amount of attorney's fees and costs is unliquidated. We thus hold that the trial court erred in awarding these fees and costs without conducting a trial for which Appellant was properly noticed pursuant to Rule 1.440(c). This matter must be addressed by the trial court on remand.

Affirmed in part and Reversed and Remanded in part.

TAYLOR and CONNER, JJ., concur.

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[1] Due to the admission, we need not address whether the amount of damages would otherwise be ascertainable by arithmetical calculation or by application of definite rules of law, rendering testimony necessary. We note, however, that calculation of the amount of "Pilot's Training Expenses" in conjunction with an Agreement which provides a definition of "Training Expenses," is distinguishable from a case where the damages require testimony as to the value, such as "damages for personal injury, disability, discomfort, pain and suffering, mental anguish, loss of capacity for the enjoyment of life, loss of wages and earning capacity," as well as "recovery for property damage to the Insured's vehicle." *Kotlyar v. Metro. Cas. Ins. Co.*, 192 So. 3d 562, 565-66 (Fla. 4th DCA 2016) (concluding the damages were unliquidated).

* * *

Not final until disposition of timely filed motion for rehearing.

DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT

GREEN EMERALD HOMES LLC,
Appellant,

v.

GREEN TREE SERVICING LLC, ARMANDO HENRIQUES DIOGO, ANA E. AGUASANA, EDITH AGUAS, DIONICIA STELLA DIOGO, unknown spouse of **ANA E. AGUAS,** a/k/a **ANA EDITH AGUAS, BOCA GARDENS HOMEOWNERS ASSOCIATION, INC., MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC.**, as nominee for **AMNET MORTGAGE, INC.**, d/b/a **AMERICAN MORTGAGE NETWORK OF FLORIDA;** unknown tenant #1 n/k/a **JOSE INGLES**, unknown tenant #2,
Appellees.

No. 4D17-983

[November 15, 2017]

Appeal of a non-final order from the Circuit Court for the Fifteenth Judicial Circuit, Palm Beach County; Eli Breger, Senior Judge; L.T. Case No. 502015CA008888XXXXMB.

Brennan Grogan of Levine Law Group, Palm Beach Gardens, for appellant.

No brief filed for appellees.

PER CURIAM.

Green Emerald Homes, LLC, ("Green Emerald") appeals the denial of its motion to quash service of process and vacate the clerk's default in the underlying mortgage foreclosure action. The plaintiff below, Green Tree Servicing, LLC, ("GTS") attempted to serve Green Emerald through substitute service on the Secretary of State pursuant to section 48.181(1), Florida Statutes (2016). We reverse for two reasons. First, GTS failed to allege the requisite jurisdictional grounds for substitute service provided under section 48.181(1). Second, GTS failed to comply with the notice requirements under section 48.161(1), Florida Statutes (2016).

Section 48.062(3), Florida Statutes (2016), authorizes substitute service on a limited liability company ("LLC") through the Secretary of State

if the plaintiff has already made reasonably diligent efforts to serve the LLC under sections 48.062(1) and (2). *Jupiter House, LLC v. Deutsche Bank Nat'l Tr. Co.*, 198 So. 3d 1122, 1123 (Fla. 4th DCA 2016).

In order to perfect substitute service through the Secretary of State, the complaint must allege one of two jurisdictional grounds provided under section 48.181(1). *Green Emerald Homes, LLC v. Fed. Nat'l Mortg. Ass'n*, 224 So. 3d 799, 802 (Fla. 2d DCA 2017) (citing *Alhussain v. Sylvia*, 712 So. 2d 806, 806 (Fla. 4th DCA 1998)). Specifically, the complaint must allege that (i) the defendant is concealing his or her whereabouts or (ii) the defendant previously conducted business in Florida, but has now become a nonresident. *Id.*

Furthermore, the plaintiff must also comply with section 48.161(1). *Jupiter House, LLC*, 198 So. 3d at 1124-25. Under section 48.161(1), the plaintiff must (i) send notice to the defendant, via certified or registered mail, that substitute service has been effected through the Secretary of State, (ii) file the return receipt from the defendant, and (iii) file an affidavit of compliance. *Id.* at 1123.

In this case, GTS's complaint merely alleges that Green Emerald owns the subject property, so GTS has failed to allege either of the jurisdictional grounds for substitute service provided under section 48.181(1). Furthermore, the record does not reflect that GTS complied with section 48.161(1) by (i) sending notice of service to Green Emerald via certified or registered mail, (ii) filing the return receipt from Green Emerald, and (iii) filing an affidavit of compliance. Accordingly, we reverse the order denying Green Emerald's motion to quash service of process, vacate the clerk's default, and remand for further proceedings.

Reversed and remanded.

WARNER, CONNER and FORST, JJ., concur.

* * *

Not final until disposition of timely filed motion for rehearing.