IN THE COURT OF APPEALS OF IOWA

No. 1-299 / 10-1070
Filed July 13, 2011

**WELLS FARGO BANK,
NATIONAL ASSOCIATION,**
Plaintiff,

vs.

**CONTINUOUS CONTROL SOLUTIONS,
INC., DMITRY KHOTS, ALEX KOMM,
ILYA MARKEVICH, BORIS G. PUSIN,
VADIM SHAPIRO, ALEX SHCHARANSKY,
BORIS SHCHARANSKY and
ZOYA STAROSELSKY,**
Defendants.

**ALEX KOMM, ILYA MARKEVICH,
BORIS G. PUSIN and VADIM SHAPIRO,**
Cross-Claim Plaintiffs/Counter
Cross-Claim Defendants-Appellees,

vs.

**CONTINUOUS CONTROL SOLUTIONS, INC.,
ALEX SHCHARANSKY, BORIS SHCHARANSKY
and ZOYA STAROSELSKY,**
Cross-Claim Defendants/Counter
Cross-Claim Plaintiffs-Appellants.

**ALEX KOMM, ILYA MARKEVICH, BORIS G.
PUSIN and VADIM SHAPIRO,**
Cross-Petition Plaintiffs,

vs.

**LEONID SHCHARANSKY and
SLAVA STAROSELSKY,**
Cross-Petition Defendants.

Appeal from the Iowa District Court for Polk County, Scott D. Rosenberg, Judge.

Appellants appeal from a judgment entered by the district court after a jury verdict awarding compensatory and punitive damages. **AFFIRMED.**

Stanley J. Thompson of Davis, Brown, Koehn, Shors & Roberts, P.C., Des Moines, and David J. Butler and Bryan M. Killian of Bingham McCutchen, L.L.P., Washington, D.C., pro hac vice for appellants.

Todd A. Strother and Timothy N. Lillwitz of Bradshaw, Fowler, Proctor & Fairgrave, P.C., Des Moines, for appellees Alex Komm, Ilya Markevich, Boris G. Pusin, Vadim Shapiro and Dmitry Khots.

Heard by Eisenhauer, P.J., and Potterfield and Tabor, JJ.

POTTERFIELD, J.

In 2008, Wells Fargo filed a petition to foreclose on a security agreement guaranteeing loans it made to Continuous Control Solutions, Inc. (CCS). In response, the officers of CCS who had personally guaranteed the loans filed cross-claims against one another and third-party claims against others who had been associated with CCS. The district court granted summary judgment in favor of Wells Fargo and partial summary judgments as to other parties, leaving claims primarily between what became known as the Shapiro Group and the Shcharansky Group.[1] The jury returned a verdict in favor of the Shapiro Group.

I. Background Facts and Proceedings.

Prior to 2002, many of the individuals involved in this appeal worked for Compressor Controls Corporation (CCC). Boris Pusin and Vadim Shapiro worked in engineering roles. Leonid Shcharansky (Lenny) and Slava Staroselsky worked in the company's sales department.

In 2002, Shapiro left CCC and purchased CCS along with two individuals not relevant to this appeal. They joined CCS as owners, employees, and officers. In January 2004, Pusin left CCC and joined CCS as an owner and engineer. Around the same time, Lenny and Slava also left CCC and joined CCS as employees in the sales department.

Lenny and Slava formed a separate company called Zorass, Inc., which the parties intended would serve two purposes: providing operating capital to CCS and serving as a trade representative for CCS overseas. In February 2004,

[1] At trial, both parties referred to the appellees collectively as the Shapiro Group and to the appellants collectively as the Shcharansky Group.

the parties executed a loan agreement whereby Zorass extended a $1.5 million line of credit to CCS. In return, CCS granted to Zorass and another company, Syscon,[2] shares of stock in CCS amounting to roughly forty percent stock ownership. In April 2004, CCS and Zorass entered into a written trade representative agreement authorizing Zorass to sell CCS's products. In late 2004, Lenny's son Alex Shcharansky (Alex) joined Zorass as an employee and shareholder.

In April 2005, Alex and Slava were elected to CCS's board of directors. At this time, CCS reorganized, and Zorass and Syscon's shares in CCS were reallocated to Alex and Boris Shcharansky, Lenny's sons, and Zoya Staroselsky, Slava's wife. Later in 2005, the relationship between the Shapiro Group and the Shcharansky Group became strained as the Shapiro Group perceived the Shcharansky Group was seeking excessive commissions and control over CCS. Shapiro testified he believed the Shcharansky Group was acting in the best interests of Zorass at the expense of CCS.

Zorass had an agency agreement with an overseas company known as BARS to obtain contracts for CCS in Uzbekistan. BARS was originally founded by Lenny and was later run by Valarie Kosokin. The parties dispute whether Lenny had divested his ownership of BARS by the time of the events leading to this appeal. In December 2005, CCS and BARS entered into an agency agreement whereby BARS would work with Slava of Zorass to obtain contracts in the Central Asia market, which included Uzbekistan.

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[2] Shapiro testified he understood Syscon to be "another company of Lenny and Slava which they own."

In December of 2005, money borrowed by CCS on its line of credit held by Zorass came due. However, Zorass agreed to a one-year extension on the line of credit. Lenny testified that Zorass agreed to extend the line of credit because he was aware CCS was having financial difficulties. When the line of credit again came due in December 2006, Zorass presented CCS with a term sheet for extension of credit, detailing conditions under which Zorass would agree to extend the line of credit for another year. Shapiro testified he believed many of the demands in the term sheet were unreasonable; therefore, the Shapiro Group rejected these terms and conditions. Shapiro testified that at this time, the Shcharansky Group told the Shapiro Group if they did not accept the terms, the Shcharansky Group was planning to file a lawsuit against the Shapiro Group. Lenny, however, testified the term sheet for the loan extension was not meant to be an ultimatum but rather an invitation to start negotiating.

CCS's rejection of the terms proposed by Zorass occurred just before CCS's annual shareholders meeting, which was held April 2, 2007. At that meeting, Alex and Slava were not reelected to CCS's board of directors; they were replaced by one member of the Shapiro Group and an individual not a party to this litigation. The next day, Zorass brought suit against CCS and initiated arbitration against Shapiro individually to collect on $900,000 CCS allegedly owed Zorass on the line of credit and in unpaid commissions. On April 11, 2007, CCS terminated the employment of Lenny and Slava. On May 15, 2007, CCS terminated Zorass's agency agreement effective June 14, 2007. CCS also terminated the BARS agency agreement effective June 28, 2007.

One central point of contention between the parties concerned a venture known as project B-0679. Beginning in late 2006, Kosokin, through BARS, and Slava, through Zorass, worked to obtain a contract for CCS at a compressor station in Uzbekistan. CCS anticipated collecting $2 million on the contract, with a margin of $493,000, sometime in May 2007.

In May 2007, Shapiro sent an email inquiring about the status of this contract. On May 29, 2007, Kosokin responded to Shapiro's email and copied Pusin, Lenny, and Slava in on his response. Kosokin's email stated:

> Regarding [the] Compressor Station . . . . Yes, we have won the tender,[3] but as I told you, [Shapiro], there are serious reasons and besides, the customer is informed about the CCS situation[4] and he is not hurrying to sign the contract and is looking at various options. The problems have already been described to you and if you think that they have evaporated, then you are gravely mistaken. Currently we are trying to convince the customer not to consider the possibility of tender results annulment (they have more than enough reasons to do so), but perhaps, everything will be well.

Shapiro testified that after he received Kosokin's email, he believed CCS had lost the contract. Lenny and Slava testified that at the time they received their copy of Kosokin's email to Shapiro, they knew CCS had won tender on this project, as the email stated. Slava testified he knew because he had personally "participated in the procedure of the tender." Lenny and Slava also testified they believed the customer was considering other options after receiving a letter from CCS stating they no longer worked for CCS.

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[3] Winning tender meant CCS could begin contract negotiations but did not guarantee CCS would obtain the contract to do the work.

[4] Presumably this refers to the internal dispute and litigation mentioned above as well as CCS's significant financial problems.

By early September 2007, CCS had no cash, so the Shapiro Group stopped its operations, fired its employees, and began to prepare for bankruptcy. On September 16, 2007, Alex and Boris Shcharansky and Zoya Staroselsky agreed to purchase the Shapiro Group's shares in CCS for fifty-four dollars total. As part of this agreement, the buyers agreed to use their best efforts to repay in full the debt owed by CCS to Wells Fargo Bank for which members of both groups had executed personal guarantees.

After the parties executed the stock purchase agreement, Shapiro learned from an employee at CCS that the customer for project B-0679 had signed the contract May 10, 2007, more than two weeks before Kosokin's email describing the client's uncertainty about the project. Kosokin had signed the contract on behalf of CCS, though Shapiro testified Kosokin was not authorized to sign contracts on behalf of CCS without his approval. The contract had been approved by necessary Uzbekistani government officials by June 13, 2007—the day before Zorass's agency agreement with CCS formally ended. Shapiro testified that if he had known the customer had signed the contract on project B-0679, the members of the Shapiro Group would not have sold their shares in CCS because the company would have been solvent.

Shapiro testified Slava was in Uzbekistan in May 2007 working with BARS on the B-0679 project. Shapiro and Lenny testified Slava was the Zorass employee in charge of contracts in Central Asia. Slava, however, testified he did not know the customer had signed the contract until after the stock purchase agreement had been executed. Alex and Lenny also testified they did not know

the B-0679 contract had been signed until after the stock purchase agreement had been executed.

The Shcharansky Group took over CCS and began efforts to revive the company. On September 17, 2007, Alex, Kosokin, Lenny, and Slava were elected as directors of CCS. Alex became president of the company. However, by October 2008, CCS had not repaid the debt owed to Wells Fargo, so Wells Fargo filed a petition to foreclose on a security agreement guaranteeing loans it made to CCS. Members of both the Shcharansky Group and the Shapiro Group had personally guaranteed the loans. Shortly thereafter, the Shapiro Group filed cross-claims and a cross-petition against the Shcharansky Group. The Shcharansky Group filed counter cross-claims against the Shapiro Group. At a jury trial on the claims that survived summary judgment, the Shapiro Group brought claims against the Shcharansky Group for fraudulent misrepresentation, fraudulent nondisclosure, and conspiracy relating to the B-0679 contract.

The jury returned a verdict in favor of the Shapiro Group against Alex, Slava, and Lenny. When asked whether the Shapiro Group proved that Alex and/or Slava made a fraudulent misrepresentation, omission, and/or inducement, the jury found Slava had but Alex had not. The jury further found that "Lenny Shcharansky participated in a conspiracy with Alex Shcharansky and/or Slava Staroselsky to make fraudulent misrepresentations, and/or omissions and/or induce the Shapiro Group to sign the Stock Purchase Agreement." The jury awarded $1.4 million in damages for the fraudulent misrepresentation, omission, and/or inducement. The jury also awarded punitive damages in the following amounts: $210,000 from Alex; $490,000 from Slava; and $700,000 from Lenny.

The Shcharansky Group appeals, asserting: (1) Slava owed no duty to disclose information regarding the signing of the contract for project B-0679 to the Shapiro Group; (2) Alex cannot be held liable for compensatory or punitive damages because the jury found he did not commit fraud; and (3) the punitive damages awards were improper and excessive.

II. Slava's Duty to Disclose.

The existence of a duty is a question of law for the court. *Van Essen v. McCormick Enters. Co.*, 599 N.W.2d 716, 718 (Iowa 1999). We therefore review the issue for correction of errors at law. *Allison by Fox v. Page*, 545 N.W.2d 281, 282 (Iowa 1996).

Appellants, members of the Shcharansky Group, assert the district court erred in failing to determine as a matter of law that Slava had no duty to CCS to disclose the signing of the project B-0679 contract between the date the contract was signed on May 10, 2007, and the date the Shapiro Group sold its stock to Alex and Boris Shcharansky and to Zoya on September 16, 2007. They argue Slava had no fiduciary or agency relationship with the Shapiro Group during those months and that he had no superior knowledge about the status of the project B-0679 contract.

We disagree. Slava was an officer of Zorass, which still had an active agency agreement with CCS at the time the contract on project B-0679 was signed and through June 13, 2007, when the contract received government approval in Uzbekistan. Zorass, as an agent of CCS, had a duty to "make full disclosure to [its] principal of all material facts to the agency." *Cruikshank v. Horn*, 386 N.W.2d 134, 137 (Iowa Ct. App. 1986).

> It is a primary incident of the obligation of an agent that he make a prompt, full, and frank disclosure and account of all matters concerning the agency, and he must give the principal any information that the latter would desire to have and which can be communicated to him without violating a superior duty to a third person.

Id. (quoting 3 Am. Jur. 2d, *Agency* § 200 (1962)). CCS presented evidence suggesting that Slava, as an officer of Zorass, intentionally failed to disclose material facts which Zorass had a duty to disclose to CCS.[5]

As an officer of Zorass, Slava may be held personally liable for a fraud that he authorized, directed, or participated in. *See Haupt v. Miller*, 514 N.W.2d 905, 908 (Iowa 1994) ("The legal fiction of the corporation as an independent entity . . . was never intended to insulate officers from liability for their own tortious conduct.").[6] A corporate officer "who takes part in the commission of a tort is liable even when the manager acts on behalf of a corporation." *Estate of Countryman v. Farmers Co-op. Ass'n*, 679 N.W.2d 598, 604 (Iowa 2004). Thus, Slava may be found personally liable without piercing the corporate veil.[7] *See Haupt*, 514 N.W.2d at 909 ("[T]he fact that a tort is committed by an officer working under a corporate name makes the individual corporate officer no less

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[5] We note, however, that no duty to disclose arose under the Restatement (Second) of Torts § 551(2)(a) (1977) as asserted by the Shapiro Group. This section of the restatement relates to parties to a business transaction. Because Slava was not a party to the stock purchase agreement, he was not a party to any business transaction with any member of the Shapiro Group and therefore owed no duty to disclose under this section of the Restatement.

[6] The court received appellants' letter regarding the application of *Haupt* to this case. Appellants' letter was not a supplemental brief allowed under Iowa Rule of Appellate Procedure 6.901(4). Even if we were to consider appellants' letter and appellee's response, it would not change our conclusion that Slava may be found personally liable.

[7] Because we conclude Slava had a duty to disclose as an officer involved in a fraud on behalf of the corporation, we need not address appellants' claim that Slava's duty to disclose based on superior knowledge was absolved by CCS's access to the relevant information

culpable for the act than if acting outside the corporate name."); *Grefe v. Ross*, 231 N.W.2d 863, 868 (Iowa 1975). The district court did not err when it failed to rule as a matter of law that Slava had no duty to disclose information to the Shapiro Group.

The district court also properly submitted to the jury the factual question of whether special circumstances existed that gave Slava a duty to disclose. The jury heard evidence that the Shapiro Group had access to the name of the end user of the B-0679 project, but that they did not know that the contract had been signed. The jury instruction stated that to prove its claim of fraudulent nondisclosure, the Shapiro Group had to prove "[s]pecial circumstances existed which gave rise to a duty of disclosure between the Shapiro Group and the Shcharansky Group." The instruction, to which both parties agreed, also required the jury to find, "While such relationship existed [during the agency], the members of the Shcharansky Group were aware that contract B-0679 had been signed by the customer in May of 2007." The parties further agreed the jury be instructed that special circumstances included four possibilities, one of which was the "special knowledge" of one party. The jury found special circumstances existed, and there is sufficient evidence to support their verdict.

III. Alex's Liability.

Appellants, members of the Shcharansky Group, next argue that because the jury found Alex did not make a fraudulent misrepresentation, omission, and/or inducement, and the jury's "yes" answer to the interrogatory regarding Lenny's involvement in a conspiracy did not specifically implicate Alex, the jury must have made a mistake in finding Alex liable for punitive damages. The Shcharansky

Group acknowledges it stipulated to the jury instructions, including the interrogatories, but contends the verdict against Alex is inconsistent and should simply be eliminated.

The Shcharansky Group bases its argument on appeal on special interrogatories 13 and 15. As we discuss below, the instruction on punitive damages and the court's response to the jury's question about punitive damages are more instructive.

Interrogatory 13 asked:

> Question 13. Did the Shapiro Group prove by clear, satisfactory, and convincing evidence that Alex Shcharansky and/or Slava Staroselsky made a fraudulent misrepresentation, omission, and/or inducement?
>
> Please place an "X" in the appropriate space.
>
> Alex Shcharansky YES _____ NO ___X___
>
> Slava Staroselsky YES ___X___ NO _____

Interrogatory 15 asked about the conspiracy:

> Question 15. Did the Shapiro Group prove by a preponderance of the evidence that Lenny Shcharansky participated in a conspiracy with Alex Shcharansky and/or Slava Staroselsky to make fraudulent misrepresentations, and/or omissions and/or induce the Shapiro Group to sign the Stock Purchase Agreement?
>
> Please place an "X" in the appropriate space.
>
> YES ___X___ NO_____

The Shcharansky Group contends the "yes" answer to question 15 is only directed to Lenny's liability and that the references to Alex and Slava are meaningless without a specific finding as to either individual's involvement in a conspiracy with Lenny. The Shcharansky Group asserts the district court erred

in denying their post-trial motion requesting the judgment against Alex be set aside as an internally inconsistent jury verdict.

The Shapiro Group asserts this argument is not preserved, characterizing it as an attempt to bootstrap ambiguity in the stipulated jury instructions into a claim that the jury and the district court misunderstood the verdict. We agree, considering the record regarding the jury deliberations and the stipulated instructions.

Jury instruction number 36 stated,

> Punitive damages may be awarded if the Shcharansky Group or Shapiro Group has proven by a preponderance of clear, convincing and satisfactory evidence the other party's conduct constituted a willful and wanton disregard for the rights or safety of another and caused actual damage.

The Shcharansky Group on appeal admits this instruction was "imprecise" in that it instructed the jury it could award punitive damages if it found the "Shcharansky Group" caused the "Shapiro Group" actual damages. The Shcharansky Group further admits the instruction's emphasis on groups rather than individuals "obscured the legal requirement that only a liable defendant . . . can be punished with punitive damages," an argument it failed to present to the trial court before it agreed to the instruction. On appeal, the Shcharansky Group contends, "Instruction #36 failed to instruct the jury that it must find that an individual defendant personally caused a plaintiff's actual damages before punitive damages can be awarded against that defendant." The Shcharansky Group asks us to ignore its failure to object to the instruction.

Further, during deliberations, the jury asked the following question, "Can you assign a dollar amount to punitives if you do not assign a dollar amount to

damages?" After a discussion, the judge and counsel for both sides agreed to the following response, "[I]t is not necessary to assign a dollar amount for actual damages in order to award punitive damages. However, the amount of punitive damages must be reasonably related to the actual damages suffered. See also Instruction No. 36."

The jury followed the instructions and the answer to their question about those instructions, all of which were prepared with the agreement of the Shcharansky Group. We conclude the jury's award of punitive damages individually against Alex, Slava, and Lenny is consistent with the jury instructions and with the court's answer to the jury's question regarding punitive damages. We do not address whether those instructions were correct, an issue that was not preserved. *See Midwest Home Distrib., Inc. v. Domco Indus. Ltd.*, 585 N.W.2d. 735, 744 (Iowa 1998) (holding appellate court may only consider on appeal objections to instructions previously raised with the district court).

IV. Punitive Damages.

Appellants argue the punitive damages award in this case was improper and excessive. "We review an award of punitive damages for correction of errors at law." *Wolf v. Wolf*, 690 N.W.2d 887, 893 (Iowa 2005). However, our review for excessiveness of the punitive damages award is de novo. *Id.*

Punitive damages may only be awarded when the plaintiff shows "by a preponderance of clear, convincing, and satisfactory evidence, the conduct of the defendant from which the claim arose constituted willful and wanton disregard for the rights . . . of another." Iowa Code § 668A.1(1)(a) (2007).

> Willful and wanton conduct is shown when an actor has intentionally done an act of an unreasonable character in disregard of a known or obvious risk that was so great as to make it highly probable that harm would follow, and which thus is usually accompanied by a conscious indifference to the consequences.

Cawthorn v. Catholic Health Initiatives Iowa Corp., 743 N.W.2d 525, 529 (Iowa 2007) (internal quotations omitted). More than negligent conduct is required to support a punitive damage award. *Id.* Punitive damages are only recoverable when the defendant acted with actual or legal malice. *Id*. "Actual malice may be shown by such things as personal spite, hatred, or ill-will and legal malice may be shown by wrongful conduct committed with a willful or reckless disregard for the rights of another." *Id.*

Appellants assert punitive damages were not proper here because there was no clear, convincing, and satisfactory evidence that any of the appellants willfully and wantonly disregarded the rights of the Shapiro Group in failing to disclose the signing of the contract for project B-0679. We disagree. The jury found certain members of the Shcharansky Group were involved in a conspiracy to induce the Shapiro Group to sign a stock purchase agreement that would result in great personal financial gain to the members of the Shcharansky Group involved in the stock purchase. This verdict evidences a finding of intentional misconduct that supported a further finding of willful and wanton disregard of the rights of the members of the Shapiro Group. We conclude an award of punitive damages was proper under these circumstances.

Appellants also assert punitive damages were excessive as they were beyond appellants' ability to pay. We disagree. As discussed above, the record supports a finding that the appellants intentionally and deceitfully engaged in a

conspiracy to mislead the Shapiro Group as to the value and viability of CCS. *See Wolf*, 690 N.W.2d at 894 (instructing a court to consider the degree of reprehensibility of a defendant's misconduct in analyzing whether punitive damages were excessive). The punitive damages award was equal to the amount of compensatory damages. *See State Farm Mut. Auto Ins. Co. v. Campbell*, 538 U.S. 408, 425, 123 S. Ct. 1513, 1524, 155 L. Ed. 2d 585, 608 (2003) (finding "[s]ingle-digit multipliers are more likely to comport with due process" than larger ratios). After considering the relevant factors in analyzing the punitive damages award, we conclude the award was not excessive. *See id.*

AFFIRMED.

Eisenhauer, P.J., concurs; Tabor, J., concurs in part and dissents in part.

TABOR, J. (concurring in part and dissenting in part)

While I agree with my colleagues on the issue of Slava Starolselsky's duty to disclose, I respectfully dissent on the question whether Alex Shcharansky may be assessed punitive damages.

Because the jury did not find Alex liable for fraud[8] and was not asked to find him liable for conspiracy to commit fraud,[9] the jury's punitive damages award against Alex cannot stand. *See Rowen v. Le Mars Mut. Ins. Co.*, 282 N.W.2d 639, 661 (Iowa 1979) (stating punitive damages may "be exacted only from those who are first liable for compensatory damages"); *see also Hoffman v. Nat'l Med. Enters., Inc.*, 442 N.W.2d 123, 127 (Iowa 1989) (setting aside verdicts because they were "so logically and legally inconsistent that they cannot be reconciled"). I would order a new trial on the question of Alex's liability and damages. *See Clinton Physical Therapy Servs., P.C. v. John Deere Health Care, Inc*., 714 N.W.2d 603, 613–14 (Iowa 2006) (ordering new trial where harmonizing inconsistent findings in verdict form would have required court to speculate as to jury's intent).

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[8] Question 13:

> Did the Shapiro Group prove by clear, satisfactory and convincing evidence that Alex Shcharansky and/or Slava Staroselvsky made a fraudulent misrepresentation, omission, and/or inducement?
>
> Please place an "X" in the appropriate space.
>
> Alex Shcharansky YES _____ NO __X__
>
> Slava Staroselvsky YES__X__ NO _____

[9] Question 15:

> Did the Shapiro Group prove by a preponderance of the evidence that Lenny Shcharansky participated in a conspiracy with Alex Shcharansky and/or Slava Staroselvsky to make fraudulent misrepresentations, and/or omissions and/or induce the Shapiro Group to sign the Stock Purchase Agreement?
>
> Please place an "X" in the appropriate space.
>
> YES __X__ NO _____

The majority accepts the Shapiro Group's charge that the Shcharansky Group failed to preserve error and was trying to "bootstrap" a complaint that the stipulated jury instructions were ambiguous into its claim that the district court should have reconciled the verdict finding Alex not liable with the jury's award of punitive damages. I do not read the Shcharansky Group's argument as an attack on the jury instructions or verdict forms. Instead, the appellant's argument centers on the district court's refusal to grant a judgment notwithstanding the verdict (JNOV) or a new trial based on the jury's award of $210,000 in punitive damages against Alex despite finding that the Shapiro Group did not prove his liability.

The Shcharansky Group preserved error by moving for a JNOV and for a new trial, alleging that punitive damages could not be assessed against Alex when the jury found that the Shapiro Group did not prove he "made a fraudulent misrepresentation, omission and/or inducement." The Shapiro Group resisted the JNOV motion, arguing that Question 15 of the stipulated verdict form allowed the jury to find Alex was part of a conspiracy with Lenny Shcharansky and Slava Staroloselsky. The Shcharansky Group countered that Question 15 did not allow the jury to find Alex was part of a conspiracy with Lenny if the jury did not first find that Alex actually committed fraud. The district court denied the Shcharansky Group's motion.

The Shapiro Group sets up the Shcharansky Group's discussion of Jury Instruction No. 36 and the district court's response to a jury question regarding punitive damages as a straw man argument, contending that the Shcharansky Group "waived any ability to argue error" by stipulating to the jury instructions.

On appeal, the Shcharansky Group does not challenge Jury Instruction No. 36 or the court's answer to the jury question as error. Rather, the Shcharansky Group's brief states: "Here, Instruction #36, which was the primary instruction on the punitive damages claim, accurately reflected the legal requirement that punitive damages can be awarded only if a plaintiff suffers actual damages." The Shcharansky Group's argument about the "imprecision" of that instruction addressed only its reference to the group of defendants rather than individuals. In its reply brief, the Shcharansky group clarifies that any imprecision as to the parties in Instruction No. 36 "explains why the jury assigned punitive damages to Alex in answering Question #18 despite finding that he was not liable for fraud." But the error does not lie in the jury instruction. The error lies in the district court's disinclination to grant a new trial based on the internally inconsistent verdict answers. The Shcharansky Group had no obligation to object to Instruction No. 36 to preserve error on its instant claim.

I disagree with the majority's conclusion that the district court's judgment allowing the punitive damages award against Alex is consistent with the jury's verdict. The jury's affirmative response to Question 15 cannot be read as a finding that Alex conspired to commit fraud. Instruction No. 29 directed the jury first to determine if either Alex "and/or" Slava committed "the wrong of fraudulent omission and inducement" and second to determine if Lenny participated in a conspiracy with one or both of them. Instruction No. 30 defined conspiracy for the jurors as "an agreement of two or more persons to commit a wrong against another." The wrong in Instruction No. 30 must be a tortious act. *See Basic Chems., Inc., v. Benson*, 251 N.W.2d 220, 233 (Iowa 1977) (explaining "[c]ivil

conspiracy is not in itself actionable; rather it is the acts causing injury undertaken in furtherance of the conspiracy which give rise to the action").

Because the jury determined in Question 13 that Slava committed a wrong but that Alex did not, the jury's affirmative response to Question 15 can only be read as finding a conspiracy between Lenny and Slava. The "and/or" wording in Question 15 contemplated that the jury might answer Question 13 in the negative for one of the actors.

The Shcharansky Group had no reason to complain about the wording of Question 15 because it tracked Instruction No. 29, which followed Iowa Civil Jury Instruction 3500.1. *See State v. Weaver*, 405 N.W.2d 852, 855 (Iowa 1987) (noting our courts are reluctant to disapprove of uniform instructions). Only after the jury returned its verdict and the inconsistency between the jury's answer to Question 13 and its assessment of punitive damages against Alex was apparent, did the Shcharansky Group have occasion to object. *Cf. Clinton Physical Therapy Servs.*, 714 N.W.2d at 610 (rejecting argument that appellant waived right to seek new trial based on inconsistent answers in verdict by consenting to a sealed verdict).

Because the answers in the jury's verdict as to Alex Shcharansky were internally inconsistent as a matter of law, the district court should have granted the Shcharansky Group's motion for new trial on that claim. I would reverse and remand on that ground.