IN THE SUPREME COURT OF FLORIDA
CASE NO. SC03-1856

Lower Tribunal Nos. 3D00-3400, 3D00-3206, 3D00-3207, 3D00-3208, 3D00-3210, 3D00-3212, 3D00-3215

HOWARD A. ENGLE, M.D., et al.,

Petitioners,

vs.

LIGGETT GROUP INC., et al.,

Respondents.
_____/

ANSWER BRIEF ON THE MERITS OF RESPONDENTS LIGGETT GROUP INC. AND BROOKE GROUP HOLDING INC.

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STATUTES

Respondents Liggett Group Inc. ("Liggett") and Brooke Group Holding Inc. ("Brooke") (together, the "Liggett defendants") respectfully submit this answer brief on the merits concerning issues raised by petitioners ("plaintiffs") that are specific to the Liggett defendants. The Liggett defendants also adopt and incorporate herein by reference the points and arguments set forth in the Brief On The Merits Of All Respondents Other Than Liggett And Brooke ("Combined Brief").

INTRODUCTION

The Third District correctly determined that this "class action" trial, rife with procedural, substantive and constitutional errors, was a miscarriage of justice, particularly for the Liggett defendants. The trial court permitted plaintiffs' counsel -- using highly improper argument and guilt-by-association -- to convince the jury to award $790 million in punitive damages against the Liggett defendants, an amount 23 times Liggett's net worth. However, as the Third District correctly held, there was no evidence at trial upon which any liability against the Liggett defendants could be based, much less a bankrupting punitive damage award. Plaintiffs' argument that the Third District improperly "reweighed" the evidence against the Liggett defendants is belied by the record in this action -- there was no such evidence -- and, indeed, by plaintiffs' own brief.

STATEMENT OF THE CASE[1]

The Third District found that the prejudicial impact of the manifest errors at trial was exemplified by the improper verdicts against the Liggett defendants. Liggett Group Inc. v. Engle, 853 So. 2d 434, 466-67 (Fla. 3d DCA 2003)[2]. To the extent there was evidence presented at trial regarding the Liggett defendants, that evidence was exculpatory, showing, among other things, that Liggett did not (i) participate in strategy meetings in the early 1950s attended by other tobacco companies (Exs. 1287, 1850(a); Pl. Br. p.4), at which, plaintiffs argue, a purported industry-wide conspiracy was conceived, (ii) sign or endorse the Frank Statement (Ex. 0018; Tr. 10836), a tobacco industry advertisement concerning smoking and health, which was a centerpiece of plaintiffs' case (Pl. Br. pp. 4-5), or (iii) participate in the creation of or strategy behind industry trade groups, such as the

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[1] References to orders and pleadings in the record are abbreviated as: "(Rec. Vol. [Volume], p. [Page])." Factual references to the Reporter's Transcript are abbreviated as: "(Tr. [Page])." References to exhibits in the record are abbreviated as: "(Ex. [Number])." References to plaintiffs' brief on the merits are abbreviated as "(Pl. Br. p. [Page])." For further detail on the background of this case, the Liggett defendants respectfully refer to the Statement of the Case contained in the Combined Brief and the briefs filed by the Liggett defendants in connection with the appeal to the Third District. Copies of the Liggett defendants briefs in the Third District are submitted in the accompanying appendix.

[2] Liggett is the smallest of the defendant cigarette manufacturers and Brooke is a holding company and the indirect parent of Liggett. (Tr. 13818, 20378-80, 20497-98, 55319).

Tobacco Industry Research Committee ("TIRC") (Tr. 26906-08; Exs. 1850(a), 3312), which plaintiffs contend were vehicles of fraud. (Pl. Br. pp. 5-6)[3].

The Phase II-A trial involved the individual claims of three named plaintiffs, none of whom ever purchased or smoked any Liggett-brand cigarette. (See Trial Court Judgment at 3 (Rec. Vol. CCCIV, p. 69485)). The jury in rendering its verdict in this phase ascribed zero percent fault to Liggett as to each of the three named plaintiffs. The verdict form specifically instructed the jury to "include a zero for any Defendant . . . you found not at fault." (Verdict Form Phase II-A, Question 12, p. 16). The trial court nevertheless entered judgment against the Liggett defendants jointly and severally for 100% of the compensatory damages awarded by the jury.

In Phase II-B, six expert witnesses (five of whom were presented by plaintiffs) severely criticized the business practices and conduct of the other tobacco companies while, at the same time, uniformly praising Liggett. (Tr. 51408, 51596-601, 51846, 51854-55, 52004, 52117-18, 52124, 52532-34, 52801-02, 55799-55801). Plaintiffs further argued to the jury during this phase that Liggett

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[3] No evidence was presented at trial that implicated Brooke in any conduct at all, let alone any wrongful conduct. The only evidence as to Brooke was that Brooke is the indirect parent of Liggett, with no independent operations, assets or income. Nonetheless, the trial court permitted plaintiffs' counsel (over objections) to argue to the jury that Brooke should be held liable for Liggett's conduct. (Tr. 37484-90.)

was worth $1.8 billion, and should pay a substantial portion of that amount as punitive damages. Liggett's audited financial statements demonstrated that Liggett's net worth is less than $34 million (Exs. L-4, L-4A), and Brooke's chief executive, Bennett LeBow, testified that a punitive damages award of $5 to 10 million would cripple the Liggett defendants. (Tr. 55318-36).

The jury returned a verdict awarding $145 billion in punitive damages, $790 million of which was against the Liggett defendants -- an amount 23 times Liggett's net worth. (Ex. L-4.) The trial court entered this award as a judgment.

SUMMARY OF ARGUMENT

POINT I: **The Third District correctly found no competent evidence to support the verdicts against the Liggett defendants.** The trial court erroneously permitted the jury to render verdicts as to the Liggett defendants, notwithstanding a complete lack of evidence of any culpable conduct.

POINT II: **The Third District correctly found no basis for punitive damages.** The Third District correctly held that the trial court had no basis for allowing the jury to consider punitive damages against the Liggett defendants, much less to enter judgment for punitive damages that exceeded 23 times the net worth of Liggett.

ARGUMENT

Plaintiffs argue that the Third District improperly reevaluated evidence concerning the Liggett defendants and substituted its judgment for that of the jury. (Pl. Br. pp. 36-39). The Third District did no such thing. Rather, the court correctly found the record void of any competent evidence that could support verdicts against the Liggett defendants.[4] In doing so, the Third District unquestionably applied the proper standard of review. See Castillo v. E.I. DuPont de Nemours & Co., Inc., 854 So. 2d 1264, 1277 (Fla. 2003) (there must be "competent evidence to support a verdict"); MMH Venture v. Masterpiece Prods. Inc., 559 So. 2d 314, 316 (Fla. 3d DCA 1990) ("an appellate court should override a jury verdict when 'there is no competent substantial evidence which sustains the jury's verdict or, stated in another form, when the verdict is against the manifest weight of the evidence'").

I. The Third District Correctly Found No Competent Evidence To Support The Verdicts Against The Liggett Defendants

The Third District found no evidence in the record which could support the Phase I and Phase II-A verdicts against the Liggett defendants. Thus, for example, the Third District noted that "it is undisputed that the Liggett defendants did not

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[4] In fact, there was no evidence presented at any stage of the trial of any conduct by Brooke, let alone conduct that could support a finding of liability. Supra p. 3, n. 3.

manufacture or sell any of the products that allegedly caused injury to the individual plaintiff representatives" (Liggett, 853 So. 2d at 467), and that they had no involvement in the events and conduct plaintiffs claimed evidenced the supposed tobacco industry conspiracy: "Liggett/Brooke did not participate in the 1950's industry strategy meetings, did not sign or endorse the Frank statement, and was not involved in the creation of the Tobacco Industry Research Committee." Liggett, 853 So. 2d at 466.

Plaintiffs assert that liability against the Liggett defendants for conspiracy could be based on Liggett's membership for limited periods of time in the two tobacco industry trade organizations, the Council for Tobacco Research and the Tobacco Institute. (Pl. Br. p. 37). Membership in trade organizations, however, does not establish knowing and intentional participation in a conspiracy. See Liggett, 853 So. 2d at 467 ("Mere participation in the tobacco industry does not destine a corporation to legal suicide upon the shores of bankruptcy"); In re Asbestos School Lit. (Pfizer Inc.), 46 F.3d 1284, 1290 (3d Cir. 1994) (defendants' joining of trade organization "[u]nquestionably could not rationally be viewed as sufficient to show that [defendant] specifically intended to further any allegedly tortious and constitutionally unprotected activities committed by the [trade organization] or other members"). See also Raimi v. Furlong, 702 So. 2d 1273, 1285 (Fla. 3d DCA), rev. denied, 717 So. 2d 531 (Fla. 1998) (reversal where

evidence was insufficient to prove that defendants "knowingly participated in" an alleged conspiracy).

Plaintiffs further cite the testimony of Brooke's chief executive, Bennett LeBow, as purported evidence that "Liggett and the other tobacco companies had conspired to lie to the public health authorities and the American people on . . . critical issues." (Pl. Br. p. 37.) The testimony referenced by plaintiffs proves nothing of the sort. Although Mr. LeBow testified that in 1997 he saw documents that he believed demonstrated that "the industry" had not disclosed certain information to the public, Mr. LeBow did not identify any specific company (certainly not Liggett) as having misrepresented or concealed any fact. Again, to the contrary, the uncontradicted evidence at trial demonstrated that Liggett did not engage in any purported industry conspiracy or fraud. (Supra pp. 2-3.) Moreover, Mr. LeBow did not specify any fact that purportedly was misrepresented or concealed, and did not specify when (even in which decade) any purported misrepresentation or concealment occurred. Under Florida law, without such particulars, plaintiffs could not even sufficiently plead, much less prove, a fraud claim. See Fla. R. Civ. P. 1.120(b).[5]

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[5] Contrary to Plaintiffs' misleading suggestion (Pl. Br. p. 37), Mr. LeBow was not asked whether he agreed with the jury's verdicts in Phases I and II-A. Rather, Mr. LeBow was asked during the punitive damages phase whether Liggett had "gotten the jury's message," to which had gotten the message even before the jury did. (Tr. 55348). That Mr. LeBow did not disagree with the jury which had, at that

Plaintiffs further challenge the Third District's ruling that the Liggett defendants were not liable to the three named plaintiffs (none of whom ever had smoked a Liggett product). (Pl. Br. p. 38.) Indisputably, there was no evidence (and plaintiffs cite none) that named plaintiffs Mary Farnan and Angie Della Vecchia ever saw or heard an advertisement or statement of any kind attributable to Liggett. As to named plaintiff Frank Amodeo, his testimony that 50-year old advertisements (with no claims concerning health or other effects on smokers) somehow "kept [him] smoking" other companies' cigarettes is insufficient to sustain liability against Liggett. No evidence indicates that these advertisements contained any statement of fact, let alone a knowingly false statement of fact, by Liggett. Moreover, that Amodeo indisputably never purchased or used a Liggett product means that his testimony cannot support a finding of reliance against Liggett.[6]

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point, rendered a zero verdict with regard to Liggett, cannot be interpreted as an admission that Liggett should be held liablehe responded that Liggett -- which had long been cooperating with states' Attorneys General and public health authorities -- had gotten the message even before the jury did. (Tr 55348). That Mr. LeBow did not disagree with the jury which had, at that point, rendered a zero verdict with regard to Liggett, cannot be interpreted as an admission that Liggett should be held liable.

[6] Plaintiffs' suggestion that counsel for the Liggett defendants during closing arguments for Phase II-A somehow admitted that the named Plaintiffs' fraud claims were viable notwithstanding the fact that they never purchased or smoked Liggett cigarettes is plainly baseless. Indeed, counsel's argument was to the opposite effect: "These [Liggett] ads were so influential and meaningful to Mr. Amodeo that they didn't cause him to buy a single pack of Chesterfield in his life, not for a nickel, not for a dime, not for nothing. For this reason, you would find that Mr.

The Third District also correctly determined that the judgment against the Liggett defendants was inconsistent with the jury's findings in the Phase II-A verdict form that they were zero percent at fault. Liggett, 853 So. 2d at 466 n.46. The jury's finding of zero percent fault as to each of the three named plaintiffs is clearly at odds with the Liggett defendants being held jointly and severally liable for full compensatory damages. Moreover, the very text of the Phase II-A verdict form reflects that the jurors had every reason to believe that judgment would be entered in favor of any defendant to which they ascribed zero percent fault. (Supra p. 3).

II. The Third District Correctly Found No Basis For Punitive Damages Against The Liggett Defendants

The Third District ruled that because there was no basis for the jury's Phase I and Phase II-A findings regarding Liggett, "the claims against the Liggett defendants clearly should not have proceeded to the punitive damages phase." (853 So. 2d at 467 n.47.) Plaintiffs nonetheless suggest that the Third District reversed the punitive damages award against the Liggett defendants based on evidence at trial of responsible conduct by Liggett. (Pl. Br. p. 38). Plaintiffs' characterization of the Third District's ruling, even if correct, does not save the punitive damages verdict. Evidence of responsible conduct -- such as the

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Amodeo did not rely on Liggett representations." (Tr. 49896.)

uniformly positive testimony concerning the Liggett defendants given by plaintiffs' own punitive damage expert witnesses -- is in fact precisely the kind of evidence that precludes punitive damages. See American Cyanamid v. Roy, 498 So. 2d 859, 862 (Fla. 1987) (punitive damages award reversed as "[t]he evidence . . . indicates a high level of conscientiousness and concern rather than that 'entire want of care which would raise the presumption of a conscious indifference to the consequences'") (quoting White Construction Co., Inc. v. Dupont, 455 So. 2d 1026, 1029 (Fla. 1984).

Plaintiffs offer no justification under the facts or law for the $790 million bankrupting punitive damages award against the Liggett defendants. Instead, plaintiffs merely refer to the conclusory and incompetent testimony of their so-called financial expert that the Liggett defendants can afford to pay such an award. (Pl. Br. pp. 38-39).[7] The only competent evidence submitted at trial --

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[7] The only financial evidence plaintiffs presented as to the Liggett defendants was the testimony of George Mundstock. Mundstock agreed that Liggett's business was on a "completely different planet" from that of the other companies, and acknowledged that his "valuation" of Liggett was invalid. (Tr. 53237- 61). Mundstock further offered no foundation for his conclusion that the Liggett defendants could actually pay the enormous sums that he derived from his novel and unsupported method. His testimony therefore cannot support the judgment. See Brito v. County of Palm Beach, 753 So. 2d 109, 113-14 (Fla. 4th DCA 1998), rev. denied, 735 So. 2d 1283 (Fla. 1999); Young Chin v. City of Homestead, 597 So. 2d 879, 882 (Fla. 3d DCA 1992); Dempsey v. Shell Oil Co., 589 So. 2d 373, 380 (Fla. 4th DCA 1991).

which reveals, among other things, that the award was 23 times Liggett's net worth -- demonstrated this to be plainly false. (Supra p. 4).[8]

CONCLUSION

For the foregoing reasons and those stated in the Brief On The Merits Of All Respondents Other Than Liggett And Brooke, the Court should approve the Third District's decision. Alternatively, the Court should decline jurisdiction.

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[8] Plaintiffs also challenge the Third District's ruling that punitive damages are precluded by the State of Florida's settlements of its medicaid reimbursement lawsuit against the tobacco companies. (Pl. Br. pp. 24-27). In their brief, plaintiffs assert that Liggett was not a party to the State's lawsuit. (Pl. Br. p. 25 n.11). This assertion is incorrect. In March 1996, Liggett became the first company to settle the State of Florida's lawsuit, which settlement is of the same breadth and has the same preclusive effect as the later settlements entered by the other companies with the State. (See Rec. Vol. CXXVII, pp. 28118-160; Rec. Vol. CXXXII, pp. 31334-31442; Rec. Vol. CCLXIV, pp. 58986-59145; Rec. Vol. CCLXV, pp. 59146-59250). Plaintiffs, in asserting that Liggett was not a party to the State's lawsuit, erroneously rely upon the State's third amended complaint (see Pl. Br. p 25 n.11, A. 13c), which was filed in November 1996, after Liggett and the State had settled.

Respectfully submitted,
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CERTIFICATE OF SERVICE

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By:

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