IN THE SUPREME COURT OF FLORIDA

No. SC03-1856

(L.T. Case Nos. 3D00-3400, 3D00-3206, 3D00-3207, 3D00-3208, 3D00-3210, 3D00-3212, 3D00-3215)

On Discretionary Review From A Decision Of
The Third District Court Of Appeal

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

v.

LIGGETT GROUP INCORPORATED; BROOKE GROUP LIMITED; PHILIP MORRIS INCORPORATED; COUNCIL FOR TOBACCO RESEARCH-USA, INCORPORATED; TOBACCO INSTITUTE, INCORPORATED; LORILLARD TOBACCO COMPANY; LORILLARD, INCORPORATED; BROWN & WILLIAMSON TOBACCO CORPORATION; AMERICAN TOBACCO COMPANY; and R.J. REYNOLDS TOBACCO COMPANY,
Respondents.

COMBINED BRIEF ON JURISDICTION OF ALL RESPONDENTS OTHER THAN LIGGETT AND BROOKE

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STATEMENT OF THE CASE AND FACTS

The Third District Court of Appeal reversed the circuit court's judgment and ordered decertification of the class on "multiple" independent grounds. (A.68.) Among other rulings, the Third District held: (1) a two-year trial demonstrated that class certification was improper because individualized issues predominated over common issues; (2) the $145 billion punitive award was unsupported by necessary findings of liability, lacked any determinable relationship to compensatory damages, and exceeded defendants' ability to pay; and (3) plaintiffs' counsel made improper arguments to the jury, including race-based appeals for jury nullification of the law. (A.23-24, 36-37, 41-42, 57-58, 67-68.)

Plaintiffs' description of the trial is inaccurate. (Br. at 1.) Phase I did not decide "liability" as to anyone. (A.4-5, 8, 25.) In Phase II-A, the jury decided liability and compensatory damages as to three individuals only. (A.5, 8.) And in Phase II-B, the jury awarded $145 billion in punitive damages in a lump sum to "the class," without allocation to any class member, and without further liability findings as to anyone. (*Id*.) Under the circuit court's "trial plan," separate Phase III trials were required to determine liability and compensatory damages for each of 700,000 or more putative class members. When all Phase III trials were completed, the punitive award would be divided *per capita* among class members who had successfully tried their individual claims, however many or few there might be. (A.6, 8-9, 14 n.8.) Plaintiffs mislabel Phase II-B as "Phase III" (Br. at 1), incorrectly suggesting that the trial plan has been completed. In fact, the circuit court entered a "final judgment" before Phase III even began. (A.6, 8.)

SUMMARY OF ARGUMENT

Plaintiffs fail to establish "conflict" jurisdiction. They make scattershot assertions of conflict with *36 cases*, ignoring the need to show an *express* and *direct* conflict. Plaintiffs also fail to establish "constitutional" jurisdiction. The few short references to "due process" in the court's 68-page opinion do not meet the jurisdictional requirement -- a new and express constitutional "construction."

ARGUMENT

I. PLAINTIFFS FAIL TO ESTABLISH "CONFLICT" JURISDICTION

A. No Conflict Arises From The Ruling On *Res Judicata* And Release

The Third District held that the punitive award was barred by the "Florida Settlement Agreement" (FSA) and by the final judgment resolving the State of Florida's suit against the tobacco industry, which sought punitive damages for the same alleged misconduct plaintiffs asserted here. The Third District based its holding on two separate and independent grounds: (1) "settlement and release," and (2) "the *res judicata* effect of the resulting final judgment." (A.64.)

Plaintiffs argue that the *res judicata* ruling conflicts with *Young v. Miami Beach Improvement Co.*, 46 So. 2d 26 (Fla. 1950). But *Young* stands for the principle that when a government litigates a matter of public interest (e.g., by suing for punitive damages), the resulting judgment bars citizens from suing to vindicate the same public interest, even if they were not formal parties to the government's suit. *Id*. at 30. The Third District applied that principle. Plaintiffs simply disagree with the Third District's view that the State's suit and this suit were sufficiently

similar to fit under *Young*. Plaintiffs' disagreement does not establish a conflict.[1]

As for the alternative ground of "settlement and release," plaintiffs vaguely assert that the Third District violated "due process" (Br. at 5) -- but they show no conflict. They cite one Florida case, *Keys Citizens for Responsible Government, Inc. v. Florida Keys Aqueduct Authority*, 795 So. 2d 940 (Fla. 2001), which has no bearing on a release or prior litigation by the State. (The decision addressed notice in a bond validation proceeding.) *Keys* emphasizes that due process requirements "are not evaluated by fixed rules of law, but rather by the requirements of the particular proceeding." *Id*. at 948. Thus, the ruling here cannot conflict with due process cases that address fundamentally different proceedings and circumstances.[2]

Finally, the effect of the FSA and the resulting judgment is a matter of first impression in Florida. Unless and until another Florida appellate court decides the issue differently, there can be no conflict. Fla. Const. art. V, § 3(b)(3).

B. No Conflict Arises From The Ruling On Class Decertification

The Third District decertified the class because crucial circumstances had changed during the seven years after its *Engle I* decision, which addressed a

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[1] Plaintiffs' other cases are irrelevant: *Albrecht v. State*, 444 So. 2d 8 (Fla. 1984) (review of agency action did not preclude inverse condemnation suit; no general public interest asserted); *deCancino v. Eastern Airlines, Inc*., 283 So. 2d 97 (Fla. 1973) (prior workmen's compensation claim; no clear record of prior judgment on the merits); *Weit v. Rhodes*, 691 So. 2d 1108 (Fla. 4th DCA 1997) (*res judicata* cannot be determined on a motion to dismiss); *State v. McBride*, 848 So. 2d 287 (Fla. 2003) (prior motion to correct prison sentence barred later motion); *Gordon v. State*, 608 So. 2d 800 (Fla. 1992) (no holding that only the legislature may limit punitive damages; actually confirms the present ruling that private parties have "no cognizable, protectable right" to punitive damages).

[2] Plaintiffs' two other cases -- *Richards v. Jefferson County*, 517 U.S. 793 (1996), and *Hansberry v. Lee*, 311 U.S. 32 (1940) -- are non-Florida cases that cannot establish a conflict. Fla. Const. art. V, § 3(b)(3).

preliminary class-certification order entered at the very threshold of the case. *R.J. Reynolds Tobacco Co. v. Engle*, 672 So. 2d 39 (Fla. 3d DCA), *rev. denied*, 682 So. 2d 1100 (1996). Among other post-*Engle I* developments, a two-year trial conclusively showed that class members' claims were highly individualized; that "common issues" failed to "predominate"; and that a class action was neither "manageable" nor "superior" to individual lawsuits. Thus, the explicit requirements of Fla. R. Civ. P. 1.220(b)(3) could not be satisfied. (A.10-24.)

Rather than demonstrating any conflict, plaintiffs cite cases that are plainly distinguishable: *Tenney v. City of Miami Beach*, 11 So. 2d 188 (Fla. 1942) (validity of a city paving lien); *City of Miami v. Keton*, 115 So. 2d 547 (Fla. 1959) (validity of a city ordinance); *McFadden v. Staley*, 687 So. 2d 357 (Fla. 4th DCA 1997) (food adulteration at one restaurant over four days). Class certification was appropriate in those cases because they involved a single incident or unitary course of conduct, with corresponding effects on all class members. Here, in contrast, plaintiffs' central claims of common-law fraud, concealment, and "intentional infliction of emotional distress" spanned decades and involved highly individualized questions for each smoker -- knowledge, reliance, behavior, medical condition, comparative fault, statute of limitations, choice of law, and other individualized issues that overwhelmed any supposed common issues. (A.14-24.)[3]

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[3] Similarly, no conflict arises with *Oce Printing Systems USA, Inc. v. Mailers Data Services, Inc.*, 760 So. 2d 1037, 1045 (Fla. 2d DCA 2000), an antitrust case in which there were no "individualized" issues as to liability. Plaintiffs' other cases on class certification are patently irrelevant: *Johnson v. Plantation General Hospital Ltd. Partnership*, 641 So. 2d 58, 60 (Fla. 1994), did not even *consider* whether the case was certifiable as a class action, and *W.S. Badcock Corp. v. Myers*, 696 So. 2d 776, 779-80 (Fla. 1st DCA 1997), addressed a different class-action rule not involved here -- Fla.

Plaintiffs also argue that the Third District was bound by its *own* prior decisions in *Engle I* and *Broin v. Philip Morris Cos*., 641 So. 2d 888 (Fla. 3d DCA 1994), *rev. denied*, 654 So. 2d 919 (1995), and therefore the court's "about-face" (Br. at 6) conflicts with (1) *stare decisis* and (2) the doctrine that one panel should not overrule another. But plaintiffs' theory -- which could be asserted in virtually any case to manufacture jurisdiction out of a supposed "*intra-district* conflict" -- is foreclosed by Fla. Const. art. V, § 3(b)(3). *See Terry v. State*, 808 So. 2d 1249, 1250 n.1 (Fla. 2002) ("This Court's jurisdiction does not extend to intra-district conflict"). In any event, not even "intra-district conflict" exists here. Plaintiffs merely disagree with the Third District's conclusion that its prior decisions were not controlling. Class-certification orders "remain conditional and subject to reconsideration until the case is finally resolved." (A.9 n.4; *see* A.7.) The Third District identified a series of post-*Engle I* developments, including a two-year trial, which showed that certification was no longer tenable. *Engle I* and *Broin*, both of which were pretrial decisions, never addressed such circumstances.[4]

C. No Conflict Arises From The Application Of *Ault v. Lohr*

Correctly applying *Ault v. Lohr*, 538 So. 2d 454 (Fla. 1989), the Third District held that a finding of *liability* -- not just a "breach of duty" -- was required

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R. Civ. P. 1.220(b)(2), which has no "predominance" or "superiority" requirement and governs claims for injunctive or declaratory relief, not claims for damages.

[4] Plaintiffs incorrectly argue that the *Engle I* mandate was a "final judgment" that barred further appellate review of class certification, citing *OP Corp. v. Village of North Palm Beach*, 302 So. 2d 130 (Fla. 1974). (Br. at 6 n.3.) But *OP Corp*. merely held that an appellate court's mandate bound the *trial court*. Moreover, it expressly recognized that the appellate court may permit consideration of "a new matter affecting the cause." *Id*. at 131.

before punitive damages could be awarded here. (A.28-37.) Plaintiffs quote a sentence fragment in *Ault*, referring to a "breach of duty," but they omit the next sentence, which states the Court's holding: "Accordingly, we hold that a *finding of liability* alone will support an award of punitive damages even in the absence of financial loss for which compensatory damages would be appropriate." 538 So. 2d at 456 (emphasis added, internal quotation marks omitted); *see also id.* (the punitive award was based on "an *express finding of liability*") (emphasis added).

The claims in *Ault* -- assault and battery -- *did not* require findings of actual injury or compensatory damages to establish liability. (A.29 n.20.) Here, in contrast, plaintiffs' claims *did* require findings of actual injury and compensatory damages (among other matters) to establish liability. (A.30 n.21.) Liability findings necessary to support the punitive award in this case were never made. In Phase I, there was no liability finding as to *anyone*, and in Phase II-A, the only liability finding related to three people, out of 700,000 or more putative class members. Yet in Phase II-B, the *entire class* was awarded $145 billion in punitive damages. (A.4-5, 8.) In invalidating that award, the Third District expressly applied the majority opinion in *Ault*, not just the concurring opinion (which plaintiffs claim "differed from" the majority but in fact is fully consistent with it).[5]

D. No Conflict Arises From The Ruling That The $145 Billion Punitive Award Was Unreasonable And Excessive

The Third District also invalidated the punitive award because it was

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[5] Similarly, there is no conflict with cases plaintiffs call *Ault*'s "DCA progeny." (Br. at 6-7.) None of those cases holds that the claims involved here -- common-law fraud, concealment, or "emotional distress" -- can support a punitive award without prior findings of actual injury and compensatory damages.

impossible to establish the necessary proportionality between punitive damages and compensatory damages. (A.26-28, 36-37.) Plaintiffs assert conflict with *St. John v. Coisman*, 799 So. 2d 1110 (Fla. 5th DCA 2001), arguing that the Third District failed to consider the reprehensibility of defendants' conduct. But *St. John* expressly requires review of all three "*BMW* factors" -- reprehensibility, *proportionality*, and comparable civil penalties. *Id*. at 1114; *see BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996). *St. John* confirms the invalidity of a punitive award where *any one* of those factors cannot be applied. Here the proportionality factor could not be applied -- much less satisfied -- because the trial plan prevented any comparison of punitive damages with compensatory damages.[6]

As a separate matter, the Third District also held that the $145 billion punitive award was bankrupting and thus violated Florida law. (A.37-42.) Rather than identifying a conflict, plaintiffs simply reargue the merits by declaring that the Third District "substitut[ed] its view of the evidence" concerning defendants' ability to pay. (Br. at 9.) None of plaintiffs' "conflicting" cases even remotely addressed the situation here: defendants' financial evidence remained *unrefuted*, and plaintiffs' own "financial experts" admitted that the punitive award would "put

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[6] Plaintiffs erroneously rely on *Owens-Corning Fiberglas Corp. v. Ballard*, 749 So. 2d 483 (Fla. 1999), which did not address *BMW*, and on pre-*BMW* cases: *Bankers Multiple Line Ins. Co. v. Farish*, 464 So. 2d 530 (Fla. 1985); *Arab Termite & Pest Control of Florida, Inc. v. Jenkins*, 409 So. 2d 1039 (Fla. 1982); *Horizon Leasing v. Leefmans*, 568 So. 2d 73 (Fla. 4th DCA 1990). Plaintiffs also argue that the Third District "repudiat[ed]" Fla. Stat. § 768.73(1)(a), creating conflict with *Holly v. Auld*, 450 So. 2d 217 (Fla. 1984). (Br. at 8 n.5.) But a statute cannot preclude review under *BMW* (*St. John*, 799 So. 2d at 1112), and *Holly* addressed a medical-malpractice discovery statute that has no conceivable relevance here.

[defendants] out of business." (A.38-39 & n.28.)

E. No Conflict Arises From The Footnote Addressing Claims Of Mary Farnan And Angie Della Vecchia

The Third District ruled that two of the three named plaintiffs, Mary Farnan and Angie Della Vecchia, failed to meet the definition of class membership under the terms of the circuit court's class-certification order. (A.33 n.23.)[7] Plaintiffs make no attempt to cite a conflicting case on the issue of class definition. Instead, they argue that a footnote in the Third District's opinion "extinguish[ed]" Farnan's and Della Vecchia's claims, and "potential[ly] extinguish[es]" the claims of other, unnamed individuals. (Br. at 9.) But the court's footnote merely rejected Farnan's and Della Vecchia's asserted rights *as putative class members*, including any right to share in the classwide punitive award. (A.33 n.23.) Their claims have not been "extinguished." Furthermore, the opinion states that "class members may pursue their claims on an individualized basis" (A.6-7); it does not address how time bars or tolling doctrines may apply in those future individual actions. Thus, nothing in the Third District's opinion is even remotely inconsistent with *Lance v. Wade*, 457 So. 2d 1008, 1011 (Fla. 1984), which allowed members of a decertified class to assert individual claims "within a reasonable time" after decertification.[8]

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[7] The claims of the third plaintiff, Frank Amodeo, were time-barred under the jury's express findings (A.32 n.23) -- a ruling plaintiffs do not challenge here.

[8] Plaintiffs' other cases (Br. at 9-10) also fail to create a conflict. In *Diamond v. E.R. Squibb & Sons, Inc.*, 397 So. 2d 671, 672 (Fla. 1981), a statute of limitations violated the constitutional guarantee of access to courts by effectively barring the plaintiff's claim "*before it ever existed*" (emphasis added). Here no statute of limitations has even been applied yet to future individual actions. Similarly, in *Southland Corp. v. Smith*, 426 So. 2d 1182 (Fla. 5th DCA 1983), a defendant was prevented from asserting an equitable defense, and in *Palm Shores, Inc. v. Nobles*, 5 So. 2d 52 (Fla. 1941), a

II. PLAINTIFFS FAIL TO ESTABLISH "CONSTITUTIONAL" JURISDICTION

The few short references to "due process" in the Third District's 68-page opinion simply do not meet the jurisdictional requirement -- an express constitutional "construction." *See* Fla. Const. art. V, § 3(b)(3). Jurisdiction cannot be invoked where, as here, a district court merely reiterates or applies "settled principles" of constitutional law, as opposed to expressly "construing" a constitutional provision and thus developing *new* constitutional law. Kogan & Waters, *The Operation and Jurisdiction of the Florida Supreme Court*, 18 Nova L. Rev. 1151, 1219 (1994). The distinction between mere "reiteration or application" on the one hand, and express "construction" on the other, is a basic feature of this Court's jurisprudence. *Id*.; *see Armstrong v. City of Tampa*, 106 So. 2d 407, 409 (Fla. 1958) (the decision must "actually construe, as distinguished from apply," a constitutional provision; it is not enough to examine "the facts of a particular case and then apply a recognized, clear-cut provision of the Constitution").

CONCLUSION

Plaintiffs' request for discretionary review should be denied.

Respectfully submitted,

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plaintiff was prevented from purging its contempt before its case was dismissed. No such preclusion has occurred here.

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Norman A. Coll

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the foregoing Combined Brief On Jurisdiction Of All Respondents Other Than Liggett And Brooke complies with the font requirements of Fla. R. App. P. 9.210(a)(2).

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