IN THE SUPREME COURT OF FLORIDA

CASE NO. SC07-_____

COLEMAN (PARENT)
HOLDINGS INC.,

Petitioner,

vs.

MORGAN STANLEY &
CO. INCORPORATED,

Respondent.
_____/

ON DISCRETIONARY REVIEW FROM THE DISTRICT COURT
OF APPEAL OF FLORIDA, FOURTH DISTRICT

PETITIONER'S BRIEF ON JURISDICTION

Jerold S. Solovy
Ronald L. Marmer
Paul M. Smith
JENNER & BLOCK LLP
330 N. Wabash Ave.
Chicago, IL 60611
P (312) 222-9350
F (312) 527-0484
jsolovy@jenner.com

Jack Scarola
SEARCY DENNEY
SCAROLA BARNHART
& SHIPLEY P.A.
2139 Palm Beach Lakes
Blvd.
West Palm Beach, FL 33402
P (561) 686-6300
F (561) 684-5816
jsx@searcylaw.com
Fla. Bar No. 169440

Joel D. Eaton
PODHURST ORSECK,
P.A.
25 W. Flagler Street
Suite 800
Miami, FL 33130
P (305) 358-2800
F (305) 358-2382
jeaton@podhurst.com
Fla. Bar No. 203513

Counsel for Petitioner

TABLE OF CONTENTS

Page

TABLE OF CITATIONS

CASES

MISCELLANEOUS

The Fourth District Court of Appeal, with Judge Farmer dissenting, not only overturned a $1.5 billion jury verdict against Morgan Stanley & Co. Inc., but ordered that judgment be entered for Morgan Stanley without any retrial. That decision, which holds Morgan Stanley harmless for its proven role in the largest stock fraud in Florida history, expressly and directly conflicts with this Court's decisions in *Engle v. Liggett Group, Inc.*, 945 So. 2d 1246 (Fla. 2006), and *Ault v. Lohr*, 538 So. 2d 454 (Fla. 1989), and with other decisions of this Court and the district courts.

Just three years ago, this Court granted review to correct the Third District's decision in *Engle*, which had held — contrary to *Ault* — that proving the amount of compensatory damages is a prerequisite to recovering punitive damages for fraud. But within months of this Court's opinion in *Engle*, the Fourth District repeated the same error in this case. After disapproving the plaintiff's method of calculating the amount of its compensatory damages (which the trial judge had fully considered and approved in a series of pretrial rulings), the Fourth District majority proceeded to wipe out a jury award of more than $600 million in compensatory damages. The majority also reversed a jury award of $850 million in punitive damages solely because the compensatory award was no longer in place. Then the Fourth District ruled that there should be no retrial, which deprived the plaintiff of any opportunity to prove its damages using the majority's

preferred method. Thus, the Fourth District's decision also conflicts with long-standing precedents of this Court and other district courts holding that a new trial is the proper remedy when erroneous pretrial rulings permeated the initial trial.

Unless this Court reviews and quashes these rulings, Morgan Stanley — which not only conspired to commit the largest stock fraud in the history of this State, but then committed sanctionable and egregious discovery misconduct — will be relieved entirely of liability for the enormous damage it caused.

I. STATEMENT OF THE CASE AND FACTS

In March 1998, Sunbeam Corporation acquired The Coleman Company, Inc. from Coleman (Parent) Holdings Inc. ("CPH"). As part of the purchase price, CPH received Sunbeam stock purportedly worth over $600 million. Within days of the transaction, as reports revealed that Sunbeam had falsified its financial statements, Sunbeam's stock price plunged. Under federal securities laws, the fraud barred CPH from selling its Sunbeam shares for nearly two years. Sunbeam declared bankruptcy, and CPH's Sunbeam stock became worthless.

CPH sued Sunbeam's investment banker, Morgan Stanley, for conspiring with Sunbeam to defraud CPH. Prior to trial, the parties disputed the proper method for measuring damages, and the trial court decided that issue. Pursuant to the court's ruling, CPH sought to recover the difference between the value of the Sunbeam stock that CPH expected to receive in the transaction and the stock's

actual value on the date when legal barriers, created by the fraud, no longer prevented CPH from selling its Sunbeam shares. After a seven-week trial, the jury found by clear and convincing evidence that CPH had suffered damage as a result of relying on Morgan Stanley's and Sunbeam's false statements and awarded CPH $604 million in compensatory and $850 million in punitive damages.

The Fourth District, with Judge Farmer dissenting, reversed. The majority did not disturb the jury's findings that Morgan Stanley had defrauded CPH and that CPH had been damaged in fact by the fraud. But it held that CPH had not properly proved the ***amount*** of its compensatory damages, because CPH's proofs had conformed to pretrial rulings that the majority concluded were incorrect. Next, the majority denied a retrial and deprived CPH of any chance to prove the amount of its damages using the majority's preferred method. Finally, the majority held that reversal of the compensatory damages award required reversing the punitive damages award as well. The majority thus ordered entry of judgment for Morgan Stanley, exonerating it of any liability for the massive fraud it helped commit.

II. SUMMARY OF THE ARGUMENT

The Fourth District's rulings expressly and directly conflict with decisions of this Court and of other district courts on three questions of law: the right to recover punitive damages when fraud is proven, the plaintiff's right to a new trial to establish the amount of its compensatory damages, and proximate cause.

III. ARGUMENT

A. The Decision Below Expressly and Directly Conflicts with This Court's Decisions in *Ault* and *Engle* Allowing Punitive Damages Absent Proof of the Amount of Compensatory Damages.

The Fourth District ruled that a plaintiff in a fraud case cannot recover punitive damages if it proves conclusively that it was injured in fact but uses the wrong method to prove the amount of its compensatory damages. (A. 10-11.) That ruling directly conflicts with this Court's decisions in *Ault* and *Engle*.

In *Ault*, this Court held that a compensatory damages award need not "'underlie a punitive damages award.'" 538 So. 2d at 454-55 (citation omitted). To the contrary, "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.'" *Id.* at 456 (citation omitted); *accord Mortellite v. Am. Tower, L.P.*, 819 So. 2d 928, 934-35 (Fla. 2d DCA 2002); *Platte v. Whitney Realty Co.*, 538 So. 2d 1358, 1360 (Fla. 1st DCA 1989).

This Court reached the same result in *Engle*. The Third District in *Engle*, applying the identical theory that the majority adopted in this case, had made a compensatory award a prerequisite to a punitive award where "actual injury" is an essential element of the underlying tort, as with fraud. *Liggett Group, Inc. v. Engle*, 853 So. 2d 434, 441, 450-53 (Fla. 3d DCA 2003). This Court disagreed, concluding that "the Third District [had] misapplied *Ault*," and held that a fraud

plaintiff seeking punitive damages need not prove a "specific injury" or a specific amount of compensatory damages. *Engle*, 945 So. 2d at 1254, 1262-63.

Repeating the very error that *Engle* had corrected, the majority below purported to distinguish *Ault* as not applying to torts (such as fraud) for which "actual injury" is an "essential element." (A. 10-11 & n.2.) But the *Ault* rule is categorical, and *Engle* itself was a fraud case. The conflict with *Ault* and *Engle* could not be more direct.[1]

B. The Decision Below Expressly and Directly Conflicts with This Court's Decisions in *Webb Furniture* and Its Progeny and with District Court Decisions Requiring a New Trial When Erroneous Pretrial Rulings Permeated the Initial Trial.

In a series of pretrial rulings, the trial court approved the method of calculating compensatory damages that CPH used at trial. (A. 10.) Judge Farmer would have upheld the resulting damages award, but the majority disagreed. (*Id.* at 4-9, 12-16.) Then, instead of remanding for a new trial using its preferred damages methodology, the majority directed that judgment be entered for Morgan Stanley. (*Id.* at 9-10, 12.) That result conflicts with decisions of this Court, with decisions

[1] The majority below stated that, under *National Equipment Rental, Ltd. v. Little Italy Restaurant & Delicatessen, Inc.*, 362 So. 2d 338, 339 (Fla. 4th DCA 1978), a finding of liability for fraud requires proof of both the fact of injury and the specific quantum of injury. (A. 11.) But that rule cannot be squared with *Engle*'s holding that a party found liable for fraud can be required to pay punitive damages even if the plaintiff "did not suffer any compensable damage." *Engle*, 945 So. 2d at 1263. As Judge Farmer correctly stated, under *Ault* and *Engle*, "zero compensatory damages do not preclude punitive damages." (A. 19.)

of other district courts, and with basic fairness and common sense.

In *Webb Furniture Co. v. Everett*, 105 Fla. 292, 141 So. 115 (1932), this Court held, "[W]hen error occurs in the trial of a common law action by reason of which the judgment is reversed, on remand of the cause, the parties are restored to the position they found themselves at the time the error was committed, and the cause must be tried again." 141 So. at 116. Here, the supposed "error" occurred prior to trial, when the court authorized CPH to seek recovery for losses it suffered after the transaction date on the ground that the fraud, which prevented CPH from selling its Sunbeam stock, proximately caused those losses. This Court has held repeatedly that a new trial is required when an erroneous pretrial or evidentiary ruling permeates the initial trial. *See, e.g.*, *Linn v. Fossum*, 946 So. 2d 1032, 1039-41 (Fla. 2006); *Florida East Coast Ry. v. Edwards*, 197 So. 2d 293, 294 (Fla. 1967); *Jones v. Tampa Elec. Co.*, 143 Fla. 693, 697-98, 197 So. 385, 386 (1940).[2]

The other district courts have faithfully adhered to those precedents. For example, in *Wolfe v. Gencorp, Inc.*, 529 So. 2d 1154 (Fla. 1st DCA 1988), the First District remanded for a new trial, holding that "[w]hen the trial court rules evidence is admissible upon the predicate laid and the appellate court reverses for

[2] *Arky, Freed, Stearns, Watson, Greer, Weaver & Harris, P.A. v. Bowmar Instrument Corp.*, 537 So. 2d 561 (Fla. 1988), on which Morgan Stanley has previously relied, does not support its contrary position. *Arky, Freed* holds merely that a plaintiff is precluded from recovery on an unpled claim. *See id.* at 563.

insufficiency of the predicate, the party offering the evidence must be afforded a new opportunity to establish a predicate for admissibility under the test applied by the appellate court." *Id.* at 1156; *accord Rowland v. Whitehead*, 375 So. 2d 607, 609-10 (Fla. 2d DCA 1979) ("justice requires that the plaintiff be permitted a new trial" if trial court rulings dissuaded plaintiff from introducing essential "additional evidence . . . in the first place"). Similarly, in *Srybnik v. Ice Tower, Inc.*, 162 So. 2d 294, 296 (Fla. 3d DCA 1964), the Third District found that the trial judge had failed to apply the "correct measure of damages." Rather than ordering judgment for the defendant, however, the court remanded the case with directions "to redetermine the damages in light of the principles announced in this opinion." *Id.*

Indeed, there was a time when the Fourth District would have followed *Srybnik* and ordered a new trial on damages in this case. In *Strickland v. Muir*, 198 So. 2d 49 (Fla. 4th DCA 1967), the court, citing *Srybnik*, held that "[s]ince plaintiffs have failed to offer the necessary proof as to their damages, the cause must be remanded and a new trial had on the issue of damages only." *Id.* at 52. That remained the rule in the Fourth District for the next 26 years, until a different panel, without acknowledging *Strickland* or any other authority, held in *Nico Industries, Inc. v. Steel Form Contractors, Inc.*, 625 So. 2d 1252, 1253 (Fla. 4th DCA 1993), that a failure of proof on the proper measure of damages required entry of judgment for the defendant. When the conflict was discovered several

years later, the court remained divided on the issue, holding in an 8-to-4 en banc decision that it would follow *Nico* rather than *Strickland*. *See Teca, Inc. v. WM-TAB, Inc.*, 726 So. 2d 828, 830 (Fla. 4th DCA 1999). *Teca* is the decision upon which the majority below relied to justify entering judgment for Morgan Stanley. (A. 9-10.) The case has never been cited by any other district court.

In addition to being out of step with decisions of this Court and every other court in the State, the Fourth District's position undermines the critical role of pretrial rulings. If plaintiffs cannot rely on favorable pretrial rulings, they must protect themselves by submitting multiple sets of evidence based on alternative legal theories. That will waste judicial resources. And in a jury trial, it surely will sow confusion. We respectfully submit that this Court needs to bring the Fourth District back into line with decisions of this Court and the other district courts.[3]

C. The Decision Below Expressly and Directly Conflicts with This Court's Decisions in *Goldberg* and *McCain* Applying Florida's Traditional Standards for Proving Proximate Causation.

The majority's new fraud damages rule — that a plaintiff must conduct an "event study" to prove the amount of its damages (A. 7-9) — has never been

[3] The majority below suggested that because CPH urged the trial court to make the relevant rulings (A. 10), the doctrine of "invited error" applied. But that doctrine applies only where a party asks the trial court for a particular ruling and then complains about that very ruling on appeal — in effect, creating its own reason for reversal. *See, e.g.*, *Gupton v. Village Key & Saw Shop, Inc.*, 656 So. 2d 475, 478 (Fla. 1995). CPH did no such thing. On appeal, it maintained that the trial court was correct, and it lost. That should not deprive CPH of the right to a retrial.

applied by any Florida court and conflicts with this Court's decisions in *Goldberg v. Florida Power & Light Co.*, 899 So. 2d 1105 (Fla. 2005), and *McCain v. Florida Power Corp.*, 593 So. 2d 500 (Fla. 1992).

The trial court ruled that, because the fraud infected Sunbeam's financial statements, federal securities laws prohibited CPH from selling the fraudulently inflated shares for nearly two years, while the shares' value continued to decline. (A. 3, 5-6.) The majority did not disturb that ruling. Nevertheless, the majority held that CPH "disregard[ed] the proximate causation required for fraud damages" because CPH did not present an "event study" to rule out all other possible causes of drops in stock value during the period when CPH could not sell the shares. (*Id.* at 6-9.) No court in Florida (or elsewhere) has ***ever*** applied the majority's event-study requirement in a common law fraud case.

In Florida, "[t]he issue of proximate cause is generally a question of fact concerned with 'whether and to what extent the defendant's conduct foreseeably and substantially caused the specific injury that actually occurred.'" *Goldberg*, 899 So. 2d at 1116 (quoting *McCain*, 593 So. 2d at 502). As a result, a tortfeasor remains liable for all damages caused by its conduct, even though its conduct operates in combination with some later cause, if the later cause was itself foreseeable. That black-letter principle appears in Fla. Std. Jury Instr. (Civ.) 5.1c.

In this case, the fraud not only caused a massive decline in the value of

CPH's Sunbeam shares, it also prevented CPH from selling the shares for nearly two years. It was certainly foreseeable that the fraud would prevent CPH from selling and that other factors might contribute to a decline in the shares' value during those two years. And because all of that was foreseeable, the fraud could legitimately be considered a legal cause of the entire decline in value. Yet the majority concluded that, unless CPH could isolate and eliminate all other factors that might have contributed to the decline in value of CPH's Sunbeam shares, it could recover nothing — not a penny. Most respectfully, that conclusion flies directly in the face of this Court's settled jurisprudence on proximate causation. And in such a closely watched case arising out of one of the most massive frauds in Florida history, it cries out for correction by this Court.[4]

IV. CONCLUSION

The Court should exercise its jurisdiction to review the decision below.

Respectfully submitted,

By _____
Joel D. Eaton

[4] The majority cannot justify its departure from traditional proximate-cause principles by pointing to the "lockup" provision in the (fraudulently induced) contract, a provision that barred CPH from selling the shares for several months. (A. 2, 6.) The fraud constituted a material breach, excusing CPH from further performance (including the lockup), while still permitting CPH to obtain benefit-of-the-bargain damages. *Hyman v. Cohen*, 73 So. 2d 393, 397 (Fla. 1954); *Sampley Enter., Inc. v. Laurilla*, 404 So. 2d 841, 842 (Fla. 5th DCA 1981).

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to counsel of record for Morgan Stanley & Co. Incorporated on the following service list by U.S. Mail on this __th day of _____, 2007:

Bruce S. Rogow, Esq.
BRUCE S. ROGOW, P.A.
Broward Financial Centre
500 East Broward Boulevard
Suite 1930
Fort Lauderdale, FL 33394

Sylvia H. Walbolt, Esq.
CARLTON FIELDS, P.A.
222 Lakeview Avenue
Suite 1400
West Palm Beach, FL 33401

_____
Joel D. Eaton

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief was prepared in Times New Roman 14-point font, in compliance with Rule 9.210(a)(2) of the Florida Rules of Appellate Procedure.

_____
Joel D. Eaton