



IN THE CIRCUIT COURT OF OHIO COUNTY, WEST VIRGINIA

**IN RE: TOBACCO LITIGATION
(Individual Personal Injury Cases)**

CIVIL ACTION NO. 00-C-5000

THIS DOCUMENT APPLIES TO ALL CASES

ORDER REGARDING RULINGS ISSUED DURING APRIL 27, 2018 HEARING

On April 27, 2018, the Presiding Judges assigned to the Tobacco Litigation conducted a hearing during which the Court issued the following rulings:

1. Dismissal of Remaining Failure to Instruct Regarding Ventilated Filter Cigarette Claims With Prejudice

On March 23, 2018, the Court ordered Plaintiffs' counsel to obtain releases and file proposed orders of dismissal with prejudice for the 5 remaining Plaintiffs identified as having claims of failure to instruct regarding ventilated filter cigarettes by April 26, 2018. *Order Regarding Rulings Issued During March 23, 2018 Hearing* (Transaction ID 61883400) at p. 4

On April 24, 2018, Plaintiffs filed a *Motion for Dismissal with Prejudice of All Remaining Claims against the Non-Liggett Defendants Including Claims for Failure to Instruct Regarding Ventilated Filter Cigarettes* (Transaction ID 61954185) on behalf of 4 of the 5 remaining Plaintiffs identified as having claims of failure to instruct regarding ventilated filter cigarettes.¹ The Court **GRANTS** Plaintiffs' motion and will enter a separate order dismissing those cases with prejudice.

Finding Plaintiff *Wanda Frazier*, Civil Action No. 00-C-1185 KAN, failed to file a proposed order of dismissal, the Court dismissed her case with prejudice for non-compliance with the Court's March 23, 2018, Order. The Court will enter a separate order of dismissal with

¹ Plaintiffs' motion applied to Plaintiffs: *James E. Boone*, Civil Action No. 98-C-2341 KAN; *Mary A. Brown*, Civil Action No. 98-C-1778 KAN; *Anna C. Hammond*, Civil Action No. 01-C-322 OHI; and *Naomi L. Stone*, Civil Action No. 98-C-1797 KAN.

prejudice in Plaintiff *Frazier's* case.

2. *Plaintiffs' Motion for Dismissal of Claims against Defendant Liggett Group, LLC* (Transaction ID 61751447)

Plaintiffs moved to dismiss their claims against Defendant Liggett Group, LLC, formerly known as Liggett Group, Inc., and Liggett & Meyers, Inc., pursuant to Rule 41(a)(2) of the West Virginia Rules of Civil Procedure in the following 11 civil actions:

Anne Barton, Civil Action No. 00-C-952 OHI
Estate of John Walker Berryman, Civil Action No. 00-C-407 OHI
Guy Flin Brotosky, Sr., Civil Action No. 00-C-987 OHI
Charles Buttrick, Civil Action No. 00-C-942 OHI
Erma Justice, Civil Action No. 00-C-635 OHI
Monica Rose Mullins, Civil Action No. 00-C-733 OHI
Gary Peyton, Civil Action No 00-C-1310 OHI
Shirley Reynolds, Civil Action No. 00-C-1334 OHI
John Rutherford, Civil Action No. 00-C-790 OHI
Joseph Samol, Civil Action No. 00-C-1355 OHI
Minnie Smith, Civil Action No. 00-C-824 OHI

There being no objection, the Court **GRANTED** Plaintiffs' motion and will enter a separate order dismissing these claims with prejudice in the above-listed civil actions.

3. *Motion to Dismiss Certain Plaintiffs' Claims against Liggett Group, LLC, Liggett & Myers, Inc., and Brooke Group Ltd.* (Transaction ID 61803244)

Defendants Liggett Group, LLC, Liggett & Myers, Inc. and Brooke Group Ltd. (collectively, the "Liggett Defendants") originally moved to dismiss 25 cases for failure to file a Liggett smoker fact sheet. The motion included the 11 previously identified civil actions Plaintiffs moved to dismiss pursuant to Rule 41(a)(2) (Transaction ID 61751447), which motion the Court granted in Section 2 above. Counsel advised the Court the following 3 civil actions listed in the Liggett Defendants' motion were already dismissed:

Estate of Billie Joe Akers, Civil Action No. 98-C-2696 KAN
Estate of Donna Miller, Civil Action No 97-C-21 MCD Miller
Estate of Mary Surgeon, Civil Action No. 98-C-2392 KAN

Plaintiffs' counsel moved to dismiss *Estate of Philip Frances DiGirolamo*, Civil Action No. 98-C-2357 KAN, because the Plaintiff decedent's family no longer wishes to prosecute this civil action. The Court **GRANTED** Plaintiffs' motion, and will enter a separate order dismissing the civil action with prejudice in *Estate of Philip Frances DiGirolamo*, Civil Action No. 98-C-2357 KAN.

The Liggett Defendants withdrew the motion to dismiss *Joyce Ann Hodges*, Civil Action No. 00-C-602 OHI, because a fact sheet was filed for that Plaintiff, although it was past the Court's deadline. The Liggett Defendants confirmed the motion to dismiss for failure to file a Liggett smoker fact sheet applies to the following 9 civil actions:

Ermel R. Bennett, Civil Action No. 00-C-406 OHI
Priscilla Brown, Civil Action No 00-C-989 OHI
Lavinia Godfrey, Civil Action No. 00-C-557 OHI
Shelia Kay Justice, Civil Action No. 00-C-636 OHI
John Edward King, Civil Action No. 00-C-650 OHI
John C. Morgan, Civil Action No. 00-C-727 OHI
Estate of Thomas Severt, Civil Action No. 00-C-796 OHI
Samuel Alton Simonds, Civil Action No. 00-C-1372 OHI
William F. Smith, Civil Action No. 00-C-1379 OHI

There being no objection, the Court **GRANTED** the Liggett Defendants' motion, and **ORDERED** counsel for the Liggett Defendants to file and serve a proposed order of dismissal with prejudice for the 9 above-listed civil actions.

4. Defendants' Liggett Group LLC, Liggett & Myers, Inc., and Brooke Ltd.'s Omnibus Motion to Dismiss 44 Civil Actions (Transaction ID 61865074)

The Liggett Defendants advised the Court their omnibus motion to dismiss applies to the following civil actions:

Robert Ankrom, Civil Action No. 00-C-937 OHI
Avin T. Badgett, Civil Action No. 00-C-392 OHI
Willard Baum, Civil Action No. 98-C-1775 KAN
Estate of Manuel F. Bolin, Civil Action No. 98-C-1777 KAN

Sarah Buckley, Civil Action No. 00-C-448 OHI
Buster Franklin Clevinger, Civil Action No. 00-C-476 OHI
John H. Collett, Civil Action No. 00-C-483 OHI
Donald L. Coulter, Civil Action No. 00-C-489 OHI
Bernice Douglas, Civil Action No. 00-C-1048 OHI
Bobby Ray George, Civil Action No. 00-C-551 OHI
Goldie B. Gibson, Civil Action No. 00-C-552 OHI
Harold Gray, Civil Action No. 00-C-559 OHI
Richard H. Jones, Civil Action No. 00-C-633 OHI
Richard E. Kennedy, Civil Action No. 00-C-643 OHI
Roy Mallory, Civil Action No. 00-C-1198 OHI
Ruth Mann, Civil Action No. 00-C-1201 OHI
Estate of Sanford Floyd Marlow, Civil Action No. 98-C-2381 KAN
Lawrence Mayeinscheine, Civil Action No. 00-C-691 OHI
Richard L. Mayo, Civil Action No. 00-C-696 OHI
Robert McClellan, Civil Action No. 00-C-1218 OHI
Sarah Oldfield, Civil Action No. 00-C-1288 OHI
Vernon L. Pauley, Civil Action No. 00-C-757 OHI
Estate of John Rayburn Pickett, Civil Action No. 97-C-21 MCD Pickett
Estate of Ralph Prochaska, Civil Action No. 01-C-481 OHI
David G. Shaver, Civil Action No. 00-C-805 OHI
John Snodgraft, Civil Action No. 00-C-827 OHI
Marie Stamper, Civil Action No. 00-C-1392 OHI
Goldie M. Tessner, Civil Action No. 00-C-858 OHI
Carey L. Thomas, Civil Action No. 00-C-861 OHI

Counsel for Plaintiffs advised the Court the civil action, *Donna Bryant as Personal Representative for the Estate of Madeline Carter*, Civil Action No. 98-C-2347 KAN, has already been dismissed.

A. Motion to dismiss claims disclosed on the December 2016 Liggett 5(b) List not properly disclosed on the original 5(b) Index

The Liggett Defendants withdrew this portion of the omnibus motion as moot in 18 civil actions after Plaintiffs provided portions of the original 5(b) index for those 18 Plaintiffs. The Liggett Defendants confirmed this portion of the omnibus motion applies to the following 2 civil actions:

Estate of Ralph Prochaska, Civil Action No. 01-C-481 OHI
Estate of John Rayburn Pickett, Jr., Civil Action No. 97-C-21 MCD Pickett

The Liggett Defendants contended that, pursuant to the Court’s Case Management Order, “[o]nly Liggett Plaintiffs who were properly disclosed in the 5b Index previously filed in compliance with the original Case Management Order, or any authorized/approved amendments thereto, will be included in the Liggett Phase I trial.” January 10, 2017 *Case Management Order/Trial Plan* (Transaction ID 60048276), p. 2, Paragraph 3.a. Because Plaintiffs *Prochaska* and *Pickett* were not properly disclosed on the original 5(b) index their claims against the Liggett Defendants should be dismissed.

Plaintiffs contended Plaintiff *Prochaska* was originally the client of another law firm, which would have made this Plaintiff’s original 5(b) filing. The *Prochaska* case was referred and transferred to Humphrey, Farrington & McClain in 2004 or 2005. Plaintiffs could not find the 5(b) information for Plaintiff *Prochaska*, but represented that at some point in time Plaintiff *Prochaska* was put on the Liggett list. Plaintiffs also contended in their response to the motion that the 5(b) materials for Plaintiff *Pickett*, were not included on the group filing of 5(b) information, but may have been filed separately. Plaintiffs requested the Court deny this portion of the Liggett Defendants’ omnibus motion, without prejudice, in order to give counsel time to review the court files to determine whether 5(b) information was filed for Plaintiffs *Prochaska* and *Pickett*.

The Court **ORDERED** counsel for Plaintiffs to conduct a review of the court files and produce 5(b) disclosures for Plaintiffs *Prochaska* and *Pickett* within 30 days. If Plaintiffs do not produce 5(b) disclosures for Plaintiffs *Prochaska* and *Pickett* within 30 days, the Liggett Defendants are **ORDERED** to file and serve proposed orders dismissing the claims of Plaintiffs *Prochaska* and *Pickett* for failure to provide a 5(b) disclosure.

B. Motion to Dismiss for Failure to Disclose Claims on the December 2016 Liggett 5(b) List

The Liggett Defendants advised the Court this portion of their omnibus motion applies to the following 3 civil actions:

Estate of Manuel F. Bolin, Civil Action No. 98-C-1777 KAN
Estate of John Rayburn Pickett, Jr., Civil Action No. 97-C-21 MCD Pickett
Estate of Sanford Floyd Marlow, Civil Action No. 98-C-2381 KAN

The Liggett Defendants acknowledged the Court had already addressed the claim of Plaintiff *Pickett* on the grounds of failure to provide a 5(b) disclosure, but asserted Plaintiffs' failure to list Plaintiff *Pickett's* claim on the December 2016 Liggett 5(b) List ordered by the Court was another ground for dismissal.

The Liggett Defendants acknowledged Plaintiffs *Bolin* and *Marlow* provided 5(b) disclosures, but contended they should be dismissed because their claims were not listed on the December 2016 Liggett 5(b) List ordered by the Court. The Liggett Defendants further contended Plaintiff *Bolin* should be dismissed because he did not identify a Liggett product on his original 5(b) disclosure.

Plaintiffs argued the Liggett Defendants failed to identify any prejudice to them of adding Plaintiffs *Pickett*, *Bolin* and *Marlow*. Plaintiffs contended they provided original 5(b) disclosures for Plaintiffs *Bolin* and *Marlow*, but Plaintiffs *Bolin* and *Marlow* were inadvertently left off of Plaintiffs' December 2016 Liggett 5(b) list.

The Court **DENIED** the Liggett Defendants' motion to dismiss Plaintiffs *Bolin* and *Marlow* on the grounds of failure to disclose their claims on the December 2016 Liggett 5(b) List, and advised the parties it would take up other bases for dismissal at the pertinent time. The Liggett Defendants' exceptions to the Court's ruling were noted.

C. Motion for Rule 25(a) Dismissal of Certain Claim for Failure to Substitute Proper Party.

The Liggett Defendants moved to dismiss the following 6 civil actions for failure to substitute the proper party within 90 days of the suggestion of death:

Robert Ankrom, Civil Action No. 00-C-937 OHI
Richard H. Jones, Civil Action No. 00-C-633 OHI
Richard L. Mayo, Civil Action No. 00-C-696 OHI
Robert McClellan, his wife, Civil Action No. 00-C-1218 OHI
Marie B. Stamper, Civil Action No. 00-C-1392 OHI
Carey L. Thomas, Civil Action No. 00-C-861 OHI

They contended there were two bases for dismissal of these cases: 1) in three of the cases motions to substitute parties were filed but no order of substitution was entered; and 2) in three of the cases parties were substituted, but the substituted party has since passed away, and a second motion for substitution has not been filed. In either situation there is not a proper plaintiff in these cases.

As set forth in Plaintiffs' response, motions to substitute were filed following the death of the Plaintiff in *Mayo*, *Stamper* and *Thomas*, although Plaintiffs could not find entered orders of substitution in those cases. As for Plaintiffs *Ankrom*, *Jones* and *McClellan*, the Plaintiff passed away while the case was pending, a motion to substitute was filed, then the administrator or personal representative later passed away, so a second motion to substitute needs to be filed.

The Court **DENIED** this portion of the Liggett Defendants' omnibus motion, noting Defendants objections and exceptions. The Court **ORDERED** Plaintiffs to file proposed orders of substitution in those cases where Plaintiffs could not find entered orders of substitution within 15 days. The Court further **ORDERED** Plaintiffs to find an appropriate personal representative in the cases where there is no personal representative, and to file a motion for substitution and proposed order within 30 days.

D. Motion to Dismiss for Failure to Comply with In Extremis Protocol in Paragraph 7 of the CMO

Counsel for the Liggett Defendants advised the Court this motion applies to 20 civil

actions:

Avin T. Badgett, Civil Action No. 00-C-392 OHI
Willard Baum, Civil Action No. 98-C-1775 KAN
Sarah Buckley, Civil Action No. 00-C-448 OHI
Buster Franklin Clevinger, Civil Action No. 00-C-476 OHI
John H. Collett, Civil Action No. 00-C-483 OHI
Donald L. Coulter, Civil Action No. 00-C-489 OHI
Bernice Douglas, Civil Action No. 00-C-1048 OHI
Bobby Ray George, Civil Action No. 00-C-551 OHI
Goldie B. Gibson, Civil Action No. 00-C-552 OHI
Harold Gray, Civil Action No. 00-C-559 OHI
Richard E. Kennedy, Civil Action No. 00-C-643 OHI
Roy Mallory, Civil Action No. 00-C-1198 OHI
Ruth Mann, Civil Action No. 00-C-1201 OHI
Lawrence Mayeinscheine, Civil Action No. 00-C-691 OHI
Sarah Oldfield, Civil Action No. 00-C-1288 OHI
Vernon L. Pauley, Civil Action No. 00-C-757 OHI
David G. Shaver, Civil Action No. 00-C-805 OHI
John Snodgraft, Civil Action No. 00-C-827 OHI
Marie Stamper, Civil Action No. 00-C-1392 OHI
Goldie M. Tessner, Civil Action No. 00-C-858 OHI

The Liggett Defendants contended these cases should be dismissed because Plaintiffs did not comply with Paragraph 7 of the Court's January 11, 2000 Case Management Order regarding plaintiff-specific discovery requirements for *in extremis* Plaintiffs.

Finding this is a fact-driven inquiry, the Court **ORDERED** Plaintiffs to file an affidavit, with supporting documentation as to the cause of death of each Plaintiff in the 20 identified civil actions within 30 days. Once Plaintiffs' affidavit is filed, the Liggett Defendants can amend their motion to dismiss if a Plaintiff's cause of death was, in fact, related to this litigation.

E. Motion to Dismiss Claims for Lack of Product Use

Counsel for the Liggett Defendants confirmed this portion of the omnibus motion applies

to the following 2 civil actions:

Willard Baum, Civil Action No. 98-C-1775 KAN
Estate of Manuel F. Bolin, Civil Action No. 98-C-1777 KAN

The Liggett Defendants contended Plaintiffs *Baum*, and *Bolin* changed their brand histories to include one or more Liggett brands 10 or more years after they had the chance to supplement their 5(b) information in 2006, and after their general liability claims against other cigarette manufacturing Defendants were unsuccessfully tried in the first Phase I trial. They further contended Plaintiffs *Baum* and *Bolin's* efforts to identify Liggett brands are not reasonable and should be struck or deemed inadmissible.

Counsel for Plaintiffs acknowledged Plaintiff *Baum* did not identify a Liggett product in his 5(b) disclosure but asserted a Liggett product was identified in Plaintiff *Baum's* 2016 disclosure. Counsel for Plaintiffs further acknowledged Plaintiff *Bolin* did not identify a Liggett product in his 5(b) disclosure or his 2016 disclosure. However, counsel represented Plaintiff's family contends Plaintiff *Bolin* used a Liggett product.

The Court **GRANTED** the Liggett Defendants' motion to dismiss Plaintiffs *Baum* and *Bolin's* cases for lack of product use. The Liggett Defendants are **ORDERED** to submit a proposed order dismissing these civil actions. The Court noted Plaintiffs' exceptions.

5. Defendant Liggett Group LLC's Motion for Discovery from Certain Plaintiffs (Transaction ID 61803127)

Defendant requested the Court take the motion up for hearing after 30 days has elapsed and the parties have determined who is still in the universe of plaintiffs. The Court deferred this motion.

6. Defendant Liggett Group LLC's Motion to Strike Plaintiffs' Second Amended Designation of Peter Shields, M.D. (Transaction ID 61803315)

Defendant contended Dr. Shields' original expert disclosure filed in December 2016 was

limited to compensation – a very discrete area relating to smoking and health. Dr. Shields was scheduled for deposition on March 8, 2018. On March 2, 2018, Defendants received an amended disclosure that significantly broadened the scope of Dr. Shields’ proposed testimony to include not only compensation, but also the information available regarding the hazardous nature of cigarettes, research done by Liggett on cigarette design, and the defective nature of cigarettes. Defendant asserted the amended disclosure for Dr. Shields does not comply with Rule 26(b)(4) of the West Virginia Rules of Civil Procedure, and allowing Plaintiffs to exceed the scope of the original disclosure is prejudicial to Liggett. Defendant further contended Plaintiffs’ production of more than 75,000 pages of documents without any index prior to Dr. Shields’ deposition, is not good faith compliance with the Court’s order requiring the parties to produce Dr. Shield’s reliance materials ten business days before his scheduled deposition.

Plaintiffs had no objection to limiting Dr. Shields’ reliance materials to what he actually read and relied upon in the areas about which he is offering expert testimony. Plaintiffs also had no objection to Defendants revising their expert disclosures, and offered to provide an index of Dr. Shields’ reliance materials.

The Court **ORDERED** Plaintiffs to amend the disclosure for Dr. Shields to comply with Rule 26(b)(4) of the West Virginia Rules of Civil Procedure within 30 days. Plaintiffs’ disclosure of reliance materials shall be limited to the materials Dr. Shields actually reviewed and relied upon in arriving at any of his conclusions in this case. The Court will permit Dr. Shields to give testimony as to his opinions pursuant to Plaintiffs’ designation.

Defendants shall have until July 1, 2018, to amend their expert witness disclosures. The deposition of Dr. Shields cannot be rescheduled until the Liggett Defendants have time to review the material relied upon by Dr. Shields.

It is so **ORDERED**.

ENTER: May 17, 2018.

/s/ Jack Alsop
Lead Presiding Judge
Tobacco Litigation