

No. 03-13-00753-CV

*In the Court of Appeals
Third District of Texas — Austin*

FILED IN
3rd COURT OF APPEALS
AUSTIN, TEXAS
3/25/2014 11:21:37 AM
JEFFREY D. KYLE
Clerk

**SUSAN COMBS, IN HER OFFICIAL CAPACITY AS TEXAS
COMPTROLLER, AND GREG ABBOTT, IN HIS OFFICIAL CAPACITY AS
TEXAS ATTORNEY GENERAL**

Appellants

v.

**TEXAS SMALL TOBACCO COALITION AND
GLOBAL TOBACCO, INC.**

Appellees

APPELLEES' MOTION FOR SANCTIONS

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Rather than address the serious constitutional issues involved in this tax challenge, the State instead dedicates several pages of its brief making unsupported, intentionally inflammatory, and completely false allegations against the members of the Texas Small Tobacco Coalition. The State also intentionally recites other information that it knows is not in the record. The State's recitation of these "facts" unjustly defames the Coalition members and will continue to do so if maintained as part of the Court's record. And these false allegations interject "facts" that even if true would be wholly irrelevant to the issues in this appeal.

Appellees Texas Small Tobacco Coalition and Global Tobacco, Inc. (collectively, the "Coalition") therefore move for this Court to use its inherent power to impose sanctions and request that this Court strike those portions of the State's brief that include unsupported accusations that members of the Coalition are violating federal law (pp. 2, 5-7)—accusations that are not only false, irrelevant, and not part of the trial record, but also unjustly defame the Coalition's members. The Coalition further requests that, as a sanction, the Court require the State to pay the Coalition's attorney's fees and costs incurred in this appeal. TEX. R. APP. P. 43.4 (authorizing an appellate court to "tax costs . . . for good cause").

ARGUMENT

The State repeatedly alleges that members of the Coalition (including Sandia Tobacco, Tantus Tobacco, and National Tobacco) sell flavored cigarettes and engage in other marketing practices designed to appeal to children.¹ The State does not and cannot cite any support—from within the record or any external source—because its accusations are patently false. The State claims that the Coalition’s members are able to market flavored cigarettes to children because they are not bound by the private settlement agreements entered into by Big Tobacco.² But the State knows that the settlement agreements do not prohibit Big Tobacco from selling flavored cigarettes. Instead, federal law prohibits *all* cigarette manufacturers from selling flavored cigarettes, as well as selling packs with more than 20 cigarettes, or otherwise marketing tobacco products towards children. *See* Family Smoking Prevention and Tobacco Control Act, P. Law No. 111-31 (2009); 21 CFR Part 1140.³ And as to any other marketing restrictions that are actually in the settlement agreements, those also have been codified in

¹ Appellants’ Brief, pp. 2, 5-7.

² Appellants’ Brief, pp. 2, 6.

³ The provision of the federal law banning flavored cigarettes is specifically codified at 21 U.S.C. § 387g. In response to mandates in the federal statute, the Food and Drug Administration has adopted a rule banning the sale of cigarette package that contains more than twenty cigarettes. 21 CFR § 1140.16(b).

federal law: the Coalition’s members, like Big Tobacco, must—and do—comply with those restrictions. *See id.*

This Court should be especially concerned that here on appeal, the State’s “evidence” suggests that the Coalition members are violating federal law, yet the State is insulated from any burden of proof. The State’s motivation in making these misrepresentations is suspect. This is an appeal of a summary judgment holding a tax unconstitutional on its face. The tax is unconstitutional because it targets only some cigarette manufacturers and not others, though all are identically situated. The tax is not uniform or equal. Having never been raised in the trial court, the State’s new false accusations are not relevant to the trial court’s judgment that the tax is not equal and uniform and should not be allowed to stand as part of a publicly filed appellate brief aimed at inflaming this Court and disparaging the Coalition’s members.

In making these false and unsupported statements to the Court, the State’s counsel has violated the Texas Disciplinary Rules of Professional Conduct and the Texas Rules of Appellate Procedure. The Disciplinary Rules forbid a lawyer from making a false statement of material fact to a tribunal. *See* TEX. DISCIPLINARY R. PROF’L CONDUCT R. 3.03(a)(1); *U.S. Gov’t v. Marks*,

949 S.W.2d 320, 327 (Tex. 1997). The Disciplinary Rules also obligate lawyers “to maintain the highest standard of ethical conduct.” TEX. DISCIPLINARY R. PROF’L CONDUCT preamble, para. 1. “The duty of honesty and candor a lawyer owes to the appellate court includes fairly portraying the record on appeal. Misrepresenting the facts in the record not only violates that duty but subjects offenders to sanctions.” *Schlafly v. Schlafly*, 33 S.W.3d 863, 873 (Tex. App.—Houston [14th Dist.] 2000, pet. denied); *see also Merrell Dow Pharmaceuticals, Inc. v. Havner*, 953 S.W.2d 706, 732 (Tex. 1997) (order on reh’g) (“Courts possess inherent power to discipline an attorney.”); *Eichelberger v. Eichelberger*, 582 S.W.2d 395, 398 (Tex. 1979) (observing that courts have the inherent power to preserve their integrity). An attorney’s “[f]ailure to observe these very basic standards of appellate practice erodes the ethical standards on which the legal profession and appellate process are based.” *Id.* at 874; *see also In re Guevara*, 41 S.W.3d 169, 173 (Tex. App.—San Antonio 2001, orig. proceeding). Further, it is “improper for parties to rely on matters outside the record in making arguments to the court.” *Schlafly*, 33 S.W.3d at 873; *see* TEX. R. APP. P. 38.1(g).

This Court has discretion to impose sanctions on the State for misrepresenting the facts and the record. *Schlafly*, 33 S.W.3d at 873. As well,

the sanctions imposed should bear a relationship to the offensive conduct. *See In re Ford Motor Co.*, 988 S.W.2d 714, 718 (Tex. 1998). Here, the State's gross misrepresentations throughout the initial section of its brief are inexcusable. It alleges that the Coalition's members are violating federal law in order to injure children, and its statements are available to all members of the public on this Court's website. The State's blatantly false and inflammatory misrepresentations are such that, if made outside of a judicial proceeding, would constitute the tort of defamation because they are designed to injure the Coalition members' reputation and thus expose them to contempt or financial injury. *See* TEX. CIV. PRAC. & REM. CODE § 73.001. And the fact that these false and unsupported accusations are coming from the Office of the Solicitor General of the State of Texas is particularly damaging.

The State's false statements are as egregious—if not more so—than statements in other cases in which a court has sanctioned a party for bad faith misstatements of the record.⁴ Thus, this Court should impose significant sanctions on the State because of the degree of the offending conduct and the

⁴ *See, e.g., In re ADT Security Servs.*, No. 04-08-00799-CV, 2009 WL 260577, at *3-4 (Tex. App.—San Antonio 2009, orig. proceeding) (sanctioning party that declined to include relevant trial testimony in the record by imposing payment of attorney's fees); *In re Altschul*, 146 S.W.3d 754, 755 (Tex. App.—Beaumont 2004, orig. proceeding) (imposing sanctions on party that stated it was prepared by an attorney when it was not); *In re Hasbro, Inc.*, 97 S.W.3d 894, 898 (Tex. App.—Dallas 2003, orig. proceeding) (imposing sanctions for failure to file a relevant transcript).

potentially serious repercussions to the Coalition's businesses and reputations because of the State's defamatory statements.

CONCLUSION AND PRAYER

Appellees Texas Small Tobacco Coalition and Global Tobacco, Inc. pray that the Court sanction the State by striking all portions of the State's brief that accuse the members of the Coalition of engaging in marketing practices that they do not, and cannot, engage in (Appellants' Brief, pp. 2, 5-7), and by requiring the State to pay the Coalition's attorney's fees and costs incurred in this appeal. Appellees further pray for any relief to which they may be entitled in law or equity.

Respectfully submitted,

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CERTIFICATE OF CONFERENCE

As evidenced by my signature below, counsel for Appellees has conferred with counsel for Appellants. Appellants have indicated that they are opposed to this Motion.

/s/ Craig T. Enoch
Craig T. Enoch

CERTIFICATE OF SERVICE

The undersigned certifies that this Motion has been served on the following counsel of record via electronic filing on March 25, 2014:

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