IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

September 2007 Term

FILED

November 15, 2007

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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

No. 33380

STATE OF WEST VIRGINIA EX REL. CHEMTALL INCORPORATED, CIBA SPECIALTY CHEMICALS CORPORATION, CYTEC INDUSTRIES, INC., G.E. BETZ, INC., HYCHEM, INC., ONDEO NALCO COMPANY, STOCKHAUSEN, INC., ZINKAN ENTERPRISES, INC., JOHN DOE MANUFACTURING AND/OR DISTRIBUTING COMPANY, JOHN CESLOVNIK, ROBERT MCKINLEY, EULIS DANIELS, JOHN DOE COMPANY REPRESENTATIVES FOR CHEMTALL INCORPORATED, CIBA SPECIALTY CHEMICALS CORPORATION, CYTEC INDUSTRIES, INC., G. E. BETZ, INC., HYCHEM, INC., ONDEO NALCO COMPANY, STOCKHAUSEN, INC., ZINKAN ENTERPRISES, INC.,
Petitioners

v.

HONORABLE JOHN T. MADDEN, JUDGE OF THE CIRCUIT COURT OF MARSHALL COUNTY; AND ALL PLAINTIFFS IN STERN, ET AL. V. CHEMTALL, INC., ET AL., MARSHALL COUNTY CIVIL ACTION NO. 03-C-49M,
Respondents

Petition for a Writ of Prohibition

WRIT DENIED

Submitted: September 12, 2007
Filed: November 15, 2007

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The Opinion of the Court was delivered PER CURIAM.
CHIEF JUSTICE DAVIS, deeming herself disqualified, did not participate in the decision in this case.
JUDGE PRATT, sitting by special assignment.
JUSTICE BENJAMIN concurs in part, dissents in part, and reserves the right to file a separate opinion.

SYLLABUS

"In determining whether to entertain and issue the writ of prohibition for cases not involving an absence of jurisdiction but only where it is claimed that the lower tribunal exceeded its legitimate powers, this Court will examine five factors: (1) whether the party seeking the writ has no other adequate means, such as direct appeal, to obtain the desired relief; (2) whether the petitioner will be damaged or prejudiced in a way that is not correctable on appeal; (3) whether the lower tribunal's order is clearly erroneous as a matter of law; (4) whether the lower tribunal's order is an oft repeated error or manifests persistent disregard for either procedural or substantive law; and (5) whether the lower tribunal's order raises new and important problems or issues of law of first impression. These factors are general guidelines that serve as a useful starting point for determining whether a discretionary writ of prohibition should issue. Although all five factors need not be satisfied, it is clear that the third factor, the existence of clear error as a matter of law, should be given substantial weight." Syllabus Point 4, *State ex rel. Hoover v. Berger*, 199 W.Va. 12, 483 S.E.2d 12 (1996).

Per Curiam:

The petitioners and defendants below, suppliers and/or manufacturers of a chemical known as polyacrylamide, seek extraordinary relief to prevent the enforcement of two orders of the Circuit Court of Marshall County in an action brought by the respondents and plaintiffs below, current and former coal preparation plant workers, in which they seek medical monitoring for diseases they allegedly may develop in the future due to their exposure to polyacrylamide. For the reasons that follow, we deny the requested relief.[1]

I.

FACTS

The respondents and plaintiffs below are coal preparation plant workers who allegedly have been exposed to polyacrylamide which is an industrial water cleaner. The petitioners and defendants below are several corporations who manufactured, distributed, and/or sold polyacrylamide to coal preparation plants.[2] In their complaint, the respondents

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[1]We wish to acknowledge the contribution of *amici curiae* in support of the petitioners including The West Virginia Chamber of Commerce, The Product Liability Advisory Council, Inc., The West Virginia Roundtable, West Virginia Manufacturers Association, Chamber of Commerce of the United States of America, National Association of Manufacturers, and American Chemistry Council.

[2]The respondents originally were granted class certification in a seven-state class (continued...)

allege a cause of action for strict liability and seek medical monitoring and punitive damages.[3]

On January 9, 2007, the Circuit Court of Marshall County ordered that Franklin Stump, Danny Gunnoe, and Teddy Joe Hoosier be allowed to intervene in the underlying action. We will hereafter refer to this order as the "Intervention Order." Also, by order dated January 9, 2007, the circuit court adopted a trial plan in which the issues of liability and punitive damages will be bifurcated from medical monitoring and class certification. Specifically, the circuit court ordered that

> [t]he first phase of the trial will involve liability and whether the Defendants' actions and/or inactions justify punitive damages, and if so, what multiple of general damages will be assessed as a punitive damage multiplier as to each Defendant. . . . Should Plaintiffs prevail on the issue of liability, the parties will

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[2](...continued)
action including plaintiffs in West Virginia, Illinois, Indiana, Ohio, Pennsylvania, Tennessee and Virginia. In *State ex rel. Chemtall, Inc. v. Madden*, 216 W.Va. 443, 607 S.E.2d 772 (2004), this Court vacated the seven-state class action. However, we authorized the circuit court to proceed to consider certification of appropriate classes and subclasses, and we further declined to order that the action proceed only as to the West Virginia plaintiffs. Thereafter, the plaintiffs withdrew all claims arising out of exposure in all of the states except West Virginia and Pennsylvania.

Subsequently, in *Stern v. Chemtall, Inc.*, 217 W.Va. 329, 617 S.E.2d 876 (2005), this Court reversed the circuit court's denial of a motion to intervene in the underlying action and remanded the matter to the circuit court for entry of an order consistent with our opinion. We discuss our holding in *Stern* in greater detail in the body of this opinion.

[3]According to the respondents, although polyacrylamide is nontoxic, it contains acrylamide monomer, a toxin which has been linked to neurologic and reproductive injuries and diseases including certain types of cancer.

> proceed in the second phase to try the issues of medical causation, medical monitoring viability, and damages.

Finally, even though the circuit court did not certify a class consisting of Pennsylvania and West Virginia plaintiffs, it concluded, after a lengthy analysis, that the relevant laws of West Virginia and Pennsylvania are sufficiently compatible so that the claims of plaintiffs from both states can fairly be adjudicated in West Virginia. We will hereafter refer to this order as the "Trial Plan Order."

The petitioners subsequently filed the instant petition for a writ of prohibition and/or mandamus with this Court in which they ask us to vacate the Intervention Order to the extent that it permits Teddy Joe Hoosier to intervene in the underlying action. The petitioners further request that this Court vacate the Trial Plan Order as it pertains to the availability and recovery of punitive damages and the compatibility of West Virginia and Pennsylvania law. On April 19, 2007, this Court granted a rule to show cause why the requested relief should not be granted. We now deny the relief sought.

II.

STANDARD OF REVIEW

The petition herein is styled as one of "Prohibition and/or Mandamus." Because the petitioners seek to correct a pre-trial order, we will consider the relief sought to

be a writ of prohibition. In *State ex rel. Crafton v. Burnside,* 207 W.Va. 74, 78, 528 S.E.2d 768, 772 (2000), we indicated that "[t]his Court is empowered to exercise its original jurisdiction to review the legal propriety of a circuit court's pre-trial orders. This Court has specifically utilized the remedy of prohibition to correct a court's pre-trial order so that a unitary trial could occur." (Citation omitted.).

Concerning the standard for granting a writ, we have held:

> In determining whether to entertain and issue the writ of prohibition for cases not involving an absence of jurisdiction but only where it is claimed that the lower tribunal exceeded its legitimate powers, this Court will examine five factors: (1) whether the party seeking the writ has no other adequate means, such as direct appeal, to obtain the desired relief; (2) whether the petitioner will be damaged or prejudiced in a way that is not correctable on appeal; (3) whether the lower tribunal's order is clearly erroneous as a matter of law; (4) whether the lower tribunal's order is an oft repeated error or manifests persistent disregard for either procedural or substantive law; and (5) whether the lower tribunal's order raises new and important problems or issues of law of first impression. These factors are general guidelines that serve as a useful starting point for determining whether a discretionary writ of prohibition should issue. Although all five factors need not be satisfied, it is clear that the third factor, the existence of clear error as a matter of law, should be given substantial weight.

Syllabus Point 4, *State ex rel. Hoover v. Berger,* 199 W.Va. 12, 483 S.E.2d 12 (1996). With these principles to guide us, we proceed to address the issues raised by the petitioners.

III.

DISCUSSION

1. Intervention Order

In its January 9, 2007, Intervention Order, the circuit court, relying on this Court's decision in *Stern v. Chemtall, Inc.*, 217 W.Va. 329, 617 S.E.2d 876 (2005), granted intervener status to Franklin Stump, Danny Gunnoe, and Teddy Joe Hoosier in the underlying action. The petitioners challenge this order to the extent that it permits the intervention of Teddy Joe Hoosier.

In *Stern*, Appellants Stump, Gunnoe, and Hoosier, along with others, appealed the Circuit Court of Marshall County's January 15, 2004, order that denied their motion to intervene in the underlying action. Two of the appellants, Stump and Gunnoe, were coal preparation workers and plaintiffs in a civil action pending at that time in the Circuit Court of Boone County, styled *Denver and Debra Pettry, et al. v. Peabody Holding Co., et al.*, Case No. 02-C-58, wherein they sought medical monitoring relief against some of the same defendants involved in the action in the Circuit Court of Marshall County. This Court, in *Stern*, referred to the litigation in the Circuit Court of Boone County as "the *Pettry* litigation" and the action in the Circuit Court of Marshall County as "the *Stern* litigation." Hoosier was not a party to the *Pettry* litigation or any litigation at that time. Rather, he sought to

intervene on behalf of water treatment workers with similar medical monitoring claims as coal preparation plant workers based on exposure to the same chemical at issue in the Marshall County action. In *Stern*, this Court reversed the denial of the motion to intervene and remanded the matter to the Circuit Court of Marshall County for entry of an order consistent with our opinion. We further ordered that the *Pettry* litigation be transferred from the Circuit Court of Boone County to the Circuit Court of Marshall County.

The petitioners now claim that the circuit court erred on remand by permitting Hoosier, the water treatment worker, to intervene in the underlying action. The petitioners assert that *Stern*, by its clear language, mandates only that "the *Pettry* litigants," *i.e.*, Stump and Gunnoe, be permitted to intervene. In addition, the petitioners aver that the circuit court exceeded its jurisdiction in permitting the intervention of water treatment workers in an action originally brought by coal preparation plant workers. According to the petitioners, the inclusion of water treatment workers will require separate evidence and analyses, extensive new discovery, and the retention of new experts.

We reject the petitioners' arguments. A careful reading of *Stern* indicates this Court's intent to permit Hoosier to intervene in the underlying action. Although it is true that we repeatedly referred to the interveners in *Stern* as "the *Pettry* litigants," we did not thereby exclude Hoosier as an intervener. To the contrary, Hoosier is clearly identified as

one of the appellants who challenged the circuit court's order denying the motion to intervene. Moreover, this Court reversed the circuit court's order absent any indication whatsoever that our reversal did not apply to Hoosier. In addition, we believe that there are facts common to both water treatment and coal preparation plant workers, such as exposure to the same chemical and the question of risk of contracting the same diseases, which make intervention proper.[4] Finally, we note that the circuit court has not yet indicated how it intends to manage any differences with regard to these two groups of plaintiffs. Thus, a ruling by this Court at the present time would be premature. Accordingly, for these reasons, we deny the writ sought by the petitioners to vacate the circuit court's January 9, 2007, Intervention Order as it pertains to the intervention of Teddy Joe Hoosier.

2. Trial Plan Order

A. Availability of Punitive Damages

Next, the petitioners challenge the circuit court's ruling regarding both the availability of punitive damages in cases in which only medical monitoring relief is sought and the procedure governing the determination of punitive damages. First, the petitioners assert that the procedure governing the determination of punitive damages is unconstitutional

[4]According to West Virginia Rule of Civil Procedure 24(b), concerning permissive intervention, "[u]pon timely application anyone may be permitted to intervene in an action . . . when an applicant's claim or defense and the main action have a question of law or fact in common."

under the United States Supreme Court's recent decision in *Philip Morris USA v. Williams,* ___ U.S. ___, 127 S.Ct. 1057, 166 L.Ed.2d 940 (2007).

The issue in *Philip Morris* was whether the Federal Constitution's Due Process Clause permits a jury to base a punitive damages award in part upon its desire to punish the defendant for harming persons who are not before the court. The Supreme Court concluded that such an award would amount to the taking of property from the defendant without due process. The principle announced by the Court in *Philip Morris* is that "the Constitution's Due Process Clause forbids a State to use a punitive damages award to punish a defendant for injury that it inflicts upon nonparties or those whom they directly represent, *i.e.*, injury that it inflicts upon those who are, essentially, strangers to the litigation." *Philip Morris,* ___ U.S. ___, ___, 127 S.Ct. 1057, 1063. A basis for this rule is that "the Due Process Clause prohibits a State from punishing an individual without first providing that individual with an opportunity to present every available defense." *Id.* (Internal quotation marks and citation omitted.). In other words,

> . . . a defendant threatened with punishment for injuring a nonparty victim has no opportunity to defend against the charge, by showing, for example in a case such as this, that the other victim was not entitled to damages because he or she knew that smoking was dangerous or did not rely upon the defendant's statements to the contrary.

Id. According to the petitioners, the circuit court's procedure for awarding punitive damages violates the petitioners' due process rights as set forth in *Philip Morris* because it requires

a jury to determine punitive damages without taking into account a plaintiff's individualized harm and prior to a finding of actual liability against any defendant.

We find no merit to the petitioners' contention. Plainly, the circuit court's trial plan, on its face, is not a clear error of law because it does not guarantee a result at odds with *Philip Morris.* Significantly, there has not yet been a trial in this case. No evidence has been adduced, none of the petitioners have been found liable for any tortious conduct, and punitive damages have not been assessed. Therefore, a decision on the constitutionality of punitive damages at this point would amount to nothing more than an exercise in speculation. Therefore, we believe the question of the constitutionality of punitive damages is best decided in light of a verdict based on a full development of the evidence at trial.

For this same reason, we also decline, at this early pre-trial stage, to address the petitioners' claim that punitive damages are not available in cases in which only medical monitoring damages are sought. Again, we are convinced that appellate review of this issue is better left to the review of a verdict after complete development of all the facts and testimony and after a trial of all the issues.[5] Accordingly, we deny the petitioners' request

[5]At least one court has recognized that "it is not uncommon for plaintiffs to join claims for punitive damages with claims for medical monitoring." *Carlough v. Amchem Products, Inc.*, 834 F.Supp. 1437, 1460 (E.D.Pa. 1993), *citing Day v. NLO, Inc.*, 814 F.Supp. 646 (S.D.Ohio 1993); *Cook v. Rockwell Int'l Corp.*, 755 F.Supp. 1468 (D.Colo. 1991); *Catasauqua Area School Dist. v. Raymark Indus., Inc.*, 662 F.Supp. 64 (E.D.Pa. 1987); (continued...)

to vacate the circuit court's January 9, 2007, Trial Plan Order as it pertains to punitive damages.

B. Compatibility of West Virginia and Pennsylvania Law

Finally, the petitioners assert that the circuit court erred in formulating a trial plan that fails to address the material differences in West Virginia and Pennsylvania law. We disagree. Generally, trial courts have broad discretion in matters of trial management and procedure. *See* Syllabus Point 2, *B.F. Specialty Co. v. Sledd,* 197 W.Va. 463, 475 S.E.2d 555 (1996) ("Trial Courts have the inherent power to manage their judicial affairs that arise during proceedings in their courts, which includes the right to manage their trial docket."). We believe that the circuit court below is fully capable of formulating procedures that effectively address any differences in West Virginia and Pennsylvania law.[6] Therefore, we deny the petitioners' request to vacate the circuit court's ruling that plaintiffs in both West Virginia and Pennsylvania can adjudicate their claims in a West Virginia court.

Prior to concluding, we feel compelled to emphasize and strongly note that the

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[5](...continued)
Sterling v. Velsicol Chem. Corp., 855 F.2d 1188 (6th Cir. 1988).

[6]In its Trial Plan Order, the circuit court suggested the application of Pennsylvania laws to the claims of Pennsylvania plaintiffs and West Virginia laws to the claims of West Virginia plaintiffs.

underlying action was originally filed in March 2003, and has not yet gone to trial. Further, the instant case is the third time that the parties below have sought the intervention of this Court in pre-trial matters.[7] We hope the litigants understand and appreciate the difficulty this Court faces in trying to decide so many issues pre-trial, in the limited context of extraordinary remedies, and in the absence of a meaningful, fully-developed factual record. Accordingly, we trust the lawyers and parties will now focus vigorously on letting these cases be tried by a trial court. Having disposed of the issues raised herein, we are confident that the parties can now proceed to trial without further delay and without the necessity of additional guidance from this Court. Finally, we reiterate our statement in *Stern* that "we believe that the circuit court is in a better position [than this Court] to manage this litigation and to protect the interests of [the parties]. The circuit judge should manage the cases and the issues herein as he deems appropriate." *Stern*, 217 W.Va. at 338, 617 S.E.2d at 885.

IV.

CONCLUSION

Having found no clear error as a matter of law in the circuit court's Intervention Order and Trial Plan Order, we deny the writ of prohibition sought by the petitioners.

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[7]*See* n. 2, *supra.*

Writ Denied.