No. 33380 - *State of West Virginia ex rel. Chemtall Incorporated, et al. v. Honorable John T. Madden*

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RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

Benjamin, Justice, concurring and dissenting:

For the reasons discussed below, I concur with the majority as to its holding regarding the circuit court's January 9, 2007, Intervention Order, and dissent as to its holding pertaining to the circuit court's January 9, 2007, Trial Plan Order.

The majority reached the correct decision in denying the writ sought by petitioners to vacate the circuit court's January 9, 2007, Intervention Order as it pertains to Teddy Joe Hoosier. While I am not entirely convinced, as is the majority, that the facts and legal issues will indeed prove to be common to both water treatment and coal preparation plant workers, the fact remains that the circuit court has not yet indicated how it intends to manage any differences with regard to these two groups of plaintiffs, and, to date, no discovery regarding water treatment workers has been conducted. Before this Court's intervention becomes necessary, further factual development on this issue is needed to affirmatively ascertain whether the petitioners will be prejudiced in a way that is not correctable on appeal. Accordingly, because it is premature at this juncture to grant a writ regarding this issue, I concur with the majority's decision to deny relief at the present time.

I respectfully dissent from the majority's opinion as to petitioner's challenge

of the circuit court's Trial Plan Order and its rulings regarding the availability of punitive damages in medical monitoring cases, the procedure governing the determination of punitive damages, and the compatibility of West Virginia and Pennsylvania law. The petitioners present important issues of law that are matters of first impression before this Court and the Trial Plan Order facially serves to prejudice the petitioners in a way that is not correctable on appeal. Delaying a consideration of the matters raised herein until an eventual appeal poses a distinct potential for prejudice to the due process rights of the petitioners.[1] Thus, I believe it is incumbent upon this Court to now entertain and issue the writ of prohibition regarding these matters.

1) The Circuit Court Committed Clear Error Because The Trial Plan Order, As It Pertains to Punitive Damages, Violates the Due Process Clause.

The Trial Plan Order, as it pertains to punitive damages, denies the defendants' due process rights for three pivotal reasons. First, because a class has not yet been certified, it is unconstitutional to require a procedure for determination of punitive damages and a punitive damages multiplier in a phase one trial that does not take into account only the harm to individual plaintiffs and does not determine liability as to any defendant. Second, I

[1]Our inaction constrains the effective choices realistically available to the petitioners to such a degree as to implicate grave due process considerations. By failing to confront the issues raised herein, we are acquiescing to a system whereby case management machinations and procedural chicanery rather than substantive law and facts appear to determine the outcome of the litigation. The right to defend yields to the need to settle.

seriously question the constitutionality of permitting a punitive damages claim to proceed in a medical-monitoring case, where the plaintiffs merely seek equitable, not compensable, relief. Finally, the appropriateness of punitive damages cannot, and should not, be determined prior to a finding of underlying liability.

A) Due process requires that a jury determine that punitive damages are based on a plaintiff's individualized harm.

Punitive damages are a deprivation of property requiring safeguards to ensure that any such award is not arbitrary and fully comports with due process. *Philip Morris v. Williams,* ____ U.S. _____, 127 S.Ct. 1057, 1061, 166 L.Ed.2d 940 (2007). This requirement applies both to the procedures applicable to the jury's decision to award punitive damages and the calculation of the amount. 127 S.Ct. at 1061. By mandating that punitive damages be addressed in the first trial phase, before a class has been certified, the circuit court's Trial Plan Order fails to ensure that any punitive damages award is reasonably related to any actual harm suffered by any plaintiff. The petitioners are essentially left with no way to address individualized claims of particular plaintiffs, and demonstrate how their particularized exposures, if any, caused no increased risk of contracting a particular disease. Unquestionably, this procedure does not comport with the holdings of the Supreme Court in *Philip Morris.*

In *Williams,* the Supreme Court found that the trial court violated defendant's

due process rights when it failed to ensure that the jury did not base its punitive damages award "in part upon its desire to punish the defendant for harming persons who are not before the court." *Id*. at 1060. The Court ruled that a punitive damages award must rely upon the defendant's conduct toward the plaintiff. *Id*. at 1063. Otherwise, a defendant has no adequate notice of the magnitude of the penalty that might be assessed against it; no ability to raise its defenses against the claim of persons not before the court; and no opportunity to contest liability as to such individuals. *Id*. Therein, the Supreme Court also stated:

> [T]o permit punishment for injuring a nonparty victim would add a near standardless dimension to the punitive damages equation. How many such victims are there? How seriously were they injured? Under what circumstances did injury occur? The trial will not likely answer such questions as to nonparty victims. The jury will be left to speculate. And the fundamental due process concerns to which our punitive damages cases refer - risks of arbitrariness, uncertainty and lack of notice - will be magnified. . .
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> [W]e can find no authority supporting the use of punitive damages awards for the purpose of punishing a defendant for harming others. We have said that it may be appropriate to consider the reasonableness of a punitive damages award in light of the potential harm the defendant's conduct could have caused. But we have made clear that the potential harm at issue was harm potentially caused the plaintiff.

Id. (internal citations omitted).

The Supreme Court warned that procedural safeguards must be employed to ensure that juries do not impose awards that run afoul of the Due Process Clause:

> [G]iven the risks of arbitrariness, the concern for adequate notice, and the risk that punitive damages awards can, in practice, impose one State's (or one jury's) policies . . . upon other States - all of which accompany awards that, today, may be many times the size of such awards in the 18th and 19th centuries . . . - it is particularly important that States avoid procedure that unnecessarily deprives juries of proper legal guidance.

Id. at 1064 (internal citation omitted).

None of our prior decisions concerning mass tort trial plans have contemplated the scenario where punitive damages are permitted to be assessed before a class has been certified in an action seeking only medical-monitoring damages. For example, in *In re West Virginia Rezulin Ligitation*, 214 W. Va. 52, 585 S.E.2d 52 (2003), an action seeking both a monetary award for medical monitoring costs and compensatory damages, this Court discussed only the appropriateness of class treatment, and did not touch at all upon the issue of whether or how punitive damages would be available. Additionally, the medical monitoring cases in *In re Tobacco Litigation*, 215 W. Va. 476, 600 S.E.2d 188 (2004), involved a decision stemming from a defense verdict at trial, where personal injury claims were asserted by individuals who were required to prove specific causation, actual damages, and entitlement to punitive damages. A punitive damages award was not at issue in that case either. Thus, as I see it, there are no prior decisions of this Court that directly govern, in their entirety, the issues of first impression presented by this action.

The Trial Plan Order at issue here does not contain the necessary procedural safeguards to ensure that due process is afforded. By trying punitive damages during the first phase of trial, the petitioners are prevented from presenting every available defense, and from confronting and cross-examining adverse witnesses. As the petitioners correctly point out, the universe of plaintiffs will not even be defined until after a trial on the merits, and thus, the petitioners will have no assurance as to whether additional individuals will be bound by the judgment; who those individuals might be through class descriptions; and how the time frames might be defined for those plaintiffs. Indeed, the applicable time frame is directly relevant to the issue of what conduct of any given defendant a jury is permitted to consider in connection with a punitive damages award. Behavior that a jury could conceivably find culpable that occurred in 1969 versus 1999, will not apply to all defendants, or to all named plaintiffs, or to all potential future class-members. Accordingly, I believe it is constitutionally inappropriate to delay class certification proceedings when the plaintiffs seek to obtain a punitive damages judgment on a class-wide basis.

B) The circuit court's order is unconstitutional because it requires a determination of punitive damages prior to any finding of actual liability against any defendant.

In its order, the circuit court bifurcated "liability and punitive damages" from "medical monitoring and class certification." Phase One therefore excludes key components of liability, such as actual causation and all factors of *Bower v. Westinghouse Electric Corp.,*

206 W. Va. 133, 139, 522 S.E.2d 424 (1999), necessary to determine the appropriateness of medical monitoring, and mandates a determination of punitive damages ahead of any liability finding. I believe this procedure is constitutionally flawed, particularly in light of the United States Supreme Court's recent decision in *Williams.* Punitive damages must "bear a reasonable relationship to the harm that is likely to occur from the defendant's conduct as well as to the harm that actually has occurred," and can be awarded only if a defendant is liable to a plaintiff. Syl. Pts. 1 and 3, in part, *Garnes v. Fleming Landfill, Inc.* , 186 W. Va. 656, 413 S.E.2d 897 (1991). As stated above, I believe that the instant litigation is an entirely different case from other medical monitoring cases previously considered by this Court. Because this case is the first class-action that seeks *only* medical-monitoring damages, and not compensatory damages, it presents issues of first impression never squarely addressed by this court. Accordingly, I am not convinced that it is appropriate, as it was in *In re Tobacco Litigiation* to permit an assessment of punitive damages prior to making a finding of liability in the instant action.

C) Punitive damages are not appropriate in an equitable medical monitoring class action.

I also believe that the circuit court has exceeded its authority by permitting the respondents to proceed with a punitive damages claim in this matter. Our Court has defined the "injury" claimed by medical monitoring plaintiffs as a "significantly increased *risk* of contracting a particular disease." *See State ex rel. Chemtall v. Madden*, 216 W. Va. 443, 455,

607 S.E.2d 772, 784 (2004) (emphasis added). A plaintiff is not required to show that a particular disease is certain or even likely to occur as a result of exposure. "All that must be demonstrated is that the plaintiff has a significantly increased risk of contracting a particular disease relative to what would be the case in the absence of exposure, and '[n]o particular level of quantification is necessary to satisfy this requirement.'" *Bower*, 206 W. Va. at 142, 522 S.E.2d at 433. Our Court has long recognized that a plaintiff may not recover punitive damages in the absence of actual harm and recovery of compensatory damages. *See Garnes*, 186 W. Va. at 667 & Syl. Pt. 1. Because the respondents have not asserted personal injury claims, as they have not suffered any actual, present physical injuries from their alleged exposure to petitioners' products, punitive damages simply should not be available in this case.

Furthermore, the Due Process Clause requires a jury to measure the entitlement to punitive damages by the amount of harm suffered by the respondents, and prohibits "grossly excessive or arbitrary punishments." *State Farm Mut. Auto Ins. Co. v. Campbell*, 538 U.S. 408, 416, 123 S.Ct. 1513, 155 L.Ed.2d 585 (2003). A proper measure of punitive damages begins with a determination of the proportionality between compensatory damages and punitive damages. *Id.*, 538 U.S. at 418. Any award of punitive damages in this class action will be completely arbitrary because there are no actual compensatory damages on which to base a multiplier. This Court has never before permitted a phase one trial of partial liability plus punitive damages entitlement and multiplier to occur in an uncertified, medical-

monitoring class action in which no personal injury claims have ever been brought. To permit punitive damages in a case of this nature is to create a landslide on the existing slippery slope of our traditional injury-based tort law.

2) The Circuit Court Committed Clear Error Because the Trial Plan Order Fails to Address Material Differences Between West Virginia and Pennsylvania Law.

Finally, it is my opinion that the material differences between our law and Pennsylvania's law make the circuit court's trial plan simply unworkable. Rule 23(a)(3) of the West Virginia Rules of Civil Procedure requires that the "claims or defenses of the representative parties [be] typical of the claims or defenses of the class." A representative party's claim or defense is typical if it arises from the same event or practice or course of conduct that gives rise to the claims of other class members, and if his or her claims are based on the same legal theory. *State ex rel Chemtall v. Madden*, 216 W. Va. 443, 455, 607 S.E.2d 772, 784 (2004). In *Chemtall I*, this Court stated that:

> In the instant case the representative parties were all allegedly exposed to acrylamide in West Virginia which means that West Virginia law on medical monitoring should be applied to the representative plaintiffs. Respondents must therefore show, and the circuit court must find, that the West Virginia medical monitoring claims are typical of the medical monitoring claims of the proposed class members who were allegedly exposed in other states. In other words, it must be shown, among other things, *that their claims are based on the same legal theory*.

Id. (Emphasis in original).

This Court also provided guidance in that decision by stating that:

> In order for the representative plaintiffs who were allegedly exposed in West Virginia to show that they could represent the proposed class members allegedly exposed in the other states, they must show that the other states recognize medical monitoring causes of action which are *reasonably co-extensive* with the medical monitoring causes of action in West Virginia. This is due to the fact that the typicality requirement requires the representative plaintiffs to establish "the bulk of the elements of each class member's claim when they prove their own claims."

Id. (Emphasis added).

In West Virginia, it is well settled that product manufacturers can be held strictly liable when a product defect is proven. Thus, causation essentially need not be proven in order to establish liability. Petitioners assert that, in Pennsylvania, however, liability must be proven by demonstrating negligence on the part of the product manufacturer. *See, e.g.*, *Redland Soccer Club, Inc. v. Department of the Army and Department of Defense of the U.S.*, 696 A.2d 137, 145 (Pa. 1997). They assert that unlike West Virginia, Pennsylvania has not yet adopted a strict liability theory of proof. The trial plan, as postured, does not seek to litigate the issue of negligence for those Pennsylvania claims. It only assumes that strict liability would apply. Although the circuit court, by pointing to a Third Circuit decision, *Barnes v. American Tobacco Co.*, 161 F.3d 127 (3rd Cir. 1998) (assuming without deciding that the Pennsylvania Supreme Court would allow an intentional tort or strict product liability

claim for medical monitoring), believes that Pennsylvania *would be inclined* to adopt strict liability if it were presented with the issue, the fact remains that Pennsylvania's highest state court has not yet made such a ruling.

Without conducting an in depth review of Pennsylvania law on this issue, if the state of the law in Pennsylvania is what petitioners say it is, then there does in fact appear to be material differences in West Virginia and Pennsylvania law regarding issues of liability in a medical monitoring action. Accordingly, as a matter of constitutional full faith and credit and due process principles, the West Virginia and Pennsylvania claims cannot be tried under one cohesive trial plan. I believe that the circuit court commits clear in error in attempting to expand Pennsylvania law to include strict liability claims for purposes of this case. At the very least, the parties should have been given ample opportunity by the circuit court to brief these issues and present them for oral argument, prior to making its own unilateral decision.

In summary, medical monitoring claims, particularly in the class action context, present new and important challenges for both the circuit courts and litigants. In light of this, I am troubled by this Court's unwillingness to entertain the matters before us here, as they are properly ripe for adjudication. The errors below require correction now, to ensure that the parties and the circuit court avoid the time, expense, and prejudice of a constitutionally infirm trial. Accordingly, I believe this Court should take the opportunity to address these issues and

I would grant the writ.

For these reasons I have set forth, I respectfully concur to and dissent from the majority's opinion.