

No. 21994 - STATE OF WEST VIRGINIA EX REL. CSR LIMITED V. THE HONORABLE A. ANDREW MACQUEEN, III, JUDGE OF THE CIRCUIT COURT OF KANAWHA COUNTY, CLIFFORD BOSTIC, RAYMOND DAUGHERTY, CLARK DILLON, ANDREW GRAY, JAMES HARPER, DONALD HORSTMAN, HERBERT RIGGS, ROBERT SHANNON, CHARLES SKILES, DEWEY TURLEY, ORVILLE WINDLE, WALTER UTTERMOHLAN, ET AL.

Miller, Justice, concurring:

Initially, I voted to grant this proceeding for a writ of prohibition based on the petition of CSR Limited. CSR represented there were no facts that would establish personal jurisdiction over it in the Circuit Court of Kanawha County. It relied, in part, on the principles announced in Asahi Metal Industry Co., Ltd. v. Superior Court of California, 480 U.S. 102, 107 S. Ct. 1026, 94 L. Ed. 2d 92 (1987). We followed Asahi Metal in Hill by Hill v. Showa Denko, K.K., 188 W. Va. 654, 425 S.E.2d 609 (1992), cert. denied, ___ U.S. ___, 113 S. Ct. 2338, 124 L. Ed. 2d 249 (1993), where we stated in Syllabus Point 2:

"Personal jurisdiction 'premised on the placement of a product into the stream of commerce is consistent with the Due Process Clause' and can be exercised without the need to show additional conduct by the defendant aimed at the forum state. Asahi Metal Industry Co. v. Superior Court of California, 480 U.S. 102, 117, 107 S. Ct. 1026, 1034, 94 L. Ed. 2d 92 (1987)."

Contrary to the United States Supreme Court's conclusion in Asahi Metal, we found in Showa Denko sufficient contact under

the stream of commerce theory to warrant personal jurisdiction in West Virginia courts. A procedural point common to both cases and which bears emphasizing is that both appeals had a developed factual record on the jurisdictional issue.

In this case, when the matter was fully argued, it was apparent that neither side could agree as to what could constitute the factual record. We were given three transcripts of hearings before the trial court and appendices with attached documents designed to bolster each party's factual claims. When it denied the motion to dismiss, the circuit court made no findings of fact.

The underlying civil action is a mass asbestosis proceeding which involves some eighty corporate defendants. The initial hearing on the lack of personal jurisdiction occurred on November 9, 1993. Plaintiffs' counsel admitted that he had

My remarks as to the proceedings before the circuit court are not meant in any manner as a condemnation of his actions. The circuit court judge decided the motion to dismiss in a conscientious fashion.

He was fully aware, I am sure, that as the evidence developed at trial, he might determine there was not sufficient personal jurisdiction and CSR could be dismissed. The true mistake was ours in granting the petition seeking a writ of prohibition without realizing the obvious, that there would be disputed facts on the personal jurisdiction issue.

misunderstood the nature of the hearing and was not prepared to argue the jurisdictional issue.

At the next hearing on November 15, 1993, the plaintiffs apparently tendered a variety of materials harvested from discovery or exhibits in other asbestosis cases. This material included a recent Mississippi case where the personal jurisdiction issue was raised unsuccessfully by CSR. The nature of this material is not identified with any particularity in the hearing transcripts. After hearing arguments by the attorneys, the circuit court advised it would go over the material and issue a ruling the next day. The following day, CSR's motion to dismiss was denied with the circuit court emphasizing Syllabus Point 2 of Showa Denko, supra.

Despite the majority's attempt to frame facts that will support its conclusion, I am convinced that many of the facts are in serious dispute by the parties. My ultimate conclusion is that a writ of prohibition is unavailable on this type of issue, even under the liberal standard first enunciated in Syllabus Point 1 of Hinkle v. Black, 164 W. Va. 112, 262 S.E.2d 744 (1979):

"In determining whether to grant a rule to show cause in prohibition when a court is not acting in excess of its jurisdiction, this Court will look to the adequacy of other available remedies such as appeal and to the

over-all economy of effort and money among litigants, lawyers and courts; however, this Court will use prohibition in this discretionary way to correct only substantial, clear-cut, legal errors plainly in contravention of a clear statutory, constitutional, or common law mandate which may be resolved independently of any disputed facts and only in cases where there is a high probability that the trial will be completely reversed if the error is not corrected in advance." (Emphasis added).

See also Syllabus Point 6, State ex rel. McClanahan v. Hamilton, 189 W. Va. 290, 430 S.E.2d 569 (1993); Syllabus Point 12, Glover v. Narick, 184 W. Va. 381, 400 S.E.2d 816 (1990).

It certainly cannot be said in this case that there was a clear legal error that could be resolved independently of any disputed facts. The entire question of personal jurisdiction was a factual one surrounded by disputed facts.

Consequently, while I agree that the writ of prohibition should be denied, I do not agree with the majority's substantive holding, as I believe it is not supported by the facts. I would dismiss the writ on the procedural ground that it does not meet the Hinkle test. It is for this reason that I concur.

CSR's adverse ruling on its motion to dismiss does not constitute a final order under Rule 54 of the West Virginia Rules of Civil

Procedure. Thus, after an adverse judgment on the merits, CSR may appeal and raise its personal jurisdiction issue. The right to appeal is another reason for not initially granting prohibition.