IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

January 1998 Term

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No. 25016

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STATE OF WEST VIRGINIA EX REL.
ERIE FIRE INSURANCE COMPANY AND
WEST VIRGINIA FARMERS MUTUAL INSURANCE COMPANY, ET AL.
Petitioners,

v.

HONORABLE JOHN T. MADDEN, JUDGE OF THE
CIRCUIT COURT OF MARSHALL COUNTY, AND
MEAGAN BARKER, AN INFANT, BY HER GUARDIAN,
AND BRADLEY BARKER INDIVIDUALLY AND ON
BEHALF OF ALL OTHER SIMILARLY SITUATED,
Respondents.

WRIT OF PROHIBITION

WRIT GRANTED

Submitted: June 2, 1998
Filed: July 14,1998

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The Opinion of the Court was delivered PER CURIAM.

JUSTICE McCUSKEY, deeming himself disqualified, did not participate in the decision in this case.

JUDGE JOHN W. HATCHER, JR., sitting by special assignment.

SYLLABUS

"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." Syllabus Point 1, *Hinkle v. Black*, 164 W.Va. 112, 262 S.E.2d 744 (1979).

Per Curiam:[1]

In the instant case, we grant a writ of prohibition and require the Circuit Court of Marshall County to dismiss several hundred insurance companies as defendants, because the named plaintiff in a class action lawsuit did not establish that there was a "juridical link" among the companies.

I.

This is a writ of prohibition in which this Court is asked to rule that the Circuit Court of Marshall County erred in not dismissing a large number of insurance companies as defendants in a class action lawsuit.

The lawsuit originated in a claim by an infant, Megan Barker ("Barker"), brought by her father, against Nationwide Insurance Company ("Nationwide"). Barker alleged that Nationwide, as the insurer for an alleged tortfeasor, acted wrongfully in obtaining a release for injuries Barker suffered in an accident with Nationwide's insured. Barker was apparently not represented by counsel and Nationwide did not obtain court approval for the settlement.[2]

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[1]We point out that a *per curiam* opinion is not legal precedent. *See Lieving v. Hadley*, 188 W.Va. 197, 201 n.4, 423 S.E.2d 600, 604 n. 4 (1992).

[2]In *State ex rel. West Virginia Fire & Casualty Co. v. Karl*, 199 W.Va. 678, 487 S.E.2d 336 (1997), this Court held that obtaining court approval for such "infant settlements" is not required by *W.Va. Code*, 44-10-14 (1929). However, we did not address whether an insurance company's conduct in obtaining such a release without court approval might be actionable.

Seeking to act as a class representative for others similarly situated, Barker claimed that by obtaining signatures on purportedly "full and final" releases from the parents or guardians of injured infants like Barker, Nationwide illegally misled the infants/or and their parents and guardians as to the nature and effect of the release.[3]

In addition to Nationwide, Barker joined as defendants several hundred other insurance companies ("the other insurance companies") that do business in West Virginia. These other insurance companies are the petitioners in the instant case.[4] Barker sought to represent a class of similarly situated persons (infants, former infants, and their parents and guardians) who had such signed purportedly "full and final" infant settlement releases with the other insurance companies, without court approval of the settlement.

The other insurance companies made a motion to dismiss, based upon the fact that Barker has no personal claim against any of those companies. The circuit court

[3]While we do not address the merits of this claim, we note that Barker attached to her brief a purported excerpt from a Nationwide claims manual. The excerpt states that infant settlement releases that are not presented to a court for approval are not binding on the infant and are "voidable by him at his option until he becomes of age." The excerpt recommends the inclusion in a release signed by the parents or guardians of an infant of a clause requiring the parents or guardian to indemnify the insurance company for any further payments to the infant, and states that the "psychological effect of the parents affixing their signature to the release, if nothing else, will usually forestall any additional claim."

[4]Erie Fire Insurance Company and West Virginia Farmers Mutual Insurance Company are the two petitioners named in the caption of the instant case. Appendix A attached to this opinion lists the names of (hopefully) all of the other petitioner insurance companies and their counsel.

denied the motion to dismiss, reasoning that the "juridical link" doctrine permitted Barker to act as a class representative for persons who have claims against the other insurance companies, even though Barker has no personal claim against them.

The circuit court found that Barker could maintain an action against the other insurance companies and act as a representative for those persons who may have claims against those companies -- because the circuit court concluded that there is a "juridical link" among the other insurance companies.[5]

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[5] The circuit court stated in its order, denying the other insurance companies' motion to dismiss:

> The plaintiff cites the case of La Mar v. H. & B. Novelty & Loan Company, 489 F. 2d 469 (9th Cir. 1973), which articulates the [juridical link] exceptions to the general rule upon which defendants, in the instant case, rely.
>
> ***
>
> Plaintiff goes on to make a list of relationships or links that the defendants in the instant case have with each other. They are as follows:
>
> > "(1) Plaintiff's claim against all of the defendants relates to obtaining a full and final release from a minor in violation of W. Va. Code §44-10-14 or, alternatively, misrepresenting a release without court approval as a full and final release;
> > (2) All of the defendants must be licensed to do business in the State of West Virginia;
> > (3) All of the defendants are regulated by the West Virginia Insurance Commissioner;
> > (4) All of the carriers have written casualty and/or liability coverage in the State of West Virginia;[1]
> > (5) Each of the companies are obligated to follow specific West Virginia statutes governing insurance, i.e., Chapter 33 of the

West Virginia Code;

(6) Each of the defendants is obligated to follow the Unfair Settlement Practices Act (see W. Va. Code §33-11-4);

(7) Each of the defendants is regulated by the West Virginia insurance regulations;

(8) The infant settlement statute, W. Va. Code §44-10-14, is common to all defendants and to all claims;

(9) Many of these companies are members of the National Insurance Foundation which appeared before the Supreme Court and filed a Motion for Leave to File an *Amicus Curiae* Brief;

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[1]Defendants who have not settled minors' claims without court approval within the last twenty years have been provided with a form affidavit, and the action against a company signing and properly executing the affidavit will result in a voluntary dismissal by plaintiffs. Over 100 companies have executed such an affidavit and are in the process of being dismissed.

(10) Many of the defendants are members of the West Virginia Insurance Federation who filed a Motion for Leave to File an *Amicus Curiae* Brief in the West Virginia Supreme Court;

(11) Many of the defendants are members of the West Virginia Association of Domestic Insurance Companies which filed a Motion for Leave to File an *Amicus Curiae* Brief before the Supreme Court;

(12) Many of the defendants are members of the National Association of Independent Insurers who filed a Motion for Leave to File an *Amicus Curiae* Brief in the West Virginia Supreme Court of Appeals;

(13) Counsel for the defendants who argued before the Supreme Court have admitted that

> many of these carriers committed the same act of obtaining a full and final release without obtaining court approval of minors' personal injury claims (see Petition for Writ of Prohibition, Paragraph 15, p. 11); and
>
> (14) The defendants have held organizational meetings in order to plan their defenses and strategies; and
>
> (15) This motion was a consolidated effort among most of the defendants."[2]

Plaintiff then summarizes the effect of these combinations of factors:

> "These factors clearly establish a united organization and/or legal relationship, and there can be little doubt that a single resolution of the dispute raised in these pleadings which is common to all plaintiffs and all defendants would be expeditious and make the single resolution of this case preferable to a multiplicity of similar actions. There would be great judicial convenience and economy promoted by certification in this action." (Plaintiffs' brief p. 15).

* * *

[2]At the argument on this motion, one of the defense counsel acknowledged that all defendants were unified on this issue with the exception of one attorney who presented the rebuttal argument on behalf of his client.

* * *

The question, then, is to put this case at rest without further inquiry. It is unlikely that the word will get out among the citizens as to whether they may have a cause of action against a carrier for an unlawful settlement of their claims. The result will truly be economical and expeditious.

Only by bringing the defendants together in one action can there be any assurance that infants who have been harmed by approvals will truly have their day in court.

This court is satisfied that a united organization and/or

legal relationship has been established to produce an expeditious single resolution of these cases such as to produce judicial economy and the result evenly applied throughout the State of West Virginia.

The consolidated motion to dismiss is OVERRULED.

The other insurance companies then brought the instant writ of prohibition asking this Court to order the circuit court to not conduct further proceedings against them, and to grant their motion to dismiss.

II.

"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." Syllabus Point 1, *Hinkle v. Black*, 164 W.Va. 112, 262 S.E.2d 744 (1979).

The circuit court's decision to deny the other insurance companies' motion to dismiss adopted, by acknowledgment, the "juridical link" doctrine. The doctrine has developed as part of Rule 23 class action certification analysis. The leading case in its development is *La Mar v. H & B Novelty and Loan Co.*, 489 F.2d 461 (9th Cir. 1973).

In *La Mar*, a plaintiff who had a Truth In Lending Act claim against a single pawn broker sued all of the pawn brokers in Oregon on behalf of all persons who had been allegedly cheated by those pawn brokers in the same fashion.

The Ninth Circuit ruled that under *Federal Rule of Civil Procedure 23*,

> . . . a plaintiff who has no cause of action against the defendant can not 'fairly and adequately protect the interests' of those who do have such causes of action. This is true even though the plaintiff may have suffered an identical injury at the hands of a party other than the defendant and even though his attorney is excellent in every material respect. Obviously this position does not embrace situations in which all injuries are the result of a conspiracy or concerted schemes between the defendants at whose hands the class suffered injury. *Nor is it intended to apply in instances in which all defendants are juridically related in a manner that suggests a single resolution of the dispute would be expeditious*.

489 F.2d at 466 (footnotes omitted, emphasis added).

The case law that has evolved under Rule 23[6] generally holds that in a class action against multiple defendants, if there is not a named representative plaintiff with a claim against a defendant, a class action may not be maintained against such a defendant unless there is alleged to be a conspiracy or concerted action, or a "juridical link," between such a defendant and a defendant against whom a named representative plaintiff does have a claim. *See LaMar*, 489 F.2d at 466. *See also Leer v. Washington Educ.*

[6]We note that effective April 6, 1998, this Court adopted a new version of *West Virginia Rules of Civil Procedure* Rule 23. Our new version is essentially identical to the federal rule and the rule in most states.

Ass'n., 172 F.R.D. 439, 447-450 (W.D.Wash. 1997); *Murer v. Montana State Compensation Mutual Insurance Fund*, 849 P.2d 1036,1038-39, 257 Mont. 434, ___ (Mont. 1993); *Cedar Crest Funeral Home, Inc. v Lashley*, 889 S.W.2d 325, 331-32 (Tex App. 1993); *Streich v. American Family*, 399 N.W.2d 210, 215-16 (Minn. App. 1987); *Itel Securities Litigation*, 89 F.R.D. 104, 117-123 (N.D.Cal 1981); *United States v. Trucking Employers, Inc.*, 75 F.R.D. 682, 689 (D.C. 1977).

A "juridical link" is typically found where multiple defendants are, with respect to the conduct at issue in the litigation, bound together by their official status, agreements, statutes, or in a similar fashion. *Trucking Employers, supra*, 75 F.R.D. at 25. It appears that no jurisdiction has found such a link among insurance companies. *See Kittay v. Allstate Ins. Co.*, 397 N.E.2d 200 (Ill.App. 1979); *Turpeau v. Fidelity Fin. Servs., Inc.*, 936 F.Supp. 975 (N.D.Ga. 1996), *aff'd*, 112 F.3d 1173 (11th Cir. 1997); *Streich, supra; Murer, supra.*

The circuit court's basis for finding a juridical link in the instant case was an amalgam of factors that can be grouped into five areas: (1) common defense activities in the instant litigation; (2) common membership in trade groups; (3) common regulatory and licensure statutes; (4) common practices at issue in the litigation; and (5) the desirability of a common resolution to the issues in the litigation.

Reviewing these areas, we determine that factors (1) and (2) may not in the instant case serve as a basis for finding a juridical link. We are not cited to any authority that common defense strategies in litigation should inure to the detriment of litigants. To

penalize such conduct could discourage economy in litigation. As to common membership in trade groups, in the absence of evidence of rules, agreements, etc. to adhere to common practices and policies pertinent to the litigation, this activity does not tend to show a juridical link.

As to factor (3), common regulatory and licensure statutes, we similarly conclude that this factor does not, absent a greater degree of particularity than is shown in the instant case, provide support for finding a juridical link. After all, most all automobile drivers have driver's licenses and have to obey the same laws -- but such commonality does not in itself allow a plaintiff who is injured by a law-breaking licensed driver to sue all such drivers on behalf of all of the persons injured by such drivers.

As to factor (4), common practices, the case law has generally held that a mere commonality of practice by a group of defendants, unaccompanied by further linkage among them, does not itself establish a juridical link. *Trucking Employers, supra; Murer, supra; Cedar Crest, supra.*

Finally, as to factor (5), the desirability of a common resolution, we can understand the circuit court's conclusion that judicial economy would be served by resolving in one proceeding the issue of whether purportedly "full and final" infant settlement releases that are not approved by a court are actionable, and whether persons who have signed such releases are entitled to relief. However, legal determination of that issue does not require multiple defendants.

In the instant case, because this matter is before this Court on a writ of prohibition, we are presented with a limited factual record. For that reason we do go beyond the foregoing discussion regarding the nature and general applicability of the doctrine of "juridical link" in connection with Rule 23 issues.[7]

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[7]The petitioners also argue that because Barker does not herself have a personal claim against each of the other insurance companies, she did not present to the circuit court a justiciable case or controversy over which the circuit court has subject matter jurisdiction -- under article 8, section 3 of our state *Constitution* -- against the other insurance companies. That is, the petitioners argue that Barker did not make allegations against the other insurance companies that would give her constitutional subject matter jurisdiction "standing." This Court has stated that:

> The question of standing to sue is whether the litigant has alleged such a personal stake in the outcome of the lawsuit so as to present the court with a justiciable controversy warranting judicial resolution of the dispute. In order to have standing to sue, a party must allege an injury in fact, either economic or otherwise, which is the result of the challenged action and show that the interest he seeks to protect by way of the institution of legal proceedings is arguably within the zone of interests protected by the statute, regulation or constitutional guarantee which is the basis for the lawsuit."

Snyder v. Callaghan, 168 W.Va. 265, 275, 284 S.E.2d 241, 248 (1981) (citations omitted). "In West Virginia the slippery doctrine of standing is not usually employed to avoid a frontal confrontation with an issue of legitimate public concern." *State ex rel. Alsop v. McCartney*, 159 W.Va. 829, 838, 228 S.E.2d 278, 283 (1976). Moreover, "a simple, easily comprehensible definition of subject matter jurisdiction is almost a contradiction in terms. Complex issues often make the determination of subject matter jurisdiction difficult, as for example, justiciability, ripeness, mootness, standing, case or controversy, and political questions." *Eastern Associated Coal Corp. v. Doe*, 159 W.Va. 200, 208, 220 S.E.2d 672, 678 (1975).

Based in part upon the slipperiness of standing issues and the complexity of subject matter jurisdiction jurisprudence that this Court has recognized, and in part upon the prudence that cautions against deciding constitutional matters when it is unnecessary to do so, we decline the invitation to engage in a constitutional subject matter jurisdictional "standing" analysis to decide whether and when a representative plaintiff on

behalf of a class that has been allegedly injured by multiple defendants may assert claims against defendants who are not alleged to have personally injured the named plaintiff.

We follow the approach taken in the leading *La Mar* case, in which the "juridical link" doctrine arose. The *La Mar* court said: "No one contends, of course, that there is no case or controversy between the defendants who seek in these cases to be dismissed and their customers [whom the plaintiff sought to represent]." 489 F.2d at 464.

A similar approach was taken by the United States Supreme Court in the recent case of *Amchem Products, Inc. v. Windsor*, ___ U.S. ___, 117 S.Ct. 2231, 138 L.Ed.2d 689 (1997). In *Amchem*, the Court faced arguments that a class action did not present a justiciable case or controversy. The Court expressly declined to address those issues, stating that the Rule 23 issues are "logically antecedent to the existence of any Article III [justiciability] issues, [and therefore] it is appropriate to reach them first[.]" ___ U.S. at ___, 117 S.Ct. at 2244, 138 L.Ed.2d at 706.

In the leading Supreme Court case involving constitutional standing and class actions, *Warth v. Seldin*, 422 U.S. 490, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975) representative plaintiffs were held to have no standing, so that there was no justiciable case or controversy -- because they had no claims against *any* of the defendants. In the instant case, as in *LaMar*, Barker does have a cognizable claim against one of the multiple defendants, and seeks to represent a class of persons with alleged claims against the others.

The distinction between constitutional subject matter jurisdiction standing, and Rule 23 "typicality" (also sometimes confusingly called "standing" in the Rule 23 context) was recognized in *Cedar Crest Funeral Home, Inc. v. Lashley*, 889 S.W.2d 325, 330 (Tex. App. 1993). In *Cedar Crest*, the court followed *LaMar*, *supra*, holding that the issue of the named plaintiff's ability to present claims of a plaintiff class against defendants against whom the named plaintiff had no claim should be decided in the Rule 23 context, and not in addressing subject matter jurisdiction.

Echoing this approach, the court in *Akerman v. Oryx Communications*, 609 F.Supp. 363, 375 (S.D.N.Y. 1984), *aff'd*, 810 F.2d 336 (2d Cir. 1987) said:

> A number of commentators have argued against an overly rigid application of [constitutional] standing principles in the context of class action litigation . . . . Certainly, many of the prudential concerns traditionally associated with the standing doctrine are met as long as at least one plaintiff who is clearly an injured party sues at least one defendant who has caused him injury. As critics of a high standing threshold in class actions have pointed out, the Rule 23 requirements of adequacy of representation and typicality of claims ensure a vigorous and focused litigation of the common issues even though the named plaintiff may not have a cause of action

against each named defendant.

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> Commentators note that the Supreme Court has relaxed another aspect of justiciability -- the mootness requirement -- in class actions challenging constitutional violations that are capaable of repetition but which would evade review if the mootness doctrine were strictly construed. . . . In such situations, it has permitted class action litigation to run its course in spite of the mooting of a named party's claim.

Concededly, some courts have taken another tack, and have either merged constitutional case-and-controversy subject matter jurisdiction with Rule 23 issues, or held that strict constitutional standing requirements must be achieved before a Rule 23 analysis is performed. *See, e.g., Weiner v. Bank of King of Prussia*, 358 F.Supp. 684 (E.D.Pa. 1973); *Angel Music, Inc. v. ABC Sports, Inc.*, 112 F.R.D. 70 (S.D.N.Y. 1985).

However, it has also been said that:

> [T]he *Weiner* ruling . . . rarely has been followed in civil rights defendant class litigation. Most courts have used the *LaMar* juridical link exception to bypass any standing problems . . . . A more direct approach would view standing on the basis of the class rather than on the standing of the individual class members.

Comment, *Defendant Class Actions and Federal Civil Rights Litigation*, 33 U.C.L.A. L.Rev. 283, 305, n. 105 (1986).

However, we do decide that, upon the factors cited by the circuit court as the basis for finding a juridical link among the other insurance companies, the circuit court erred in finding a juridical link, and in refusing to grant their motion to dismiss.

IV.
Conclusion

Consequently, the writ of prohibition is granted, and the circuit court is required to grant the other insurance companies' motion to dismiss.

Writ Granted.