No. 31319 – *State of West Virginia ex rel. Albert Leung, M.D. v. Honorable David H. Sanders, Judge of the Circuit Court of Berkeley County, and Christel Y. Schell*

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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

Albright, Justice, concurring in part, dissenting in part:

While I concur with the majority opinion as to the reasons cited for issuing the writ of prohibition that pertain to the timeliness of the third-party complaint and the presence of averments grounded in negligence contained within the third-party complaint, I must dissent from the majority's conclusion that the lower court violated established rules of standing in ruling on the issue of whether the screening requirements of the West Virginia Medical Professional Liability Act[1] (hereinafter referred to as the "Act") had been met in conjunction with the filing of the third-party complaint.[2]

Rather than addressing the substantive issue presented by this case concerning the applicability of the prerequisites for filing an action under the Act to third-party impleader motions, the majority opted to dispense with the properly raised issue by citing principles of standing that arguably do not apply to the procedural circumstances of this case. In so doing, the majority merely postpones for yet another appeal the issue which is squarely presented by this case.

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[1]*See* W.Va. Code § 55-7B-1 to -11 (1986 & Supp. 2003) .

[2]*See* W.Va. Code § 55-7B-6.

As support for grounding the issue on the plaintiff's lack of standing to assert non-compliance with the screening requirements of West Virginia Code § 55-7B-6, the majority relies upon generalized principles of standing that address the substantive right to bring a cause of action in the first instance or to seek enforcement of the rights of others.[3] None of the cases cited by the majority concerns the issue presented here: whether a plaintiff has a sufficient interest in the filing of a third-party complaint that would permit her to raise a procedural objection to the filing of the third-party complaint. *See* W.Va.R.Civ.P.14 (stating that "[a]ny party may move to strike the third-party claim").

By characterizing the rights involved as merely those of the third-party defendants that Dr. Leung sought to implead (Drs. Wanger and Shenandoah), the majority takes an overly narrow view of the interests at stake with regard to the granting of Dr. Leung's motion for leave to file a third-party complaint. Certainly, Doctors Wanger and Shenandoah, upon the granting of the motion for a third-party complaint, could have raised non-compliance with the Act's screening requirements as an objection in their answer to the

[3]While the majority relies upon the "prudential standing rule" which, in most circumstances, prevents a party from asserting the rights of others, "this rule may be relaxed in appropriate circumstances." C. Wright, A. Miller, E. Cooper, 13 *Federal Practice and Procedure* § 3531.9 at 542-43 (1984). Recognizing the "flexible approach" that is applied to this issue, the authors of this respected treatise summarize the same by stating that "the rule against asserting the rights of others is a prudential rule that can be relaxed when the purposes of standing doctrine are served." *Id.* at 543 and n.2 and cases cited therein.

third-party complaint.[4] There is simply no basis, however, for the majority's conclusion that such objection belongs exclusively to the third-party defendants.

Courts have found that a plaintiff has standing to challenge the legal sufficiency of a third-party complaint. In *Malerba v. Cessna Aircraft Co.*, 554 A.2d 287 (Conn. 1989), the Connecticut Supreme Court reasoned:

> "When standing is put in issue, the question is whether the person whose standing is challenged is a proper party to request an adjudication of the issue. . . ." "[Standing is] ordinarily held to have been met when a complainant makes a colorable claim of direct injury he . . . is likely to suffer. . . ."
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> The question then is whether the third party complaint and the parties it draws into the action create a risk of a direct injury to the original plaintiff. *Injury in this context includes procedural injury to the cause of action.*

Id. at 288-89 (citations omitted and emphasis supplied).

Looking to the rules of practice which permit a third-party defendant to assert any defenses the third-party plaintiff has against the plaintiff as well as asserting any claim against the plaintiff arising out of the transaction or occurrence which is the subject matter of the plaintiff's claim against the third-party plaintiff, the court in *Malerba* found significant the fact that a third-party defendant is "arm[ed] . . . with the full panoply of procedural

[4]We do not find it necessary to determine the applicability of the screening requirements set forth in West Virginia Code § 55-7B-6 for purposes of addressing this issue.

options available to address not only the claim of the third party plaintiff but also the claim of the original plaintiff against the original defendant." 554 A.2d at 289; see W.Va.R.Civ.P. 14. Based on the potential addition of two defendants through the third-party complaint, the Connecticut court concluded that the plaintiff in that action had established "a colorable claim of a likelihood of injury to [his] . . . cause of action." 554 A.2d at 289*; see also Leisure Resort Technology, Inc. v. Trading Cove Assoc.*, 29 Conn.L.Rptr. 648, 2001 WL 746403 at *2 (Conn.Super. 2001) (upholding plaintiff corporation's standing to challenge counterclaim filed by defendants against corporation's president in his individual capacity where corporate president did not join in motion finding that "counterclaim . . . raises at least a colorable claim of a likelihood of injury to the plaintiff's cause of action similar to the 'procedural injury' recognized by the Supreme Court in *Malerba*"); *Tynon v. D.R. McClain & Son*, 499 N.Y.S.2d 354 (N.Y. App. Div. 1986) (finding that plaintiff, as an adverse party to third-party defendant, had standing to challenge third-party defendant's motion for leave to serve amended answer to third-party complaint).

The majority wrongly concludes that the plaintiff in this case has no interest and, therefore, no standing to object to the filing of the third-party complaint. In their attempt to distinguish the unfettered right of "[a]ny party" to move to strike a third-party claim established under Rule 14 of the Rules of Civil Procedure, the majority suggests that this provision should not be considered as applicable unless the third-party complaint

"affect[s] the rights of the party moving to strike such third-party claim." The majority suggests a limitation to Rule 14 that simply does not exist. Moreover, what the majority clearly overlooks is that the plaintiff in this case set forth grounds of both interest and alleged injury by asserting prejudice as a result of the last minute granting of the third-party complaint. A plaintiff clearly has an interest in the granting of an eleventh hour motion to implead.

In a case that more closely resembles this one from a procedural standpoint, the plaintiffs challenged the defendants' attempt to implead a third party for indemnification purposes. *See Lemp v. Town of East Granby,* 2000 WL 1912696 (Conn.Super. 2000). While the defendants argued that the plaintiffs were without standing to address the issue of the city's decision to implead the dog's owners in a negligence case, the court stated: "This argument skirts the actual issue raised by the plaintiffs, which does not focus upon the merits of the proposed third-party complaint, *but upon the propriety of seeking the court's permission to submit such a complaint at this stage of the proceedings*." *Id*. at * 1 (emphasis supplied). In finding in favor of the plaintiffs on the issue of standing, the Connecticut court looked to the clear authority provided by the impleader statute to object to such motions and the fact that "the plaintiffs have not challenged the merits or content of the proposed complaint." *Id.* at * 2.

Like the plaintiffs in *Lemp,* the plaintiff in this case was challenging the filing of the third-party complaint based upon the last minute nature of such procedural request and the anticipated delays that would result to her original cause of action. Because this aspect of her challenge was based on the failure to comply with the screening requirements imposed under West Virginia Code § 55-7B-6, her objection was clearly procedural in nature. Having established that the plaintiff had a right to object to the filing of the third-party complaint under principles of standing and the rules of civil procedure, she was permitted to raise any objections to the propriety of filing the third-party complaint, which included non-compliance with the screening requirements of West Virginia Code § 55-7B-6. To dispense with this issue, as the majority does, by concluding that the plaintiff had no standing to raise a procedural issue involving the issue of impleader amounts, in my opinion, to a shirking of the Court's responsibility to address issues fairly raised.