No. 31743 – *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 Chemical Corporation, Cytec Industries, Inc., G. E. Betz, Inc., Hychem, Inc., Ondeo Nalco Company, Stockhausen, Inc., Zinkan Enterprises, Inc. v. The Honorable John T. Madden, Judge of the Circuit Court of Marshall County; and all plaintiffs in Stern, et al. v. Chemtall, Inc., et al., Civil Action No. 03-C-49M*

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OF WEST VIRGINIA

Starcher, J., concurring:

I do not envy the circuit judge's position in the instant case. As I recently said:

> Class actions are, in a word, intimidating. They are the long-distance marathons of the legal world. They are expensive, time-consuming, and difficult to manage.
>
> They are also an indispensable tool for litigants, plaintiffs and defendants alike, to "secure the just, speedy, and inexpensive determination" of many actions. Rule 1, *West Virginia Rules of Civil Procedure*.

Gulas v. Infocision Management Corp., 215 W.Va. 225, ___, 599 S.E.2d 648, 653 (2004) (*per curiam*) (Starcher, J., concurring). In the average "toxic tort" personal injury lawsuit, the plaintiff will claim some injury from a toxic chemical made by the defendant; the defendant's response is usually to try and focus the judge's and jury's attention upon the "sins" of the plaintiff, to suggest the plaintiff's injuries are unique and entirely the result of the plaintiff's actions. But a class action lawsuit like the one at bar, by a group of plaintiffs who claim to have been harmed by the defendant's toxic chemical, places the limelight

relentlessly upon the defendant. The malfeasance of the defendant becomes the sole focus. Because the plaintiffs' damages are concentrated in one lawsuit instead of spread out among dozens of smaller lawsuits in different jurisdictions, the press, the public, government regulators and corporate shareholders are more likely to take note of that malfeasance. This is, in large part, why corporate defendants despise class actions.

Defendants who have potentially harmed large groups of plaintiffs will, therefore, attack the formation of a class action by claiming – often misleadingly – the existence of high procedural hurdles that cannot be vaulted by the plaintiffs, long before the parties have collected and/or exchanged any discovery. For instance,

> [T]he bigger the class, the greater the likelihood that the defendant will argue that there is no common problem across the system. . . .
>
> Defendants attempting to avoid class certification will, almost exclusively, overwhelm a circuit judge with the differences between each class member's case. It is akin to a judge being asked to look at a forest of oak trees and being told the difference between each tree: each tree has a different height, a different color, a different number of leaves, a unique number of branches, a wide variation in the number and size of tree rings, and so on.
>
> The test for the judge, though, is to step back and look at the similarities in class members. Step back and see the forest. No matter the number of branches or leaves, a collection of oak trees has enough similarities to be called a "class" of oak trees.

Id.

In the instant case, the defendants argued that a "class action . . . may only be certified if the trial court is satisfied, *after a rigorous analysis*, that the prerequisites of Rule

23(a) have been satisfied." *General Telephone Co. of Southwest v. Falcon*, 457 U.S. 147, 161, 102 S.Ct. 2364, 2372, 72 L.Ed.2d 740, ___ (1982) (emphasis added). As the majority opinion suggests, most federal courts have blithely accepted this argument and require a party seeking class action certification to endure a "rigorous" analysis of their class certification evidence by the trial court.

After carefully reading Rule 23 of our *Rules of Civil Procedure*, and reading the *Rules* as a whole, neither I nor my colleagues can find anything that requires a party to submit any motion to a "rigorous" analysis by a trial court. Use of the term "rigorous" suggests that a trial judge must exercise "harshness, rigidity, inflexibility,"[1] or be "severely exact or accurate; . . . stern . . . hard, inflexible, stiff, unyielding."[2] Frankly, it is difficult to determine how a litigant could achieve a "just, speedy, and inexpensive" resolution of a dispute when the trial judge, usually at the initial, pre-trial stages of the case, is being harsh, inflexible, exacting and unyielding in considering the parties' motions.

Hence, the majority's opinion dispenses with grafting onto our analysis of Rule 23 class certification motions the "rigorous" requirement used by federal courts. Instead, we hold in Syllabus Point 8 that judges should do what they always do when considering a party's motion: be "thorough." A trial judge should look at any motion made under the *Rules of Civil Procedure* in a conscientious, careful, and methodical fashion. It is one thing to look

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[1]*Oxford Desk Dictionary and Thesaurus* 689 (1997).

[2]*Random House Webster's Unabridged Dictionary* 1657 (2d.Ed. 1998).

at a class certification motion thoroughly and with "great care and completeness;"[3] it is quite another thing to look at a class certification motion harshly, inflexibly and unyieldingly as a procedural roadblock to justice. The Court has wisely chosen the former, flexible term "thorough," and courts and litigants should in the future forever eschew the use of the word "rigorous" when talking about a motion under our *Rules of Civil Procedure*.

The record in this case suggests that the alternative to the certification of a class action – dozens if not thousands of individual trials by each plaintiff using nearly identical evidence – would likely overwhelm the limited resources of the court and the parties. Creativity and determination by a circuit judge are therefore key to the fair resolution of an action such as the one at bar, and I applaud the circuit judge's initiative in moving this case forward. The procedures available under Rule 23 of the *Rules of Civil Procedure* are very effective tools for reaching a just, speedy, and inexpensive determination of the issues raised by the parties. As the majority opinion suggests, the circuit judge in this case could always break this case up into subclasses, or certify or decertify certain classes, so long as the requirements of Rule 23 are met.

The issue that drove the majority's decision to issue a writ of prohibition in the instant case was our – and the parties' – inability to grasp (1) how the out-of-state plaintiffs' cases were connected to West Virginia, and (2) whether it would, in a constitutional sense, be fair to adjudicate their cases here. The Court's decision to issue a writ in this case does

[3]"Thorough," *Oxford Desk Dictionary and Thesaurus* 834 (1997).

not preclude the circuit judge in the future from certifying a class or sub-classes involving out-of-state plaintiffs; we simply need the judge to carefully analyze and explain why a plaintiff – who lived, worked, and was injured exclusively in a foreign jurisdiction – should be allowed or required to have their case heard by a West Virginia jury.

A corollary to this problem is a determination of the applicable law. I have personally seen this problem in the context of asbestos personal injury litigation. I was a trial judge in a border county, and often had to handle cases where a plaintiff lived in West Virginia, but worked and was injured in another state, or vice-versa. Sometimes the plaintiff was injured in several states including West Virginia, or was injured entirely in foreign states but brought suit in West Virginia because one of the defendants was a West Virginia company.

The circuit judge in this case must, at the outset, have a general, basic handle on the law of these foreign jurisdictions. This does *not* mean that the circuit judge must be prepared to draft jury instructions at the outset of the case. The majority's opinion simply holds that the judge must comprehend in a general sense whether or not the claims of the out-of-state plaintiffs are compatible with West Virginia law such that the claims of those plaintiffs could be fairly understood and adjudicated by a jury.[4]

[4]For instance, if West Virginia required proof of some fact by a preponderance of the evidence, but another state required proof of the same fact by clear and convincing evidence, a jury could easily understand and adjudicate whether the evidence showed – by a preponderance of the evidence – that the fact existed in West Virginia, and showed – clearly and convincingly – that the same fact existed in the foreign state as well.

(continued...)

I therefore respectfully concur.

[4](...continued)

Likewise, West Virginia allows a plaintiff to recover the costs of future medical monitoring that result from a defendant's misconduct; if the foreign state does or might similarly allow a plaintiff to recover those costs in a civil action, the circuit judge might allow the claims of both West Virginia and foreign plaintiffs to proceed together.