STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

STATE OF WEST VIRGINIA EX REL. COAL AGE, INC., D/B/A CAI INDUSTRIES; THE BAUGHAN GROUP, INC.;AND GAULEY ROBERTSON, INC., Petitioners

vs.) No. 11-1404 (Wyoming County 10-C-20)

HONORABLE WARREN R. MCGRAW, JUDGE OF THE CIRCUIT COURT OF WYOMING COUNTY, AND JASON D. O'NEAL, ET AL., Respondents

FILED
February 10, 2012
released at 3:00 p.m.
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

The petitioners herein, Coal Age, Inc., doing business as CAI Industries; The Baughan Group, Inc.; and Gauley Robertson, Inc. (collectively "CAI" or "petitioners"), request this Court to issue a writ of prohibition to prevent the respondent herein, the Honorable Warren R. McGraw, Judge of the Circuit Court of Wyoming County, from enforcing his September 13, 2011, order. By that order, Judge McGraw granted the other respondent herein, Jason D. O'Neal ("Mr. O'Neal"), leave to file a second amended complaint to add an additional defendant, Roger Baughan[1] ("Mr. Baughan"). Before this Court, CAI asserts that the circuit court erred by permitting Mr. O'Neal to amend his complaint when he was dilatory in doing so.

Upon our review of the parties' arguments, the appendix record, and the pertinent authorities, we deny the requested writ of prohibition. In summary, we conclude that Judge McGraw did not abuse his discretion by permitting Mr. O'Neal to add an additional defendant and that the petitioners were not prejudiced by the addition of Mr. Baughan to these proceedings. Furthermore, because this case does not present a new or significant issue of law, we find this matter to be proper for disposition in accordance with Rule 21 of the West Virginia Revised Rules of Appellate Procedure.

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[1]Mr. Baughan is the chairman, president, and CEO of petitioner The Baughan Group, Inc., of which petitioner CAI Industries is a subsidiary.

The facts giving rise to the instant proceeding are not disputed by the parties. On June 20, 2009, Mr. O'Neal[2] was working as an electrician in an underground coal mine when he was run over by a shuttle car and catastrophically injured. As a result of this accident, Mr. O'Neal suffered amputations of several appendages, lost the function of numerous bodily systems, remains confined to a hospital bed, and requires daily nursing care. On February 11, 2010, Mr. O'Neal, joined by his wife and three minor children, filed the instant lawsuit in the Circuit Court of Wyoming County asserting claims of negligence and products liability against the various defendants. Mr. O'Neal claimed that the defendants failed to use "proximity detection" technology when they manufactured and sold the shuttle car that injured him.

Thereafter, CAI removed the case to federal court, which ultimately remanded the matter back to the Wyoming County Circuit Court on October 4, 2010. On that same date, Mr. O'Neal moved to amend his complaint to add as a defendant Robertson, Inc., doing business as Gauley Robertson, Inc. The circuit court granted Mr. O'Neal's motion. Discovery then ensued, as well as court-ordered mediation. Trial of the case was scheduled to begin on September 26, 2011.

On September 1, 2011, Mr. O'Neal moved to amend his complaint a second time to add Mr. Baughan as an additional defendant. During the previously scheduled pre-trial conference, the circuit court entertained Mr. O'Neal's motion, granting the same. By order entered September 13, 2011, the circuit court ruled that Mr. O'Neal's motion to amend "is sufficiently timely, under the circumstances, and that granting [his] request would further the interests of justice and would not unfairly prejudice any Party to this matter."

CAI now requests this Court to issue a writ of prohibition to prevent the circuit court from enforcing its order allowing Mr. O'Neal to amend his complaint. We previously have held that,

> [i]n determining whether to entertain and issue the writ of prohibition for cases not involving an absence of jurisdiction but only where it is claimed that the lower tribunal exceeded its legitimate powers, this Court will examine five factors: (1) whether the party seeking the writ has no other adequate means, such as direct appeal, to obtain the desired relief; (2) whether the petitioner will be damaged or prejudiced in a way that is not correctable on appeal; (3) whether the lower tribunal's order is clearly erroneous as a matter of law; (4) whether the lower tribunal's order is an oft repeated error or manifests persistent disregard for either procedural or substantive law; and (5)

[2]Mr. O'Neal is thirty years old.

> whether the lower tribunal's order raises new and important problems or issues of law of first impression. These factors are general guidelines that serve as a useful starting point for determining whether a discretionary writ of prohibition should issue. Although all five factors need not be satisfied, it is clear that the third factor, the existence of clear error as a matter of law, should be given substantial weight.

Syl. pt. 4, *State ex rel. Hoover v. Berger*, 199 W. Va. 12, 483 S.E.2d 12 (1996). In other words, "[a] writ of prohibition will not issue to prevent a simple abuse of discretion by a trial court. It will only issue where the trial court has no jurisdiction or having such jurisdiction exceeds its legitimate powers. *W. Va. Code*, 53-1-1." Syl. pt. 2, *State ex rel. Peacher v. Sencindiver*, 160 W. Va. 314, 233 S.E.2d 425 (1977).

With specific regard for the nature of the ruling from which CAI seeks prohibitory relief, we have held that

> [a] trial court is vested with a sound discretion in granting or refusing leave to amend pleadings in civil actions. Leave to amend should be freely given when justice so requires, but the action of a trial court in refusing to grant leave to amend a pleading will not be regarded as reversible error in the absence of a showing of an abuse of the trial court's discretion in ruling upon a motion for leave to amend.

Syl. pt. 6, *Perdue v. S.J. Groves & Sons Co.*, 152 W. Va. 222, 161 S.E.2d 250 (1968). CAI does not suggest that Judge McGraw lacked jurisdiction to rule upon Mr. O'Neal's motion to amend his complaint. Rather, CAI contends that, by granting Mr. O'Neal's motion to amend his complaint, Judge McGraw exceeded his legitimate powers because Mr. O'Neal's motion to amend was untimely.

Rule 15(a) of the West Virginia Rules of Civil Procedure governs the amendment of pleadings. In pertinent part, Rule 15(a) directs that "a party may amend the party's pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires." We have interpreted this language to mean that

> "[t]he purpose of the words 'and leave [to amend] shall be freely given when justice so requires' in Rule 15(a) W. Va. R. Civ. P., is to secure an adjudication on the merits of the controversy as would be secured under identical factual situations in the absence of procedural impediments; therefore, motions to amend should always be granted under Rule 15 when: (1) the amendment permits the presentation of the merits of the action; (2) the adverse party is not prejudiced by the sudden assertion of the subject of the

> amendment; and (3) the adverse party can be given ample opportunity to meet the issue." Syllabus Point 3, *Rosier v. Garron, Inc.*, 156 W. Va. 861, 199 S.E.2d 50 (1973).

Syl. pt. 2, *State ex rel. Vedder v. Zakaib*, 217 W. Va. 528, 618 S.E.2d 537 (2005). Moreover,

> [t]he liberality allowed in the amendment of pleadings pursuant to Rule 15(a) of the West Virginia Rules of Civil Procedure does not entitle a party to be dilatory in asserting claims or to neglect his or her case for a long period of time. Lack of diligence is justification for a denial of leave to amend where the delay is unreasonable, and places the burden on the moving party to demonstrate some valid reason for his or her neglect and delay.

Syl. pt. 3, *State ex rel. Vedder v. Zakaib*, 217 W. Va. 528, 618 S.E.2d 537.

Upon the record before us, we conclude that Judge McGraw did not abuse his discretion by granting Mr. O'Neal's motion to amend his complaint to add Mr. Baughan as a defendant to his lawsuit. First, said "amendment permits the presentation of the merits of the action." Syl. pt. 2, in part, *State ex rel. Vedder v. Zakaib*, 217 W. Va. 528, 618 S. E.2d 537. The inclusion of Mr. Baughan as a party defendant to this action secures the presence before the lower court of the parties who are potentially liable for Mr. O'Neal's injuries and ensures the complete resolution of Mr. O'Neal's claims.

Second, the petitioners have not demonstrated prejudice by the amendment of Mr. O'Neal's complaint, and Mr. Baughan's addition to the lawsuit as a defendant is hardly "sudden" given his active participation in the case since his May 2010 affidavit. *See* Syl. pt. 2, in part, *Vedder*, 217 W. Va. 528, 618 S. E.2d 537. Other than complaining that Mr. O'Neal has been dilatory in moving to amend his complaint, CAI has not asserted that it will suffer any prejudice from this amendment. Moreover, as the chairman, president, and CEO of one of the named petitioners, it is reasonable to presume that Mr. Baughan has been aware of this litigation from its inception.

Third, Mr. Baughan, as well as CAI, will be "given ample opportunity to meet the issue" of including Mr. Baughan as a defendant to the instant proceeding. Syl. pt. 2, in part, *Vedder*, 217 W. Va. 528, 618 S. E.2d 537. Both CAI and Mr. O'Neal have conceded that the trial in this case would have been continued from its original date because, as of the pre-trial conference, neither side had commenced, much less completed, their discovery of expert witnesses. Because the trial has been continued; Mr. Baughan already is familiar with the instant litigation; CAI is aware of Mr. Baughan's involvement in the underlying decisions giving rise to Mr. O'Neal's lawsuit; and no new theories of liability have been advanced

against Mr. Baughan, ample time exists for Mr. Baughan and CAI to adequately prepare their defenses in response to Mr. Baughan's inclusion as a party defendant in the case *sub judice*.

Finally, while it certainly seems from our consideration of the record in this case that Mr. O'Neal could have moved to amend his complaint to add Mr. Baughan as a defendant earlier than the eve of trial, the timing of his motion does not rise to the level of dilatoriness or suggest that he failed to act with due diligence. *See* Syl. pt. 3, *Vedder*, 217 W. Va. 528, 618 S. E.2d 537. Mr. O'Neal did not learn of Mr. Baughan's involvement with the corporate decisions regarding the shuttle car that injured him until he had deposed CAI's designated representatives. It would be unreasonable to require Mr. O'Neal to move to amend his complaint to add Mr. Baughan as a party defendant *before* Mr. Baughan's liability for his injuries had become apparent to him. *See id.*

For the foregoing reasons, we conclude that the circuit court did not abuse its discretion by permitting Mr. O'Neal to amend his complaint to add Mr. Baughan as an additional defendant to his lawsuit against CAI. The record evidence demonstrates that Mr. O'Neal acted timely in moving to amend his complaint and that CAI was not prejudiced by the amendment. Accordingly, we deny the requested writ of prohibition.

Writ Denied.

ISSUED: February 10, 2012

CONCURRED IN BY:

Chief Justice Menis E. Ketchum
Justice Robin Jean Davis
Justice Brent D. Benjamin
Justice Margaret L. Workman
Justice Thomas E. McHugh