STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

STATE EX REL. ERIE INSURANCE PROPERTY & CASUALTY COMPANY AND STEVEN L. PETERS, Petitioners

vs.) No. 11-0259 (Jackson Co. 85-C-153)

THE HONORABLE DAVID W. NIBERT, JUDGE OF THE CIRCUIT COURT OF JACKSON COUNTY, WEST VIRGINIA, ET AL., Respondents

FILED
June 14, 2011
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RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

The petitioners herein, Erie Insurance Property & Casualty Company and its claims adjuster, Steven L. Peters (hereinafter collectively referred to as "Erie"), request this Court to grant them a writ of prohibition to prevent the respondent herein, the Honorable David W. Nibert, Judge of the Circuit Court of Jackson County, West Virginia (hereinafter "Judge Nibert"), from enforcing the court's order entered November 12, 2010. By that order, Judge Nibert certified a class consisting of various Erie insureds and persons who had attempted to obtain coverage for injuries caused by Erie insureds. Before this Court, Erie contends that Judge Nibert failed to perform the class certification analysis required by this Court's decisions in *In re West Virginia Rezulin Litigation*, 214 W. Va. 52, 585 S.E.2d 52 (2003), and *State ex rel. Chemtall Inc. v. Madden*, 216 W. Va. 443, 607 S.E.2d 772 (2004). Upon a review of the parties' arguments, the designated record, and the pertinent authorities, we conclude that the circuit court did not conduct the thorough class action analysis contemplated by our prior opinions. Accordingly, we grant as moulded the requested writ of prohibition and remand this case to the Circuit Court of Jackson County with directions to conduct a class certification analysis in accordance with this Court's holdings in *In re West Virginia Rezulin Litigation*, 214 W. Va. 52, 585 S.E.2d 52 (2003), and *State ex rel. Chemtall Inc. v. Madden*, 216 W. Va. 443, 607 S.E.2d 772 (2004), and to prepare a class certification order that fully considers and complies with these authorities. Furthermore, this case presents no new or significant questions of law, and oral presentation would not assist in our determination of the issues raised herein. Therefore, we will resolve this case through a memorandum decision pursuant to Rule 21 of the West Virginia Revised Rules of Appellate Procedure.

The instant controversy originated when Emily Hardman (hereinafter "Emily") was fatally injured in an automobile accident on October 1, 2006, in Jackson County, West Virginia. At the time of the accident, Emily was covered by a policy of motor vehicle insurance purchased by her parents, Richard and Tamara Hardman (hereinafter individually referred to as "Mr. Hardman" and "Mrs. Hardman" or collectively referred to as "the Hardmans"), in March 1994. At the time the Hardmans purchased the subject policy of insurance, Mrs. Hardman elected to include in their policy underinsured motorists coverage in the following amounts: $20,000 per person; $40,000 per occurrence; and $10,000 for property damage. Later, in 2003, Erie requested the Hardmans to again elect or reject underinsured motorists coverage. Mrs. Hardman renewed her election of underinsured motorists coverage with the same limits as she previously had chosen.

During the course of their efforts to recover underinsured motorists benefits in relation to Emily's accident, the Hardmans determined that, in their opinion, Erie's 2003 underinsured motorists coverage election/rejection document did not comply with the form requirements of W. Va. Code § 33-6-31d (1993) (Repl. Vol. 2006) and the commercially reasonable offer requirements of W. Va. Code § 33-6-31(b) (1998) (Repl. Vol. 2006). Specifically, Mrs. Hardman suggests that, because the subject election/rejection language was not on the precise form prepared by the West Virginia Insurance Commissioner and because the document required them to add together the premium amounts charged for the first vehicle (initial premium) and subsequent vehicles (multi-car discounted premium) insured under the subject policy, the form was defective by failing to inform them, as insureds, of the total amount of the premium that would be charged for the elected coverage. *See* W. Va. Code § 33-6-31d(a) (indicating that election/rejection form "shall specifically inform the named insured of the coverage offered and the rate calculation therefor, including, but not limited to, all levels and amounts of such coverage available and the number of vehicles which will be subject to the coverage"). In light of this allegedly defective document, the Hardmans requested underinsured motorists benefits equal to the liability limits of their motor vehicle insurance policy,[1] which benefits Erie refused to pay. *See Bias v. Nationwide Mut. Ins. Co.*, 179 W. Va. 125, 365 S.E.2d 789 (1987) (requiring insurer to pay insured optional coverages in amount equal to liability limits of subject policy where insurer has failed to make commercially reasonable offer of such optional coverages to insured).

Mrs. Hardman then filed a declaratory judgment action against Erie in the Circuit Court of Jackson County to determine the amount of underinsured motorists benefits available under the Hardmans' policy of motor vehicle insurance as a result of Emily's

[1]The liability limits of the Hardmans' motor vehicle insurance policy with Erie were $100,000 per person; $300,000 per occurrence; and $50,000 for property damage.

accident. Subsequently, Mrs. Hardman filed a motion to amend her complaint to add claims for breach of contract, bad faith, and unfair claims settlement practices in violation of W. Va. Code § 33-11-4(9) (2002) (Repl. Vol. 2006). During the course of this litigation, the Hardmans discovered that the election/rejection form that Erie had requested them to complete in 2003 was a standardized form that would have been distributed to other Erie insureds, as well. Therefore, Mrs. Hardman filed a motion to further amend her complaint to include allegations in support of class action status. Rather than simply ruling upon Mrs. Hardman's motion, however, the circuit court found that they had satisfied the prerequisites for pursuing their claims as a class action proceeding. Thereafter, the parties engaged in class discovery, and the circuit court held a hearing on Mrs. Hardman's motion for class certification. After this hearing, the circuit court granted Mrs. Hardman's motion by order entered November 12, 2010, certifying the class as follows:

> All citizens of West Virginia who, from October 1, 1998[,] to the present, were involved in a motor vehicle accident covered under an Erie Property & Casualty Insurance Company motor vehicle insurance policy issued in West Virginia, who were insureds under any Erie policy and who were injured by or suffered property damage caused by an act of an underinsured motorist, and who did not receive underinsured motorists coverage benefits at least equal to the liability limits stated in the policy declarations. Excluded from the Class are the following:
>
> a. Persons who signed a compliant underinsured motorists coverage selection/rejection [sic] form.
>
> b. Persons who settled an underinsured motorists bodily injury claim for less than the stated underinsured motorists bodily injury coverage limits.
>
> c. Persons who settled an underinsured motorists property damage claim for less than the stated underinsured motorists property damage coverage limits.
>
> d. Persons who settled a bodily injury claim where the tortfeasor's bodily injury liability limits were not "constructively exhausted."
>
> e. Persons who settled a property damage claim where the tortfeasor's property damage liability limits were not "constructively exhausted."
>
> f. Persons who obtained a judgment against a tortfeasor for less than the

applicable and existing liability and stated underinsured motorists coverage limits.

g. Persons who made an underinsured motorists bodily injury claim where the underinsured bodily injury policy limits were equal to or greater than the bodily injury liability limits of the Erie policy.

h. Persons who made an underinsured property damage claim where the underinsured property damage policy limits were equal to or greater than the property damage liability limits of the Erie policy.

From this ruling of the circuit court, Erie petitions this Court for prohibitory relief.

Before this Court, Erie requests a writ of prohibition to prevent Judge Nibert from enforcing his order certifying the above-described class. We previously have recognized the availability of extraordinary relief in similar matters because "[w]rits of prohibition offer a procedure . . . preferable to an appeal for challenging an improvident award of class standing." *McFoy v. Amerigas, Inc.*, 170 W. Va. 526, 532, 295 S.E.2d 16, 22 (1982). Thus, prohibition is used in this manner to "restrain inferior courts from proceeding in causes . . . in which, having jurisdiction, they are exceeding their legitimate powers . . . ." Syl. pt. 1, in part, *Crawford v. Taylor*, 138 W. Va. 207, 75 S.E.2d 370 (1953).

> In 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) 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).

Furthermore, our consideration of the issues presented by the case *sub judice* requires us to consider the correctness of the circuit court's class certification order, affording deference to the circuit court's ruling. In this regard, we previously have held that "[t]his Court will review a circuit court's order granting or denying a motion for class certification pursuant to Rule 23 of the *West Virginia Rules of Civil Procedure* [1998] under an abuse of discretion standard." Syl. pt. 1, *In re West Virginia Rezulin Litigation*, 214 W. Va. 52, 585 S.E.2d 52 (2003). *Accord* Syl. pt. 5, *Mitchem v. Melton*, 167 W. Va. 21, 277 S.E.2d 895 (1981) ("Whether the requisites for a class action exist rests within the sound discretion of the trial court.").

Applying these standards of review to the circuit court's class certification order in the instant proceeding, we find prohibition to be an appropriate remedy in this case. Although the circuit court referenced, within its class certification order, each of the prerequisites to class certification established by Rule 23 of the West Virginia Rules of Civil Procedure, the court did not conduct the attendant detailed analysis that we have directed courts to perform incident to the certification of a class.

Rule 23 of the West Virginia Rules of Civil Procedure details the procedure for certifying an action as a class action proceeding. *See generally* W. Va. R. Civ. P. 23. In summary, Rule 23 establishes numerous prerequisites with which the party seeking class certification must comply before class status may be conferred. Thus, when a circuit court is requested to certify a class, all of the requirements of Rule 23 must be satisfied:

> When a circuit court is evaluating a motion for class certification under Rule 23 of the *West Virginia Rules of Civil Procedure* [1998], the dispositive question is not whether the plaintiff has stated a cause of action or will prevail on the merits, but rather whether the requirements of Rule 23 have been met.

Syl. pt. 7, *In re West Virginia Rezulin Litigation*, 214 W. Va. 52, 585 S.E.2d 52. Moreover,

> [b]efore certifying a class under Rule 23 of the *West Virginia Rules of Civil Procedure* [1998], a circuit court must determine that the party seeking class certification has satisfied all four prerequisites contained in Rule 23(a)–numerosity, commonality, typicality, and adequacy of representation–and has satisfied one of the three subdivisions of Rule 23(b). As long as these prerequisites to class certification are met, a case should be allowed to proceed on behalf of the class proposed by the party.

Syl. pt. 8, *Rezulin*, 214 W. Va. 52, 585 S.E.2d 52. In making such a determination, however, it is not sufficient for the circuit court merely to recognize the existence of each criterion.

Rather, the court is required to conduct a detailed analysis explaining its reasons for finding that each of the required elements of Rule 23 has been fulfilled:

> A class action may only be certified if the trial court is satisfied, after a thorough analysis, that the prerequisites of Rule 23(a) of the West Virginia Rules of Civil Procedure have been satisfied. Further, the class certification order should be detailed and specific in showing the rule basis for the certification and the relevant facts supporting the legal conclusions.

Syl. pt. 8, *State ex rel. Chemtall Inc. v. Madden*, 216 W. Va. 443, 607 S.E.2d 772 (2004).

In its underlying order, the circuit court correctly identified and addressed each factor required to exist before a class action may be maintained. *See* W. Va. R. Civ. P. 23(a) & (b); Syl. pts. 9, 11, 12, & 13, *Rezulin*, 214 W. Va. 52, 585 S.E.2d 52. However, the circuit court did not thoroughly evaluate each criterion as contemplated by Rule 23 and as required by Syllabus point 8 of *Chemtall*. Specifically, *Chemtall* requires "the class certification order should be detailed and specific in showing the rule basis for the certification and the relevant facts supporting the legal conclusions." Syl. pt. 8, in part, 216 W. Va. 443, 607 S.E.2d 772. Here, however, the circuit court merely recited each prerequisite to class certification and summarized its finding that such criterion had been satisfied without specific explanation as to how the factor had been met. Conclusory summations, without further explanation, do not constitute the "detailed and specific . . . showing" required by our holding in *Chemtall* and are not sufficient to confer class status.

Therefore, we grant as moulded the requested writ of prohibition to prevent the Circuit Court of Jackson County from enforcing its November 12, 2010, class certification order. We further remand this case to the circuit court with directions to conduct a class certification analysis pursuant to the standards enunciated in *In re West Virginia Rezulin Litigation*, 214 W. Va. 52, 585 S.E.2d 52 (2003), and *State ex rel. Chemtall Inc. v. Madden*, 216 W. Va. 443, 607 S.E.2d 772 (2004), that fully considers the criteria enumerated therein and to prepare a class certification order in compliance with these authorities.

Writ Granted as Moulded.

ISSUED: June 14, 2011

CONCURRED IN BY:

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