Nos. 16-0401 and 16-0402 - *Dan Ryan Builders, Inc. v. Crystal Ridge Development, Inc.*

LOUGHRY, Chief Justice, dissenting:

FILED
June 8, 2017
released at 3:00 p.m.
RORY L. PERRY, II CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

The majority has fallen victim to its own ill-conceived precedent regarding claims for contribution and, in its attempt to skirt this precedent, has put the petitioner to the impossible task of predicting that this Court would later hold its attempt to adhere to the letter of the law against it. Hiding behind a swarm of federal and state res judicata caselaw, the majority fails to address the petitioner's primary argument in this matter: that it was prohibited *by our caselaw* from bringing its contribution claim in the federal court action. As the petitioner correctly brings to the majority's attention, *Charleston Area Medical Center, Inc. v. Parke-Davis*, 217 W. Va. 15, 17, 614 S.E.2d 15, 17 (2005), prohibits pursuit of a contribution claim in a separate action not initiated by the tortfeasor. Syllabus point six of *Parke-Davis* states in pertinent part: "The inchoate right of contribution recognized by this state *can only be asserted by means of third-party impleader in an action brought by the injured party against a tortfeasor*." (emphasis added). Nonetheless, the majority now holds that the petitioner is barred from pursuing its claim for contribution in the very manner which *Parke-Davis* mandates.

Despite the majority's attempt to obfuscate the inequity of its result in its elaborate factual recitation, the facts in this case are quite simple. The Crystal Ridge homeowners filed suit against the petitioner in the Circuit Court of Harrison County, alleging

that the petitioner negligently constructed the development. The actual construction work regarding the fill slope which failed and gave rise to the homeowners' suit was performed by the Lang Defendants and Horner Brothers. Thereafter, the petitioner filed suit in federal court seeking relief against the Lang Defendants, *for damages the petitioner itself incurred* in trying to rectify the failing fill slope before further damage to the homeowners resulted; the Lang Defendants brought a third-party claim against the Horner Brothers. The petitioner explained that it did not wish for its claim for its own damages to effectively become "lost in the shuffle" of the homeowners' lawsuit. In the federal court action, the petitioner's complaint erroneously sought contribution and indemnification relative to the pending state court suit.[1] However, upon the Lang Defendants' motion to dismiss, the federal court specifically highlighted the inappropriateness of such a claim in the federal action, suggesting that it be brought in state court. Recognizing its error, the petitioner voluntarily withdrew that claim and filed a third-party action against the Lang Defendants and Horner Brothers in the state court action for contribution and indemnity. The federal court action proceeded to trial and the petitioner was awarded damages for the Lang Defendants' negligence in constructing the fill slope.

---

[1]The petitioner's counsel indicated in oral argument that the inclusion of such claim was an error of draftsmanship by prior counsel, which was subsequently rectified through voluntary dismissal of that claim. Why the majority ascribes any nefarious intent to such activity is unclear. Certainly, mistakes can and do occur; nothing in the record would suggest anything untoward. When litigants rectify such errors in accordance with our caselaw, the majority's knee-jerk reaction to ascribe gamesmanship to mere inadvertence does little to encourage litigants to admit error and conform their pleadings to our caselaw.

The majority takes issue with these procedural maneuvers and holds that because the petitioner voluntarily dismissed its claim for contribution and indemnity in the federal court action, these claims are precluded from being litigated in the state court action through the doctrine of res judicata. Citing *Blake v. Charleston Area Med. Ctr., Inc.*, 201 W. Va. 469, 498 S.E.2d 41 (1997), the majority concludes that res judicata prohibits not only the re-litigation of claims asserted in a prior action, but "every other matter which the parties *might have litigated* as incident thereto[.]" *Id*. at 477, 498 S.E.2d at 49. (emphasis added). It is at this point that the majority's analysis crumbles entirely. In the face of the petitioner's claim that *Parke-Davis* in fact *forbids* the bringing of a claim for contribution in a separate action and therefore does not qualify as a "matter which the parties might have litigated" in the separate federal action, the majority retreats to vague incantations about avoiding "piecemeal litigation" rather than offering any substantive law or addressing the directly on-point holding of *Parke-Davis*.

The reason for this is obvious: the holding in *Parke-Davis* is poorly reasoned, overbroad, and, most importantly, does not fit the majority's desired resolution of this matter. I, too, have repeatedly lamented the "common sense-defying logic" and "tortured conclusions" employed in *Parke-Davis*. *Modular Bldg. Consultants of W. Va., Inc. v. Poerio, Inc.*, 235 W. Va. 474, 488-89, 774 S.E.2d 555, 569-70 (2015) (Loughry, J., concurring); *see also State Auto Prop. & Cas. Ins. Co. v. Al-Ko Kober*, No. 14-0556, 2015 WL 3631685, at

*4 (W. Va. June 10, 2015) (Loughry, J., concurring) (criticizing *Parke-Davis*).[2] While I have made clear that I "do not advocate piecemeal litigation for purposes of pursuing contribution or indemnity [and] [w]here an action is filed, all claims should be brought therein via impleader or consolidation[,]" *Parke-Davis*' overly restrictive requirement that contribution claims may *only* be brought in an action filed by the tortfeasor is problematic for the reasons stated in my concurrences and as further demonstrated herein. *State Auto*, 2015 WL 3631685 at *4.

Nonetheless, the holding in *Parke-Davis* remains undisturbed and is the current applicable law regarding the *required* forum in which to bring claims for contribution. This holding plainly mandates that such claims "can only be asserted by means of third-party impleader in an action brought by the injured party against a tortfeasor." *Id*., syl. pt. 6. I previously bemoaned the potential lack of future opportunity to revisit *Parke-Davis* because "tortfeasors will undoubtedly be reluctant to risk running afoul of the *Parke-Davis* holding," thereby evading our review. *State Auto*, 2015 WL 3631685 at *4. This prediction is fully borne out in this case. Attempting to strictly comply with the *Parke-Davis* holding lest it jeopardize its inchoate right of contribution, the petitioner voluntarily dismissed its contribution claim in the federal court action and brought its contribution claim by way of

[2]I would be remiss if I failed to note that the majority's author, despite refusing to discuss the implications of *Parke-Davis* in the opinion, joined in my *State Auto* concurrence criticizing the case and agreed that it was "wrongly decided." 2015 WL 3631685 at *4.

third-party impleader in the state court action–just as the syllabus point requires. Now, the majority finds that the petitioner's claim is barred because it did precisely that. This Court cannot on the one hand demand that litigants proceed in a particular manner regarding a specific cause of action, then penalize them for doing so.

The majority's refusal to address the petitioner's primary argument–that it was *legally foreclosed* from proceeding as the majority now finds it should have–is telling, to say the least. Moreover, while the majority takes the petitioner to task for attempting "two bites" at the apple, it fails to appreciate that the petitioner was already victorious in federal court, obviating the need for a "second bite." The majority fails to appreciate that the petitioner does not seek additional damages in the state court action. Rather, it seeks merely to ensure, in the state court action, that it is not held liable for greater than its own proportionate share of fault.[3] It was long-ago established that "[i]n West Virginia one joint tort-feasor is entitled to contribution from another joint tort-feasor[.]" *Haynes v. City of Nitro*, 161 W. Va. 230,

[3]Furthermore, the majority's professed abhorrence of "piecemeal" litigation is undermined by its refusal to utilize the more appropriate concept which would limit the duplication of litigation in the instant matter: collateral estoppel. As indicated above, the federal court found that the Lang Defendants and Horner Brothers were negligent in their construction of the fill slope. Accordingly, in my view, the petitioner should have been entitled to assert collateral estoppel or issue preclusion against the Lang Defendants and Horner Brothers in the state court action. "Collateral estoppel is designed to foreclose relitigation of issues in a second suit which have actually been litigated in the earlier suit even though there may be a difference in the cause of action between the parties of the first and second suit." *Conley v. Spillers*, 171 W. Va. 584, 586, 301 S.E.2d 216, 217 (1983).

230, 240 S.E.2d 544, 545 (1977). The majority's refusal to permit the petitioner to preserve this indelible right via a claim for contribution for fear that some duplication of proof may occur is nonsensical.

As is apparent, the petitioner sought recovery of its own damages in the federal court action and, as plaintiff, had every right to choose its forum. As this Court has little trouble recognizing when a traditional personal injury plaintiff is involved, "the plaintiff's choice of forum should rarely be disturbed." *Nezan v. Aries Techs., Inc*., 226 W. Va. 631, 644, 704 S.E.2d 631, 644 (2010) (quoting *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947)). The same holds true of the petitioner. Simply because the petitioner is named as a defendant in a parallel action instituted by a different party who was likewise injured by the same joint tortfeasors does not require the petitioner to subordinate its choice of forum for its own damages. Multiple or overlapping litigation is not invariably avoidable. Differing parties having differing rights and remedies to pursue may occasionally cause multiple pending actions to ensue on parallel tracks. Where joinder is not mandatory by way of our Rules of Civil Procedure or substantive law, it is inappropriate for this Court to second-guess choices made in the course of litigation for no other reason than it would have preferred the matters all be decided in one action.

Moreover, any suggestion by the majority that the petitioner should have

pursued its own claim for damages in the state court litigation initiated first by the homeowners, is completely incorrect. West Virginia Rule of Civil Procedure 14(a) provides that the third-party complaint serves to implead those "who [are] or may be liable to the third-party plaintiff for all or part of the plaintiff's claim against the third-party plaintiff." It does not authorize the assertion, via third-party complaint, of causes of action independent of the plaintiff's claim, regardless of whether it stems from the same underlying facts. Other states with similar rules have held that

> [a]lthough third-party practice is properly used to reduce litigation where the third-party claim arises out of the same basic facts which determine the plaintiff's claim against the defendant, it can not be used to maintain an entirely separate and independent claim against a third party, *even if it arises out of the same general set of facts as the main claim.*

Filipponio v. Bailitz, 392 N.E.2d 23, 26 (Ill. Ct. App. 1978) (emphasis added). Federal courts interpreting the identical language contained in their federal counterpart to our Rule 14 agree.[4] As explained in one leading treatise on civil procedure:

> If the claim is separate or independent from the main action, impleader will be denied. The claim against the third-party defendant must be based upon plaintiff's claim against defendant. *The crucial characteristic of a Rule 14 claim is that defendant is attempting to transfer to the third-party defendant the liability asserted against defendant by the original plaintiff. The mere fact that the alleged third-party claim arises from the same transaction or set of facts as the original claim is not*

[4]Federal Rule of Civil Procedure 14(a)(1) similarly provides that a "defending party may, as third-party plaintiff, serve a summons and complaint on a nonparty *who is or may be liable to it for all or part of the claim against it."* (emphasis added).

enough.

6 Fed. Prac. & Proc. Civ. § 1446 (3d ed.); *see Stewart v. Am. Int'l Oil & Gas Co.*, 845 F.2d 196, 199 (9th Cir. 1988) ("[A] third-party claim may be asserted only when the third party's liability is in some way dependent on the outcome of the main claim and is secondary or derivative thereto."); *Kenneth Leventhal & Co. v. Joyner Wholesale Co.*, 736 F.2d 29, 31 (2d Cir. 1984) ("[T]he third party's liability here is neither dependent upon the outcome of the main claim nor is the third party potentially secondarily liable as a contributor to the defendant."); *Hefley v. Textron, Inc*., 713 F.2d 1487, 1498 (10th Cir. 1983) (same); *Commodity Futures Trading Commission v. Hunt*, 591 F.2d 1211 (7th Cir. 1979) (same); *McCain v. Clearview Dodge Sales, Inc*., 574 F.2d 848 (5th Cir. 1978) (same); *United States v. Joe Grasso & Son, Inc*., 380 F.2d 749, 751 (5th Cir. 1967) ("[A]n entirely separate and independent claim cannot be maintained against a third party under Rule 14, even though it does arise out of the same general set of facts as the main claim."); *Cordova v. FedEx Ground Package Systems, Inc*., 104 F. Supp. 3d 1119 (D. Or. 2015) (same); *Polymeric Res. Corp. v. Estate of Dumouchelle*, No. 10-14713, 2014 WL 2815681, at *2 (E.D. Mich. June 23, 2014) (dismissing third-party claim which was independent of plaintiff's claim and did not seek to apportion liability of plaintiff's claim against third-party plaintiff); *Colony Ins. Co. v. Kwasnik, Kanowitz & Associates, P.C.*, 288 F.R.D. 340 (D.N.J. 2012) (same); *iBasis Global, Inc. v. Diamond Phone Card, Inc*., 278 F.R.D. 70 (E.D. N.Y. 2011) (same); *Am. Contractors Indem. Co. v. Bigelow*, No. CV 09-08108-PCT-MHM, 2010 WL 5638732, at

*2 (D. Ariz. July 30, 2010) ("[A] third-party claim may be asserted only where a third-party defendant's liability to the third-party plaintiff is dependent on the outcome of the main claim and is secondary or derivative thereto."); *E.I. DuPont de Nemours and Co. v. Kolon Industries, Inc*., 688 F. Supp. 2d 443 (E.D. Va. 2009) (same).

Therefore, as demonstrated above, the petitioner was *required* by our long-standing caselaw to bring the action for contribution in the state court action by way of third-party complaint. Further, the petitioner *could not have* pursued its independent claim for damages in the state court action and was fully permitted to choose its forum. Simply put, there was no legally permissible way for the petitioner to have proceeded in this matter other than precisely how it did. This is quite simply a scenario where some multiplicity of suit was unavoidable. The majority completely misses the forest for the trees in its analysis; by doggedly focusing on the narrow legal issue of res judicata and its elements, it fails entirely to appreciate that the practical realities of the claims in this case, coupled with controlling precedent, required the petitioner to proceed in exactly this manner.

Where the law requires that a matter be pursued in a specific forum in a specific manner, it is quite simply inconceivable to me how a majority of this Court concludes that a litigant that adheres to precisely this procedure somehow relinquishes its right to have its cause of action heard. This injury to the petitioner is compounded by the

insult of the majority's abject refusal to so much as dignify the caselaw upon which the litigant adhered and relied to its detriment. Accordingly, I respectfully dissent.