No. 33224 – *Donna Joan Blankenship, an individual, et al. v. Ethicon, Inc., a New Jersey corporation, et al.*

Starcher, J., concurring, in part, and dissenting, in part:

FILED
December 26, 2007
released at 10:00 a.m.
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

It is axiomatic that both the Legislature and the Court are constitutionally empowered to alter the common law. Courts amend the common law narrowly and incrementally, on a case-by-case basis and usually over many years. But the Legislature, when changing the common law, often makes drastic statutory changes in response to real or perceived crises, and often without a clear understanding of the impact those changes might have on individual cases. When the crises pass or are proven illusory, the Legislature is rarely impelled to repeal the statutes, and so statutes sometimes exist that address a non-existent problem. This means that cookie-cutter Legislative enactments intended to "fix" a problem with the common law often end up creating absurd conundrums – or worse, end up trampling upon constitutional rights – when applied to facts in a courtroom.

The Medical Professional Liability Act, *W.Va. Code*, 55-7B-1 *et seq.* ("MPLA"), is just such a Legislative enactment. The MPLA was enacted to alter the common law to "fix" a perceived crisis involving medical malpractice lawsuits against the health care industry. The instant case shows how, in the context of a product liability action against medical providers, the MPLA muddles the common law and the *West Virginia Constitution* to create absurd legal situations in the courtroom.

I dissent from the majority opinion's attempt to construe MPLA, because I believe it is a monstrous, unconstitutional procedural mess. I join Chief Justice Davis's statement in footnote two, and I share her view that the MPLA requirements for providing pre-suit notice and a certificate of merit are totally unconstitutional, because they infringe upon this Court's exclusive constitutional rule-making powers. *See* ___ W.Va. at ___ n. 2, ___ S.E.2d at ___ n. 2 (Slip Op. at 2-3, n. 2). The MPLA blatantly tramples upon the separation of powers doctrine.

Unfortunately, only a minority of the members of this Court are currently willing to recognize the substantial constitutional problems created by the MPLA. The majority opinion was, therefore, drafted to give as limited an interpretation to the MPLA as possible, in the context of the facts of this case.

I do, however, concur and concede that the majority opinion's limited interpretation of the MPLA reaches a result that is palatable under standard rules of statutory construction. By the pure terms of *W.Va. Code*, 55-7B-2(e), a lawsuit against a hospital – alleging that the hospital supplied a defective product in the course of medical treatment – is still a lawsuit that concerns the rendering of "health care." Accordingly, lawyers bringing such suits must attempt to follow the arcane procedural hoops created by the MPLA.

But simply because the majority opinion can give the MPLA a logical construction, and simply because lawyers must bring product liability actions against health care providers under the procedures created by the MPLA, doesn't mean that application of the MPLA will have any meaningful, logical affect on future product liability lawsuits

against health care providers. To the contrary, application of the MPLA to the instant case clearly demonstrates the absurdity of the MPLA, and demonstrates why the Legislature should exercise restraint when it attempts to meddle with centuries-old common law principles.

Product liability law traces its roots in the common law back to 1842 and the English case of *Winterbottom v. Wright*, 10 M. & W. 109, 152 Eng.Rep. 402 (Ex. 1842). In that case, the court established that at common law, a person in privity of contract with the manufacturer of a product could recover damages in tort for defects in the product. This Court appears to have first adopted product liability law principles – absent the privity requirement – into West Virginia's common law in 1902 in *Peters v. Johnson, Jackson & Co.*, 50 W.Va. 644, 41 S.E. 190 (1902). In *Peters*, we permitted a plaintiff who used a defective drug to recover tort damages from the seller of the drug, permitting recovery "when the thing used . . . is very dangerous to human life and injury may reasonably be expected to happen to others therefrom." 50 W.Va. at 651-52, 41 S.E. at 193.

This Court definitively adopted a common-law cause of action for strict product liability in *Morningstar v. Black and Decker Mfg. Co.*, 162 W.Va. 857, 253 S.E.2d 666 (1979). Unlike a typical common law tort action, a strict liability action involving a defective product does not focus upon the actions of the defendant. Instead, the focus is upon the product that caused the plaintiff's injuries. The question is not whether the defendant had a duty and was negligent in breaching that duty; the question is whether the product was not reasonably safe for its intended use. We held in Syllabus Point 3 of *Morningstar* that the

cause of action is "designed to relieve the plaintiff from proving that the manufacturer was negligent in some particular fashion during the manufacturing process and to permit proof of the defective condition of the product as the principal basis of liability." The general test of whether a product is defective was established in Syllabus Point 4, where we stated:

> In this jurisdiction the general test for establishing strict liability in tort is whether the involved product is defective in the sense that it is not reasonably safe for its intended use. The standard for reasonable safeness is determined not by the particular manufacturer, but by what a reasonably prudent manufacturer's standards should have been at the time the product was made.

We made it clear in 1979 that the product liability principles established by *Morningstar* are applicable to all manufacturers, distributors, suppliers and sellers of a defective product. The "rule applies to both the manufacturer and the seller, who are engaged in the business of selling such product which is expected to and does reach the user without substantial change in the condition in which it was sold." 162 W.Va. at 888 n.22, 253 S.E.2d at 683 n. 22.

The hospitals in the instant case argued that they are exempt from the requirements of *Morningstar*, and cannot be held liable for supplying patients with sutures that were not reasonably safe for their intended use. The hospitals shotgunned several arguments at the circuit court, but essentially, the hospitals argued that (a) they do not sell sutures to patients, (b) they do not distribute sutures to patients, (c) hospitals, not the patients, are the end users of sutures, and (d) sutures are an incidental part of the vast panoply of

health care services provided by hospitals. The majority opinion side-stepped the hospitals' arguments, and focused entirely upon the notice requirements of the MPLA.

However, the hospitals' arguments are likely to be repeated in the future, and in the context of the MPLA. Unfortunately for medical providers, the modern trend is to hold medical providers liable for selling, distributing, or using defective products in the course of treating patients. Just as unfortunately, strict product liability principles and the MPLA mix together like oil and water.

There is nothing new or novel in the hospitals' arguments about medical providers being exempt from products liability law. Since the 1970s, hospitals and doctors have argued that they are not common, ragamuffin retailers of products, but are healers of the sick not subject to strict products liability. Hospitals and doctors have argued they were "mere conduits" in the distribution of medical products to patients, and should therefore be exempt from common law rules that imposed liability on distributors of non-medical products. *Carmichael v. Reitz*, 17 Cal.App.3d 958, 979 (1971). The California courts led the way in exempting health care providers from strict product liability principles, largely on the basis that "[i]t needs no extended discussion to perceive that a hospital is primarily devoted to the care and healing of the sick." *Shepard v. Alexian Bros. Hosp.*, 33 Cal.App.3d 606, 611 (1973). Many courts initially accepted this logic, and adopted a "hospital exemption" that presumed that defective products and equipment are merely incidental to the professional service provided by hospitals and doctors. Courts avoided imposing liability for defective products in the 1970s because "the hospital was a non-profit facility, essential

to the community, which could not handle the woes of such liability." Robert R. Willis, "Strict Products Liability and Hospitals: Liability of the Modern Hospital and the use of Surgically Implanted Medical Products, Tools, and Prosthetic Devices," 34 Western.St.U.L.Rev. 191, 203 (Spring 2007).

But in recent years, the economics of the medical industry have changed, and courts have begun to swing the opposite direction. "[A]t the start of the 21st century, both the health care and hospital industry have evolved to become one of the most profitable industries in the United States and therefore could be economically mature to handle strict products liability. . . . In terms of function, the hospital of just twenty years ago bears little resemblance to today's complex corporate entity. . ." *Id.* at 203-04. Hospitals today are no longer non-profit, charitable affairs but are massive corporate structures.

> Between 1980 and 1996, the number of nonprofit hospitals declined by 10 percent and the number of beds they controlled declined by 15 percent. During this same period, however, the number of for-profit hospitals increased by 40 percent and the number of beds they controlled increased by 57 percent.

Helmut K. Anheier and Jeremy Kendall, *Third Sector Policy at the Crossroads: An International Non-Profit Analysis*, 23 (Routledge 2001). Further, hospitals and doctors are no longer "primarily devoted to the care and healing of the sick" as they were 30 years ago when the hospital exemption was created, but are now also devoted to maximizing shareholder and individual wealth.

> Health care in the United States is a trillion-dollar industry. Even small players in the industry are fairly large by the standards of many other industries. A modest group practice of

> five physicians can generate revenues of $3 million or more annually (more than the annual revenue of a typical McDonald's franchise). A community hospital can generate revenues of $100 million (more than the annual revenue of some major-league baseball teams), and some teaching hospitals have revenues exceeding $500 million annually (roughly twice the 1999 net revenue of the Internet auction site eBay).

David Dranove, *The Economic Evolution of American Health Care: From Marcus Welby to Managed Care*, 93 (Princeton U. Press 2000).

In recognition of this change in the medical system, the drafters of the *Restatement of the Law* have recently concluded that hospitals and doctors can, and should, be held liable for defectively manufactured medical products distributed to patients. The latest iteration of the *Restatement Third* says:

> A retail seller or other distributor of a prescription drug or medical device is subject to liability for harm caused by the drug or device if:
>
> > (1) at the time of sale or other distribution the drug or medical device contains a manufacturing defect . . ; or
> >
> > (2) at or before the time of sale or other distribution of the drug or medical device the retail seller or other distributor fails to exercise reasonable care and such failure causes harm to persons.

Restatement Third, Torts: Products Liability § 6(e) (1998).

In this case, the plaintiffs' focus is not upon the actions of any health care provider – that is, whether any provider violated any relevant standard of care. Instead, the focus is upon the allegedly defective product sold to / supplied to / distributed to / used upon

the patient in the course of surgery. The question upon which the jury will be instructed is, were the Vicryl sutures not reasonably safe for their intended use? If the answer by the jury is "yes," then the purposes of strict products liability law will be met. The injured plaintiffs – who were usually injured while lying asleep on a surgical table, and were ultimately powerless to protect themselves against the defective product – will not have to bear their losses alone, but will be fully compensated by the sellers, distributors and manufacturers of the defective sutures. The sellers, distributors and manufacturers will be able to distribute their losses, initially, among themselves according to their degrees of fault, if any (and, in the absence of any fault, will be entitled to complete indemnification for all of their damages). *See* Syllabus Point 1, *Hill v. Joseph T. Ryerson & Son, Inc.*, 165 W.Va. 22, 268 S.E.2d 296 (1980) ("A seller who does not contribute to the defect in a product may have an implied indemnity remedy against the manufacturer of the product, when the seller is sued by the user."). In the long term, the losses of the sellers, distributors and manufacturers can be incorporated into the price of the product and distributed among all future customers. And, most importantly, by allowing a jury to impose liability, the sellers, distributors and manufacturers will be encouraged to repair and eliminate the defect, and hopefully be deterred from using defective sutures in the future.

The majority opinion concludes that the MPLA applies in this case because it is a lawsuit involving the provision of "health care." But, when the jury is finally instructed on its burden of proof, the application of the MPLA to this case will change nothing. The portion of the MPLA that sets forth the elements of proof, *W.Va. Code*, 55-7B-3, only

establishes a burden of proof in cases where the plaintiff alleges that an injury "resulted from the failure of a health care provider to follow the accepted standard of care." We recently found that "the MPLA is in derogation of the common law and its provisions must generally be given a narrow construction." *Phillips v. Larry's Drive-In Pharmacy, Inc.*, 220 W.Va. 484, 492, 647 S.E.2d 920, 928 (2007). "Where there is any doubt about the meaning or intent of a statute in derogation of the common law, the statute is to be interpreted in the manner that makes the least rather than the most change in the common law." *Id.*, Syllabus Point 5. So, strictly construing *W.Va. Code*, 55-7B-3, it clearly has no application to the instant case. The plaintiffs' case centers upon whether the hospitals supplied a product that was not reasonably safe for its intended use, not whether the hospitals failed to follow any accepted standard of care.

The absurdity of this case, as the majority opinion says the MPLA mandates, is that the plaintiffs must jump through several pointless procedural hoops before getting their case heard by a jury. They must still comply with the MPLA and mail each defendant a notice telling them that they are about to be sued – even though the defendants already know that, because they were served with complaints in 2003. But, while the majority opinion plainly and clearly says that the MPLA applies in this case, the end result is that the MPLA won't do much to change the jury's verdict in each plaintiff's case. The only impact the MPLA might have is to deprive injured plaintiffs of their rightful damages, by capping the damages that can be recovered at an arbitrary amount that has no relationship to the evidence. *See W.Va. Code*, 55-7B-8. *But see, Riggs v. West Virginia University Hospitals*,

___ W.Va. ___, ___ S.E.2d ___ (No. 33335, Nov. 20, 2007) (Starcher, J., dissenting) (pointing out that *W.Va. Code*, 55-7B-8 applies only to liability "based on health care services rendered . . . to a patient."). And, as I and other members of this Court have discussed before, those caps on damages are also blatantly unconstitutional. *See, e.g.*, *Verba v. Ghaphery*, 210 W.Va. 30, 37, 552 S.E.2d 406, 413 (2001) (Starcher, J., dissenting).

In conclusion, I respectfully concur with the majority opinion's logical, narrow reading of the MPLA – even though the end result of the application of the MPLA to the instant case is nothing more than additional delay and expense for the parties. I dissent to express my hope that, in the future, the Court or the Legislature will recognize the absurd and unconstitutional effects of the MPLA and either strike down or repeal the Act in its entirety.