STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

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C. CASEY FORBES, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

ACE American Insurance Company, and
ACE Property & Casualty Insurance Company,
Defendants Below, Petitioners

v.) No. 22-564 (Circuit Court of Boone County CC-03-2017-C-36)

AmerisourceBergen Drug Corporation, and
Bellco Drug Corporation
Plaintiffs Below, Respondents

AND

St. Paul Fire and Marine Insurance Company,
Defendant Below, Petitioner,

v.) No. 22-575 (Circuit Court of Boone County CC-03-2017-C-36)

AmerisourceBergen Drug Corporation, and
Bellco Drug Corporation
Plaintiffs Below, Respondents

MEMORANDUM DECISION

"An anti-suit injunction is an order barring parties to an action in this state from instituting or prosecuting substantially similar litigation in another state." Syl. pt. 6, *St. Paul Fire & Marine Ins. Co. v. AmerisourceBergen Drug Corp.*, 246 W. Va. 245, 868 S.E.2d 724 (2021). In *St. Paul*, this Court affirmed the Circuit Court of Boone County's decision to enter an anti-suit injunction in an insurance coverage lawsuit. The injunction precluded one of the petitioners herein, St. Paul Fire and Marine Insurance Company ("St. Paul"), from prosecuting a lawsuit that it filed in California against respondent AmerisourceBergen Drug Corporation ("ABDC"), because the issues in the California case were substantially similar to the coverage issues already being litigated between the parties in West Virginia. *See generally id.* However, while this Court found the circuit court's order proper, we also found portions of the order "unclear" or "overbroad" as drafted, and so we "remand[ed] the case for clarification of the order[.]" *Id*. at 258, 868 S.E.2d at 737. On June 10, 2022, the circuit court entered a new order that clarified and explained the breadth and effect of the anti-suit injunction. Petitioner St. Paul, and two other insurance companies, petitioners ACE American Insurance Company and ACE Property & Casualty Insurance Company (hereafter jointly referred to as "ACE"), now appeal that order. After examination of the briefs and the record, and considering the parties' oral arguments, we find no substantial question of law and

no prejudicial error, and we determine that a memorandum decision affirming the circuit court's order is appropriate.[1] *See* W. Va. R. App. P. 21(c).

This case began in March of 2017, when plaintiff-respondent ABDC filed a complaint in the Circuit Court of Boone County against five defendant insurers (including petitioners St. Paul and ACE). ABDC initially sought coverage under sixteen insurance policies for one prescription opioid lawsuit that had been filed against it by the West Virginia Attorney General. However, in its complaint, ABDC noted it reserved the right to seek coverage for additional lawsuits filed by West Virginia cities, counties, and other entities. ABDC later expanded its request for coverage to as many as 165 other West-Virginia-oriented opioid lawsuits against ABDC. ABDC alleged the defendant insurers had sold liability or excess insurance policies to ABDC but that they had breached their contracts by refusing to provide indemnification or a defense for the opioid lawsuits. ABDC's complaint sought a judicial interpretation of insurance policy language potentially applicable to these opioid lawsuits against ABDC.

In November of 2020, after three-and-a-half years of contentious discovery and motion practice in West Virginia, and well before the West Virginia coverage case had been resolved, St. Paul filed a similar lawsuit against ABDC in Orange County, California. St. Paul also listed numerous other insurers, such as ACE, as defendants. Like the West Virginia case, the California lawsuit generally sought a judicial interpretation of insurance policy language potentially applicable to opioid lawsuits filed nationwide against ABDC.

ABDC responded to the California lawsuit by filing a motion for an anti-suit injunction in Boone County. The motion sought to stop all of the parties to the West Virginia action, including ABDC, St. Paul, and ACE, from pursuing any other lawsuits similar to the insurance-policy-interpretation claims pending in West Virginia. On January 7, 2021, the circuit court entered its first order enjoining the parties from litigating the California lawsuit or any other collateral lawsuits against one another regarding any insurance policy language that might apply to any opioid lawsuit against ABDC.[2]

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[1] Petitioner St. Paul appears by attorneys Lee Murray Hall, Bryce L. Friedman, Joshua Polster, and Matthew C. Penny, while petitioner ACE appears by attorney J. Zak Ritchie. Respondents ABDC and its subsidiary, Bellco Drug Corporation, appear by attorneys Charles S. Piccirillo, Todd A. Mount, Courtney C.T. Horrigan, and Kim M. Watterson.

[2] The California trial court subsequently entered an order staying St. Paul's California lawsuit, "in the interests of comity and the conservation of judicial resources to avoid potential conflicting rulings and allow the earlier-filed [West Virginia] case to proceed first, eliminating the risk of multiple and inconsistent judgments in different cases." *St. Paul Fire & Marine Ins. Co. v. AmerisourceBergen Corp.*, 80 Cal. App. 5th 1, 6, 295 Cal. Rptr. 3d 400, 403 (2022) (upholding the trial court's stay). Moreover, the parties indicate that as many as twenty of the insurer defendants in the California lawsuit were affiliated with the five defendant insurers in the West Virginia lawsuit. Many other California unaffiliated insurer defendants were never served with the complaint, and many of those that were served have since been dismissed by St. Paul.

St. Paul and ACE appealed the circuit court's anti-suit injunction order to this Court. In an opinion filed November 15, 2021, this Court affirmed the circuit court's entry of an anti-suit injunction. *See St. Paul*, 246 W. Va. at 245, 868 S.E.2d at 724. We held that a trial court may enter an injunction that bars parties to a lawsuit in this State from pursuing "substantially similar litigation" in another State. We stated in Syllabus Point 6 that determining whether litigation in another State is "substantially similar involves assessing (1) the similarity of the parties; (2) the similarity of the issues; and (3) the capacity of the action in this state to dispose of the foreign state action." *Id.* at 247, 868 S.E.2d at 726. We found no error in the circuit court's finding that St. Paul's California lawsuit was substantially similar and "overlapped and competed with the issues pending in West Virginia." *Id.* at 256, 868 S.E.2d at 735. We further found that the circuit court did not abuse its discretion when it found that "its ability to successfully resolve the West Virginia suit was threatened by St. Paul's California action." *Id.* at 257, 868 S.E.2d at 736. In sum, we found "no error by the circuit court in its decision to enter an anti-suit injunction." *Id.*

Nevertheless, this Court expressed reservations with the "breadth and focus" of the circuit court's anti-suit injunction. *Id*. While ABDC's West Virginia complaint sought interpretation of sixteen insurance policies, the circuit court's order failed to explain why it prohibited the parties from litigating any other question unrelated to the interpretation of the sixteen identified policies at issue in the West Virginia action. *Id.* at 258, 868 S.E.2d at 737. Moreover, as written, the circuit court's order precluded the parties "from pursuing some agreed-upon resolution of the California action, or a resolution from the California court such as a stay or a dismissal." *Id.* Accordingly, we reversed the circuit court's order, in part, and remanded the case with directions that the circuit court clarify its order or otherwise narrowly tailor its impact.

ABDC promptly renewed its motion for the Circuit Court of Boone County to enter an anti-suit injunction and, on June 10, 2022, the circuit court entered another anti-suit injunction order. While ABDC's complaint implicated only sixteen policies, the circuit court noted that the West Virginia coverage lawsuit had expanded during discovery to encompass many other lawsuits, and because coverage may have been triggered under every policy issued by an insurer defendant from January 1, 1996, to the present, the language of every affected policy needed consideration. In a thorough analysis, the circuit court compared the insuring language from the policies at issue in the West Virginia action with the policies raised in the California action and found that the policies issued by St. Paul and ACE at issue in both actions employed "substantially" or "materially identical" terms. The circuit court found that its interpretation of the policies at issue in the West Virginia case would "dispose of the issues regarding the interpretation of the identically worded" policies at issue in the California lawsuit.[3] Moreover, the circuit court noted that at least twenty of the insurer entities named in the California lawsuit were, in actuality, affiliates of the five insurer defendants in the West Virginia lawsuit. The remaining, unaffiliated insurer defendants in the California lawsuit issued excess insurance policies that "followed form" and incorporated the same terms and conditions as the policies issued by primary insurers like St.

[3] The circuit court also found that the excess insurance policies issued by the other two West Virginia defendant insurers (American Guarantee & Liability Insurance Company, and Endurance American Insurance Company) were "follow form" policies that incorporated the exact same terms and conditions as the primary layer of coverage – that is, the liability policies issued by St. Paul and ACE.

Paul and ACE. In sum, the circuit court found that the policies at issue in both California and West Virginia were issued by the insurers "on the same standard forms" and "contain the same exact terms and conditions . . . or incorporate those same terms by reference." Accordingly, because an "overly restrictive [i]njunction would fail to capture the reality of the litigation among the parties," the circuit court determined that its injunction must extend to all policies related to the West Virginia opioid cases.

In recognition of this Court's concern that the circuit court's first order appeared overbroad, the circuit court clarified that its order was temporary. Further, while the West Virginia insurance coverage action is pending, the circuit court explained that it only enjoined the parties from pursuing collateral insurance coverage litigation regarding those lawsuits pending in either the West Virginia Opioid Mass Litigation Panel case or the National Opioid Multidistrict Litigation. Moreover, the circuit court only barred collateral litigation concerning policies issued to ABDC (or its predecessors and affiliates), and issued by the insurer defendants (or their predecessors and affiliates); and only those insurance policies either (1) expressly at issue in the West Virginia coverage action or implicitly at issue because the policy applies to a West Virginia opioid claim, or (2) written on forms substantially similar to the forms at issue in the West Virginia action (or that follows form to such insurance policies). The circuit court expressly ruled that any party could still seek a compromise resolution of any claims, whether through settlement or otherwise.

Petitioners St. Paul and ACE filed separate appeals of the circuit court's June 10, 2022, injunction order, and those appeals were consolidated for argument and consideration by this Court. "*West Virginia Constitution*, article VIII, section 3, . . . grant[s this Court] jurisdiction to hear appeals from interlocutory orders by circuit courts relating to preliminary and temporary injunctive relief." Syl. pt. 2, *State ex rel. McGraw v. Telecheck Servs., Inc.*, 213 W. Va. 438, 582 S.E.2d 885 (2003). We review the circuit court's order granting an injunction for abuse of discretion. Syl. pt. 4, *State v. Baker*, 112 W. Va. 263, 164 S.E. 154 (1932) ("The granting or refusal of an injunction, whether mandatory or preventive, calls for the exercise of sound judicial discretion in view of all the circumstances of the particular case; regard being had to the nature of the controversy, the object for which the injunction is being sought, and the comparative hardship or convenience to the respective parties involved in the award or denial of the writ."). To the extent that the petitioners challenge the circuit court's findings of fact, we apply a "clearly erroneous" standard. Syl. pt. 4, in part, *Burgess v. Porterfield*, 196 W. Va. 178, 469 S.E.2d 114 (1996).

The petitioners assert two points of error that we address. The petitioners first argue that the circuit court's newest injunction order contravenes this Court's earlier opinion in *St. Paul*. They contend the circuit court abused its discretion by issuing an injunction that, like the original injunction, is overbroad because it improperly goes beyond the sixteen policies identified in ABDC's complaint to encompass all of the insurer defendants' policies which date back to January 1, 1996. However, our review of the record shows no abuse of discretion by the circuit court.

The petitioners correctly assert that, when ABDC began this case, it sought coverage for only one lawsuit by the Attorney General. But during discovery, ABDC notified the insurer defendants that it sought coverage for as many as 165 additional lawsuits against ABDC by West

Virginia political subdivisions,[4] and that many of these lawsuits involve claims dating back to 1996. In our prior decision in this case, we directed the circuit court to clarify whether it was necessary to "preclude[] the litigation of *any* issues between the parties, if those issues were unrelated to the interpretation of the sixteen insurance policies at issue in the West Virginia action." *St. Paul*, 246 W. Va. at 258, 868 S.E.2d at 737. The circuit court recognized this Court's concern, and its injunction reflects that it does "not broadly extend to '*any* issues' between the parties." Instead, the circuit court's order incorporates our holding in Syllabus Point 8 of *St. Paul*, where we held that an anti-suit injunction

> is appropriate when equity compels the circuit court: (1) to address a threat to the court's jurisdiction; (2) to prevent the evasion of an important public policy; (3) to prevent a multiplicity of suits that result in delay, inconvenience, expense, inconsistency, or will be a "race to judgment"; or (4) to protect a party from vexatious, inequitable or harassing litigation.

Id. at 247, 868 S.E.2d at 726. The circuit court's order reflects that an injunction was needed to address threats to the court's jurisdiction, not only from St. Paul's substantially similar suit in California, but also because St. Paul admitted below (and has not disputed on appeal) its intent to pursue similar claims in other jurisdictions if the circuit court's injunction is lifted or narrowed. The circuit court also recognized, as did this Court, the public policy implications of assessing whether there was insurance coverage for claims brought against ABDC by West Virginia entities, "without competing rulings from a foreign court." *Id*. at 257, 868 S.E.2d at 736. Further, the circuit court found that an injunction was necessary to prevent a multiplicity of suits litigating the same coverage issues. Finally, the circuit court found that the California lawsuit was filed for improper purposes, namely forum shopping and the disruption of the West Virginia case.[5]

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[4] The record indicates that the opioid lawsuit by the West Virginia Attorney General against ABDC (the suit that triggered the request for insurance coverage that led to this case) was one of the first in the country. Subsequent to the settlement of that opioid lawsuit, thousands of similar lawsuits against ABDC were filed in both West Virginia and across the country by other government entities, Native American Tribes, third-party payors, and individual and class-action plaintiffs.

[5] Petitioners also assert that the circuit court's injunction constituted an abuse of discretion and prejudiced petitioners because it focused exclusively on the California lawsuit and failed to comprehensively account for a different lawsuit filed in Delaware involving ABDC and petitioners. However, we find no reason to address the petitioners' assertion because the record shows that petitioners are no longer parties to the Delaware lawsuit.

Specifically, in January of 2022, an insurer that is not a party to the West Virginia case – Arrowood Indemnity Company – filed an action in a Delaware trial court against ABDC. *See Arrowood Indem. Co. v. AmerisourceBergen Corp.*, Del. Super. Ct. No. N22C-01-182. Arrowood sought a ruling that no coverage was available for opioid lawsuits under policies Arrowood issued to ABDC. However, in March of 2022, Arrowood amended its complaint and added petitioners St. Paul and ACE as defendants to its action against ABDC. Arrowood sought a declaration that if

Upon our review, we do not view the circuit court's newest injunction order as overbroad. The circuit court conducted a detailed review of the policy language employed in petitioners' policies issued to ABDC and effectively found that the applicable coverage provisions of St. Paul's policies were "materially indistinguishable (or word-for-word identical)" and ACE's policies "had the same terms and conditions" between 1996 until 2018. The circuit court's assessment that petitioners' efforts to have other state courts (like California) interpret those coverage provisions while delaying or sidestepping the years of work of the circuit court is the reason anti-suit injunctions are permitted. The petitioners direct us to nothing clearly erroneous in the circuit court's findings, and we find no abuse of discretion in the breadth of the injunction order.

Petitioners' second argument asserts that the circuit court abused its discretion and violated principles of comity and judicial restraint. As we said in Syllabus Point 7 of *St. Paul*, "The principle of comity requires that a circuit court enter an anti-suit injunction cautiously and with restraint." *Id.* at 247, 868 S.E.2d at 726. We explained that comity requires courts to "exercise the power to enjoin foreign suits sparingly and only in very special circumstances where a clear equity is presented requiring the interposition of the court to prevent manifest wrong and an irreparable miscarriage of justice." *Id.* at 254, 868 S.E.2d at 733 (quoting 42 Am. Jur. 2d Injunctions § 186 (2021)). Petitioners contend that because other state and federal courts in recent years have taken up similar insurance cases in the context of prescription opioids – albeit cases involving different

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it owed any coverage to ABDC, any costs should be shared by petitioners. Petitioners responded by filing counterclaims against Arrowood. Arrowood's action was later consolidated with similar lawsuits by other insurers against ABDC.

Unfortunately for petitioners, on November 8, 2023, the Delaware Insurance Commissioner initiated liquidation proceedings against Arrowood. *See State of Delaware ex rel. The Honorable Trinidad Navarro v. Arrowood Indemnity Company*, No. 2023-1126-LWW (Court of Chancery of Delaware, Nov. 8, 2023) ("Arrowood is insolvent, in an unsound condition, a condition that renders its further transaction of insurance presently or prospectively hazardous to its policyholders, and has consented to the entry of a Liquidation and Injunction Order[.]"). Because of the liquidation proceeding, all claims by Arrowood were severed from the consolidated insurance coverage action and permanently stayed. More importantly, the Delaware trial court concluded that because the sole claims by petitioners were counterclaims, in the absence of Arrowood those claims should also be severed and stayed. In sum, the Delaware trial court found that petitioners St. Paul and ACE "are no longer parties to the Civil Action." *See In re AmerisourceBergen Corp. (n/k/a Cencora) Delaware Insurance Litigation*, No. N22C-01-182 (Del. Super. Ct., April 22, 2024).

We acknowledge ABDC's counter-argument that the circuit court's injunction order precludes only collateral litigation by the parties "against one another" and does not prevent the petitioners from responding to suits by non-parties to the West Virginia action (like Arrowood). But since the petitioners are no longer parties to the Delaware action, we find petitioners' arguments regarding the effect of the circuit court's injunction order on the petitioners' actions in the Delaware action moot and so we need not address them.

insurers who provided different policies to different opioid distributors – the circuit court violated the principle of comity and should have refrained from entering its injunction.

The record, however, shows that the threat to comity began with St. Paul, when it filed its competing action in California. After three-and-a-half years of wide-ranging and expensive discovery and motion practice in West Virginia, St. Paul filed duplicative litigation on similar grounds in a foreign state – duplicative litigation which the circuit court found was designed to evade a ruling in West Virginia. On these grounds, "a court has a duty, as well as power, to protect its jurisdiction over a controversy in order to decree complete and final justice between the parties and may issue an injunction for that purpose[.]" *St. Paul*, 246 W. Va. at 253, 868 S.E.2d at 732 (quoting *James v. Grand Trunk W. R. Co.*, 14 Ill.2d 356, 152 N.E.2d 858, 865 (Ill. 1958)).[6] In summary, we find no abuse of discretion or abuse of comity by the circuit court.

Accordingly, for the foregoing reasons, we affirm the circuit court's June 10, 2022, anti-suit injunction order.

Affirmed.

ISSUED: November 14, 2024

CONCURRED IN BY:

Justice Elizabeth D. Walker
Justice John A. Hutchison
Justice William R. Wooton
Justice C. Haley Bunn
Judge Robert E. Ryan, sitting by temporary assignment

Chief Justice Tim Armstead, deeming himself disqualified, did not participate.

[6] Petitioner ACE also asserts in its brief that two corporate affiliates of ACE (Federal Insurance Company and Indemnity Insurance Company of America) issued policies to ABDC (or its predecessors) and, because those two affiliates were not mentioned in ABDC's West Virginia complaint, they are not bound by the circuit court's anti-suit injunction. ACE argues the circuit court's injunction should be modified to ensure that it does not apply to these entities. We decline to address this assertion because ACE does not cite to any part of the record showing it presented this argument to the circuit court in the first instance. *See, e.g., Whitlow v. Bd. of Educ. of Kanawha Cnty.*, 190 W. Va. 223, 226, 438 S.E.2d 15, 18 (1993) ("Our general rule in this regard is that, when nonjurisdictional questions have not been decided at the trial court level and are then first raised before this Court, they will not be considered on appeal.").