2015 IL App (5th) 140590-U

NO. 5-14-0590

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

VERNON LEE ANDERSON, SR., ERNESTINE LAWRENCE, KATIE BURNETT-SMITH, MARTHA EMILY YOUNG, MARCELLA PHILLIPS, and BERNICE LAVERNE COLLINS, All of Whom are Individuals Residing in Illinois, on Behalf of Themselves, and All Others Similarly Situated,	)	Appeal from the Circuit Court of St. Clair County.
Plaintiffs-Appellees,	)	
v.	)	No. 09-L-73
CERRO FLOW PRODUCTS, INC.,	)	
Defendant-Appellant	)	
(Pharmacia Corporation, Pharmacia & Upjohn Co., LLC, Solutia, Inc., Monsanto Co., Pfizer, Inc., and Monsanto AG Products, LLC, Defendants).	)	Honorable Andrew J. Gleeson, Judge, presiding.

JUSTICE CHAPMAN delivered the judgment of the court.
Justice Welch concurred in the judgment.
Justice Moore specially concurred.

ORDER

¶ 1 *Held*: The trial court did not abuse its discretion in granting a stay in this case, and we affirm the order. We remand this case with directions to set a date or a status hearing.

¶ 2 Since 1935, the defendant companies were involved in various industrial concerns involving the alleged release of millions of tons of PCBs, dioxins, and furans into the environment from multiple sites within St. Clair County. The plaintiffs are individuals who resided in the allegedly affected area at some time since 1935 or individuals who currently own real property within that area. In addition to this case, there are 134 other mass tort actions filed by different plaintiffs and against the same defendants pending in St. Clair County. Mediation concluded in early 2014. In August 2014, the trial court ordered the parties to submit an agreed or proposed case management order. The plaintiffs sought a stay, arguing that the individual cases were more advanced than this proposed class action. The trial court stayed the case without specific findings. Cerro Flow, the only defendant who appealed, argues that the trial court abused its discretion. The Monsanto defendants did not appeal. We find that the trial court's comments on the record, as well as the facts of this case, amply support the trial court's order, and we affirm, but remand with directions to the court to set a status hearing.

¶ 3 FACTS

¶ 4 Dating back as far as 1935, the defendant companies allegedly released millions of tons of PCBs, dioxins, and furans (Released Substances) into the environment. The sites at issue are located in St. Clair County, predominantly in the Village of Sauget. The sites are the W.G. Krummich Plant in Sauget operated by one or more of the Monsanto defendants, the Cerro Flow facility also located in Sauget, and a 90-acre landfill operated by Sauget & Co. (Release Sites).

¶ 5 The plaintiffs allege that the release of the Released Substances into the air have created and continue to create health risks for residents, and have also contaminated and continue to contaminate real property within a two-mile radius of one or more of the Release Sites.

¶ 6 The plaintiffs alleged that the Monsanto defendants actively concealed the health risks and real property contamination caused by the releases into the atmosphere. They also alleged that the Monsanto defendants conspired with a nondefendant, Industrial Bio-Test Labs of Northbrook, Illinois, to certify that the substances being released from the Release Sites were noncarcinogenic. Evidence allegedly established that the substances were carcinogenic, and thus certifications to the contrary were fraudulent. Finally, the plaintiffs alleged that the Monsanto defendants continue to disseminate false and misleading information to area residents denying that there is any threat to their health or to their property.

¶ 7 The plaintiffs alleged that Cerro Flow has a copper recycling operation at its Sauget facility. The plaintiffs also alleged that Cerro Flow scrapped PCB transformers and drained manufacturing wastewater and PCB oil into Dead Creek Segment A, located on the Cerro Flow site, and discarded these substances at the facility landfill. The plaintiffs further alleged that because of these activities, Cerro Flow directly released large quantities of substances into the environment.

¶ 8 The plaintiffs alleged that the Released Substances spread to adjacent communities by smokestack emissions, wind erosion, smoke from fires in Monsanto waste piles, and other airborne releases at the sites. The plaintiffs also alleged that the soil, waterways,

and groundwater were contaminated, and that the Released Substances were deposited on and within structures throughout the adjacent areas.

¶ 9 The plaintiffs filed this putative class action on February 10, 2009. They divided the complaint into seven counts, and separated the counts into two categories: Medical Monitoring and Remediation.

¶ 10 The plaintiffs designated four counts as substantive claims for Medical Monitoring. The Medical Monitoring claims alleged negligence, strict liability, nuisance, and trespass. Medical Monitoring class participants were defined as "[c]urrent Illinois citizens who reside or have resided within a two-mile radius of the Sauget Landfill, the Monsanto Facility or the Cerro Facility at any time since January 1, 1935." Several categories of persons were excluded from the Medical Monitoring claims: any person who has cancer or another serious or life-threatening disease proximately caused by exposure to the Released Substances; any person who has already filed a claim for personal injuries proximately caused by exposure to the Released Substances; any judge conducting any proceeding in this case and members of their immediate family; any officer, director, affiliate, legal representative, successor or assign of any of the named defendants–or any entity which is a parent or subsidiary of the named defendants; and proposed class counsel and any lawyer or employee in their law firms.

¶ 11 The plaintiffs also filed three Remediation counts, alleging negligence, nuisance, and trespass. The proposed Remediation class was defined as "Current Illinois citizens who own real property within a two-mile radius of the Suaget Landfill, the Monsanto Facility or the Cerro Facility." In addition to the categories of persons excluded from the

Medical Monitoring class, there were two additional categories of persons excluded from the Remediation class: any property owner whose real estate has already been remediated as a direct and proximate result of exposure to the Released Substances, and any property owner who has already asserted a property damage claim proximately resulting from exposure to Released Substances.

¶ 12 In addition to this proposed class action, the attorneys representing the plaintiffs have filed 134 mass tort actions with over 12,000 plaintiffs against Cerro Flow in St. Clair County. In 2009, the attorneys filed this case and 20 other mass tort actions against Cerro Flow and the Monsanto defendants based upon the same exposures, seeking damages for personal injuries and real property remediation. In 2010, the attorneys filed a wrongful death lawsuit on behalf of representatives of 1,219 deceased individuals, alleging that the Monsanto defendants and Cerro Flow exposed the decedents to the Released Substances and that the exposures injured the decedents resulting in their deaths. In 2014, the attorneys filed 113 additional mass tort actions against Cerro Flow. Of the 113 cases, 111 allege personal injuries and property damages, while 2 allege wrongful death.

¶ 13 The same attorneys filed a proposed class action in St. Louis City in 2010. The defendants removed the case to federal court in Missouri. The plaintiffs in that case, all Missouri citizens, also sought damages for personal injuries and property damage.

¶ 14 By agreement of the parties, the federal district court stayed the Missouri class action from September 2010 until June 2014. In June 2014, the Missouri plaintiffs

advised the court that they had reached a settlement framework with the Monsanto defendants.

¶ 15 On September 14, 2010, the St. Clair County trial court stayed this proposed class action to facilitate complex mediation with an emphasis on the individual cases. The parties entered into a tolling and claims management agreement. The parties agreed to extend the stay seven times. Mediation came to an unsuccessful end in 2014 with respect to Cerro Flow. However, the Monsanto defendants tentatively reached a settlement.

¶ 16 On July 8, 2014, the plaintiffs and Cerro Flow consented to an initial case management order, which lifted the agreed-upon stay as to Cerro Flow. Thereafter, on August 5, 2014, Cerro Flow sent a proposed case management order to the court addressing various discovery and class certification issues. On August 13, 2014, the trial court entered an order directing the parties to either submit an agreed-upon case management order or submit individual case management orders by August 26, 2014. Cerro Flow submitted its proposed case management order to the court on August 26, 2014.

¶ 17 On August 26, 2014, the plaintiffs filed a motion to stay the case, and alternatively sought entry of a case management order that would not mandate class certification before May 19, 2017. The plaintiffs argued that the mass actions of their other clients were more advanced than this proposed class action. They argued that legal experts believe that staying a proposed class action to allow the advancement of more mature individual cases is beneficial to the overall legal process.

¶ 18 The court held a hearing on September 3, 2014. The court took the motion under advisement, and on November 12, 2014, entered an order granting the motion without specific findings or explanation. Cerro Flow timely filed its notice of appeal from this interlocutory trial court order pursuant to Supreme Court Rule 307(a)(1) (eff. Feb. 26, 2010).

¶ 19 LAW AND ANALYSIS

¶ 20 In the plaintiffs' motion to stay, they asked the trial court to stay this Medical Monitoring and Remediation proposed class action. The individual cases would move forward. They premised their request for a stay on the maturity of the individual cases versus the maturity of this class action case. The parties designed and used the previous agreed-to stays in this case to advance discovery in the individual cases. The plaintiffs contend that there was a lot of discovery conducted and that because of these efforts, they were close to settlement with the Monsanto defendants. In support of this maturity argument, the plaintiffs cite to an article authored by the mutually-selected mediator, Professor Francis McGovern, who advances the theory that more advanced individual cases should be adjudicated and evaluated before the court should consider certification of a class. Francis E. McGovern, *An Analysis of Mass Torts for Judges*, 73 Tex. L. Rev. 1821, 1841-45 (1995). The rationale is that by working through the more advanced cases before moving forward with the less-developed class action, the trial court will have a better knowledge of the issues in order to decide to certify or deny certification of the proposed class.

¶ 21 In opposition to the motion to stay, Cerro Flow argued that a further stay would be prejudicial because of the tolling of the statute of limitations, especially since the plaintiffs filed this case more than five years earlier. Additionally, Cerro Flow argued that the plaintiffs' maturity argument was misplaced because this case was factually different from those referenced by Professor McGovern. Finally, Cerro Flow contends that the individual cases are not more advanced than this class action.

¶ 22 We review a trial court's order staying a case with an abuse-of-discretion standard. *May v. SmithKline Beecham Clinical Laboratories, Inc.*, 304 Ill. App. 3d 242, 246, 710 N.E.2d 460, 463 (1999). A trial court abuses its discretion if we determine that the court "acted arbitrarily without the employment of conscientious judgment or, in view of all the circumstances, exceeded the bounds of reason and ignored recognized principles of law so that substantial prejudice resulted." (Internal quotation marks omitted.) *Kaden v. Pucinski*, 263 Ill. App. 3d 611, 615, 635 N.E.2d 468, 471 (1994). The abuse-of-discretion standard of review is "the most deferential standard of review–next to no review at all." *In re D.T.*, 212 Ill. 2d 347, 356, 818 N.E.2d 1214, 1222 (2004).

¶ 23 In Illinois, the party asking the court to stay the case bears the burden to prove that there is adequate justification for a stay. *May*, 304 Ill. App. 3d at 246, 710 N.E.2d at 464 (citing *Kaden*, 263 Ill. App. 3d at 615, 635 N.E.2d at 471).

¶ 24 Cerro Flow argues that the court's order reflects a clear abuse of discretion because the record contains no specific reference to the court's consideration of four factors which Illinois law requires the trial court to consider before granting or denying a stay. The four factors are "comity; the prevention of multiplicity, vexation, and harassment; the

likelihood of obtaining complete relief in the foreign jurisdiction; and the *res judicata* effect of a foreign judgment in the local forum." *May*, 304 Ill. App. 3d at 246, 710 N.E.2d at 464; see also *A.E. Staley Manufacturing Co. v. Swift & Co.*, 84 Ill. 2d 245, 254, 419 N.E.2d 23, 27-28 (1980).

¶ 25 These four factors must be considered by the trial court where there is an identity of parties and issues to a case filed in an intrastate or foreign court. See 19 A.L.R.2d 301 (1951). In *A.E. Staley Manufacturing Co. v. Swift & Co.*, the Illinois case that is the foundation of the usage of the four factors, two cases were at issue–one filed in Iowa, and the second filed in Illinois. *Staley*, 84 Ill. 2d at 248, 419 N.E.2d at 24. Swift sued Staley in Iowa. Staley sued Swift in Illinois. *Id.* Swift filed a motion to stay or alternatively to dismiss for *forum non conveniens* in the Illinois case pending disposition of the Iowa case. *Id.* The Illinois Supreme Court considered the four factors because there were two cases on file with the same parties in different jurisdictions. *Id.* at 253-54, 419 N.E.2d at 27-28. However, the court denied the motion to stay because if it granted the stay, Staley would be mandated to seek relief from Swift in Iowa with a counterclaim, or would have to wait until the stay was lifted in Illinois before it could proceed on its claim against Swift. *Id.*; 735 ILCS 5/2-619(a)(3) (West 2012); see also *Kaden*, 263 Ill. App. 3d at 616-17, 635 N.E.2d at 472 (where the court denied the stay request because there was no identity of the parties or subject matter; while all of the cases involved the same plaintiff, the plaintiff sued various county governments and therefore there was no likelihood that the parties would obtain complete relief from the other court case).

¶ 26 We find that the four factors are inapplicable to the procedural and factual history in this case. The named plaintiffs in this proposed class action are not plaintiffs in any other case pending against Cerro Flow arising out of the same set of facts in St. Clair County or in another Illinois county or in any foreign jurisdiction. While there are numerous cases pending against Cerro Flow based upon the same emission of substances in the same geographic area, these particular plaintiffs are not parties in those cases. Thus, we conclude that the court did not abuse its discretion by failing to address the four factors.

¶ 27 Alternatively, Cerro Flow argues that the plaintiffs failed to establish that they would suffer hardship without the stay.

> "[A] party seeking a stay must justify it by clear and convincing circumstances outweighing potential harm to the party against whom it is operative. [Citation.] Thus [the party seeking a stay] must 'make out a clear case of hardship or inequity in being required to go forward, if there is even a fair possibility that the stay for which he prays will work damage to someone else.' " *Zurich Insurance Co. v. Raymark Industries, Inc.*, 213 Ill. App. 3d 591, 595, 572 N.E.2d 1119, 1123 (1991) (quoting *Landis v. North American Co.*, 299 U.S. 248, 254-55 (1936)).

¶ 28 We disagree with Cerro Flow's statement that the plaintiffs did not present any evidence or argument of hardship. The plaintiffs argued repeatedly that all parties used the four-year stay of proceedings to advance the individual cases. Although no specific class action discovery was undertaken, the parties could use much of the scientific and corporate discovery in these individual cases to proceed with this proposed class action.

All parties agreed to the stays in order to work on the individual cases. Forcing these plaintiffs to move forward with their proposed class action case in this factual context would be inequitable.

¶ 29 Cerro Flow next argues that the indefinite stay is prejudicial. Cerro Flow's primary argument is that an additional stay is prejudicial because the statute of limitations for other potential plaintiffs would remain tolled. *Steinberg v. Chicago Medical School*, 69 Ill. 2d 320, 342, 371 N.E.2d 634, 645 (1977) (citing *American Pipe & Construction Co. v. Utah*, 414 U.S. 538, 554 (1974)). Cerro Flow cites section 2-802(a) of the Code of Civil Procedure, which states: "As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it may be so maintained and describe those whom the court finds to be members of the class." 735 ILCS 5/2-802(a) (West 2012). Although we understand the need to resolve pending potential class actions, we find that Cerro Flow's argument is disingenuous. Although the plaintiffs filed this case more than five years ago, the case was stayed for four of those years. Cerro Flow agreed to each stay. Cerro Flow participated in discovery in the individual cases, and Cerro Flow will be able to utilize that discovery when this case resumes.

¶ 30 Overall, we note that a trial court judge has the inherent power to control the disposition of cases in his court. See *Link v. Wabash R.R. Co.*, 370 U.S. 626 (1962). A trial court judge has vast discretion to manage his docket. *Bank of America, N.A. v. Land*, 2013 IL App (5th) 120283, ¶ 24, 992 N.E.2d 1266. The deference given to a trial court's

order to grant or deny a stay is based upon the judge's own knowledge of his trial dockets and overall caseload. See *Link*, 370 U.S. 626.

¶ 31 While we are aware that the trial court's order granting the stay contained no explanation articulating the court's reasoning, that fact does not necessarily equate to an abuse of the court's discretion. When a court's order does not contain the bases for its ruling, we presume on appeal that the trial judge knew and applied the law. *Foutch v. O'Bryant*, 99 Ill. 2d 389, 391-92, 459 N.E.2d 958, 959 (1984). However, if the record contains "strong affirmative evidence" establishing that the trial judge did not know or did not apply the law, then the court of review should reverse the trial court. *People v. Howery*, 178 Ill. 2d 1, 32, 687 N.E.2d 836, 851 (1997) (citing *People v. Virella*, 256 Ill. App. 3d 635, 638, 628 N.E.2d 268, 271 (1993)).

¶ 32 From a review of the transcript of the hearing on the plaintiffs' motion to stay, we do not find strong affirmative evidence that Judge Gleeson was unaware of the law or chose not to apply the law. Judge Gleeson informed the parties that he had an obligation to Cerro Flow and to all other parties' cases in his courtroom to ensure that he had "some kind of meaningful and efficient manner" to control his docket. He expressed concern that a stay of this case would not enhance judicial economy. In response, attorneys for the plaintiffs and Monsanto explained that a significant amount of discovery had been completed in the four years that this case was stayed, including detailed questionnaires to the potential plaintiffs who had filed cases, interrogatories to the plaintiffs who had filed cases, and expert witness discovery. Although Cerro Flow disagrees that the individual plaintiff cases were "miles ahead" of this case, the parties told Judge Gleeson that there

was enough discovery conducted to warrant a Monsanto settlement. Monsanto's attorney informed the court that it shared documents with Cerro Flow and allowed Cerro Flow days of access to review Monsanto documents.

¶ 33 We find no basis to conclude that the trial court "acted arbitrarily without the employment of conscientious judgment" or "exceeded the bounds of reason and ignored recognized principles of law," and we affirm the court's order. See *Kaden*, 263 Ill. App. 3d at 615, 635 N.E.2d at 471.

¶ 34 We note, however, that the court has not set a status hearing to determine if this case should remain stayed. We also note that the original order staying the case in 2010 set a date for a status hearing. At each subsequent status hearing, the stay was continued and a new status hearing date was set. We find that this practice served to benefit the parties and their attorneys, as well as the trial court assigned to manage this case. Therefore, pursuant to Supreme Court Rule 366(a)(5) (eff. Feb. 1, 1994), we remand this case to the trial court with directions to set a status hearing to determine the necessity of a continued stay, and to make any other orders appropriate at that time.

¶ 35 CONCLUSION

¶ 36 For the foregoing reasons, we affirm the judgment of the St. Clair County circuit court, and remand to the trial court with directions to set a status hearing.

¶ 37 Affirmed and remanded with directions.

¶ 38 JUSTICE MOORE, specially concurring:

¶ 39 I concur with the majority position that the circuit court did not abuse its discretion in granting the plaintiffs' motion to stay because I cannot say that, based on the record, no reasonable trial judge would have ruled as did the circuit court. However, I write specially to express my concern that the interests of the class action plaintiffs are different than the interests of the individual plaintiffs in the related cases in that the class action plaintiffs are in need of medical monitoring and remediation to identify current health concerns and prevent potential injury. While I agree that the discovery taking place for the individual cases could serve to aid the plaintiffs in the class action, I believe it is important to ensure that no conflict of interest arises when formulating any global settlement with regard to the individual cases. Additionally, the circuit court and the plaintiffs' attorneys ought to be mindful that time is of the essence in protecting the proposed class's interests in this matter, as the allegations involved are serious.