IN THE SUPREME COURT OF TENNESSEE

Tennessee Supreme Court No.: E2018-01994-SC-R11-CV
Tennessee Court of Appeals No.: E2018-01994-COA-R3-CV

JARED EFFLER, ET AL.,
Plaintiff,
v.
PURDUE PHARMA L.P., ET AL.
Defendants.

ON APPEAL FROM THE CIRCUIT
COURT FOR CAMPBELL COUNTY, TENNESSEE
NO. 16596

AMICUS BRIEF OF THE INTERNATIONAL ASSOCIATION OF DEFENSE COUNSEL IN SUPPORT OF APPLICATION FOR PERMISSION TO APPEAL

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BACKGROUND

This case involves a highly unusual claim under the Drug Dealer Liability Act, Tenn. Code Ann. §29-38-101 to 116 (the "DDLA"). The model DDLA was authored by then United States Attorney Daniel Bent. Joel W. Baar, "NOTE: LET THE DRUG DEALER BEWARE: MARKET SHARE LIABILITY IN MICHIGAN FOR THE INJURIES CAUSED BY THE ILLEGAL DRUG MARKET", 32 Val.U.L.Rev. 139, 140 (1997) (hereinafter "Baar"). According to Barr:

> Bent . . . devised the DDLA after working with other U.S. attorneys on illegal drug prevention, meeting individuals who had suffered from the illegal drug market, studying the sociology of illegal drug abuse and studying negligence and market share law.

Barr, 32 Val. U.L. Rev. at 140, n. 10. (emphasis added). The American Legislative Exchange Council adopted the DDLA as model legislation in 1992. Barr, 32 Val. U.L. Rev. R., at 140-41.

> The DDLA is based on two central principles that represent a paradigm shift in the way American courts have begun to address situations where the identity of the true tortfeasor cannot be determined. The first principle is that a potential defendant's liability is based on entering the illegal drug market in any capacity, not just making a sale to a particular person. The second principle is that the focus of the DDLA is on the ultimate harm to society caused by the illegal drug market, whether to innocent people or even drug users themselves, and not on the determination of how the harm was caused.

> The DDLA has three primary goals. First, it seeks to allow all persons, businesses and government organizations injured by the illegal drug market to bring suit for damages against all persons who are a part of the illicit drug market within a designated market. Second, it seeks to deter individuals from entering the illegal drug market by imposing liability where there would have been none. Finally, it attempts to encourage illegal drug users to seek treatment and to encourage companies to provide treatment with the knowledge that reimbursement may be obtained from illegal drug dealers within a target market.

Barr, 32 Val. U.L. Rev. at 141 (emphasis added, footnotes omitted). Barr's analysis parallels numerous other commentators who have written about the DDLA. See Taylor, "COMMENT: The Oklahoma Drug Dealer Liability Act: A Civil Remedy For A 'Victimless' Crime", 52 Okla. L. Rev. 227, 239 (1999) ("Acting on the theory that producers and sellers of illegal drugs should be held to at least the same level of responsibility as are manufacturers of legitimate goods, dealer liability created a new cause of action loosely based on theories of market share or alternative liability") (emphasis added); Reiter, "NOTE AND COMMENT: DOLLARS FOR VICTIMS OF A 'VICTIMLESS' CRIME: A DEFENSE OF DRUG DEALER LIABILITY ACTS", 15 J.L. & Pol'y 1329, 1353-56 (2007) (discussing "Notable cases brought under Drug Dealer Liability Acts" and stating that these statutes apply to "persons who knowingly distribute or participate in the distribution of an illegal drug …." (p. 1355) (emphasis added); Dean, "THROUGH THE HAZE: FASHIONING A WORKABLE MODEL FOR IMPOSING LIABILITY ON MARIJUANA

VENDORS", 49 Gonz. L. Rev. 611, 621 (2014) ("Drug Dealer Liability Acts (DDLAs) … create a tort cause of action for persons injured by illegal drugs") (emphasis added); and Blum, "Validity, Construction, and Application of State Drug Dealer Liability Acts", 12 A. L. R. 7th Art. 2 (2016) ("The purpose of the DDLA is to relax causation requirements to prove negligence because the common law effectively barred family members of drug users from filing suit against illegal drug dealers" (emphasis added).

ARGUMENT

I. This Court Should Grant The Application For Permission To Appeal Since The Appeal Involves Important Questions Of Law And The Ruling Of The Court Of Appeals Involves Questions Of Public Interest

The plaintiffs correctly note that

> overdose deaths in Tennessee increased more than 400% from 1999 to 2016, and the vast majority (nearly 72% in 2015) involved opioids …. Opioid abuse has also caused a loss in productivity, an increase in crime, more children in state custody, and greater healthcare costs.

(Plaintiffs' Answer in Opposition to Application for Permission to Appeal (hereinafter "Plaintiffs' Answer"), pp. 8-9. Plaintiffs overlook the fact that unfortunately this is nothing new.

> Approximately $27 billion was spent by state and federal governments on the war on drugs during fiscal year 1991 …. William F. Buckley, Jr., in an address to the New York Bar Association [in 1995], commented that: We are speaking of a plague [illegal drug distribution and abuse] that consumes an estimated $75 billion per year of public money, exacts an estimated $70 billion a year from consumers, is responsible for nearly 50 percent of the million Americans who are today

> in jail, occupies an estimated 50 percent of the trial time of our judiciary, and taxes the time of 400,000 policemen ….

Barr, 32 Val. U.L. Rev. at 141, n. 17.

What is new is the September 11, 2019 Tennessee Court of Appeals decision in this case, which is the first appellate decision in the United States in the 27 years since the DDLA was proposed in 1992 to hold the manufacturer of a legal drug prescribed lawfully by a licensed physician or lawfully sold to legal distributors may be liable under the DDLA.[1] Surely this unusual and unique decision meets the criteria set forth in Rule 11 of the Tennessee Rules of Appellate Procedure "(2) the need to settle important questions of law [and] (3) the need to settle questions of public interest …."[2] (plaintiffs' answer, p. 9).

In fairness to plaintiffs they do not expressly state that holding manufacturers of legal drugs which are lawfully sold pursuant to prescriptions issued by licensed physicians is not a question of "public interest." (plaintiffs' answer, passim). Plaintiffs correctly state that "Rule 11 sets a 'high standard for gaining review.' Fletcher v. State, 951 S.W. 3d 378, 382 (Tenn. 1997)." (plaintiffs' answer, p. 9). Plaintiffs overlook that the issue in Fletcher (which met the "high standard" in Rule 11) was whether the Post-Conviction Procedure Act enacted by the

[1] Under the Court of Appeals decision the manufacturers may be held liable even though they do not learn of the identity of the purchaser until after lawful drug was purchased.

[2] This Court has stated "… we function primarily as a law-development court, rather than as an error-correction Court." State v. West, 844 S.W. 2d 144, 146 (Tenn. 1992).

Legislature, §40-30-217(c), divested this Court of its discretionary jurisdiction under Rule 11 to review decisions denying motions to reopen a criminal conviction. This Court held the answer was no:

> It is well-established that the fundamental role of this Court in construing statutes is to ascertain and give effect to legislative intent. State v. Sliger, 846 S.W. 2d 262, 263 (Tenn. 1993). The Legislature is presumed to know the state of the law at the time it passes legislation. Wilson v. Johnson County, 879 S.W. 2d 807, 810 (Tenn. 1994). Courts must presume that the Legislature did not intend an absurdity and adopt, if possible, a reasonable construction which provides for a harmonious operation of laws. Cronin v. Howe, 906 S.W. 2d 910, 912 (Tenn. 1996); Epstein v. State, 211 Tenn. 633, 366 S.W. 2d 914 (1963).
>
> To conclude that the Legislature, by its silence, intended to divest this Court of jurisdiction to review decisions denying motions to re-open is not reasonable. Had the General Assembly intended to enact a statute aimed divesting this Court of jurisdiction to consider appeals from decisions denying motions to reopen, it could have drafted a provision explicitly stating that purpose and intent. We will not presume from silence that such a provision was intended.

951 S.W. 2d at 381-82. (footnote omitted).

> The overriding purpose of a court in construing a statute is to ascertain and effectuate the legislative intent, without either expanding or contracting the statute's intended scope. Ray v. Madison City, 536 S.W. 3d 824, 831 (Tenn. 2017); [Tenn. Dept. of Corr. v.] Pressley, 528 S.W. 3d [506] at 512 [(Tenn. 2017)]. Legislative intent is first and foremost reflected in the language of the statute.

Wallace v. Metro Gov't of Nashville, 546 S.W. 3d 47, 52 (2018). Also see Waters v. Farr, 291 S. W. 3d 873, 881 (Tenn. 2009) (same) ("When called

upon to construe a statute, we must first ascertain and then give full effect to the General Assembly's intent and purpose. . . . (citation omitted). Our chief concerns is to carry out the legislature's intent without either broadening or restricting the statute beyond its intended scope. . . . (citation omitted). Every word in a statute "is presumed to have meaning and purpose, and should be given full effect (if so doing does not violate the obvious intention of the legislature"). . . (citation omitted).

The IADC respectfully submits that the repeated references in the DDLA[3] to "illegal" drugs strongly suggests that in enacting the DDLA the legislature did not intend to punish manufacturers of lawful drugs which are lawfully sold and purchased. The opioid medications produced by the appellant manufacturers are legal under state and federal law and are FDA approved. The manufacturers sell opioids to licensed distributors, registered with the Drug Enforcement Administration (DEA), who thereafter control distribution of the medications.

More importantly, the precise issue before the court is whether Tennessee should adopt the novel decision of the court of appeals, which finds no support in any other jurisdiction and apparently no support among any of the commentators who have analyzed the DDLA in the last

[3] The DDLA permits injured persons to recover damages from persons who have joined the illegal drug market. Tenn. Code Ann. 29-38-102. The DDLA defines an "illegal drug market" as the support system of illegal drug related operations from production to retail sales. It defines an "illegal" drug as a drug, the distribution of which is a violation of state law. Tenn. Code 29-38-104.

27 years. If left intact, the court of appeals' decision will have an impact far beyond the confines of this case. Manufacturers of any prescription medication (not just opioids) will be subject to potential liability under a law clearly targeted at the illegal drug market. That will be bad for business and Tennesseans in general, as it will have a chilling effect on a legal industry focused on improving the health and well-being of millions throughout this state (and 49 others). The IADC respectfully suggests that this important question warrants granting the Application.

Plaintiffs' suggestion that Dunaway v. Purdue Pharma L.P., 391 F. Supp. 3d 802, 806 (M.D. Tenn. 2019) "supports the Court of Appeals' decision" (plaintiffs' answer p. 18) is without merit. Dunaway explicitly stated:

> In 2005, the [Tennessee] General Assembly enacted the [TDDLA] to provide persons injured by illegal drugs with a civil course of action for damages against persons who knowingly participate in the illegal drug market in Tennessee." Waters v. Farr, 291 S.W. 3rd 873, 915 (Tenn. 2009). One purpose of the Act is "to shift to the extent possible, the cost of the damage caused by the existence of the illegal drug market in a community to those who illegally profit from that market." Tenn. Code Ann. §29-38-103 (4). The General Assembly set out to craft a cause of action that would be wielded against "all participants" in the illegal drug market", but particularly those "not usually the focus of criminal investigations." Tenn. Code Ann. §29-38-103 (4). An "illegal drug," under the statute, is any "drug, the distribution of which is a violation of State law." Tenn. Code Ann. §29-38-104 (1).

391 F. Supp 3d at 811 (emphasis added).

The California Court of Appeals, third appellate district, reached a similar conclusion in a claim against a pharmacy under the California DDLA:

> The purpose of the Act is to enable persons injured as a consequence of the use of an "illegal controlled substance" to recover damages from persons who participated in their marketing and to shift the cost of damages "to those who illegally profit from that market." (§§11701, 11702).
>
> The Act applies both to users and specified others. It applies to "[s]pecified illegal controlled substance[s]'," which include any substance which violates section 11352, (§11703, subd(i). The drugs at issue in this case, Norco, OxyContin, and hydrocodone, are schedule II drugs under Section 11055, subdivision (b)(1)(j) and (N), the marketing of which is made illegal by section 11352 "unless upon the written prescription of a [licensed] physician. . . ."

Whittemore v. Owens Healthcare-Retail Pharmacy, Inc., 185 Cal. App. 4th 1194, 1200-01, 111 Cal. Rptr. 3d 227, 231 (2010) (emphasis added).

As another court stated in rejecting a similar claim against other defendants:

> In asking this Court to allow the pursuit of a common law public nuisance cause of action, plaintiff would have us summarily ignore: . . .
>
> (3) the significance and unfairness of holding defendants accountable even though their commercial activity is wholly lawful and currently heavily regulated, and that their products are nondefective; and
>
> (4) the plain fact that courts are the least suited, least equipped, and thus the least appropriate branch of government to regulate and micro manage the

manufacturing, marketing, distribution and sale of handguns.

People v. Sturm, Ruger & Co., 761 N.Y.S. 2d 192, 198, 309 A.D. 2d 91, 99 (N.Y. App. Div. 2003) (affirming dismissal of public nuisance claim against gun manufacturers, wholesalers, and retailers).

CONCLUSION

The application for permission to appeal should be granted.

CERTIFICATE OF COMPLIANCE

This brief consists of 2,594 words and complies with Rule 3.02, Section 3, of Rule 46 of the Tennessee Supreme Court.

December 24, 2019.

Respectfully submitted,

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