IN THE SUPREME COURT OF THE STATE OF WASHINGTON

CERTIFICATION FROM THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT IN EDWARD J. BYLSMA,	)	
Plaintiff/Appellant,	)	No. 86912-0
v.	)	En Banc
BURGER KING CORPORATION, a Florida corporation; and BURGER KING RESTAURANT #5259, d/b/a KAIZEN RESTAURANTS, INC., an Oregon corporation,	)	
Defendants/Respondents.	)	Filed January 31, 2013

González, J.—Clark County Deputy Sheriff Edward Bylsma seeks to proceed to trial and recover damages from Burger King Corporation under the Washington Product Liability Act (WPLA), chapter 7.72 RCW, for his claim that he suffers ongoing emotional distress from discovering that he was served a burger with phlegm inside the bun. In a certified question, the Ninth Circuit Court of Appeals asks us to determine whether the WPLA permits relief for emotional distress damages, in the

absence of physical injury, caused to the direct purchaser by being served and touching, but not consuming, a contaminated food product. We answer that the WPLA permits relief in such circumstances, but only if the emotional distress is a reasonable reaction and manifest by objective symptomatology.

I. Facts and Procedural History

On March 29, 2009, Clark County Deputy Sheriff Edward J. Bylsma drove his marked police cruiser through the drive-thru of a Burger King that is operated by Kaizen Restaurants in Vancouver, Washington. Bylsma ordered a Whopper with cheese and drove away with an uneasy feeling after receiving his burger. He pulled into another parking lot down the street, lifted the top bun, and observed what appeared to be a glob of spit on the meat patty. He inserted his finger into the glob to confirm it was not fat. Later DNA (deoxyribonucleic) testing revealed the saliva belonged to one of the employees working at the time.

Bylsma brought suit against Burger King and Kaizen Restaurants in the United States District Court for the District of Oregon raising claims under Oregon law for product liability, negligence, and vicarious liability. Bylsma claims that he suffers ongoing emotional distress, including vomiting, nausea, food aversion, and sleeplessness. These symptoms have led him to seek treatment from a mental health professional.

Burger King moved for judgment on the pleadings. Magistrate Judge Papak

issued findings and recommendations, and recommended Burger King's motion be granted. The magistrate judge found that Washington law applies, the WPLA preempts all other causes of action, and the WPLA does not allow for recovery of emotional distress damages caused to a purchaser in the absence of physical injury. District Court Judge Marsh adopted the magistrate judge's findings and recommendations and dismissed the case.

Bylsma appealed to the Ninth Circuit. Bylsma does not dispute that Washington law applies or that the WPLA preempts other potential causes of action but argues that emotional distress damages absent physical injury are recoverable under the WPLA. Opening Br. at 1. Because this issue is central to the outcome of the case and its resolution may have far-reaching effects in Washington, the Ninth Circuit seeks our guidance. Order Certifying Question at 129-30.

II. Standard of Review

Certified questions from federal courts are pure questions of law that we review de novo. *Bradburn v. N. Cent. Reg'l Library Dist.*, 168 Wn.2d 789, 799, 231 P.3d 166 (2010). This certified question involves interpreting the WPLA. In interpreting a statute, our primary aim is to ascertain and carry out the legislature's intent. *Dep't of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 9, 43 P.3d 4 (2002).

III. Analysis

The WPLA, enacted in 1981, created a single cause of action to provide relief

for "harm caused by the manufacture, production, making, construction, fabrication, design, formula, preparation, assembly, installation, testing, warnings, instructions, marketing, packaging, storage or labeling of [a] product." RCW 7.72.010(4); *Wash. Water Power Co. v. Graybar Elec. Co.*, 112 Wn.2d 847, 853-56, 860, 774 P.2d 1199, 779 P.2d 697 (1989). A "product liability claim" under the WPLA preempts any claim or action that previously would have been based on any "substantive legal theory except fraud, intentionally caused harm or a claim or action brought under the consumer protection act, chapter 19.86 RCW." RCW 7.72.010(4); *see Graybar*, 112 Wn.2d at 860; *Wash. State Physicians Exch. & Ass'n v. Fisons Corp.*, 122 Wn.2d 299, 323, 858 P.2d 1054 (1993); *La.-Pac. Corp. v. ASARCO Inc.*, 24 F.3d 1565, 1584 (9th Cir. 1994). Under the WPLA, if "the claimant's harm was proximately caused by the fact that [a] product was not reasonably safe in construction," then the product manufacturer is strictly liable. RCW 7.72.030(2). A product is not reasonably safe in construction only if "when the product left the control of the manufacturer, the product deviated in some material way from the design specifications or performance standards . . . [or] from otherwise identical units of the same product line," with the trier of fact "consider[ing] whether the product was unsafe to an extent beyond that which would be contemplated by the ordinary customer." RCW 7.72.030(2)(a), (3). The WPLA establishes separate standards for claims based on defective design or inadequate warnings or instructions, which are not at issue here. RCW 7.72.030(1).

Although much of the WPLA was taken from the Model Uniform Product Liability Act (UPLA), 44 Fed. Reg. 62, 713 (1979), the legislature chose not to use the UPLA's definition of "harm." Senate Journal, 47th Leg. Reg. Sess. at 630 (Wash. 1981); *Fisons*, 122 Wn.2d at 319-20. The UPLA defines "harm" to include "mental anguish or emotional harm" only if "attendant to . . . personal physical injuries" or "caused by . . . being placed in direct personal physical danger and manifested by a substantial objective symptom." 44 Fed. Reg. at 62,717. In contrast, RCW 7.72.010(6) more broadly defines "harm" as "any damages recognized by the courts of this state . . . [except for] direct or consequential economic loss under Title 62A RCW." The legislature intended to allow for the "continuing development of the term through case law." Senate Journal, supra, at 630; *Fisons*, 122 Wn.2d at 320.

Under the WPLA's definition of harm, we look to Washington case law to determine whether the damages in question are "recognized by the courts of this state." RCW 7.72.010(6). Because the WPLA does not require proof of intent and does not preempt claims based on intentional conduct, we will focus on strict liability and negligence cases for guidance. *See Fisons*, 122 Wn.2d at 321.

In deciding whether to allow damages for emotional distress in the absence of physical injury, Washington courts have balanced the right to compensation for emotional distress against competing interests in preventing fraudulent claims and ensuring that tortfeasers are held responsible only insofar as is commensurate with

their degree of culpability. We have not addressed emotional distress damages absent physical injury in the context of a strict liability claim. In negligence cases, however, we allow claims for emotional distress in the absence of physical injury only where emotional distress is (1) within the scope of foreseeable harm of the negligent conduct, (2) a reasonable reaction given the circumstances, and (3) manifest by objective symptomatology. *Hunsley v. Giard*, 87 Wn.2d 424, 433, 436, 553 P.2d 1096 (1976). These requirements were developed to address past concerns that feigned claims of emotional distress would lead to "'intolerable and interminable litigation.'" *Corcoran v. Postal Tele.-Cable Co.*, 80 Wash. 570, 579, 142 P. 29 (1914) (quoting *Peay v. W. Union Tele. Co.*, 64 Ark. 538, 544, 43 S.W. 965 (1898)). The scope of foreseeable harm of a given type of conduct depends on "'mixed considerations of logic, common sense, justice, policy, and precedent.'" *King v. City of Seattle*, 84 Wn.2d 239, 250, 525 P.2d 228 (1974) (quoting Thomas Atkins Street, The Foundations of Legal Liability 110 (1906)); *see also Colbert v. Moomba Sports, Inc.*, 163 Wn.2d 43, 52, 176 P.3d 497 (2008) (limiting the reasonably foreseeable class of plaintiffs who can recover for emotional distress caused by injury to a third party). We have permitted recovery in the absence of physical injury, for example, where undertakers improperly buried an infant child, *Wright v. Beardsley*, 46 Wash. 16, 89 P. 172 (1907), where a defendant inadvertently printed plaintiff's telephone number on its sales slips causing the plaintiff to be harassed by telephone calls, *Brillhardt v. Ben Tipp, Inc.*, 48 Wn.2d

722, 297 P.2d 232 (1956), and where a funeral home failed to provide ashes in a burial urn and the decedent's mother handsifted through the ashes, mistaking them for packing material, *Corrigal v. Ball & Dodd Funeral Home, Inc.*, 89 Wn.2d 959, 962, 577 P.2d 580 (1978). Although none of these cases involved contaminated food in particular, each concerned emotionally laden personal interests, and emotional distress was an expected result of the objectionable conduct in each case. Common sense tells us that food consumption is a personal matter and contaminated food is closely associated with disgust and other kinds of emotional turmoil. Thus, when a food manufacturer serves a contaminated food product, it is well within the scope of foreseeable harmful consequences that the individual served will suffer emotional distress. The courts of this state recognize damages for such emotional distress, and thus, such damages, if proved, are recoverable under the WPLA.

IV. Conclusion

We answer the certified question in the affirmative. The WPLA permits relief for emotional distress damages, in the absence of physical injury, caused to the direct purchaser by being served and touching, but not consuming, a contaminated food product, if the emotional distress is a reasonable response and manifest by objective symptomatology.

AUTHOR:
Justice Steven C. González

WE CONCUR:

Justice Debra L. Stephens

Justice Charles W. Johnson

Justice Charles K. Wiggins

Justice Mary E. Fairhurst

Tom Chambers, Justice Pro Tem.