No. 99-

IN THE

SUPREME COURT OF THE UNITED STATES

MARDY COTTON

Petitioner,

v.

JOHNSON AND JOHNSON

Respondent

Mardy Cotton

1410 Washington Blvd. Apt 1805

Detroit Michigan 48226

(313) 550-9970

PETITION FOR A WRIT OF CERTIORARI

Now come Mardy Cotton acting In Pro Per to request a writ of certiorari from the Unites States Supreme court

QUESTIONS PRESENTED

1. Whether both conditions precedent to a law that contains two conditions precedent must be met before the law can be applied, and
2. Whether "congress" can grant immunity to any person or business without violating the first amendment; which states: congress shall make no law respecting … the right of the people … to petition the government for a redress of grievances, particularly when such grant also circumvents the prohibition against issuing titles of nobility to wealthy families by providing wealthy families with the same privilege of immunity but simply without the title.

PARTIES TO THE PROCEEDINGS BELOW

1. Mardy Cotton, a citizen of the State of Michigan and the United States of America
2. Johnson and Johnson, a family owned corporation doing business in the State of Michigan

OPINIONS BELOW

United States district court eastern district of Michigan Southern division defendant's motion to dismiss was granted by order dated: December 1, 2016 in Ann Arbor, Michigan by Judith e. Levy united states district judge. Case no. 16-cv-12564

United States Court of Appeals for the sixth circuit issue the order affirming the district judge's decision on September 22, 2017 before: Judges Gibbons and Thapar, circuit judges and signed by Deborah S. Hunt, as clerk. Case no. 16-2770

PERTINENT PROVISIONS

Michigan Product Liability Act (MPLA). Mich. Comp. Laws § 600.2946, and

The United States Constitution per the first amendment and the prohibition against titles of nobility therein.

STATEMENT OF THE CASE

On March 23, 2016, plaintiff filed this lawsuit against defendant in state court. Count I alleges that defendant was negligent and strictly liable for overly promoting and failing to warn of the side effects of Risperdal. Count II alleges that defendant is liable for breach of express and implied warranties made about "the nature and properties of Risperdal." Count III alleges that defendant is also strictly liable because Risperdal was defective at the time it was sold to plaintiff. Plaintiff seeks damages in the amount of one million dollars for medical expenses, loss of earnings and earning capacity, pain and suffering, and "loss of the ability to enjoy the normal functions of life."

On July 8, 2016, defendant removed this case from state court to this Court. Six days later, on July 14, 2016, defendant filed a motion to dismiss; Legal Standard Under Fed. R. Civ. P. 12(b)(6), claiming immunity under a Michigan's product liability statue (MPLA).

On December 1, 2016 the trial court granted the defendant's motion an appeal followed and the appeals court affirmed the district court's ruling by order issued on September 22, 2017.

The MPLA provides: In a product liability action against a manufacturer or seller, a product that is a drug is not defective or unreasonably dangerous, and the manufacturer or seller is not liable, if the drug was approved for safety and efficacy by the United States food and drug administration, and the drug **<u>and its labeling were in compliance with the United States food</u>**

and drug administration's approval at the time the drug left the control of the manufacturer or seller see Taylor v. Gate Pharm, 468 Mich. 1. 6-7. 658 N. W. 2d. 127 (2003).

The defendant does not contend that its labeling of the product was in compliance with FDA's approval at the time the drug left its control as it has plead guilty to misbranding the product before it left its control.

The District Court's Rulings

The Court's Analysis: Defendant claims it is entitled to immunity pursuant to the Michigan Product Liability Act (MPLA), MICH. COMP. LAWS § 600.2946. Plaintiff asserts that, regardless of whether defendant qualifies for immunity, the MPLA is unconstitutional.

A. Plaintiff's Constitutional Arguments

Plaintiff argues that the MPLA violates his First Amendment right to petition the government because it bars him from bringing his claims against defendant. He also argues that the MPLA violates the separation of powers doctrine because it deprives courts of the ability to redress his injuries.

"[T]he right of access to courts for redress of wrongs is an aspect of the First Amendment right to petition the government." Borough of Buryea, Pa. v. Guarnieri, 564 U.S. 379, 387 (2011). However, this right is not unbounded, and it is not "a right to bring to court [any] grievance that the [plaintiff] wishe[s] to present." Lewis v. Casey, 518 U.S. 343, 354 (1996). Rather, the right of access to the courts protects plaintiffs from being prevented from filing a lawsuit or obtaining a hearing. Garcia v. Wyeth-Ayerst Labs., 385 F.3d 961, 968 (2004); EJS Props., LLC v. City of Toledo, 698 F.3d 845, 864 (6th Cir. 2012) (right to access the courts addresses instances in which an official's conduct denies a plaintiff "adequate, effective and meaningful" access to the courts). Thus, for a plaintiff to state a claim that his right of access to the courts was denied, he must allege, for instance, that an official interfered with his access to legal resources or his ability to file a court document. See, e.g., Lewis, 518 U.S. at 354 (noting that most access to courts cases involve prisoners stopped from filing or pursuing direct appeals, 42 U.S.C. § 1983 claims, and habeas claims); Rodgers v. Hawley, 14 F. App'x 403, 409 (6th Cir. 2001) (prisoner must allege that prison officials "hindered his efforts to pursue a none-frivolous legal claim").

Here, plaintiff has not been denied the right of access to the courts. He was not prevented from filing his lawsuit or having his arguments heard by the Court. And, as the Sixth Circuit has held, the MPLA's broad grant of immunity does not unconstitutionally restrict access to the courts. Garcia, 385 F.3d at 968. Accordingly, the MPLA does not violate plaintiff's right to petition the government by denying him access to the courts. The MPLA also does not violate the separation of powers doctrine. First, this doctrine is not applicable to this case because it addresses the powers of the branches of the federal government, not the effect of state laws, such as the MPLA, on the federal government. Second, Congress establishes the jurisdiction of the federal courts, and is generally free to expand and eliminate jurisdiction over claims as it wishes. But Congress may not enact statutes or jurisdictional changes that "require[] a federal court to act unconstitutionally," Bank Markazi v. Peterson, ___ U.S. ___, 136 S. Ct. 1310, 1324 n.19 (2016) (internal citations omitted), or that otherwise violate the Constitution or a party's constitutional rights.

Here, plaintiff has not alleged that the MPLA requires the federal courts to act unconstitutionally or that the MPLA violates his constitutional rights, except to the extent that the statute violates his right to petition the government. As set forth above, the statute does not violate plaintiff's right to petition. Accordingly, the MPLA does not violate the separation of powers doctrine.

B. Michigan Product Liability Act Immunity Defendant claims that it is entitled to immunity under the MPLA. (Dkt. 5 at 3.) Plaintiff asserts that defendant has admitted to misbranding Risperdal during the period that plaintiff was using the drug, and defendant is therefore not entitled to immunity. (Dkt. 13 at 2.)

A drug manufacturer is entitled to immunity under the MPLA if plaintiff has brought a product liability action, and if, inter alia, the drug was approved by the U.S. Food & Drug Administration (FDA). MICH. COMP. LAWS § 600.2946(5). There are two exceptions to this road grant of immunity. First, manufacturers are not immune if they "intentionally withhold[] from or misrepresent[] to the [FDA] information concerning the drug that is required to be submitted." Id. § 600.2946(5)(a). This exception applies only if the FDA makes a formal finding of fraud. Garcia, 385 F.3d at 966. Second, manufacturers lose immunity if they make "an illegal payment to an official or employee of the [FDA] for the purpose of securing or maintaining approval of the drug." MICH. COMP. LAWS § 600.2946(5)(b). The MPLA defines "product liability action" as "an action . . . brought . . . for injury to a person . . . caused by or resulting from the production of a product." MICH. COMP. LAWS § 600.2945(h). "Production" is defined as "manufacture . . . warning, instructing, marketing, selling, advertising, packaging, or labeling." MICH. COMP. LAWS § 600.2945(i). As is made clear by the statutory definitions, plaintiff has brought a product liability action, notwithstanding his claims of negligence and breach of warranty. A court is not "bound by a party's choice of labels for its action because this would put form over substance." Duronio v. Merck & Co., Inc., Case No. 267003, 2006 WL 1628516, at *3

(Mich. App. June 13, 2006). Instead, a court should examine the content of the claims to determine whether a plaintiff is in substance bringing a product liability action. See id. Here, plaintiff's claims address aspects of "production" – failure to warn, advertising or marketing (over promotion and warranties about the nature and properties of Risperdal), and manufacture (defect at the time sold). As plaintiff summarizes in Count III, "Risperdal ingested by plaintiff was defective when sold by the defendant, by reason of negligence and breach of warranties [Counts I and II] . . . and defendant is strictly liable." (Dkt. 1 at 8.) Thus, plaintiff's complaint involves injury caused by the production of a product, and therefore is a product liability action. See Duronio, 2006 WL 1628516, at *5 (finding plaintiff's common law fraud claim against drug manufacturer was in substance a product liability claim).

Because plaintiff has brought a product liability action and Risperdal has been approved by the FDA,1 defendant is entitled to immunity from suit unless one of the two statutory exceptions applies. Plaintiff claims that defendant has admitted to misbranding Risperdal and selling it for purposes for which it was not approved. (Dkt. 13 at 2.) Even if these allegations are true, plaintiff has not alleged either (1) that the FDA has made any findings of fraud or (2) that defendant improperly paid the FDA to secure or maintain approval of Risperdal.

Thus, plaintiff has not pleaded any facts or allegations to suggest that either exception applies. Accordingly, plaintiff's argument cannot overcome defendant's immunity, and plaintiff's claims must be dismissed.

IV. Conclusion

Defendant has demonstrated that it is entitled to statutory immunity from plaintiff's claims under the MPLA. And plaintiff's constitutional arguments to the contrary are unavailing. But plaintiff correctly comprehends that the MPLA effectively prohibits him from pursuing his claims against defendant, and is understandably (The Court may take judicial notice of this fact pursuant to Fed. R. Evid. 201(c)), frustrated. Even so, "if a challenged action does not violate the Constitution, it must be sustained," and "[its] wisdom is not the concern of the courts." I.N.S. v. Chadha, 462 U.S. 919, 944 (1983). Accordingly, defendant's motion to dismiss is GRANTED.

IT IS SO ORDERED. Dated: December 1, 2016 s/Judith E. Levy Ann Arbor, Michigan JUDITH E. LEVY United States District Judge

The Circuit Court's Decision.

Cotton first argues that the MPLA does not provide Johnson & Johnson with immunity because Johnson & Johnson "admitted to misbranding the product." Under the MPLA, drug manufacturers are immune to product liability actions if the drug was approved by the U.S. Food & Drug Administration (FDA), with two exceptions. The first exception applies if the manufacturer "[i]ntentionally with[held] from or misrepresent[ed] to the [FDA] information concerning the drug that [was] required to be submitted," and applies only if the FDA makes a formal finding of fraud. Mich. Comp. Laws § 600.2946(5)(a); *see Garcia v. Wyeth-Ayerst Labs.*, 385 F.3d 961, 966 (6th Cir. 2004). The second exception applies if the manufacturer made "an illegal payment to an official or employee of the [FDA] for the purpose of securing or maintaining approval of the drug." Mich. Comp. Laws § 600.2946(5)(b). Cotton did not and does not allege facts supporting the application of either exception. Thus, the MPLA applies to this case and Johnson & Johnson is immune from suit.

As is evident from this representation of how the court reached it decision the defendant is presumed to have been covered by the statue simply by gaining approval by the FDA. My argument is that there is a second condition precedent that the product must be correctly labeled and that the product was not correctly labeled by the defendant's own admission. That issue is completely unaddressed as the issue of whether I addressed one of the two other issues, which would have been necessary for me to have addressed it the defendant had correctly labeled the product.

REASONS FOR GRANTING THE WRIT

I. That the court's failure to include a second condition precedent is a gross injustice that should shock the consciousness of the court

A condition precedent is a condition that must be met before for a contract can be enforced; Black's Law says "A rule in a contract that parties must do what they agree to". In this case the defendant was not only required to get FDA approval but also to insure that the label was in compliance with FDA approval before it left its control. By misbranding the product the defendant failed to meet the second condition precedent to its agreement with the FDA and its approval of the product; therefore the protection the approval would have had does not apply as the defendant was not in compliance with their FDA approval contract.

The courts simply failed to read second condition precedent into their decision making process, which was the bases of my argument.

The defendant admits to unlawfully (having plead guilty to a crime) injuring me and having set aside money in an agreement to compensate similarly situated parties, yet I and any other Michigan resident they believe they can simply snub because by some means 'lobbyist' convinced the Michigan legislature to grant them immunity. Yet the law also required the defendant to correctly label the product in compliance with what was approved. When the defendant admitted to misbranding the product, a brand which appears on the label, they have admitted to not complying with the second condition. It's reasonable to assume that the purpose of having the defendant plea to misbranding the product as part of a plea bargain was to disqualify the defendant from claiming immunity in jurisdictions where immunity might apply in the first place; as this is a 'crime'.

Accordingly I would simply ask the court to read into consideration the second condition precedent required before immunity applies and therein find that immunity does not apply and therefore I was not required to address the 'two exceptions' wherein immunity applied.

II. That the unconstitutional nature of the law should shock the consciousness of the court

There are only three aspects to social economics; 'the individual', 'society' and 'defense'.

There are only two considerations to each of these aspects:

1. An individual's determination of whether their relationship with other individuals will be one of cooperation or competition.
2. Society's representation of the social policy governing the relationship between the individuals within society, also referred to a as politics or government, which will either be one of the administration of justice or the rule of law, and
3. 'Defense', a determination as to whether defense will be provided by a militia (the individuals voluntarily) or an army (any group of paid professionals).

There is only 'one' set of decisions derived from the above considerations that provides for the creation[1], maintenance[2] and defense[3] of individual liberty, which is biblically known as a "House".

A social economic system may be deemed a House when:

1. The individuals determine that their relationship with one another will be based upon cooperation rather than a competition
2. The social policy that governs that relationship is one of the administration of justice rather than the rule of law, 'and'
3. Defense is reliant upon a militia or 'the individuals' themselves rather than an army or other group of paid professionals.[4]

All other determinations made within the above three considerations result in the social economic system biblically known as a "Kingdom", and

A social economic system may be deeded a Kingdom when:

1. The relationship between individuals is competitive rather than cooperative, 'or'
2. The social policy that governs society is the rule of law, which is necessary in order to maintain law and order in a competitive environment or jungle induced by competition, rather than equity or the administration of justice, 'or'
3. Defense is reliant upon an army or other group of compensated professionals rather than a militia or the individuals themselves.

[1] Profit is created as individual cooperate and reduce the time it takes to complete the necessary tasks that sustain their quality of life or standard of living; this provides them with free-time, freedom otherwise known as "liberty". (liberty is "for" the people)
[2] Profits must be equitably or justly distributed in order to maintain cooperation. (governance or justice " by" the people)
[3] Defense requires the participation of all the people. (defense "of" the people)
[4] Paying an army for defense can only result in diminishing profit/liberty meant to be defended. To avoid this, the wealthy might pay to provision any army the so that it can loot and take booty from others in order to maintain itself; yet neither of these alternatives are beneficial to society, as the former only leads to the formation of a kingdom and the latter an empire. Although glory of western societies social stagnation of over 2000 years this is the very social economic system we as Americans have expressed our desire to avoid.

This nation was founded with the specific intent not to be dominated by nor become a kingdom and to that end:

1. The separate states united, otherwise entering into a cooperative agreement to establish a constitutional form of government; consequently this nation was founded upon cooperation not conquest.
2. Each justice or judge of the United States takes the following oath or affirmation before performing the duties of his office: "I, ___ ___, do solemnly swear (or affirm) that I will **administer justice** without respect to persons, and do equal right to the poor and to the rich, and that I will faithfully and impartially discharge and perform all the duties incumbent upon me as ___ under the Constitution and laws of the United States. So help me God."; consequently our judiciary is committed by oath to the administration of justice not the rule of law, And
3. Both the declaration of independence and the second amendment to our constitution demonstrate that it is the American intent that the defense of this nation lay in the hands of a militia or the individuals themselves; respectively stating: "And for the support of this Declaration, with a firm reliance on the protection of Divine Providence, we mutually pledge to each other our Lives, our Fortunes, and our sacred Honor" and "A well regulated militia, being necessary to the security of a free state, the right of the people to keep and bear arms, shall not be infringed".

However in examining the present state of our union we find:

1. That as a result of capitalism completion is promoted over cooperation with compliance to authority being confused with cooperation.

2. The rule of law being heralded as our governing social policy rather than the administration of justice, a condition this court should feel obliged to address per its member's oath to administer justice rather than adhere to the rule of law, and
3. The defense in this nation in the hands of an army, particularly localized with an army of police authorized to use deadly force against people whenever they 'fear' harm might come to them, which is antithetical to an oath to protect and serve, with any talk of forming a militias being discouraged as being potentially labeled a terrorist groups formed in defiance to police authority or the creation of a 'police state'; which is precisely what the second amendment intended to permit.

Apparently somewhere along the road in this great American experiment of government for, by and of the people, this nation has been sidetracked and it is this branch of government's responsibility, as part of our checks and balances doctrine, to help right that course by administering justice in this case, not merely by correcting the misapplication of this rule of law but also in declaring this unconstitutional law unconstitutional.

What is even more disturbing about this law is that it requires knowledge of the "deep state" in order to avoid its application; the "deep state" being illegal representative activity or 'corruption', the vary instrument used to take this nation off it course in the first place. Certainly members of the "deep state" would be aware of how, when and where corrupt activities takes place and therefore would be able to allege such activity with an ability to prove it; accordingly people who are not members of the "deep state" would not have such knowledge and would not be able to truthfully allege knowledge thereof; and this is the very point to which I am accused of having failed, per the law itself; I failed to have alleged that I had knowledge of corrupt activities I had no knowledge of, although I have my suspicions. Consequently only those who are members of the "deep state" are protected from law's application.

A grant of immunity is a law "respecting" the ability to "petition the government for a redress of grievances". Any right to petition the government for a redress of grievances is rendered void if the defendant has immunity. A petition is not a "filing"! The protection intended by the first amendment was not as to the filing of a petition, but as to substance of the petition itself. The merit within a petition is not an assurance of success in petitioning for a redress of grievances, as is its filing, yet yes one must get pass the filing in order to address the substance or merit within the petition. The defendant does not allege that there is no merit within the petition, but rather that the merit within the petition is not relevant because it enjoys immunity from having to answer the petition itself. Yet the constitution prohibits 'congress' from making any laws respecting the right of the people to petition the government for a redress of grievances. So what am I missing here is there some rational that places this law outside of 'respecting' my ability to petition the government for a redress of my grievances? Does the court actually believe that the congressional assembly that enacted this law did not consider that the law was in some way "respecting" the right to petition the government for a redress of grievances; or was it that vary right that the legislators were being asked to restrict.

The first amendment states: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances". Placed in clear context it says congress shall make no law respecting … the right of the people … to petition the government for a redress of grievances. This is a law respecting my right (as a US citizen) to petition the government for a redress of my grievance against the defendant. It has actually depriving me of my day in court, as I have not seen even one day in any court, and I contend that the Michigan State legislature had no right to "make" this law as it violates the first amendment to the United States Constitution.

The term "respecting" is perhaps the broadest term that could have been used. Its use prevents the U.S. congress or any legislative branch of government charged with "making laws" from infringing on all the specific areas of concerns mentioned; speech, the press or the written word, peaceable assembly and petitioning the courts or government for a redress of grievances and there's no legalese that can get around that fact!

The court held that the right of access to the courts protects plaintiffs from being prevented from filing a lawsuit or obtaining a hearing. Garcia v. Wyeth-Ayerst Labs., 385 F.3d 961, 968 (2004); EJS Props., LLC v. City of Toledo, 698 F.3d 845, 864 (6th Cir. 2012) (right to access the courts addresses instances in which an official's conduct denies a plaintiff "adequate, effective and meaningful" access to the courts). I have had no hearings on the merits of my case whatsoever and outside of pleadings and my responds to this motion to dismiss, which is a motion to deny me access to the courts for a redress of my grievance, or a nullification of my lawsuit upon filing that is the product of a 'congressional act', which the constitution prohibits.

The court held that "He was not prevented from filing his lawsuit or having his arguments heard by the Court". However I have been prevented from having my argument heard by the Court. I did not file this lawsuit to argue the constitutionality of this statue, but to have the court address a redress of my grievance against the defendant. In fact the defendant has admitted to being responsible for my damages, but argues that congress has granted it immunity and therefore I have no right to have the courts address a redress of my grievance and it is this that I contend violates my right.

Finally as this is a wealthy family owned business, so much so that one of its family members made a video of how it felt to have inherited such wealth when he did nothing to deserve it. This is simply a means of conserving wealth, which the wealthy are always apt to do even as they do injury to others; which is what both the first amendment and the prohibition against titles of nobility are all about.

CONCLUSION

In conclusion I assert that this court has three options.

1. Ignore his case as not relevant enough for its consideration
2. Address the issue of the second condition precedent only and reverse on that ground avoiding the constitutional issues raised.
3. Address the constitutional issues as set forth in defense of the constitution and the administration of justice.

Respectfully submitted

Mardy Cotton

Mardy Cotton