IN THE SUPREME COURT OF TEXAS

NO. 04-1023

IN RE ALLIED CHEMICAL CORPORATION ET AL., RELATORS

ON PETITION FOR WRIT OF MANDAMUS

Argued November 16, 2005

CHIEF JUSTICE JEFFERSON, joined by JUSTICE O'NEILL, JUSTICE WAINWRIGHT, and JUSTICE JOHNSON, dissenting.

On August 9, 2004, the trial court signed an order identifying five trial plaintiffs, consolidating their claims for trial, and setting a February 14, 2005 trial date. It later reset the trial for June 6, 2005. Relators sought mandamus relief from the consolidation order. The landscape has changed since then. On May 20, 2005, after this Court stayed the case, the trial court vacated its previous consolidation order and directed that only Guadalupe Garza's personal injury claims proceed to trial. After that, Garza and other plaintiffs supplemented their discovery responses—identifying causation witnesses—and produced affidavits relators say they require for trial. Consequently, the two bases upon which relators sought mandamus–improper consolidation and a trial setting before causation evidence had been produced–are no longer at issue. The Court nevertheless uses this case to create a procedural rule that, for the first time, creates an inactive docket for "complex mass tort cases like this one." ___ S.W.3d ___. While I can appreciate the

utility of such a rule, I cannot countenance its adoption in a moot case. Accordingly, I respectfully dissent.

At the time relators filed their mandamus petition, their complaint focused on the consolidation order, as they alleged that the "trial court's August 9, 2004 order is an abuse of discretion that leaves Relators without an adequate remedy by appeal." They presented two issues: (1) whether it was an abuse of discretion for the trial court to consolidate cases involving five different plaintiffs, in contravention of *In re Van Waters & Rogers, Inc*. and in the absence of an adequate response to the *Able Supply* interrogatory; and (2) whether there was an adequate remedy by appeal. Relators asserted that "the issue in this mandamus proceeding is ***not*** the plaintiffs' failure to answer the *Able Supply* Interrogatory, but rather the effect of that failure on trial consolidation." (Emphasis in relators' brief on the merits, at 30-31.)

Today, despite the trial court's deconsolidation, the Court conditionally grants the writ to resolve an *Able Supply* problem that is not, strictly speaking, before us. *See Able Supply v. Moye*, 898 S.W.2d 766, 768 (Tex. 1995). The Court prohibits the trial court from setting "any of the plaintiffs' claims for trial until the defendants have a reasonable opportunity to prepare for trial after learning who will connect their products to plaintiffs' injuries." But the plaintiffs have supplemented their responses to provide that information. The Court has thus abated trial until the real parties satisfy a condition that has already taken place. While I can appreciate the Court's frustration with the procedural history of this case, mandamus is inappropriate when: (1) plaintiffs have supplemented their discovery answers to reveal the names of those who purport to connect the

products with the injuries; and (2) the defendants do not contend that the supplementation is inadequate under *Able Supply*.

In September 2005, plaintiffs supplemented their discovery responses with reports from nine experts: a hematologist/oncologist, two toxicologists, a civil engineer, an industrial hygienist, two environmental engineers, an epidemiologist, and a former DuPont research chemist. One of those experts, Frank Gardner, M.D., clinical professor of medicine at the University of Texas Medical Branch in Galveston, concluded (after reviewing Garza's hospital and clinical records) that:

> [Garza] lived in the vicinity of the HS facility, and had prolonged exposure to pesticides. The chronic exposure to high risk levels of organochlorine pesticides were the cause, with more probability than not, for [her] onset of non-Hodgkins lymphoma.

William R. Sawyer, Ph.D., a toxicologist, calculated Garza's exposure doses of organochlorine pesticides and concluded:

> I am certain, to within a reasonable degree of toxicological certainty that Ms. Garza's chronic exposures to DDT, dieldrin, BHCs, and toxaphene released from Hayes-Sammons significantly contributed to the onset of her NHL. My review of her historical medical records, direct interview, and inspection of her 1016 Nicholson Street home failed to provide any other significant occupational or environmental exposures contributing to the onset of her NHL.

The Court's opinion does not analyze these expert reports, perhaps because they were filed after the trial court's order setting Garza's case for trial. But we cannot ignore the fact of their production. Garza has supplemented her response to the *Able Supply* interrogatory, and the trial court is in the best position both to evaluate the reports and to fashion relief where appropriate. Thus

far, relators have not challenged the reports' adequacy in the trial court, and we should not presume that the court would abuse its discretion if called upon to make that determination.[1]

Our rules provide remedies for incomplete discovery responses. Relators can move to compel adequate responses, or they may seek sanctions for discovery abuse; they may file no-evidence motions for summary judgment before trial or motions for directed verdict during trial.[2] Relators have not availed themselves of the pretrial methods, instead seeking extraordinary relief from this Court in the first instance. The Court likens this case to *Able Supply*, but there is a critical difference. Before the *Able Supply* defendants sought mandamus relief, the plaintiffs had refused to answer, and the trial court had declined to compel, the answer to the defendants' interrogatories. *Able Supply*, 898 S.W.2d at 768. Only then did we order the trial court to grant the motion to compel.

By contrast, relators here do not seek an order compelling an answer to the *Able Supply* question, but rather a special rule for, as the Court puts it, "complex mass tort cases like this one." ___ S.W.3d ___. After the trial court deconsolidated the cases, relators' issue shifted—they now seek an "order prohibiting the trial court from setting *any* plaintiff's claim for trial unless that

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[1] Although we stayed the underlying proceedings, relators could have moved to lift the stay so that the trial court could make this determination, just as the real parties moved to lift the stay so that the trial court could consider their motion to deconsolidate. *See also Terrazas v. Ramirez*, 829 S.W.2d 712, 715 (Tex. 1991) (granting parties' motion to lift stay so that trial court could consider proposed settlement).

[2] Rule 215.1(b)(3) provides: "[I]f a party fails . . . to answer an interrogatory submitted under Rule 197; . . . the discovering party may move for an order compelling . . . an answer . . . or apply to the court in which the action is pending for the imposition of any sanction authorized by Rule 215.2(b) without the necessity of first having obtained a court order compelling such discovery." TEX. R. CIV. P. 215.1(b)(3). Moreover, "an evasive or incomplete answer is to be treated as a failure to answer." *Id*. 215.1(c).

plaintiff has first provided an adequate answer to the *Able Supply* Interrogatory." (Emphasis added.) At argument, relators conceded that they were asking us to create, in effect, an inactive docket for mass tort cases.

In other areas of the law, the Legislature has created rules for certain types of cases in which a threshold showing is necessary before the case may proceed. In cases involving health care liability claims, for example, an expert report showing causation must be filed not later than 120 days after suit is filed, or the case will be dismissed. TEX. CIV. PRAC. & REM. CODE § 74.351. For claims involving asbestos or silica, expert reports must be served on defendants within thirty days of their answer or appearance date. TEX. CIV. PRAC. & REM. CODE § 90.006(a). Similarly, through our rulemaking process, we have provided that in any pending case, after an adequate time for discovery, a party may move for summary judgment on the grounds that there is no evidence of causation. TEX. R. CIV. P. 166a(i).

Rather than make such changes by judicial decree, the better practice is to enact these reforms in conjunction with our rulemaking procedure, or when public policy mandates, by legislation.[3] A statute or rule could provide the precision that is lacking in the Court's opinion. For example, what is a "complex mass tort case[]"? __ S.W.3d at __. Do class actions qualify? What about multidistrict litigation? What is the requisite number of plaintiffs? What time period gives defendants a "reasonable opportunity to prepare for trial after learning who will connect their

[3] Our rulemaking procedures include consideration of comments from the bench, bar, and the general public, and we have modified or changed each set of civil procedure, evidence, and appellate rules proposals since 1997 as a result of those comments. http://www.supreme.courts.state.tx.us/advisory_archives/ra_100903.htm (last visited June 13, 2007 and copy available in Clerk of Court's file).

products to plaintiffs' injuries"? *Id*. at __. What is the penalty for noncompliance? Under the Court's new rule, these determinations will be made on an ad hoc basis, with little guarantee of predictability or uniformity.

More puzzling is the effect of the Court's ruling on this case. The Court orders that, before trial may commence, the plaintiffs must reveal the witnesses who will testify on causation and give the defendants a reasonable opportunity to prepare for trial after receiving that information. But Garza supplemented her discovery responses in September 2005, almost two years before the Court conditionally issued today's writ. Presumably, therefore, when the stay is lifted, the trial court will be free to set Garza's case for trial. I can only surmise, then, that the Court's motivation is to evade the laborious process inherent in rulemaking or legislation and create a blanket rule barring trial in any "mass tort" case until the plaintiff names a causation expert. This should occur by rule or statute, after comment, rather than by opinion when the question presented has disappeared from the case.

The Court contends the case is not moot because its stay order "preserved the parties' positions as they were at the time, not as they hustled to change them thereafter." ___ S.W.3d ___. But we do not grant mandamus relief when it would be of no practical effect, or "if for any reason it would be useless or unavailing." *Dow Chem. Co. v. Garcia*, 909 S.W.2d 503, 505 (Tex. 1995) (quoting *Holcombe v. Fowler*, 9 S.W.2d 1028, 1028 (Tex. 1928)). Nor do we grant it before the trial court has been asked to act. *Axelson, Inc. v. McIlhany*, 798 S.W.2d 550, 556 (Tex. 1990) (noting that mandamus was "improper" when relators could not "point to an order of the trial court refusing their most recent request" to conduct discovery). The Court seems to recognize as much, relying on

the "capable of repetition but evading review" exception to the mootness doctrine. *Blum v. Lanier*, 997 S.W.2d 259, 264 (Tex. 1999). But that "rare" exception requires a reasonable expectation that the same action will recur (with no appellate recourse) if the writ were withheld, and we have no indication that is the case. *Id*. Utilizing the exception to justify mandamus relief here can only be based on an expectation of the trial court's future abuse of discretion, but we generally presume that our judges follow the law. Finally, the case will not "evade review." If the discovery responses are inadequate and the trial court fails to compel further response, relators have the right to mandamus relief, as recognized in *Able Supply*.

While I agree that defendants in mass tort cases face difficult hurdles in preparing for trial, and while I also agree that causation-related discovery must not be delayed,[4] I disagree that this case presents the opportunity for us to create special rules for such cases. The trial court withdrew its consolidation order. Garza has supplemented her discovery responses, and the trial court has not been asked to evaluate their adequacy. I would deny mandamus relief.

Wallace B. Jefferson
Chief Justice

OPINION DELIVERED: June 15, 2007

[4] Nor do our rules sanction such delay. *See* TEX. R. CIV. P. 193.5(b) (providing that supplemental discovery responses be made "reasonably promptly after the party discovers the necessity for such a response").