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

JUSTICE BRISTER delivered the opinion of the Court, in which JUSTICE HECHT, JUSTICE MEDINA, JUSTICE GREEN, and JUSTICE WILLETT joined.

JUSTICE HECHT filed a concurring opinion.

CHIEF JUSTICE JEFFERSON filed a dissenting opinion, in which JUSTICE O'NEILL, JUSTICE WAINWRIGHT, and JUSTICE JOHNSON joined.

JUSTICE WAINWRIGHT filed a dissenting opinion.

Trial judges have broad discretion in scheduling discovery and trial, but that discretion has never been unlimited. As we stated in 1847, trial courts may set trials as they wish, but not so indiscriminately that the parties are "deprived of any just defense, or that their rights would in any manner be jeopardized."[1]

[1] *Borden v. Houston*, 2 Tex. 594, 603 (1847) ("In refusing this application [for continuance] we are unable to perceive that any rule of law was violated, or that there was any abuse of judicial discretion calling for a reversal of the judgment. Had it appeared that by being required to proceed to trial at that term, the defendants, without any fault on their part, would be deprived of any just defense, or that their rights would in any manner be jeopardized, a different case would have been presented.").

Since 1847, new kinds of litigation have emerged that require new applications of this rule. Eleven years ago in *Able Supply Co. v. Moye,* we held that in mass tort cases involving hundreds of parties and complicated causation questions, a trial judge could not postpone responses to basic discovery until shortly before trial.[2] Finding that is precisely what has occurred here, we again grant mandamus relief.

I. The Proceedings and Mootness

Roughly 1,900 plaintiffs sued 30 defendants in Hidalgo County, alleging exposure to chemical fumes and leaks from several sites where pesticides were mixed or stored before the sites were placed in receivership in 1967 and remediated in 1980. The plaintiffs identified no particular incidents or products, instead alleging exposure to a "toxic soup" of emissions in the air for many decades. As we recently noted, no such claim "has ever been tried or appealed in Texas," and thus "the tort is immature."[3]

Five years after filing, the trial court set the first trial for little more than six months away. Despite our admonitions that trial courts should "proceed with extreme caution" in setting consolidated trials in immature mass torts,[4] the trial court consolidated five claims for the initial trial. The five plaintiffs had little in common — ranging in age from 29 to 74, residing in various directions from two different sites, alleging exposure over different parts of seven decades, and

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[2] 898 S.W.2d 766, 772 (Tex. 1995).

[3] *In re Van Waters & Rogers, Inc*., 145 S.W.3d 203, 208 (Tex. 2004).

[4] *Id.* at 208 (citation omitted); *In re Ethyl Corp*., 975 S.W.2d 606, 614 (Tex. 1998) (allowing consolidated trial as asbestos claims were mature tort).

suffering injuries from asthma and arthritis to miscarriages and heart disease, and in two cases damaged property. Shortly after the trial court's order, we issued *In re Van Waters & Rogers, Inc*., reversing the same kind of order in the same kind of case in the same county.[5] The defendants brought the opinion to the trial judge's attention, but he changed nothing. Neither did the Thirteenth Court of Appeals, where the defendants sought mandamus relief to no avail.[6]

But when we granted a stay and requested full briefing, the plaintiffs retreated, asking the trial court to (1) sever out the property claims, (2) drop one plaintiff, and eventually (3) withdraw its consolidation order and proceed to trial on just one plaintiff's claims. The trial court granted these requests, ordering that "the personal injury claims of Plaintiff Guadalupe Garza proceed to trial."

We disagree with the dissent that this last order renders these proceedings moot for several reasons. First, in their petition for mandamus (as well as in the trial court), the defendants complained of two things — that the trial court erred in setting a consolidated trial "in contravention of *In re Van Waters & Rogers, Inc.* and in the absence of an adequate response to the *Able Supply* Interrogatory." The trial court has withdrawn consolidation (the *Van Waters* problem), but one plaintiff's claims have still been ordered to trial despite inadequate responses (the *Able Supply* problem). As the relief requested by the defendants is a trial of one plaintiff's claims held a

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[5] 145 S.W.3d at 211.

[6] __S.W.3d__, __(Tex. App.–Corpus Christi 2004).

reasonable time after the *Able Supply* interrogatory is adequately answered,[7] a controversy still exists whether they are entitled to that.[8]

Second, the defendants argue that while the plaintiffs have moved for deconsolidation in the face of this mandamus proceeding, even though they were unwilling to do so in the face of *Van Waters*, they have refused to give any assurance that they will not seek future consolidated trials inconsistent with *Van Waters*. The situation that gives rise to this proceeding is thus fully capable of repetition, and if review can be evaded by the modification of orders pending mandamus proceedings, the defendants would be put to the repeated expense of seeking review only to have it denied by last-minute changes in the trial court's orders. An appellate court's jurisdiction cannot be manipulated in this way.

Third, our order staying the docket control order here preserved the parties' positions as they were at the time, not as they hustled to change them thereafter. The plaintiffs apparently filed supplemental answers after the trial setting — not the order but the trial date itself. The question before us is not changed by knowing what experts the plaintiffs would have finally disclosed at trial; that they would not do so any earlier is precisely the defendants' complaint. And while the defendants certainly did challenge the adequacy of those answers at oral argument (the first time the

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[7] "Accordingly, Relators, defendants below, request that . . . the trial court be ordered to proceed to trial with a single plaintiff, after discovery is complete, and after the designated plaintiff — consistent with *Able Supply* — connects his or her alleged injury to exposure to the defendants' products and services via testimony of a qualified medical expert."

[8] *See In re Kellogg Brown & Root, Inc.*, 166 S.W.3d 732, 737 (Tex. 2005) ("A case becomes moot if a controversy ceases to exist between the parties at any stage of the legal proceedings . . .").

plaintiffs asserted them as an excuse), the question before us is not their adequacy but their timeliness.

Finally, while we encourage parties to work out pretrial disputes so appellate courts need never consider them, we cannot encourage parties to manipulate pretrial discovery to evade appellate review. Pretrial cannot be conducted one way when appellate courts are looking and another way when they are not. As hundreds of similar claims remain in this case and the plaintiffs stoutly maintain they had no duty to supplement their answers at all, the question before us is not moot as it is capable of repetition in a manner that evades review.[9]

II. The Trial Setting and *Able Supply*

In *Able Supply*, more than 3,000 plaintiffs sued nearly 300 defendants for toxic exposure. After 8 years, the plaintiffs still had not named anyone who could connect their injuries to any defendant's product. Instead, each plaintiff responded in discovery that this basic and crucial element of their claims "has not been determined at this time, but will be supplemented at a later date." As here, the plaintiffs asserted that the trial court had "broad discretion to manage its own docket, and . . . has acted well within that discretion in determining that no answers are required at the present time."[10] We disagreed, holding that the trial court's apparent indifference as to when such information might be disclosed was a clear abuse of discretion with no adequate remedy by appeal.[11]

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[9] *See Blum v. Lanier*, 997 S.W.2d 259, 264 (Tex. 1999).

[10] *Able Supply Co. v. Moye,* 898 S.W.2d 766, 770 (Tex. 1995).

[11] *Id.*

The issue in this case is the same. The defendants made the same request as in *Able Supply*, asking for medical experts who could connect the plaintiffs' diseases to the defendants' products.[12] Although five years had passed since filing, the plaintiffs all responded either "not applicable" or that "none of their treating physicians" could do so. But the interrogatory did not ask about treating physicians, but *any* expert; as we noted in *Merrell Dow Pharmaceuticals, Inc. v. Havner*, treating physicians usually cannot make this kind of connection.[13] By changing the defendants' question, the plaintiffs were able to respond with almost nothing.

The plaintiffs point out that their supplemental answers included a long list of chemicals to which they were "potentially exposed," and medical articles and expert reports suggesting some of those chemicals were "capable of causing" or "significantly contributed" to some of their diseases. But as this Court explained in *Havner*, "[t]o raise a fact issue on causation . . . a claimant must do more than simply introduce into evidence epidemiological studies."[14] Evidence that a chemical *can* cause a disease is no evidence that it *probably* caused the plaintiff's disease.[15] And as *Havner* illustrated, an expert's assurance that a study establishes causation does not make it so. Claimants

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[12] Specifically, the defendants' interrogatory stated:

> Please state the name and address of each and every doctor, physician, psychiatrist, psychologist, counselor, or other medical practitioner who has attributed your alleged injury made the basis of this lawsuit to exposure to the Defendants' products or Defendants' conduct, including the dates of treatment or examination of each such doctor, physician, or other medical practitioner, and the name or identity of the products to which your alleged injury is attributed.

[13] 953 S.W.2d 706, 719-20 (Tex. 1997).

[14] *Id*. at 720.

[15] *Id*. at 714-21.

must have an expert who can answer why a study is reliable, and how the plaintiff's exposure is similar to that of the study's subjects.[16] An expert must also exclude other causes with reasonable certainty,[17] a special problem here as the plaintiffs allege exposure to so many different chemicals. By failing to list any expert who could make this vital connection, the plaintiffs' responses were, for all practical purposes, just like those in *Able Supply*: "We'll tell you later."

We recognize this evidence is hard to obtain, but courts cannot "embrace inferences that good science would not draw."[18] Without it, no one can prepare for trial. Accordingly, we have repeatedly granted mandamus in mass toxic tort cases when plaintiffs have refused to produce basic information like this.[19]

The plaintiffs point out that this case comes to us in a different posture than *Able Supply*, in which the trial court had refused to compel discovery. Here, although the defendants have moved to compel discovery several times, the order they challenge merely sets the case for trial. But that does not make this case different for two reasons.

First, unless we assume the interrogatory was answered in bad faith, there is nothing more to compel. The discovery rules have been amended since *Able Supply*, now requiring that "a party must make a complete response, based on all information reasonably available to the responding

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[16] *Id*. at 720.

[17] *Id*.

[18] *Id*. at 727.

[19] *See Van Waters*, 62 S.W.3d 197, 201 (Tex. 2001); *In re Colonial Pipeline Co*., 968 S.W.2d 938, 942 (Tex. 1998); *Able Supply*, 898 S.W.2d at 768.

party or its attorney at the time the response is made."[20] Parties and attorneys certify this to be true when they sign a discovery response;[21] they can no longer simply choose to delay disclosure until the last minute.[22] Taking their responses at face value, the plaintiffs here and their attorneys certified that *no one* could make the causal connection they needed. Given the short time remaining before trial, the defendants properly objected that this rendered the trial setting premature; they did not have to spend the few remaining weeks begging for better answers.

Second, *Able Supply* addressed not just inadequate *responses* but inadequate *time* for discovery. There, the trial court never barred discovery completely, as the plaintiffs promised to give better answers 30 days before trial. But we held that was not enough:

> In a suit of this massive nature, which includes disparate exposures to a multitude of products, requiring defendants to wait until 30 days before trial to obtain crucial and probative evidence of a causal connection between their products and plaintiffs' injuries is such a denial of their rights as to go to the heart of the case.[23]

Here, the plaintiffs never promised better answers any earlier; to the contrary, they claimed to have "fully and accurately" responded already.

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[20] TEX. R. CIV. P. 193.1; *see also* Alex Wilson Albright, *New Discovery Rules: The Supreme Court Advisory Committee's Proposal*, 15 REV. OF LITIG. 275, 292-93 (1996) ("The proposed rules, therefore, require parties to respond, amend, and supplement discovery earlier than required under the current rules. While parties now may wait until as few as thirty days before trial to disclose important requested discovery, Proposed Rule [193.1] requires a party to make full disclosure upon the initial response to written discovery.").

[21] *See* TEX. R. CIV. P. 191.3 ("The signature of an attorney or party on a disclosure constitutes a certification that to the best of the signer's knowledge, information, and belief, formed after a reasonable inquiry, the disclosure is complete and correct as of the time it is made.")

[22] *See id.* 193.5(b) (requiring supplemental responses "reasonably promptly after the party discovers the necessity for such a response"), 193.6(a) (requiring exclusion of untimely supplements except on showing of good cause and no unfair surprise or prejudice).

[23] *Able Supply*, 898 S.W.2d at 772.

Thus, the problem here is the same as that in *Able Supply*: too little time between adequate responses and trial for the defendants to have a fair chance to mount a defense. This problem can be addressed from either end: the defendants in *Able Supply* sought to move discovery responses up; the defendants here sought to move the trial setting back. Defendants are not required to seek both. Instead, the trial court abused its discretion by doing neither.

III. Mandamus and Appeal

Of course, we generally do not consider interlocutory complaints about trial settings.[24] But we generally do not review orders refusing to compel discovery either. Yet we did so in *Able Supply* for three reasons.

First, we have granted mandamus when a discovery order imposes a burden on one party far out of proportion to any benefit to the other.[25] Here, as in *Able Supply*, the burden of making 30 defendants prepare in the dark for 1,900 claims is far out of proportion to the benefit of giving the plaintiffs more time (after five years) to decide who or what injured them. Filing thousands of claims like those here requires only a reasonable inquiry and belief that they are not groundless;[26] recovering on them requires considerably more. In the meantime, thousands of hours and millions of dollars may be needlessly wasted if the claims can never be proved. Mandamus is appropriate in such cases to avoid this "monumental waste of judicial resources."[27]

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[24] *See Gen. Motors Corp. v. Gayle*, 951 S.W.2d 469, 477 (Tex. 1997) ("[T]he denial of a motion for continuance is an incidental trial ruling ordinarily not reviewable by mandamus.").

[25] *See Able Supply*, 898 S.W.2d at 771 (citing *Walker v. Packer*, 827 S.W.2d 833, 843 (Tex. 1992)).

[26] *See* TEX. R. CIV. P. 13.

[27] *Id.*

Second, we have granted mandamus when a denial of discovery goes to the heart of a party's case.[28] There are many cases in which it is perfectly reasonable to conduct discovery up until 30 days before trial.[29] But in suits like this one, denying discovery until then goes to the very heart of this case, as well as what our justice system is supposed to be about.[30]

Third, we have granted mandamus when a discovery order severely compromises a party's ability to present any case at all at trial.[31] No trial was set in *Able Supply*, but the plaintiffs' intention to withhold responses until shortly before then meant the defendants could not prepare a viable defense. Late disclosure may not compromise a defendant when the complaint is minor or causation obvious; but the connection between chemical fumes and cancer is quite different, as is a bellwether trial that may affect thousands of others.

We cannot ignore the trial court's order here without ignoring *Able Supply*. If mandamus was proper there, it must be here too.

IV. Conclusion

Since *Able Supply,* we have intervened to compel discovery only in complex mass tort cases like this one.[32] Similarly, today's holding is no indication that we intend to intervene in more trial

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[28] *See id.*

[29] *See, e.g.*, TEX. R. CIV. P. 190.2 (allowing discovery until 30 days before trial in cases involving up to $50,000).

[30] *See Able Supply*, 898 S.W.2d at 772.

[31] *See id.*

[32] *See In re Van Waters & Rogers, Inc.*, 62 S.W.3d 197, 201 (Tex. 2001); *In re Colonial Pipeline Co.*, 968 S.W.2d 938, 943 (Tex. 1998).

settings. There are good reasons to schedule trial settings well in advance, and few reasons to postpone doing so until discovery is fully complete. But trial settings, like discovery orders, cannot be used to hold the parties hostage.[33]

It has long been the rule in Texas that plaintiffs bear the burden of pleading and proving how they were injured and by whom.[34] They cannot simply file suit against everyone in the vicinity and demand that the defendants prove otherwise.

Therefore, we direct the trial court to vacate its order 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. The writ will issue only if the trial court fails to comply.

Scott Brister
Justice

OPINION DELIVERED: June 15, 2007

[33] *See Able Supply*, 898 S.W.2d at 772.

[34] *See Gaulding v. Celotex Corp.*, 772 S.W.2d 66, 68 (Tex. 1989) ("A fundamental principle of traditional products liability law is that the plaintiff must prove that the defendants supplied the product which caused the injury.").