IN THE SUPREME COURT OF TEXAS

NO. 04-1023

IN RE ALLIED CHEMICAL CORPORATION ET AL., RELATORS

ON PETITION FOR MANDAMUS

Argued November 16, 2005

JUSTICE HECHT, concurring.

I join fully in the Court's opinion but add a further word in response to Chief Justice Jefferson's dissent.

The underlying mass toxic tort case, though not unique, is one of a handful of such cases. It was filed in September 1999 for a group of more than 800 plaintiffs, which grew to about 3,000, then shrank. The twelfth amended petition, filed in July 2004, named 1,893 plaintiffs and over thirty defendants. It described the case as "a toxic tort case involving the gross pesticide contamination of Plaintiffs' neighborhood" from 1950-1967. It alleged that "Plaintiffs are now suffering from a multitude of health complaints, including cancers, birth defects, neurological disorders, skin disorders and other illnesses." It also alleged property damage.

Years ago we observed that "[m]ass tort litigation such as this places significant strain on a defendant's resources and creates considerable pressure to settle the case, regardless of the

underlying merits."[1] For this reason, mandamus review has been necessary in a few but important instances to prevent the use of such litigation to abuse the civil justice system. For example, in *In re Van Waters & Rogers, Inc.*, 454 plaintiffs sued 55 defendants for personal injuries allegedly due to exposure to a "toxic soup" of chemicals around a manufacturing plant.[2] In response to defendants' interrogatory asking for the names of medical practitioners who could attribute a plaintiff's injury to exposure to a defendant's product, "the plaintiffs uniformly answered they did not recall."[3] When defendants sought additional discovery, the trial court set the claims of twenty plaintiffs chosen by their counsel for trial and abated discovery from any other plaintiffs.[4] By the time the case was decided by this Court, the case had been pending seven years, and still plaintiffs had not provided "basic information regarding their individual injuries and the causative chemicals".[5] We directed the trial court to set aside the discovery abatement and trial settings.[6]

In *In re Colonial Pipeline Co.*, 3,275 plaintiffs sued three pipeline owners for personal injuries allegedly due to exposure to fuel that escaped and caught fire when the pipelines ruptured in a flood.[7] In two years of litigation, the plaintiffs had refused to provide any information in

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[1] *CSR Ltd. v. Link*, 925 S.W.2d 591, 596 (Tex. 1996).

[2] 62 S.W.3d 197, 198 (Tex. 2001) (per curiam).

[3] *Id.*

[4] *Id.* at 198-199.

[5] *Id.* at 200.

[6] *Id.* at 201.

[7] 968 S.W.2d 938, 940-941 (Tex. 1998) (per curiam).

discovery about their injuries or what caused them, and the trial court abated discovery from any plaintiffs except ten that their counsel had selected for trial.[8] We directed the trial court to vacate the discovery and scheduling orders that denied the defendants basic information about the plaintiffs' claims.[9]

In *Able Supply Co. v. Moye*, over 3,000 plaintiffs sued nearly 300 defendants for injuries allegedly due to exposure to toxic materials at a steel mill.[10] Asked in an interrogatory to identify medical practitioners who could link injuries with exposure to a defendant's product, no plaintiff had done so in almost eight years that the case had been pending, yet the trial court had denied defendants' motions to compel production of the information.[11] No trial had ever been set.[12] We held that denying defendants "access to the basic facts underpinning the claims against them" while defense costs "mounted to millions of dollars" was indefensible.[13] And we were "acutely concerned" that settlements extracted from defendants in these circumstances went in large part to plaintiffs' counsel.[14] "This Court," we concluded, "will not tolerate the abuses that have occurred in the management of this case."[15]

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[8] *Id*. at 941.

[9] *Id*. at 943.

[10] 898 S.W.2d 766, 767-768 (Tex. 1995).

[11] *Id.* at 768.

[12] *Id*.

[13] *Id*.

[14] *Id*. at 772.

[15] *Id*. at 773.

In each of these mass tort cases, the claims of hundreds or thousands of plaintiffs, enormous in the aggregate, left pending for years despite the absence of critical information regarding the nature and cause of alleged injuries, forced settlements irrespective of the claims' merits, if any. In other cases, setting the widely disparate claims of a few plaintiffs accomplished the same end. In *In re Ethyl Corp.*, 459 workers or their families were suing one or more of 69 premises owners for exposure to asbestos.[16] The claims of 22 workers against one or more of five defendants were set for a single trial.[17] The workers' alleged exposures ranged from just over a year to more than 38 years, their alleged injuries differed widely in severity, and each had been exposed to asbestos at one or more sites other than those of the defendants.[18] Aggregating so many disparate claims for trial, we noted, could easily overwhelm a jury, resulting in prejudice and confusion.[19] In a companion case, *In re Bristol-Myers Squibb Co.*, the trial court ordered a single trial of four cases involving the breast-implant claimants of nine plaintiffs against three groups of defendants.[20] Unlike asbestos litigation, breast-implant litigation was not a mature tort,[21] and the concerns posed by aggregate trial were aggravated by the courts' lack of experience with such claims. In each case we set out factors to be considered in aggregating claims for trial but concluded, based on the records before us, that

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[16] 975 S.W.2d 606, 608-609 (Tex. 1998).

[17] *Id*. at 609.

[18] *Id*.

[19] *Id*. at 614.

[20] 975 S.W.2d 601, 602 (Tex. 1998).

[21] *Id*. at 603.

the trial courts had not been shown to have clearly abused their discretion.[22] But in *In re Van Waters & Rogers, Inc.*, in a proceeding subsequent to the one discussed above, we applied the factors set out in *Ethyl* and concluded that in consolidating twenty plaintiffs' disparate claims for trial, the trial court had clearly abused its discretion.[23]

The patterns of abuse in these cases are repeated in the present one. Early on, the defendants sent the plaintiffs this basic interrogatory:

> 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.

Though plaintiffs concede they cannot prevail without expert testimony from such professionals, they all responded, "not applicable", or that no treating physician had made the attribution. Plaintiffs stated in their response to the petition for mandamus that "[t]his evidence fully satisfies every requirement set out by this Court to apprise a Defendant of the allegations pending against it." Plaintiffs' counsel also asserted at oral argument that it would not be an abuse of discretion for the trial court to set the case for trial even though no evidence of causation had been produced.[24]

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[22] *Id.* at 603-605; *In re Ethyl Corp.*, 975 S.W.2d at 610-617.

[23] 145 S.W.3d 203, 211 (Tex. 2004).

[24] The following colloquy occurred at oral argument:

"JUSTICE: But if you have a mass tort case like this one, and you have hundreds of plaintiffs, and you have scores of defendants, you think that it is unreasonable to put even one case to trial without evidence of causation, or not? I'm not sure.

"PLAINTIFFS' COUNSEL: I believe that if the trial court has examined the interrogatories under a proper

Plaintiffs first moved for a trial setting in March 2004, requesting that five plaintiffs' claims be tried. The trial court granted the motion in August. In September, defendants petitioned the court of appeals for mandamus relief, which the court denied in November. Days later defendants petitioned this Court for relief.

Defendants' interrogatory is essentially identical to the one in *Able Supply*.[25] The dissent argues "there is a critical difference" between that case and the present one, namely, there "the plaintiffs had refused to answer" the interrogatory and the trial court had refused to compel them to do so, while here defendants "do not seek an order compelling an answer" but instead an order prohibiting a trial setting unless the plaintiffs provide evidence of causation.[26] Relators, the dissent argues, are not entitled to mandamus relief without first moving to compel answers to their interrogatory. The dissent ignores the fact that relators' objection to going to trial before plaintiffs have produced evidence of causation is tantamount to a request for such evidence and the trial court's order setting trial is tantamount to a refusal to compel its production. The trial court's position is clear: the plaintiffs need not produce evidence of causation for thousands of plaintiffs for

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motion to compel, has determined that the responses to those interrogatories are inadequate, that there is no information showing any causative link, that I don't know of anything in Texas law that would allow a *sua sponte* summary judgment on the basis of no evidence. But I would certainly say that the trial court would have within its discretion the power to not set that case to trial.

"JUSTICE: Of course, the trial court always has that power. What I'm asking is, if the trial court set the case for trial nonetheless, would that be an abuse of discretion?

"PLAINTIFFS' COUNSEL: No. I don't believe it would be."

[25] 898 S.W.2d 766, 768, 773 (Tex. 1995).

[26] *Post* at ___.

their claims to remain pending and even be set for trial. When a "request [for relief] would have been futile and the refusal little more than a formality", they are not prerequisites to mandamus review.[27]

The dissent has missed the point of our decision in *Able Supply*. It was not that parties should respond meaningfully to discovery requests, although they certainly should, but that plaintiffs in a massive case cannot stonewall production of critical evidence to deprive defendants of their right to a fair trial:

> 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.[28]

In answer to the question, what evidence is there of causation, the difference between a blank and "none" or "not applicable" is not "critical"; it is indiscernible.

Plaintiffs' position is that they have fully answered the defendants' interrogatory regarding causation evidence, that any motion to compel further response should be denied, that any motion for summary judgment for want of essential evidence should also be denied, and that the case should go to trial in its present posture. No one questions our observation that in a massive case like this, plaintiffs' refusal to provide defendants meaningful discovery on critical issues forces settlements irrespective of the merits of plaintiffs' claims. Deprived of such basic procedural protections, a defendant can scarcely risk further abuse. And that, the dissent argues, is really too bad, but there

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[27] *In re Perritt*, 992 S.W.2d 444, 446 (Tex. 1999) (citing *Terrazas v. Ramirez*, 829 S.W.2d 712, 723 (Tex. 1991)).

[28] *Id*. at 772.

is just nothing that can be done without legislation or a change in procedural rules. That the civil justice system cannot protect litigants' basic rights to a fair trial without the Legislature's assistance would be a humiliating concession for the Court to make.

The dissent "can only surmise" that "the Court's motivation is to evade the laborious process inherent in rulemaking or legislation".[29] The dissent need not disparage the Court's motivations. The Court's purpose here is to correct isolated abuse that does not occur often enough — fortunately, to the credit of existing statutes and procedures — to require corrective legislation or rules, but nevertheless threatens extraordinary injury, not only to the parties in a case, but to the integrity of the justice system. This is a proper function of extraordinary relief, as the Court said in *In re Prudential Insurance Co. of America*,[30] citing commentary by Professors Wright, Miller, and Cooper: mandamus review "that responds to occasional special needs provides a valuable ad hoc relief valve for the pressures that are imperfectly contained by the statutes permitting appeals from final judgments and interlocutory orders".[31] Occasional intervention may be necessary, they added, "simply to bring the balancing perspective that appellate review is intended to provide in controlling

[29] *Post* at ___.

[30] 148 S.W.3d 124 (Tex. 2004).

[31] 16 CHARLES ALAN WRIGHT, ARTHUR R. MILLER, & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3934.1, at 572, 574 (1996), *cited in In re Prudential Ins. Co. of Am.*, 148 S.W.3d at 137 n.53.

the practices as well as the substantive decisions of trial courts."[32] Correcting isolated problems avoids the injustice of inaction while obviating the need for broader statutory appellate review.[33]

Finally, the dissent argues that this proceeding has been mooted by plaintiffs' supplementation of discovery while it has been pending. The dissent stresses that relators have not challenged the sufficiency of the new discovery responses, but the supplemental responses, whether adequate or not, do not moot this proceeding because there remain 1,888 plaintiffs for which evidence of causation still has not been provided after more than seven years of litigation, and plaintiffs refuse to state whether they will continue to request that more trials be set without such evidence. The dissent argues that this case does not fall within the mootness exception for issues "capable of repetition but evading review" because there must be "a reasonable expectation that the same action will occur again if the issue is not considered",[34] and "we have no indication that is the case here."[35] Actually, we do, if only in the fact that the supplementation came not only seven years after the case was filed, but even after the date set for the first trial of a plaintiff's claims, after we have repeatedly required that causation evidence be produced in discovery well in advance of trial

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[32] *Id*.

[33] *Id*. at 137 n.54 (citing George C. Pratt, *Extraordinary Writs*, in 19 MOORE'S FEDERAL PRACTICE § 204.01[2][b], at 204-7 (3d ed. 2004) ("In order to meet the demands of justice in individual cases, discretionary review is preferable to enlarging by judicial interpretation the categories of interlocutory orders that are appealable as of right. General categories of orders that are appealable as of right often include many orders that should not be appealable at all. Review by extraordinary writ allows the circuit courts to retain the final judgment rule and avoid piecemeal appeals, yet be able to respond to the exceptional case that should be reviewed prior to final judgment. Thus, [mandamus] affords an avenue of relief to litigants and a tool for the courts to supervise the proper administration of justice.")).

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

[35] *Post* at ___.

in other such cases, and after we have refused to approve separate trials of groups of plaintiffs with dissimilar claims used to pressure settlements. What we have yet to see is some indication that the problems are over.

Nathan L. Hecht, Justice

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