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Court of Appeals of Texas,
El Paso.

Michael and Bertha ADJEMIAN, Individually and as Next Friend of Michelle Adjemian, A Minor, et al., Appellants,
v.
AMERICAN SMELTING AND REFINING, CO., Phelps Dodge Copper Refinery, a/k/a Phelps Dodge Refining Corp., and Tony Lama Co., Appellees.

No. 08–00–00336–CV.
|
March 7, 2002.

**Synopsis**
Plaintiffs brought action alleging that various personal injuries, illnesses, and deaths were proximately caused by defendants' negligent release, emission, and discharge of hazardous toxic chemicals into the air, soil, sub-soil, ground, and underground water and alleging that defendants failed to warn them of the inherent danger of the hazardous and toxic chemicals to which they were exposed. The County Court at Law # 5 of El Paso County dismissed action, and plaintiffs appealed. The Court of Appeals, Chew, J., held that: (1) plaintiffs' failure to comply with court management order warranted dismissal of injury claims; (2) property causes of action were also subject to dismissal; and (3) dismissal sanction was not unjust.

Affirmed.

West Headnotes (3)

[1] **Pretrial Procedure**
Dismissal or default judgment

Plaintiffs' failure to comply with court management order in action alleging various personal injuries arising from defendants' alleged release of toxic chemicals warranted dismissal of action; even if order did not specifically require provision of expert testimony, plaintiffs were clearly required to provide information about specific toxic substances to which they were exposed, particular injuries that resulted from exposure, and medical evidence that supported each claim, which plaintiffs failed to do, through expert testimony or otherwise.

1 Cases that cite this headnote

[2] **Pretrial Procedure**
Dismissal or default judgment

Plaintiffs' failure to comply with court management order with respect to property causes of action allegedly arising from defendants' alleged release of toxic chemicals warranted dismissal of those claims; none of plaintiffs specified what type of property damage they suffered, as required by order, and plaintiffs failed to describe at all or with any specificity the alleged activity or event that led to the damage. Vernon's Ann.Texas Rules Civ.Proc., Rule 166.

1 Cases that cite this headnote

[3] **Pretrial Procedure**
Dismissal or default judgment

Sanction of dismissal for plaintiffs' failure to comply with court management order was not

unjust and inappropriate, in action alleging various injuries arising from defendants' alleged release of toxic chemicals, as trial court's findings of fact and conclusions of law established direct relationship between plaintiffs' actions, including repeated failure to meet court-ordered deadlines and comply with court mandates, and the court's decision to dismiss; such conduct constituted bad faith and callous disregard for the judicial process.

Appeal from the County Court at Law # 5 of El Paso County, Texas, (TC # 97–1692).

Before Panel No. 2 BARAJAS, C.J., McCLURE, and CHEW, JJ.

*OPINION*

DAVID WELLINGTON CHEW, Justice.

***1** Appellants Michael and Bertha Adjemian, individually and as next friend of Michelle Adjemian, a minor, et al., appeal the trial court's dismissal of their claims in favor of Appellees American Smelting and Refining, Co. ("American Smeltiing"), Phelps Dodge Copper Refinery, a/k/a Phelps Dodge Refining Corporation ("Phelps Dodge"), and Tony Lama Company ("Tony Lama"). On appeal, Appellants raise two issues. First, they argue that the trial court improperly granted Appellees' Motion to Dismiss. Second, they claim that the imposition of death penalty sanctions was unjust. We affirm.

In May 1997, this lawsuit was filed in El Paso County. The Plaintiffs Original Petition was brought by approximately 396 individuals, and named six corporate defendants. Plaintiffs asserted personal injuries, illnesses, and deaths were proximately caused by the defendants' negligent release, emission, and discharge of hazardous toxic chemicals into the air, soil, sub-soil, ground, and underground water. Plaintiffs also alleged that defendants failed to warn them of the inherent danger of the hazardous and toxic chemicals to which they were exposed.

In October 1997, defendants filed a Motion for Entry of a Lone Pine Order. Defendants sought an order requiring every plaintiff to file exposure and physician statements sufficient to establish a *prima facie* case on the issue of causation for the injuries asserted in the petition. The motion also requested a stay of discovery until after plaintiffs had complied with the proposed order. Plaintiffs did not file a response.

In January 1998, the trial court had a hearing on defendants' motion. During the hearing, defendants expressed concern about the likelihood of massive discovery costs and protracted pretrial proceedings. Plaintiffs maintained ordinary discovery was more appropriate, cooperation would reduce pretrial conflicts, and a discovery timetable could be developed to address concerns of the parties and the court. The court took the motion under advisement for twenty days and asked the plaintiffs to submit a proposed order in response. The court indicated its desire for the parties to work together to determine how the case should proceed. All parties, especially counsel for plaintiffs, indicated they would do so. Plaintiffs' counsel never filed a proposed order with the court. Consequently, the court did not rule on defendants' motion.

During the months following the initial hearing, very little occurred to move the case forward. At some point, plaintiffs served defendants with a second set of discovery requests.[1] In response, defendants filed a First Amended Motion for Entry of a Lone Pine Order on November 10, 1997. The court then held a status conference on November 15, 1999.

The trial court learned that neither side had participated in any form of discovery. Defense counsel argued for dismissal of the case, or in the alternative, the entry of a Lone Pine Order and noted that plaintiffs' counsel had never complied with the court's instruction to submit a proposed order. They also presented the court with an account of their communications with plaintiffs' counsel. According to defendants, plaintiffs' counsel repeatedly failed to respond to correspondence or defendants' proposed orders that were sent over a period of months following the January 1998 hearing. Counsel for the plaintiffs offered no meaningful response to the criticisms

  

of the defendants, but did take responsibility for the case "languishing on the vine." Mainly, plaintiffs again urged the court to consider a standard discovery order and offered to work under an abbreviated time frame.

***2** At the end of the status conference, the court announced its intent to enter a case management order and place the case on the dismissal docket. The trial judge indicated that the case would be reviewed again in approximately six months for compliance with the case management order. The court then stayed discovery in the case, pending plaintiffs' submission of affidavits to support causation. Finally, the court made clear that suggested changes could be made to the order by any of the parties, if made "by the end of the week ...."

On November 23, 1999, eight days after the status conference had been held, the court filed its case management order with the District Clerk. On that same date, plaintiffs filed a Response in Opposition to Defendants' Motion for Entry of "Lone Pine" Case Management Order. Both documents appear to have been filed at the same time. The case management order ("CMO") set a June 5, 2000 deadline for plaintiffs to file detailed affidavits.

On June 5, 2000, plaintiffs filed a Fifth Amended Petition[2] and thirty-seven affidavits on behalf of a total of sixty-one individuals. More than 300 plaintiffs were dropped from the suit and three defendants were dismissed. Only American Smelting, Phelps Dodge, and Tony Lama remained as defendants in the suit.

On June 8, 2000, Tony Lama filed a Brief in Support of Dismissal for Non–Compliance with the Case Management Order. Phelps Dodge and American Smelting filed similar briefs urging dismissal on June 9, 2000. Each of the briefs urged the court to dismiss the case in its entirety or at least certain plaintiffs, for failure to comply with the CMO. A hearing to review compliance with the CMO and/or dismissal for want of prosecution was set for June 9, 2000.

On June 9, 2000, the court held a review hearing for compliance with the CMO. During the hearing, plaintiffs produced some additional information to support their claims. However, plaintiffs acknowledged that evidence of medical causation, as required by the CMO, had not been filed with the court. Plaintiffs argued that they were unable to produce such evidence without discovery. At the end of the hearing, the trial judge stated that he would review the affidavits and other information and make a ruling. Plaintiffs' counsel requested additional time to respond to defendants' briefs prior to a ruling, and the court agreed. Plaintiffs' counsel indicated that the response would be filed within a week.

On June 14, 2000, plaintiffs filed a motion requesting more time to respond to defendants' briefs. In this motion, plaintiffs indicated that they were gathering additional information to support their claims. On June 26, 2000, the plaintiffs filed a Response in Opposition to Defendant's Motion to Dismiss. Defendants filed a reply on June 29, 2000. Finally, on August 8, 2000, the trial court entered an Order of Dismissal and Final Judgment.

An appellate court applies an abuse of discretion standard when reviewing the propriety of a trial court's sanction for failure to comply with a court order. *Koslow's v. Mackie,* 796 S.W.2d 700, 704 (Tex.1990). The trial court's decision will only be set aside if the abuse of discretion is clear. *Id.* The test under this standard has been articulated in two forms: (1) whether the trial court acted without reference to any guiding rules and principles, or (2) whether under all the circumstances of the particular case, the trial court's action was arbitrary or unreasonable. *Downer v. Aquamarine Operators, Inc.,* 701 S.W.2d 238, 241–42 (Tex.1985), *cert. denied,* 476 U.S. 1159, 106 S.Ct. 2279, 90 L.Ed.2d 721 (1986); *Lindsey v. Lindsey,* 965 S.W.2d 589, 591 (Tex.App.-El Paso 1998, no pet.). Moreover, the appellate court shall not substitute its own judgment for that of the lower court. *Landry v. Travelers Ins. Co.,* 458 S.W.2d 649, 651 (Tex.1970). Evidence is viewed in the light most favorable to the trial court's actions and every legal presumption is made in its favor. *Shebay v. Davis,* 717 S.W.2d 678, 681 (Tex.App.-El Paso 1986, no writ). For these reasons, "a [party] who attacks the ruling of a trial court as an abuse of discretion labors under a heavy burden." *Johnson v. Fourth Court of Appeals,* 700 S.W.2d 916, 917 (Tex.1985)(orig.proceeding); *Ortiz v. Furr's Supermarkets,* 26 S.W.3d 646, 654 (Tex.App.-El Paso 2000, no pet.).

***3** [1] In their first issue, Appellants argue that the trial court erroneously granted Appellees' Motion to Dismiss. Appellants have two specific complaints. First, they contend that the requirements of the CMO and the basis upon which the trial court dismissed the case were different. Second, they claim that the trial court erred in dismissing the property causes of action.

In the first instance, Appellants argue that they made a good faith effort to comply with the requirements of the CMO. They complain that the trial court abused its discretion when it dismissed the case for Appellants' failure to produce information which was not a part of the court's order. Appellants specifically take issue with three of the court's findings upon which the Order of Dismissal is based: (1) that Appellants did not include an affidavit from an expert witness; (2) that Appellants failed to file any affidavit indicating a medical determination had been made that a specific toxic chemical emitted by any of the defendants caused an alleged injury to any of the plaintiffs; and (3) that Appellants failed to produce any evidence of a link between a toxic substance emitted by the defendants and injuries to the plaintiffs. Appellants do not contest the validity of these findings, but rather the court's consideration of them. Essentially, the Appellants argue that they had no notice that the court required production of this information and that failure to provide it would result in dismissal of the case.

The CMO mandated Appellants to provide information about the specific toxic substances to which they were exposed, the particular injuries that resulted from the exposure, and the medical evidence that supported each claim.[3] The court specifically allowed Appellants to provide the required information themselves. Section I–C provided that "[a]t the option of the Plaintiffs, such affidavits may rely upon the testimony of each individual Plaintiff concerning their claim."

Appellants complain that nothing in the CMO required them to provide an affidavit from an expert. This is an accurate statement, there is no such requirement in the CMO. However, the CMO did require a variety of information that could have been presented to the court through an expert. Appellants' argument implies that the trial court dismissed the case because they failed to submit an affidavit from an expert. However, a review of the Order of Dismissal reveals that the absence of affidavits by experts was simply part of a larger concern voiced by the court. The reference to such affidavits is part of the fifth finding in the Order of Dismissal. This paragraph provides:

> The Plaintiffs filings on or before June 5, 2000 did not include, as to any of the 61 remaining Plaintiffs identified on Exhibit 'D', any Affidavit reflecting (1) the details of any medical examination performed on any Plaintiff, (2) the details of any medical testing performed on any Plaintiff, (3) the details of any medical diagnosis made by a medical provider as to any Plaintiff, or (4) the details of any treatment received as a result of a medical diagnosis of any condition. Further, the Plaintiffs filings on or before June 5, 2000 did not include, as to any of the remaining 61 Plaintiffs identified on Exhibit 'D', *any Affidavit from any expert witness of any kind on any subject matter,* and did not include any Affidavit from any medical provider whatsoever of any kind on any subject matter. Further, the Plaintiffs filings on or before June 5, 2000 did not include, as to any of the remaining 61 Plaintiffs identified on Exhibit 'D', any Affidavits identifying, or credibly identifying, the specific alleged toxic substance or chemical emitted by each of the remaining respective Defendants to which each remaining respective Plaintiff was allegedly injuriously exposed. [Emphasis added].

***4** When read in totality, we think it clear that the trial court did not simply find a failure by Appellants to provide expert testimony. Rather, the court found that Appellants failed to provide *any* affidavits to satisfy the listed requirements of the order. Given that Appellants did not comply with the CMO, they have failed to demonstrate how the trial court's action was arbitrary or unreasonable. *See* *Koslow's,* 796 S.W.2d at 704.

Additionally, the CMO required each plaintiff to file affidavits with respect to their individual claims. The court listed the items to be provided by each plaintiff with specificity. Section I–E required each plaintiff to provide "[d]etails of any medical examinations, testing, diagnosis, or treatment relied upon by each individual Plaintiff, or each individual Plaintiff's expert, to support their claim." This requirement shows that the court expected Appellants to provide some medical information in

support of their claims.

Appellants complain that the lower court improperly dismissed the case based on their failure to provide information by affidavit indicating that some type of medical determination had been made that a specific toxic chemical emitted by one or more of the Appellees caused an alleged injury to any of the Appellants. Appellants specifically argue that the CMO did not require such an affidavit. Appellants' assertion is incorrect. A plain reading of the CMO indicates that the primary purpose behind the order was to require Appellants to produce this type of causation evidence.

As the court stated in the Order of Dismissal, Appellants did not include any detailed information about medical examinations, testing, diagnosis, or treatment. Further, Appellants' affidavits provided virtually no information indicating their injuries were caused by a substance emitted by one of the Appellees. The affidavits merely stated each Appellant's injury and their opinion that the injury was somehow linked to the fact that they lived, worked, or regularly visited the neighborhoods surrounding the Appellees' businesses. Many affidavits simply included a statement such as "I was exposed to chemicals from the Phelps Dodge plant by breathing the air ...." Some affidavits mention that appellants have been treated by doctors for their injuries, but none indicate that a doctor has concluded that the illnesses are due to chemical exposure from one of the Appellees' plants. Only a single affidavit comes close to meeting this requirement. The affidavit of Maria Elena Ontiveros includes the following statement:

> I was at my obstetrician in 1967 when he noticed the deformity of my arm. He asked me about it. I told him that I was born that way. *He made the comment, 'it seems to be a birth defect, probably from ASARCO.'* At that time, I did not know what he meant by that. It never crossed my mind that the chemicals from that plant or any other plant might have caused my birth defect until I read a flyer from an attorney named Clarence Dorsey in 1997. The flyer talked about birth defects or people living near some of the plants in El Paso.

***5** As previously discussed, the CMO did not require the production of affidavits from medical experts. Instead, the CMO merely required Appellants to assure the court there had been some type of medical determination that each plaintiff had been harmed by a substance emitted by one of the defendants. Appellants fail to prove how this requirement was arbitrary or unreasonable. *See* *Koslow's,* 796 S.W.2d at 704.

Appellants' third complaint about the trial court's findings of facts and conclusions of law seems to be a reiteration of their second. Essentially, Appellants argue that the CMO did not require them to provide the court with causation evidence. But, as stated above, the CMO plainly required Appellants to provide medical evidence supporting their claims.

Finally, Appellants implicitly raise the issue of notice. However, the record is replete with references to the lack of medical evidence establishing causation. At the first pretrial hearing, Appellees urged the trial court to enter an order requiring Appellants to produce some sort of evidence establishing causation.

[2] With respect to the dismissal of the property causes of action, the trial court's CMO dealt with both property and non-property damage claims. The second section of the order provided the following:

> Property Damage: If a Plaintiff claims that their property damage was a result of a specific incident or incidents, such as a spill, explosion, fire or some other discreet event, the statement shall include from each such incident:
>
> A. the date and location of the incident;
>
> B. a detailed description of the incident;
>
> C. a detailed description of the manner in which that incident exposed such Plaintiff to the allegedly toxic substance or chemical or caused contamination; and
>
> D. a detailed description of the alleged route or routes of exposure.

Appellants argue that the affidavits filed with the court provide evidence in support of their nuisance claims. They contend that such claims need not be supported by expert testimony and thus should not have been dismissed.

In reviewing the thirty-seven affidavits filed by the Appellants, we cannot find a single Appellant who fully complied with this provision of the order. None of the Appellants specify what type of property damage they have suffered. Further, as with the non-property claims, Appellants failed to describe at all or with any specificity the alleged activity or event that led to the damage. If anything, Appellants provide even less information about their property claims than their non-property claims.

A trial court is vested with broad authority to manage its docket and handle all pretrial matters. *See* TEX.R.CIV.P. 166; TEX.R.JUD.ADMIN. 7(a)(6). Included in this authority is the ability to make and enforce orders, such as the case management order entered in this case. *See* *Koslow's,* 796 S.W.2d at 703–04. Should a party fail to comply with these pretrial orders, the trial courts have authority implicit under TEX.R.CIV.P. 166 to sanction them. *Koslow's,* 796 S.W.2d at 704; *Wal–Mart Stores, Inc. v. Butler,* 41 S.W.3d 816, 817 (Tex.App.-Dallas 2001, no pet.). Such sanctions may include striking pleadings and rendering a default judgment. *Koslow's,* 796 S.W.2d at 704; *McConnell v. Memorial Const. Co.,* 821 S.W.2d 166, 167 (Tex.App.-Houston [1st Dist.] 1991, writ denied). In this case, the trial court properly dismissed Appellants' case for failure to comply pursuant to its authority under Rule 166. We find no abuse of discretion and overrule the first issue.

***6** [3] In their second issue, the Appellants contend that the trial court's dismissal sanction was unjust and inappropriate. *See* *Chrysler Corp. v. Blackmon,* 841 S.W.2d 844, 849 (Tex.1992); *Koslow's,* 796 S.W.2d at 704 n. 1, 2. To determine whether a court's sanction is just, the Texas Supreme Court has developed a two-part test. *TransAmerican Natural Gas Corp. v. Powell,* 811 S.W.2d 913, 917 (Tex.1991). First, there must be a direct relationship between the offensive conduct and the sanction imposed. *Id.* Second, the sanction imposed must not be excessive. *Id.* If a sanction effectively prevents a decision based on the merits of the case, there must be a showing of flagrant bad faith or callous disregard on the part of counsel or a party. *TransAmerican Natural Gas Corp.,* 811 S.W.2d at 918. Further, lesser sanctions must first be imposed. *Id.*

In their second issue, Appellants' argue the trial court's dismissal with prejudice of all causes of action constitutes an unjust sanction. The trial court's findings of fact and conclusions of law establish that there was a direct relationship between Appellants' actions and the court's decision to dismiss.[4] Though the dismissal with prejudice precludes the Appellants from "having their day in court," it was well within the court's discretion under the circumstances. *See* *Koslow's,* 796 S.W.2d at 704; *Lentworth v. Trahan,* 981 S.W.2d 720, 722–23 (Tex.App.-Houston [1st Dist.] 1998, no pet.). Appellants' repeated failure to meet court-ordered deadlines and comply with court mandates constitutes bad faith and callous disregard for the judicial process. *See* *TransAmerican Natural Gas Corp.,* 811 S.W.2d at 918. The trial court responded to Appellants' conduct with patience and fairness. As indicated in the Order of Dismissal, the court gave the Appellants more than three years to move the case forward. Instead, the only times the case advanced was in response to the Appellees' actions or the actions of the court itself.

After reviewing all the circumstances surrounding the lower court's dismissal of the case, we find that the action was just and appropriate. Appellants' second issue is overruled.

Accordingly, we affirm the judgment of the lower court.

**All Citations**

Not Reported in S.W.3d, 2002 WL 358829

Footnotes

1 The first set of discovery requests had been sent prior to the January 1998 hearing.

2 There were no second, third, or fourth amended petitions.

3 See CMO, Section I, subsections B, D, and E.

[4] The trial court gave three specific reasons for dismissing the case with prejudice as to all claims. First, each Appellant failed to comply with the CMO. Second, the "failure to come forward with evidence reflecting any medical determination of a link between any alleged specifically identified toxic chemical emitted by a particular Defendant and the claimed injuries of each respective Plaintiff ...." Third, a finding that Appellants filed the litigation without any basis in fact and law.

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