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Court of Appeals of Texas, El Paso.

In re JOBE CONCRETE PRODUCTS, INC., Relator.

No. 08-01-00351-CV.
|
Dec. 6, 2001.

Before BARAJAS, C.J., McCLURE, and CHEW, JJ.

OPINION

ANN CRAWFORD McCLURE, Justice.

***1** Jobe Concrete Products, Inc. (Jobe) seeks a writ of mandamus requiring the Honorable Herbert Cooper, judge of County Court at Law No. 5 of El Paso County, to dismiss the claims of 847 plaintiffs who joined the suit by filing an amended petition, or alternatively, to sever the claims into separate causes of action, and to withdraw portions of a case management order. We conditionally grant relief.

PROCEDURAL SUMMARY

On August 18, 2000, Joe Piñon, Angelina Piñon, and Yvonne Piñon filed suit in the 41st District Court of El Paso County against Jobe, alleging nuisance and negligence causes of action arising out of the operation of Jobe's rock crushing and concrete batch facility located on McKelligon Canyon Road in El Paso.[1] The Piñons live near the quarry and claim that Jobe's improper and negligent operation of the site has caused personal and emotional injury and damages to their property through noise and the emission of chemicals, dust, and other substances. On October 5, 2000, the Piñons' filed an amended petition which is identical to their original petition but added 522 additional plaintiffs by simply attaching a list of names as Exhibit A.[2] Thus, the amended petition did not state specific venue allegations pertaining to the additional plaintiffs nor did it state the factual basis for their claims against Jobe. Shortly after filing the amended petition, some of the additional plaintiffs served Jobe with discovery requests. Consequently, Jobe filed a motion to strike the intervention by the additional plaintiffs because they had not filed a petition in intervention and had made no showing that they were entitled to intervene in the suit as required by TEX.R.CIV.P. 60. At the same time, Jobe filed a motion to abate discovery by the additional plaintiffs until the trial court ruled on the motion to strike. A few days later, Jobe filed its "Motion to Sever and Abate, and Alternative Motion for Separate Trials." Citing the possibility of prejudice if all of the claims were tried together, Jobe requested that the trial court sever the cases of the additional plaintiffs into separate causes of action and abate those cases pending resolution of the Piñons' claims. Following a hearing on these motions on December 4, 2000, the Honorable Mary Anne Bramblett, presiding judge of the 41st District Court,[3] took the motions under advisement.

On January 5, 2001, the plaintiffs filed a motion to enter an interim scheduling order. Judge Bramblett conducted a hearing on February 5, 2001 and Jobe objected to the proposed scheduling order prepared by the plaintiffs. Judge Bramblett took this motion under advisement as well. On February 9, 2001, Jobe filed a motion for entry of a "Lone Pine" order and provided the court with a proposed case management order.[4] Among other things, Jobe complained that the additional plaintiffs had served over 230 separate discovery requests and had filed a motion to compel, but had never specified the nature of their injuries, when they were injured, who had diagnosed and treated them, or their damages. Further, Jobe alleged that the Piñons had provided inadequate and vague answers to discovery. Consequently, Jobe asked that each

plaintiff, including the additional plaintiffs, be required to produce an affidavit from a physician establishing the plaintiff's exposure and personal injury. With respect to the claimed property damage, Jobe requested that the plaintiffs be required to produce an affidavit specifying the address and location of the property, valuation information, the dates of the alleged damage or harm and how it occurred, and the amount of damage alleged. Finally, Jobe asked that all discovery be stayed until each plaintiff had demonstrated a *prima facie* case by providing the requested information.

***2** On March 9, 2001, Judge Bramblett denied Jobe's motion to strike the intervention and motion to sever. On the same date, she entered the following case management order:

> This mass tort case is extremely complex and will be exhaustive of judicial resources. The Court's file is likely to become voluminous and threatens to become unmanageable. The procedure outlined herein will further the convenience of the Court and the parties. Pursuant to Rule 166 of the Texas Rules of Civil Procedure, the Court enters the following Order in the above-captioned case. It is hereby ORDERED:
>
> Plaintiffs shall designate a group of 12 Plaintiffs[5] whom the Court plans to put to trial first. The 'First Trial Plaintiffs' shall be designated by April 12, 2001, and a group of not less than 12 'Second Trial Plaintiffs' shall be designated by the Defendants within 60 days of completion of trial on the First Trial Plaintiffs' claims.
>
> That on or before June 15, 2001, the First Trial Plaintiffs shall file affidavits with respect to each Plaintiff's non-property damage claims of alleged exposure to substances from the Jobe McKelligon Canyon plant, and claims of damages caused by such alleged exposure. Such affidavits shall contain the following with respect to all non-property damage claims of each individual First Trial Plaintiff:
>
> I. Non Property Damage Claims:
>
> A. the facts, circumstances, and evidence of each individual Plaintiff's alleged exposure to blasting, emissions, substances or chemicals attributable to the Jobe McKelligon Canyon plant.
>
> B. The affidavits of the First Trial Plaintiffs shall also include:
>
> 1. the particular alleged substance or chemical to which each individual Plaintiff claims exposure or injury from the Defendant's place of business;
>
> 2. a description of the manner, time duration, and concentration, if known, of such alleged exposure or contamination;
>
> 3. all known facts supporting such claims of alleged exposure attributable to the Jobe McKelligon Canyon plant including:
>
> a. the nature of the proximity and activities which resulted in exposure;
>
> b. a description of the alleged route or routes of alleged exposure (i.e., dermal contact, inhalation, or ingestion);
>
> c. the approximate date when each individual Plaintiff learned of any injury claimed;
>
> d. the manner by which each individual Plaintiff learned of the alleged injuries;
>
> e. the identity of all persons who told or suggested to each Plaintiff that he or she might have sustained personal injury due to exposure to a substance, emission, chemical or blast attributable to the Defendants and the approximate date that the information was relayed to each individual Plaintiff.
>
> Such affidavits may rely upon the testimony of each individual Plaintiff concerning their claim.
>
> C. The affidavits shall also contain each particular illness, injury, or condition claimed by each individual Plaintiff to have been caused by the alleged exposure.
>
> ***3** D. The affidavits shall contain details of any medical examinations, testing, diagnosis, or treatment relied upon by each individual Plaintiff, or each individual Plaintiff's expert, to support their claims.

II. Property Damage Claims:

A. If a Plaintiff claims that any property damage was the result of a specific incident or incidents, such as a spill, explosion, fire, blast or some other discreet [sic] event, the affidavit shall include from each such incident:

1. the date and location of the incident;

2. a detailed description of the incident;

3. a detailed description of the manner in which that incident exposed such Plaintiff's property to the substance, emission or blasting;

4. a detailed description of the alleged route or routes of exposure.

IT IS ORDERED THAT Plaintiffs shall present the First Trial Plaintiffs for deposition before August 17, 2001. Second Trial Plaintiffs shall file affidavits similar to those required of the First Trial Plaintiffs, as set out above, within 60 days of their designation by Defendants. Plaintiffs shall present the Second Trial Plaintiffs for deposition within 90 days of their designation by Defendants.

IT IS FURTHER ORDERED THAT discovery herein is stayed regarding all other Plaintiffs excepting the First Trial Plaintiffs until further order of this Court.

The depositions of the First Trial Plaintiffs shall proceed as follows:

a. Plaintiffs, after consultation with Defendants, shall provide Defendants with the date on which each Plaintiff shall be deposed. If Defendants wish to request documents at the depositions, they must serve a deposition notice so requesting. Defendants are ordered to work together and file only one such notice on behalf of all Defendants regarding each Trial Plaintiff from whom production is sought. Each Defendant may request whatever documents it wants.

b. Pursuant to Tex.R.Civ.P. 199.5(c), Defendants' total examination of each Trial Plaintiff shall not exceed six hours; likewise, Plaintiffs' total examination of each Trial Plaintiff shall not exceed six hours.

Plaintiffs and Defendants shall file motions and responses regarding whether the designated trial groups meet the requirements of *In re Ethyl Corporation,* 975 S.W.2d 606 (Tex.1998) no later than the [sic] 30 days before such groups' scheduled trial date. The Court shall then rule upon whether the designated Plaintiffs' claims can be properly tried together.

Information required by this Order may be supplemented at any time, but no later than five days before the review hearing.

A hearing to review compliance with this Order is set for the 18th day of June, 2001 at 2:00 p.m.

Shortly after entering the case management order, Judge Bramblett transferred the case to County Court at Law No. 5. On April 4, 2001, counsel for plaintiffs filed a fourth amended petition and added another 325 plaintiffs to the suit, for a total of 847 additional plaintiffs. By this petition, the additional plaintiffs have ostensibly intervened pursuant to TEX.R.CIV.P. 60, or alternatively, they have joined in the suit pursuant to the permissive joinder provision of TEX.R.CIV.P. 40.[6] Jobe responded by filing a "Supplemental-And Motion for Reconsideration of its-Motion to Strike Intervention, Motion to Sever and Abate and Alternative Motion for Separate Trials, and Motion for Entry of a Case Management Order Also Known as a Lone Pine Order." Judge Cooper conducted a hearing on Jobe's motion on June 8, 2001 and took the motion under advisement. While considering the motion, Judge Cooper initially set the case for trial on December 4, 2001, but it has since been removed from the trial docket. It is currently targeted for trial in June 2002. On August 20, 2001, Judge Cooper denied Jobe's motion to reconsider and informed the parties that the prior case management order remained in effect. Jobe file its petition for writ of mandamus on September 6, 2001.

STANDARD OF REVIEW

***4** Mandamus is an extraordinary remedy available only in the most limited of circumstances. *Canadian Helicopters, Ltd. v. Wittig,* 876 S.W.2d 304, 305

(Tex.1994); *In re Salgado,* 53 S.W.3d 752, 758 (Tex.App.-El Paso 2001, orig. proceeding). A court should issue mandamus only to correct a clear abuse of discretion or the violation of a legal duty when there is no other adequate remedy at law. *Canadian Helicopters,* 876 S.W.2d at 305; *Salgado,* 53 S . W.3d at 758. A court abuses its discretion when it fails to properly apply the law to the undisputed facts, when it acts arbitrarily or unreasonably, or when its ruling is based on factual assertions unsupported by the record. *Salgado,* 53 S.W.3d at 758. With respect to factual issues or matters committed to the trial court's discretion, the reviewing court may not substitute its judgment for that of the trial court. *In re Levi Strauss & Co.,* 959 S.W.2d 700, 702 (Tex.App.-El Paso 1998, orig. proceeding). Therefore, the relator must establish that the trial court could reasonably have reached only one decision. *Id.* Even if the reviewing court would have decided the issue differently, it cannot disturb the trial court's decision unless it is shown to be arbitrary and unreasonable. *Id.* The relator bears the heavy burden of showing an abuse of discretion as well as the inadequacy of an appellate remedy. *Canadian Helicopters,* 876 S.W.2d at 305; *Salgado,* 53 S.W.3d at 758.

INTERVENTION

In its first issue, Jobe contends that Judge Cooper clearly abused his discretion in refusing to strike the purported intervention of the 847 additional plaintiffs.[7] The additional plaintiffs maintain, however, that the fourth amended petition adequately demonstrates a justiciable interest as required by TEX.R.CIV.P. 60.

Rule 60 permits a party to intervene in a suit by filing a pleading, which is subject to being stricken by the court on the motion of any party. TEX.R.CIV.P. 60. A person or entity is given the right to intervene if it could have brought the same action or any part thereof on its own. *Guaranty Federal Savings Bank v. Horseshoe Operating Company,* 793 S.W.2d 652, 657 (Tex.1990). An intervenor is not required to secure the court's permission to intervene; any party who opposes the intervention has the burden to challenge it via a motion to strike. *Guaranty Federal,* 793 S.W.2d at 657. Once the motion to strike has been filed, the burden then shifts to the intervenor to show a justiciable interest in the lawsuit. *Mendez v. Brewer,* 626 S.W.2d 498, 499 (Tex.1982). The interest asserted by the intervenor may be legal or equitable in nature but it must be greater than a mere contingent or remote interest. *Intermarque Automotive Products, Inc. v. Feldman,* 21 S.W.3d 544, 549 (Tex.App.-Texarkana 2000, no pet.). A party has a justiciable interest, and thus, a right to intervene, when his interests will be affected by the litigation. *Id.* The trial court may determine the intervenors' justiciable interest on the basis of the petition in intervention. *Metromedia Long Distance, Inc. v. Hughes,* 810 S.W.2d 494, 497 (Tex.App.-San Antonio 1991, pet. denied). The sufficiency of the petition is tested by its allegations of fact construed in conjunction with the allegations of fact set out in the pleadings of those parties resisting the intervention. *Id.* If a party cannot show a justiciable interest in the lawsuit, the trial court should strike the plea in intervention. *Id.* The trial court is given broad but not unbridled discretion in determining whether the intervention should be stricken. *Id.*

***5** The additional plaintiffs initially entered this suit without the benefit of a petition in intervention. Instead, counsel utilized an unorthodox approach and merely listed the additional plaintiffs' names in an attachment to an amended petition. That petition in no way suggested that the additional plaintiffs sought to intervene pursuant to Rule 60. Further, it did not include any allegations of fact pertaining to the additional plaintiffs. If the motion to strike had been ruled upon at that point, the trial court would have been required to strike the purported intervention. By the time of the hearing, however, the additional plaintiffs had filed a second amended petition and counsel relied exclusively on this petition to establish their justiciable interest.[8] According to representations made by plaintiffs' counsel at the hearing, the petition alleged that the additional plaintiffs' claims are identical to the Piñons' claims and are based on the same facts. Further, at the time Judge Cooper reconsidered the prior order denying Jobe's motion to strike, the plaintiffs had filed a fourth amended petition which alleged that the "Additional Plaintiffs have a present justiciable interest in this lawsuit because, like the Piñon Plaintiffs, they are entitled to recover damages as alleged in the Petition." The petition further alleged that the additional plaintiffs reside or resided near the Jobe McKelligon Canyon Facility and were exposed to the blasting, noise from the

blasting, emissions of fine particulate matter of less than 10 microns, and other chemicals from the Jobe McKelligon Canyon Facility. Like the Piñons, they alleged nuisance and negligence claims arising out of Jobe's operation of the McKelligon Canyon quarry. Thus, Judge Cooper could have concluded that the additional plaintiffs had established a justiciable interest. However, our inquiry does not end here.

Even if a party has a justiciable interest, and thus, a right to intervene in a lawsuit, the trial court retains discretion to strike the intervention. *Intermarque Automotive,* 21 S.W.3d at 549; *Rogers v. Searle,* 533 S.W.2d 440, 442 (Tex.Civ.App.-Corpus Christi 1976, no writ). For example, the court may strike the intervention if it will complicate the litigation with a multiplicity of issues. *Atchley v. Spurgeon,* 964 S.W.2d 169, 171 (Tex.App.-San Antonio 1998, no pet.); *see* *Guaranty Federal,* 793 S.W.2d at 657 (holding that a trial court abuses its discretion if it strikes a petition in intervention if (1) the intervenor establishes a justiciable interest, (2) the intervention will not complicate the case by an excessive multiplication of the issues, and (3) the intervention is almost essential to effectively protect the intervenor's interest). It cannot be seriously argued that the intervention of 847 additional plaintiffs into this suit has not complicated the litigation. After all, Judge Bramblett expressly based her decision to enter a *Lone Pine* order on the complexity of the case. But for the intervention, entry of this order would not have been necessary. Yet sheer complexity does not lead us to conclude that the trial court judges abused their discretion in permitting the intervention. Both Judge Bramblett and Judge Cooper could well have determined that any problems caused by the intervention could be managed through the use of a carefully drafted case management order. While another judge might disagree with this approach, it does not demonstrate a clear abuse of discretion, and thus, does not warrant correction by mandamus. Issue One is overruled.

JOINDER/SEVERANCE

***6** Jobe contends in its second issue that Judge Cooper clearly abused his discretion in refusing to sever the claims of the additional plaintiffs into separate lawsuits. Plaintiffs essentially argue that because the Supreme Court has never held that joinder is not improper in a mass tort case, we should reject Jobe's argument out of hand. In support of this argument, they direct our attention to *In re Ethyl Corporation,* 975 S.W.2d 606 (Tex.1998) and *Polaris Investment Management Corp. v. Abascal,* 892 S.W.2d 860, 861 (Tex.1995).

In *Polaris,* approximately 2,700 plaintiffs and plaintiff-intervenors sought damages from Polaris and Prudential Securities resulting from the sale of certain limited partnerships. *Polaris,* 892 S.W.2d at 861. Due to the large number of plaintiffs, the trial court ordered an initial separate trial of a small group of plaintiffs and limited discovery to only those plaintiffs initially set for trial. *Id.* In a *per curiam* opinion, the Supreme Court determined that mandamus relief was inappropriate because the selection of the trial plaintiffs and the limitation on discovery were incidental rulings which were not subject to mandamus review. *Id.* at 861-62.

In *Ethyl,* the Supreme Court addressed a defendant's challenge to the trial court's decision to group for trial the premises liability claims of twenty-two workers or their family members against five defendants for deaths or injuries allegedly caused by asbestos exposure. *Ethyl,* 975 S.W.2d at 608. The underlying suit was brought by 459 plaintiffs who were represented by the same counsel. *See id.* Settlements and summary judgments eventually reduced the number of claims remaining for trial to those of 111 workers or their families against one or more of five defendants, including Ethyl Corporation. *Ethyl,* 975 S.W.2d at 609. In an attempt to make trial of the remaining claims more manageable, the trial court selected twenty-five claims with one predominant factor in common but the defendants objected because they wanted separate trials. *Id.* Three claims were later eliminated from the trial grouping. *Id.* The defendants sought mandamus relief. Although the case did not, technically speaking, concern consolidation pursuant to TEX.R.CIV.P. 174(a) because all of the plaintiffs and defendants were already parties to the same suit when the twenty-two claims were selected for a separate trial, the Supreme Court applied Rule 174(b) in determining whether the trial court abused its discretion in refusing to order separate trials. *Id.* at 610. Because the record was silent with regard to many factors[9] that would inform the court's decision on the commonality or dissimilarity of the claims, the court found that the relators had failed to demonstrate an abuse of discretion. *Id.* at 608.

In neither *Polaris* or *Ethyl* was the Supreme Court called

upon to decide whether the claims of the plaintiffs were improperly joined under Rule 40 or whether the claims should have been severed pursuant to Rule 41. For all we know, these issues had already been resolved in other proceedings. Contrary to the plaintiffs' view, *Polaris* and *Ethyl* do not stand for the proposition that joinder is never improper in a mass tort case. We believe the correct approach is to apply Rules 40 and 41 to the issue squarely before us.

***7** Rule 40 addresses permissive joinder, and it provides, in pertinent part:

> All persons may join in one action as plaintiffs if they assert any right to relief jointly, severally, or in the alternative in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all of them will arise in the action.

TEX.R.CIV.P. 40. The rule does not define "same transaction" or "occurrence." However, the Texas permissive joinder rule is equivalent to the federal rule and federal caselaw applies the "logical relationship test" in determining if joinder is appropriate. *Blalock Prescription Center, Inc. v. Lopez-Guerra,* 986 S.W.2d 658, 663 (Tex.App.-Corpus Christi 1999, no pet.). Under this test, a transaction is flexible, comprehending a series of many occurrences logically related to one another. *Id* . To arise from the same transaction, at least some of the significant facts must be relevant to both claims. *Id.; see e.g., Jack H. Brown & Co., Inc. v. Northwest Sign Co., Inc.,* 718 S.W.2d 397, 400 (Tex.App.-Dallas 1986, writ ref'd n.r.e.). A logical relationship between two or more causes of action does not require that the events giving rise to the claims be close in time. *See Tindle v. Jackson National Life Insurance Co.,* 837 S.W.2d 795, 798 (Tex.App.-Dallas 1992, no writ)(addressing compulsory counterclaim) .[10] Even though a claim arises out of the same transaction or occurrence as another claim, joinder is not permitted unless it is also shown that a question of law or fact common to all of the claims will arise in the action. *See Levi Strauss,* 959 S.W.2d at 703 (noting that Rule 40 contains two conjunctively stated requirements, "same transaction" and "any question of law or fact common to all of [the claims]"). Joinder may still be inappropriate if the potential prejudice resulting from joinder outweighs judicial economy and convenience. *See Levi Strauss,* 959 S.W.2d at 703. Accordingly, Rule 40(b) allows the trial court to enter other orders to prevent delay or prejudice. TEX.R.CIV.P. 40(b); *see Levi Strauss,* 959 S.W.2d at 703.

Rule 41 of the Rules of Civil Procedure covers misjoinder and non-joinder of parties. It provides that:

> [A]ctions which have been improperly joined may be severed and each ground of recovery improperly joined may be docketed as a separate suit between the same parties, by order of the court on motion of any party or on its own initiative at any stage of the action, before the time of submission to the jury or to the court if trial is without a jury, on such terms as are just. Any claim against a party may be severed and proceeded with separately.

TEX.R.CIV.P. 41. This rule refers to a claim which is a severable part of a controversy that involves more than one cause of action. *McGuire v. Commercial Union Insurance Company of N.Y.,* 431 S.W.2d 347, 351 (Tex.1968). Pursuant to Rule 41, the trial court is granted broad discretion in the matter of consolidation and severance of causes. *Guaranty Federal,* 793 S.W.2d at 658; *McGuire,* 431 S.W.2d at 351. A claim is properly severable if (1) the controversy involves more than one cause of action; (2) the severed claim is one that would be the proper subject of a lawsuit if independently asserted; and (3) the severed claim is not so interwoven with the remaining action that they involve the same facts and issues. *Id.* The controlling reasons for a severance are to do justice, avoid prejudice, and further convenience. *Guaranty Federal,* 793 S.W.2d at 658. There is a substantial overlap between the analysis applied under Rules 40 and 41. Essentially, a court is required to determine whether judicial economy and convenience are substantially outweighed by the potential for prejudice if the claims remain joined in the same action.

***8** Turning first to the question whether the claims of the additional plaintiffs arise out of the same transaction or occurrence, we look to the allegations found in the fourth amended petition. The petition contains conclusory allegations that the claims of the additional plaintiffs arise from the same transaction or occurrence as the Piñons and that there are common questions of law or fact. Of course, we are not bound by these conclusions but must instead look only to the allegations of fact found in the petition. The additional plaintiffs allege that they, like the Piñons, reside or previously resided near the Jobe McKelligon Canyon Facility and were exposed to the blasting, noise from the blasting, and resulting emissions of dust, fine particulate matter of less than 10 microns, and chemicals, which caused a variety of injuries to them and to their property. Plaintiffs do not rely on a single event or occurrence but instead claim exposure over a ten-year period to noise and emissions of various substances. From our review of the pleadings, the only common issue in these claims is Jobe's operation of the facility. Each plaintiff's exposure to the blasting and emission of substances, timing of the exposure, type of injury, causation, and damages will vary from plaintiff to plaintiff. Although the claims may share common questions of law regarding negligence and nuisance, the varying factual situations are not logically related. *See* *Blalock,* 986 S.W.2d at 664. Therefore, the claims of the additional plaintiffs do not arise out of the same transaction or occurrence within the meaning of Rule 40. The trial court lacks discretion to permit joinder under Rule 40 where the elements stated in that rule are not satisfied. *Levi Strauss,* 959 S.W.2d at 704.

Next, we must decide whether the trial court clearly abused its discretion in refusing to sever the improperly joined cases. As recognized by the Supreme Court in *In re Bristol-Myers Squibb Co.,* 975 S.W.2d 601, 603 (Tex.1998), some types of mass torts, such as asbestos litigation, are mature and may be approached differently than less mature mass torts. In the case of a mass tort that is not mature, a trial court is required to proceed with extreme caution in consolidating cases for trial due to the potential for unfairness to both parties. *See id.* We believe this same admonishment applies not only to the decision to consolidate several cases for trial but also to a decision to permit joinder of the massive amount of claims presented here. Bearing this in mind, we are not persuaded that joinder of the claims of 850 plaintiffs promotes the interests of either judicial economy or convenience. One need only review the trial court's case management order to see that joinder of the additional plaintiffs' claims to those of the original three plaintiffs has tremendously complicated what appears to be an already complex case. Perhaps there are unidentified advantages to having the claims joined together in a single suit but they are outweighed by the obvious and significant disadvantages which operate to the prejudice of both plaintiffs and defendant. For example, by virtue of the case management order, the claims of hundreds of plaintiffs will be delayed while the first twelve cases are tried. Because discovery as to the remaining claims has been limited, at least to some extent,[11] Jobe is faced with the prospect that evidence relevant to those claims will be destroyed, memories will fade, and witnesses will die or disappear. *See In re Van Waters & Rogers, Inc.,* No. 00-1885, 2001 WL 1381373 (Tex. November 8, 2001). This restriction of discovery likely would not have occurred but for joinder of the cases. Given the absence of any identifiable advantage to joinder of these claims and the existence of tremendous potential for prejudice, severance is required to prevent manifest injustice. The additional plaintiffs have not demonstrated that their legal rights will be prejudiced by the severance of their claims from those of the Piñons and from one another. Consequently, there is no room for the exercise of discretion by the trial court. *See* *Womack v. Berry,* 156 Tex. 44, 291 S.W.2d 677, 683 (1956). While the refusal to order a separate trial under such circumstances is usually termed a clear abuse of discretion, it is nevertheless a violation of a plain legal duty. *Id.* Because Jobe does not have an adequate remedy by appeal, mandamus relief is appropriate. *See Levi Strauss,* 959 S.W.2d at 705. Issue Two is sustained.[12]

***9** Having found a clear abuse of discretion on the part of the trial court from which Jobe has no adequate remedy at law, we grant Jobe's petition for writ of mandamus to the extent it seeks relief from the trial court's failure to sever the claims of the additional plaintiffs not only from the claims of the Piñons but from one another. We therefore order that Respondent sever the claims of the additional plaintiffs into individual cause numbers.[13] Having found no clear abuse of discretion in the trial court's refusal to strike the intervention, we deny all other relief sought by the petition. Because we are confident that the trial court will comply with the order of this court, the writ of mandamus will issue only if it fails to do so.

All Citations

Not Reported in S.W.3d, 2001 WL 1555656

Footnotes

1 The Piñons have also sued two other defendants but they are not parties to this mandamus proceeding.

2 When necessary to distinguish these plaintiffs from the Piñons, we will refer to all plaintiffs other than the Piñons as the "additional plaintiffs." Otherwise, we will refer to all plaintiffs collectively as "the plaintiffs."

3 The Piñons' suit was originally filed in the 41st District Court and the Honorable Mary Anne Bramblett, presiding judge of that court, entered several orders prior to the case being transferred to the County Court at Law No. 5. After transfer, Judge Cooper refused to re-consider the prior rulings of the 41st District Court. Therefore, Jobe seeks mandamus against Judge Cooper.

4 A "Lone Pine" order, which has its origins in *Lore v. Lone Pine Corporation,* 1986 WL 637507, No. L-33606-85 (N.J.Super. Ct. Law Div.1986), is a case management order entered in mass tort cases. The order is designed to handle the complex issues and potential burdens on defendants and the court in mass tort litigation. *Acuna v. Brown & Root, Inc.,* 200 F.3d 335, 340 (5th Cir.2000).

5 It is unclear how Judge Bramblett arrived at an initial trial unit of twelve plaintiffs. During oral argument, Jobe alleged that the initial grouping as designated by plaintiffs is illogical, with the claims of some minors urged independently of their parents' and or siblings' claims.

6 In an apparent effort to meet Jobe's motion to strike intervention, the petition alleges that the additional plaintiffs have a justiciable interest in the suit. Additionally, the petition seeks to bring the claims of the additional plaintiffs within the permissive joinder rule by stating that the additional plaintiffs assert claims that arise from the same transactions or occurrences as the Piñons and there are common questions of law or fact between the claims of the additional plaintiffs and the Piñons. *See* TEX.R.CIV.P. 40.

7 In its petition, Jobe combines its arguments pertaining to intervention and severance. Although there is some overlap among the issues and analysis, there are different rules and applicable standards and the relief sought is distinct. *See* *Ghidoni v. Stone Oak, Inc.,* 966 S.W.2d 573, 586-87 (Tex.App.-San Antonio 1998, pet. denied). Therefore, we will conduct a separate analysis of each argument.

8 Because the record does not include the second amended petition, we rely on counsel's representations.

9 The court applied what are referred to as the Maryland factors in determining the consolidation issue. *See* *Ethyl,* 975 S.W.2d at 611.

10 Texas courts have applied this same test in the context of determining whether a counterclaim is compulsory. *Blalock,* 986 S .W.2d at 663.

11 The parties debate exactly how much discovery has been restricted.

12 Given our resolution of this issue, it is unnecessary to address Jobe's complaints regarding the case management order.

13 While we have found that a blanket joinder of all claims of the 847 additional plaintiffs is improper, our opinion should not be read as prohibiting Respondent from consolidating certain claims of the additional plaintiffs into appropriate trial units. Such an order should comply with the Supreme Court's guidelines in *In re Bristol-Myers Squibb Co.,* 975 S.W.2d 601 (Tex.1998) and *In re Ethyl Corp.,* 975 S.W.2d 606 (Tex.1998) as well as Rules 40 and 174(b) of the Texas Rules of Civil Procedure.

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