

No. 08-1076

**IN THE
SUPREME COURT
OF TEXAS**

***In re* DEERE & COMPANY D/B/A JOHN DEERE COMPANY AND
JOHN DEERE CONSTRUCTION & FORESTRY COMPANY**

Relators.

**Original Mandamus Proceeding
From the 18th Judicial District Court of Johnson County, Texas
Honorable John Neill, Presiding Judge**

BRIEF IN REPLY IN SUPPORT OF RELATOR'S BRIEF ON THE MERITS

RICHARD A. SAYLES

State Bar No. 17697500

EVE L. HENSON

State Bar No. 00791462

MARK D. STRACHAN

State Bar No. 19351500

JOEL L. ISRAEL

State Bar No. 24055717

SAYLES|WERBNER, P.C.

4400 Renaissance Tower

1201 Elm Street

Dallas, Texas 75270

(214) 939-8700

(214) 939-8787 (FAX)

COUNSEL FOR RELATORS

BRIEF IN REPLY

In accordance with Texas Rule of Appellate Procedure 55.4, Relators, the Deere Defendants, file this Brief in Reply in Support of their Brief on the Merits, and would show as follows:

In her Real Party in Interest's Brief on the Merits in Opposition to Petition for Mandamus ("Response Brief"), Plaintiff Francesca Martinez has continued to ignore the threshold question which led to Relators' Petition for Mandamus: What was Plaintiff's request for production on which the Judge's Order was based? From the outset, Plaintiff's Response presents a flawed series of generalities that ignores the chronology leading to Relators' Petition for a writ, and heavily relies on a Waco Court of Appeals case that demonstrates precisely why the trial court committed an abuse of discretion necessitating the relief sought herein. Consequently, Plaintiff fails to present any valid argument countering the conclusion that mandamus relief is necessary in this case.

I. Ms. Martinez's Response Brief Patches Together a Series of Unsupported Factual Statements That Fail to Address the Overbroad Discovery Order

Plaintiff's Response begins with two flawed premises: (1) that the trial court "limited" its order; and (2) that the limitation was applied "to only bolt-on steps and handles and with respect to only equipment models that have steps and handles substantially similar to those on the equipment at issue."¹ The fundamental inaccuracy of each lies at the heart of Relators' argument.

¹ See Response Brief, at p. 7.

A. Chief Justice Gray in Waco was correct that an overbroad discovery request was made even more overbroad by the Trial Court's Order.

As discussed in detail in Deere's Brief on the Merits, Plaintiff served 47 requests for production in June 2006, including a request No. 18 for "all [non-governmental] documents of customer complaints received by Defendant relative to the sidestep on any model backhoe."² The seemingly innocuous request was overbroad and Deere objected thusly, while also producing documents. Almost two years later, Plaintiff decided without any explanation to move to compel on 35 of its 47 requests, and not "several" as the Response Brief suggests³, including No. 18.

Though the trial court commanded Ms. Martinez at the first hearing on her motion to limit her proposed order to three or four models and the evidence that made those models relevant, Plaintiff did neither, and instead lodged a proposed Order with 35 product lines. This Order, which the trial court signed in December 2008, expanded the discovery request as follows:

1. "All non-governmental documents" became "all documents";
2. "Customer complaints" became "any lawsuits, problems or complaints";
3. "The sidestep" became "any bottom step or handle that supports human weight"; and
4. "Any model backhoe" became 35 different product lines, 80% of which are not even backhoes.

² Relators' Record ("RR") Tab 10, Plaintiff Arturo Martinez' First Requests for Production to Defendant Deere & Company d/b/a John Deere Company ("First Request for Production"), p. 9 at No. 18.

³ See Response Brief, at p. 9.

To suggest that the trial court “limited” the order suspends belief, since it cannot be disputed that the order substantially expanded the overbroad request.

B. The only evidence that the trial court and Supreme Court have seen demonstrates that most of the models sought bear no similarity, much less substantial similarity, to the 410D backhoe.

The overriding theme of the Response Brief is that Relators’ Petition should be denied because: (1) they provided no evidence to the trial court; and (2) the models sought by Plaintiff have steps and handles “substantially similar” to the Deere 410D backhoe on which Arturo Martinez’s incident occurred. Unfortunately for Ms. Martinez, her statements are incorrect – Plaintiff is the only one who has provided no evidence and whose claims are unsupported.

Relators, including in their September 11, 2008 letter to the trial court, demonstrated that at most only five backhoe loader models were reasonably similar with regard to the step at-issue in this case.⁴ Deere has explained that due to a 1996 model modification, the 410D backhoe in this case switched from a two-bolt to a four-bolt step assembly, and four other backhoe loader “D” series models incurred the same modification. As a result, these four models post-1996, in addition to the 410D, are the only reasonably similar designs that should require review and production of relevant information.⁵ That evidence was before both the trial court and now before this Court. Ms. Martinez argues that “the trial court repeatedly attempted to narrowly tailor the discovery order in this case, but John Deere provided no information to the Court by

⁴ RR Tab 8, September 11, 2008 Letter to The Honorable Judge John Neill from Mark D. Strachan (“Deere Letter”).

⁵ RR Tab 8, Deere Letter.

which it could tailor the order as John Deere desired.”⁶ That statement is blatantly false – Deere presented a proposed order providing for production of five backhoe models, the 300D, 310D, 315D, and 410D, and 510D, after the 1996 step modification that Deere described to the trial court. Also demonstrably false is Ms. Martinez’s assertion that Deere represented to the trial court that responding to the order with 78 models would not be burdensome⁷ – all counsel for Relators stated was that if the order was tailored to a small handful of similar models, *e.g.*, those five above, complying with that narrowed request would not be overly burdensome. The current Order *had not even been drafted* when that statement was made. The representation also was made in a hearing in which Plaintiff’s counsel acknowledged, at least until apparently changing his mind, that this case solely involved a step assembly with “four holes in and bolted”.⁸ This came on top of his statement at the first hearing that Plaintiff was only interested in going back 15 years, a position which also changed.⁹

Further, as Relators readily acknowledged in their Brief on the Merits, the affidavit of their expert, Daniel Griswold, was not presented to the trial court, however Deere presented straightforward evidence to the trial court as to the five potentially relevant models. They further relied on the trial court’s statement that Plaintiff needed to limit her order to a few models, and that they would not be allowed to submit a request for dozens, and certainly not without explanation.

⁶ See Response Brief, at p. 8.

⁷ See Response Brief, at p. 10.

⁸ RR Tab 10, September 4, 2008 Hearing Transcript, at 9:11-15.

⁹ RR Tab 5, May 8, 2008 Hearing Transcript, at 9:21-23.

Plaintiff now brazenly tries to turn the table by pretending that it has shown a link between the steps on tractors and four-wheel loaders with the backhoe at issue, when all she has done is proclaim that “my expert said so”. Even more remarkably, Ms. Martinez dismisses the detailed affidavit of Daniel Griswold, who has worked with the Deere equipment at issue for decades, as “unsupported assertions.”¹⁰ Plaintiff asks this Court to disregard a detailed statement made under oath, and instead rely on her counsel’s empty proclamation that the equipment is substantially similar.

Mr. Griswold’s affidavit merely provides addition support to the argument presented to the trial court – that only five backhoe models have similar sidestep assemblies and only those five could possibly be responsive to Plaintiff’s Request for Production No. 18. Plaintiff can say 100 times that the sidesteps on all 78 models she seeks are “substantially similar”, but that does not make it so. She continuously repeats the mantra that all of the models had similar step and handle components, but has never said why or how. Not all of the models have bolt-on steps, and most that do use both different quantities and with a different attachment orientation as compared with the 410D. Plaintiff says they are substantially similar, but nothing more.

Ultimately, what Plaintiff wants is the ability to harass Deere by forcing it to search for dozens of models regardless of their relevance. If successful, Ms. Martinez will have subverted Texas Rule of Civil Procedure 215.1 and the public policy underlying it. Rule 215.1 allows a party to file a motion to compel, and even has removed the requirement from several decades ago that the moving party must show good cause. But

¹⁰ *Id.* at 12.

the rule could not have been designed to allow a moving party to expand a request for one model into a request for 78 over a span of 40 years, with the burden on the nonmoving party to establish the irrelevance of each. If that truly is the law, it will open the door for litigants to abuse the discovery process by asking for whatever they want, knowing that even if they do not get it, they will have at least forced the nonmoving party to spend immense time and resources in the process of demonstrating lack of relevance.

If Plaintiff succeeds, what is to stop the next plaintiff from asking a products manufacturer for documents related to hundreds of irrelevant models over a period of 50 or 60 years? And if she succeeds, the next defendant would be forced to go one by one through each model and distinguish it from the actual model that was involved in the lawsuit. That cannot be the law, and Plaintiff's false recitation of the facts and procedure that has occurred over the last two years in this case demonstrates why. An initial request cannot open the door to compel without limitation. A court "order that compels overly broad discovery well outside the bounds of proper discovery is an abuse of discretion for which mandamus is the proper remedy."¹¹ That patently is the case here.

II. Ms. Martinez's Reliance on the *May* Case Further Demonstrates Why the Proposed Order Deere Submitted Is Proper Under These Circumstances

The parties appear to agree that the 1989 *Deere v. May* case, in addition to those Supreme Court cases cited in Relators' Brief on the Merits, has particular application to this mandamus proceeding. Where they differ is in the interpretation.

¹¹ *Dillard Dep't Stores, Inc. v. Hall*, 909 S.W.2d 491, 492 (Tex. 1995) (internal citation omitted).

In the *May* case, unlike here, there was no direct evidence as to how the incident occurred, and in spite of that, the Waco Court of Appeals still narrowly tailored the scope of admissibility to three other bulldozer models that had undergone a similar transmission modification to the Deere 450C at issue in the incident.¹² Consequently, the evidence was limited to 34 incidents involving those dozers.

Where Ms. Martinez's argument fails is in her attempt to extrapolate the Waco court's approval of dozens of *incidents* into a supposed approval of dozens of *models*. The latter, of course, was never approved. Deere agrees that the number of *incidents* is irrelevant, and if "one hundred other occurrences" took place on the 410D and four other models similarly modified by Deere in 1996, then Deere will produce documents as to each one and that evidence will have increased the probability that Arturo Martinez's injuries occurred as Plaintiff alleges.

But just because production of documents related to the other 73 models may demonstrate more incidents, where those incidents are not substantially similar and did not occur "under reasonably similar circumstances", they are irrelevant to this case.¹³ While 100 incidents of a four-bolt step breaking on a 410D or 510D would be both relevant and admissible, 100 incidents of individuals slipping and falling off of a tractor step or the welded assembly of a 410TJ sidestep would not. The Response Brief adapts a "the more the merrier" approach that ignores these crucial differences in an attempt to mold the holding in *May* into something it is not. Again, in *May*, Deere had initiated a

¹² *John Deere Company v. May*, 773 S.W.2d 369, 371-2 (Tex. App.-Waco 1989, writ denied).

¹³ *Id.* at 372.

safety modification program on the 450C and three other models 15 months prior to the accident, with a redesigned spool valve and neutral gear on the dozers' second transmission.¹⁴ Evidence of other occurrences were admissible “if they involved *the same type of occurrence*, i.e., the circumstances would be reasonably similar if the dozers moved after being left in neutral with the engine running.”¹⁵ On that basis, the court limited the scope of the request to bulldozer models that had undergone the same safety modification program to the redesigned spool valve and neutral gear on the transmission. The conclusion thus remains that by applying *May* as expansively as possible to our facts, Plaintiff's request should be limited to, at most, those five models that were modified with a four-bolt apparatus by Deere's 1996 Product Improvement Program. Such an order still might lead to evidence related to dissimilar incidents involving slip-and-falls and other incongruous circumstances, however it is a much more reasonable expansion than including 73 unrelated models over a span of 40 years.

Plaintiff may claim that the trial court “narrowly tailored the Order to require production on only substantially similar incidents and only models using the steps and handles similar to those on the 410D.”¹⁶ The trial court's Order, however, contains **absolutely no limitation** as to similarity of the incidents – it allows “any lawsuits, problems or complaints” regardless of how the incident occurred – and does nothing to limit the models to those reasonably similar as defined by *May* and this Court in the

¹⁴ *Id.* at 372.

¹⁵ *Id.* at 372-73.

¹⁶ *See* Response Brief, at p. 20.

trilogy of decisions discussed in Deere's Brief on the Merits.¹⁷ The trial court abused its discretion by turning an overbroad discovery request into an even more overbroad order in spite of controlling case law to the contrary and Deere's evidence as to the at-most five models whose sidesteps bear sufficient similarity. On that basis, Relators must prevail.

PRAYER

For the reasons set forth above as well as those in their Brief on the Merits, Relators respectfully pray that this Court issue a writ of mandamus directing Respondent to set aside his Order of December 5, 2008 and to enter an order limiting the scope of Plaintiff's discovery requests to, at most, those five post-1996 modification models identified as being reasonably similar, and therefore, potentially relevant to this matter.

Respectfully submitted,

/s/ Joel L. Israel

RICHARD A. SAYLES

State Bar No. 17697500

EVE L. HENSON

State Bar No. 00791462

MARK D. STRACHAN

State Bar No. 19351500

JOEL L. ISRAEL

State Bar No. 24055717

SAYLES|WERBNER, P.C.

4400 Renaissance Tower

1201 Elm Street

Dallas, Texas 75270

(214) 939-8700

FAX (214) 939-8787

COUNSEL FOR RELATORS

¹⁷ As aptly stated by this Court in the *Graco* case, for instance, "[e]vidence about different products and dissimilar accidents has long been inadmissible, as it generally proves nothing while distracting attention from the accident at hand." *In re Graco Children's Products, Inc.*, 210 S.W.3d 598, 601 (Tex. 2006)

CERTIFICATE OF SERVICE

The undersigned certifies that on this 20th day of April, 2009, a true and correct copy of the foregoing instrument was served in accordance with the Texas Rules of Civil Procedure via certified mail, return receipt requested, on the following counsel of record:

Clay Lewis Jenkins
Stephen L. Daniel
JENKINS & JENKINS P.C.
516 West Main Street
Waxahachie, Texas 75165

Randall G. Walters
Robert D. Royse, Jr.
WALTERS, BALIDO & CRAIN
900 Jackson Street, Suite 600
Dallas, Texas 5202

Andrew N. Soule
Hermes Sargent Bates, L.L.P.
901 Main Street, Suite 5200
Dallas, Texas 75202

John R. MacLean
MACLEAN & BOULWARE
11 North Main Street
Cleburne, Texas 76033

F. Leighton Durham
Durham & Pittard, L.L.P.
P.O. Box 224626
Dallas, Texas 75222

A true and correct copy of the foregoing instrument was served via certified mail, return receipt requested, on:

The Honorable John Neill
18th Judicial District Court
Guinn Justice Center
204 S. Buffalo Ave., Room 304
Cleburne, Texas 76033

/s/ Joel L. Israel

Joel L. Israel