

No. 09-0264

*In The Supreme Court of Texas
Austin, Texas*

IN RE ALLIED CHEMICAL CORPORATION ET AL.

ORIGINAL PROCEEDING FROM THE 332ND JUDICIAL DISTRICT COURT, HIDALGO COUNTY, TEXAS
CAUSE NO. C-4885-99-F
HONORABLE MARIO E. RAMIREZ, JR., PRESIDING

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INTRODUCTION

The mandamus petition questions whether the trial court's order abating basic discovery is an abuse of discretion in contravention of prior opinions from this Court. Since the petition was filed, the trial court has indefinitely suspended answers to the *Able Supply* and *Borg-Warner* Interrogatories. The trial court's post-petition actions in this case and its companion cases highlight the abusive nature of the discovery order and further magnify that order's coercive effect. The events of these cases provide real world examples of what happens when a trial court does not follow the law of the case and Supreme Court precedent.

DISCUSSION

I. The Mandamus Proceeding Is Premised On Settled Principles.

In *Able Supply*, the Court questioned plaintiffs' ability to properly evaluate and potentially settle their cases if they have not — as in this case — disclosed during discovery the identity of the healthcare provider who has attributed the plaintiffs' alleged injuries to exposure to the defendants' particular products. *Able Supply Co. v. Moye*, 898 S.W.2d 766, 772 (Tex. 1995). The Court previously held that defendants here were entitled to answers to the *Able Supply* Interrogatory **before** plaintiffs' claims could be set for trial. *In re Allied Chem. Corp.*, 227 S.W.3d 652, 658 (Tex. 2007) (*Allied I*). It logically follows, based on *Able Supply*, that plaintiffs should answer the *Able Supply* Interrogatory **before** a court compels defendants to mediate — yet the trial court has

repeatedly ordered mediation while indefinitely abating answers to both the *Able Supply* and *Borg-Warner* Interrogatories.¹ R2:229, SR:12, 13, 30, 33, 43.²

The trial court originally defined “a reasonable time” to *begin* answering the *Able Supply* and *Borg-Warner* Interrogatories as nine months from the date of the hearing on defendants’ motion to compel. R3:319, 465. Although the plaintiffs admitted they could begin answering in August 2009, the trial court’s order effectively allowed them to abate their discovery responses until at least December 15, 2009, when the first 50 discovery responses were due. *Id.*; R2:311. Thereafter, the trial court’s order allowed the remaining answers to trickle in over the next several years at the rate of 45 per month, in the sequence of plaintiffs’ choosing. R3:465-66.

No answers have been forthcoming; the deadlines for December 2009 and January 2010 have come and gone. And, as discussed below regarding the trial court’s recent inactions, the trial court has effectively ruled that *no* answers will be forthcoming.

The prior briefing explains that the discovery order is an abuse of discretion which ignores prior precedent, including law of the case, and which leaves defendants without an adequate remedy by appeal. *See* Relators’ Brief on the Merits at 13-24 (citing, among others, *Allied I, In re Allied Chem. Corp.*, 287 S.W.3d 115, 130 (Tex. App.—Corpus

¹ *Borg-Warner Corp. v. Flores*, 232 S.W.3d 765, 773 (Tex. 2007) (requiring plaintiffs to provide defendant- and product-specific evidence relating to the dose of the specific product to which plaintiffs were allegedly exposed, coupled with evidence that the dose was a substantial factor in causing the alleged injury).

² A supplemental record is being filed with this brief.

Christi 2008, orig. proceeding) (*Allied II*), *In re Colonial Pipeline Co.*, 968 S.W.2d 938 (Tex. 1998), and *In re Van Waters & Rogers, Inc.*, 62 S.W.3d 197 (Tex. 2001)). Defendants cannot effectively or fairly prepare for trial or mediation when the 1800+ *Acevedo* plaintiffs and intervenors have not provided the basic causation evidence requested by the *Able Supply* and *Borg-Warner* Interrogatories (or when plaintiffs have admitted that no such evidence exists). See Petition in No. 09-0065.³

In deciding whether to grant mandamus relief, courts commonly analyze potential harms that might occur if an order is allowed to stand. See, e.g., *In re McAllen Med. Ctr., Inc.*, 275 S.W.3d 458, 462 (Tex. 2008) (holding that inadequacy of appeal depends on the facts of each case); *In re Prudential Ins. Co.*, 148 S.W.3d 124, 138 (Tex. 2004) (outlining potential adverse consequences if the trial court's order was not corrected by mandamus relief). But there is no need to hypothesize in this case because the abuse and coercion continues to occur in the underlying *Acevedo* case and the two other "toxic soup" cases involving the same claims, counsel, defendants, and judge: the *Guadalupe Garza* case and the *Elda Garza* case.

II. The Coercive Nature Of The Trial Court's Discovery Order Is Further Reflected In The *Garza* Cases.

The trial court previously severed certain claims of one *Acevedo* plaintiff, Guadalupe Garza, while retaining some of her claims in the *Acevedo* case. The trial court

³ The related petition for writ of mandamus involving the crime-fraud exception to the attorney-client and work-product privileges remains pending before the Court.

set the severed claims for trial on October 19, 2009. SR:44. Evidently, plaintiffs and the trial court perceived Ms. Garza's trial as their bellwether trial, even though no two plaintiffs share the same alleged injuries from the same "toxic soup" circumstances. *Compare Allied I*, 227 S.W.3d at 654 (observing that "[t]he five [consolidated trial] plaintiffs had little in common"); *In re Chevron U.S.A., Inc.*, 109 F.3d 1016, 1019-1020 (5th Cir. 1997) (explaining that dissimilar claims will not support a bellwether trial). For this reason, defendants attribute the actions in the *Guadalupe Garza* case to plaintiffs in all three cases.

Because the 14 trial defendants believed that Ms. Garza lacked adequate answers to the *Able Supply* and *Borg-Warner* Interrogatories, they sought mandamus relief from the trial court's severance and trial setting orders. *See* Petition in No. 09-0106 (filed February 5, 2009). At defendants' request, this Court stayed the *Guadalupe Garza* case on April 9, 2009. After full briefing on the merits, the petition was denied, and the Court's stay of the *Guadalupe Garza* case was lifted on August 21, 2009 — less than 60 days before the scheduled trial date.

During the four-month pendency of this Court's stay, no activity had taken place in the *Guadalupe Garza* case, including previously scheduled expert reports and depositions. However, events had occurred in the *Elda Garza* case. On August 11, 2009, the trial court ordered the *Elda Garza* plaintiffs to answer the *Able Supply* and *Borg-Warner* Interrogatories no later than October 12, 2009, just days before the then-stayed trial setting in *Guadalupe Garza*. SR:173.

Once this Court's stay in *Guadalupe Garza* was lifted, plaintiffs requested that the October 19, 2009 trial setting go forward, and the trial court so required. *See* SR:10. To defendants' astonishment, plaintiffs claimed they were ready for trial, without the need to depose defendants' experts. Plaintiffs' own experts had not even completed their reports and depositions. Apparently, plaintiffs believed their best chance to extort settlements was through a "fire drill" or short trial notice. In response, defendants moved heaven and earth to prepare expert reports while simultaneously spending huge sums of money to prepare for trial.

When no flurry of settlements appeared, plaintiffs revealed their gamesmanship. On the eve of trial, they dismissed numerous defendants from the *Guadalupe Garza* case, leaving three "target" defendants. SR:46-69. And, rather than comply with the deadline for answering the *Able Supply* and *Borg-Warner* Interrogatories in the *Elda Garza* case, plaintiffs sought a 45-day extension, citing their counsel's preparation for the *Guadalupe Garza* trial as their rationale. SR:174 (motion dated October 14, 2009).

After defendants challenged Ms. Garza's pleadings, plaintiffs requested a continuance, but the trial court denied their request. SR:72, 87. Plaintiffs reversed course and sought to depose at least three defense experts *during* trial, and the trial court allowed that request. SR:94-95, 100. The target defendants then presented incontrovertible evidence that Ms. Garza's claims were barred by limitations. SR:92. Plaintiffs did not object, and the trial court took judicial notice of the evidence. SR:93, 102. Yet the trial went forward. SR101.4 to 101.5.

The abusive orders continued during trial. For example, the trial court declined to strike plaintiffs' expert testimony although the subjects he testified about were clearly beyond his expertise, involved subjects that had never been disclosed for the expert, were based on documents that had never been provided to defendants, and contained information that *plaintiffs' own expert* ultimately admitted from the witness stand was false. *See, e.g.*, SR:106-26, 130-63.

After three weeks of trial, the court again ordered the parties to mediate, although the ongoing trial had not revealed legitimate answers to the basic discovery required by the *Able Supply* and *Borg-Warner* Interrogatories. *See* SR:129. Nonetheless, a tentative settlement based on numerous conditions precedent was reached for the three target defendants as to *all* plaintiffs in *all* cases. To date, plaintiffs have not satisfied any of these conditions.

Based on the conditional settlement, the *Elda Garza* plaintiffs sought an additional extension of time to answer their *Able Supply* and *Borg-Warner* Interrogatories. SR:179 (requesting "45-days from the date of this Order" [not motion]). According to the *Elda Garza* plaintiffs, their answers will necessarily "differ" now that the potential components of the "toxic soup" have changed. *Id.*

In other words, plaintiffs contend they cannot answer who caused their injury, what caused their injury, or what dose caused their injury until they know which defendants remain in the case. The *Able Supply* and *Borg-Warner* Interrogatories do not allow plaintiffs to manipulate their answers in this fashion. SR:167-68, 172 (requiring a

response as to each defendant and product that have ever been in the case); SR:184-86 (Montrose's response to plaintiffs' motion). The trial court, however, has not ruled on the *Elda Garza* motion, effectively abating the answers indefinitely. *See* SR:30.

III. The Trial Court's Post-Petition Actions In *Acevedo* Demonstrate Concrete And Continuing Harm.

The discovery order at the heart of this mandamus proceeding required the first responses to the *Able Supply* and *Borg-Warner* Interrogatories by December 15, 2009, long after the parties were first ordered to mediate. R3:465-66; R2:229. Since the mandamus petition was filed, the trial court has repeatedly ordered defendants to attend mediation *before the deadlines* contained in the order. SR:12 (scheduling mediation for November 17-19); SR:13 (rescheduling mediation to December 2). A mediation was held in December but was largely unsuccessful. While some defendants reached a tentative settlement agreement, that settlement has not been finalized.

When the December 15 discovery deadline finally arrived, plaintiffs refused to answer. Instead, the *Acevedo* plaintiffs followed the example set by the *Elda Garza* plaintiffs and moved to extend the deadline — for a minimum of 45 days. SR:14 (seeking 45 days “from the date of this Order” [sic]); SR:21 (one intervenor's joinder). Like the *Elda Garza* plaintiffs, the *Acevedo* plaintiffs alleged that they too needed more time to answer basic discovery because the overall number of “active” defendants had changed. *Id.*

Indeed, at the hearing on their motion, *plaintiffs conceded they would determine “what the Able Supply and Borg-Warner Interrogatory response will be” when “we*

know what defendants are left.” SR:28 (emphasis added). As in *Elda Garza*, however, neither the questions nor the answers are limited to the defendants left in the case. SR:5-6, 9. Instead, the questions seek complete information about the alleged “toxic soup.” *Id.*

By their own admission, plaintiffs are pursuing millions of dollars in damages for a “toxic soup du jour,” which transparently lacks another ingredient each day they can extort another settlement. *See also* Petition in No. 09-0065. Against this backdrop, defendants do not use lightly the words “extort” or “extortion.” *Compare* MODEL PENAL CODE § 223.4(6) (defining theft as obtaining another’s property by “threatening to ... withhold testimony or information” about another’s legal claim or defense); *Roberts v. State*, 278 S.W.3d 778, 790 (Tex. App.—San Antonio 2008, pet. ref’d) (describing theft by coercion as similar to extortion).

Defendants still lack basic causation information that could be supplied by plaintiffs’ adequate answers to the *Able Supply* and *Borg-Warner* Interrogatories, but the trial court has ordered the parties back to mediation. SR:33 (ordering mediation to occur by January 15); SR:43 (extending mediation deadline to February 5). Simultaneously, the trial court has refused to rule on plaintiffs’ motion to extend the *Able Supply* and *Borg-Warner* deadline in the *Acevedo* case, just as it has refused to rule in the *Elda Garza* case. SR:30. The trial court’s inaction has once again abated discovery in contravention of this Court’s rulings, and it signals an intent to permanently deprive defendants of basic discovery in a misguided effort to make the case go away.

CONCLUSION & PRAYER

The trial court's orders in the companion cases demonstrate abusive attempts to force settlements in the *Acevedo* case before the *Acevedo* plaintiffs comply with *Allied I* and *Allied II* by answering the *Able Supply* and *Borg-Warner* Interrogatories. The trial court's actions and inactions in these cases represent an attempt to preclude defendants from ever obtaining answers to basic discovery. The orders reinforce the coercive effect of the trial court's March 13, 2009 discovery order.

The Court has previously condemned this sort of case management and settlement coercion by trial courts and should do so again. *See, e.g., Able Supply v. Moye*, 898 S.W.2d at 773 ("This Court will not tolerate the abuses that have occurred in the management of this case."). Accordingly, mandamus relief should issue as outlined in defendants' opening brief on the merits.

Respectfully submitted,

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VERIFICATION

THE STATE OF TEXAS *
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On January 26, 2010, the affiant, ROBERT G. NEWMAN, appeared in person before me, a notary public, who knows the affiant to be the person whose signature appears on this document. According to the affiant’s statements under oath, the affiant is trial and mandamus counsel for Relator, Allied Chemical Corporation. The affiant further states under oath that he has read the foregoing motion and all factual statements in the motion are within his personal knowledge and true and correct.

Robert G. Newman

GIVEN UNDER MY HAND AND SEAL OF OFFICE on January 26, 2010.

Notary Public, State of Texas

CERTIFICATE OF SERVICE

I certify that on January 26, 2010, this brief was served via email (when available), as well as by certified mail/return receipt requested (with the accompanying supplemental record), on the following:

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