NO. 09-0264

In The Supreme Court Of Texas

IN RE ALLIED CHEMICAL CORPORATION, *et al.*,
Relators.

The Honorable Mario E. Ramirez, Jr., 332nd Judicial District Court,
Hidalgo County, Texas, Respondent, Arising Out Of Cause No. C-4885-99-F

BRIEF OF AMICI CURIAE AMERICAN CHEMISTRY COUNCIL, CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, NATIONAL ASSOCIATION OF MANUFACTURERS AND TEXAS CHEMICAL COUNCIL

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INTEREST OF AMICI CURIAE

The American Chemistry Council (ACC) represents the leading companies engaged in the business of chemistry. Council members apply the science of chemistry to make innovative products and services that make people's lives better, healthier and safer. The business of chemistry is a $689 billion enterprise and a key element of the nation's economy, providing jobs for more than 800,000 Americans. It is one of the nation's largest exporters, accounting for more than ten cents of every dollar in U.S. exports.

The Chamber of Commerce of the United States of America is the world's largest federation of businesses and associations, representing 300,000 direct members and indirectly representing more than three million U.S. businesses and professional organizations of every size and in every relevant economic sector and geographical region of the country. An important function of the Chamber is the representation of its members' interests by filing amicus curiae briefs in cases involving issues of national concern to American business.

The National Association of Manufacturers ("NAM") is the nation's largest industrial trade association, representing small and large manufacturers in every industrial sector and in all 50 states. The NAM's mission is to enhance the competitiveness of manufacturers by

shaping a legislative and regulatory environment conducive to U.S. economic growth and to increase understanding among policymakers, the media and the general public about the vital role of manufacturing to America's economic future and living standards.

The Texas Chemical Council is a statewide trade association representing approximately 70 chemical manufacturers with more than 200 Texas facilities. TCC member companies manufacture products that improve the quality of life for all Americans. The Texas chemical industry has invested more than $50 billion in physical assets in the state and pays over $1 billion annually in state and local taxes. TCC's members provide approximately 70,000 direct jobs and over 400,000 indirect jobs to Texans across the state. Chemicals are the state's number one export at $35 billion each year.

The amicus groups named above are the sole sources for the fee paid for preparing this brief. Some but not all of the parties in this proceeding are members of one or more of the amicus groups.

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MISCELLANEOUS

I. INTRODUCTION

Mandamus should issue here, but that is not enough. This mandamus proceeding exists because of bigger systemic problems. A true adversary justice system must require a claimant to shoulder the burden of proof, determine whether the claimant's burden has been satisfied, and then subject the determination to review. Cases such as this one appear to follow different rules that require correction.

The actions permitted here essentially removes the plaintiffs' burden of ever going forward with the evidence. Discovery is avoided and in large part cases are seldom tried. When they are tried, judgment is seldom reached because the goal is not a judgment, but an ambush, by which "the parties are 'deprived of any just defense . . . .'" *In re Allied Chem. Corp.*, 227 S.W.3d 652, 654 (Tex. 2007) (*Allied I*). Appellate review of the merits is therefore impossible.

Where this is allowed, a case's value is divorced from the plaintiff's injuries or the defendant's culpability. Instead, the "value" depends upon the ability to "stonewall production of critical evidence to deprive defendants of their right to a fair trial." *Allied I*, 227 S.W.3d at 662 (Hecht, J., concurring). It is therefore particularly important here for the Court to exercise its mandamus power. But it should now be

abundantly clear that case-by-case supervision of this type of litigation, especially in this locality, has proven inadequate to the task.

In *Allied I*, every member of this court recognized the problem existing in this case and in these types of cases. The only difference was whether to tackle the problem by mandamus,[1] by rule changes,[2] or by further motion practice.[3] Such an "either or" position is no longer tenable. Mandamus is warranted in this case ***along with*** changes to the rules and exercise of this Court's regulatory authority over the judiciary and the practice of law.

II. ARGUMENT AND AUTHORITIES

A. Mandamus Relief Is Appropriate Here

"Immature" tort or not, defendants have the right to timely disclosures of "factual information that is fundamental to the defense of their cases." *Able Supply v. Moye*, 898 S.W.2d 766, 771 (Tex. 1995). Prolonging discovery without evidentiary basis grants plaintiffs extortionary power for settlement with the same practical effect as

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[1] *Allied I*, 227 S.W.3d at 652-63 (supporting mandamus).

[2] *Id.* at 666 (dissenting and stating that "the better practice is to enact these reforms in conjunction with our rulemaking procedure, or when public policy mandates, by legislation.").

[3] *Id.* at 667 (dissenting and opining that relators should have filed no evidence motions for summary judgment or motions to compel discovery).

outright abatement of discovery. *See In re Allied Chem. Corp.*, 227 S.W.3d 652, 658 (Tex. 2007) (*Allied I*). And when the subject of discovery "goes to the heart of the litigation" and forces defendants to prepare theoretical defenses against non-specific claims, effectively abating discovery is an abuse of discretion necessitating extraordinary relief. *In re Colonial Pipeline Co.*, 968 S.W.2d 938, 941-42 (Tex. 1998); *accord In re Van Waters & Rogers, Inc.*, 62 S.W.3d 197, 200 (Tex. 2001).

Three factors merited mandamus relief in *Allied I*, and those same three are still present: (1) "the discovery order imposes a burden on one party far out of proportion to any benefit to the other," (2) the "denial of discovery goes to the heart of a party's case," and (3) the "discovery order severely compromises a party's ability to present any case at all at trial." 227 S.W.3d at 658. Five more years of delay on $100 million in claimed actual damages will trigger "thousands of hours and millions of dollars" in defense costs. *In re Van Waters*, 62 S.W.3d at 200. This discovery dispute still strikes at the heart of Defendants' case because the same fundamental interrogatory questions are at issue. *Id.* And the lack of the most fundamental information still compromises Defendants' ability to assert various defenses, necessitating mandamus. *Id.*

Plaintiffs allege exposure beginning in 1950, acutely implicating the Court's concern in *Colonial Pipeline* that "memories fade and evidence may be lost or corrupted." 968 S.W.2d at 941; *see In re Van Waters*, 62 S.W.3d at 200. Causation, of course, is the key dispute in any such case. *Allied I*, 227 S.W.3d at 658. Absent basic causation disclosure, no one can prepare for trial. *Id*. A trial court cannot set cases for trial without allowing sufficient time to defend the disclosure, nor can it keep defendants in perpetual judicial purgatory in the interim. But the Plaintiffs justify further delay based on the schedule of a single "risk assessment" expert, who is not a proper causation expert in any event.[4]

A single expert sorting through over 1,800 plaintiffs makes little tactical sense if the desired result is just and timely compensation. Indeed, the expert herself noted that at least 1,000 similar experts could render the opinions. Relator's Brief on the Merits, at 18 (citing R3:444). Rather than just and timely compensation, Plaintiffs' desired

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[4] The expert's reports evaluate the "risk or endangerment to human health" with regards to regulatory and cleanup work. Relator's Brief on the Merits, at Tab 4. The reports do not attribute plaintiff-specific health effects to particular products, pursuant to *Able Supply*, or provide dose specific information, pursuant to *Borg-Warner*. Therefore, the expert's testimony is irrelevant to the Plaintiffs' basic failure to disclose. *Allied I*, 227 S.W.3d at 655.

outcome is to push the limits of discovery as far as possible, and when pushed back, "retreat" to try a different tactic. *Allied I*, 227 S.W.3d at 654-55.

A decade is sufficient time for Plaintiffs to discover, settle on, and disclose the factual and legal bases supporting their claims. Plaintiffs in *Able Supply* failed to supply discovery for eight years and in *In re Van Waters* for seven. 898 S.W.2d at 767-68; 62 S.W.3d at 200. As delays increase and defense costs mount, Plaintiffs' bargaining position strengthens "irrespective of the claims' merits." *Allied I*, 227 S.W.3d at 660 (Hecht, J., concurring). Hence Plaintiffs' track record indicates no desire to proceed to trial, merely to delay. But this case is only one symptom of a larger, systemic disease.

B. The Trial Court's Approach To Discovery Is Part Of A Larger And Much More Serious Systemic Problem

1. The practice permitted below abhors resolution on the merits

In Hidalgo and neighboring counties, few cases are actually resolved on the merits and fewer still advance to trial. As in this case, the game is to keep the ball in the air and avoid a fair presentation of the merits.

According to the Office of Court Administration,[5] Hidalgo County, the seventh most populous county in Texas, averaged only ***three civil jury verdicts*** per year between 2006 and 2008.[6] Similarly, for the same time period, Nueces County averaged ***ten***, Starr County averaged ***four*** and Zapata County averaged only ***one*** per year. No one can plausibly maintain that all the rest of those cases are being disposed of by "no evidence" summary judgment motions.[7] Defendants either buy their peace, oftentimes without basic discovery, or plaintiffs eventually nonsuit non-target defendants, who likely ought not have been joined in the first place, but who nonetheless had to pay the price of admission.

But the statistics are not simply demonstrating an abstract problem. Here, for example, Plaintiffs pushed to proceed immediately to trial after the Court denied Petition 09-1016.[8] But when no

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[5] Figures compiled from http://www.courts.state.tx.us/pubs/annual-reports.asp.

[6] By comparison, Travis County, the fifth most populous county, averaged just over 47 civil jury verdicts per year for the same period.

[7] Would that defendants ***could*** solve this problem by resort to no-evidence summary judgments or other motion practice. *See Allied I*, 227 S.W.3d at 667 (Wainwright, J. dissenting). There are jurisdictions within this state where the remedies prescribed in Rule 166a(i) are essentially unattainable, and no appellate remedy exists for the ordinary order denying summary judgment.

[8] *See* Relator's Supplemental Reply Brief, at 5 (citing SR:10).

settlement was forthcoming, the named Plaintiff shrunk from the challenge by dismissing all but three Defendants.[9] Apparently taken by surprise at actually proceeding to a ***real trial***, Plaintiffs had to depose three defense experts during the ongoing trial.[10] Ultimately, three weeks of trial produced nothing more than further court-ordered mediation, with the Defendants still lacking responses to the interrogatories this Court ordered in *Allied I*.[11]

Plaintiffs succeeded in delaying judgment, and Defendants remained subject to the whims of the trial court. In such a system, cost and risks are the goals, not resolution. Disclosure is not made, summary judgment is not entertained, trial is not held, and appellate review, beyond being inadequate, ***cannot*** occur.

2. *Such a system poses a crisis of confidence that is of constitutional scale*

Society cannot tolerate a system of justice in which the value of a claim is based upon the ability to drive up risk and ***avoid*** resolution on the merits rather than on the defendant's fault for the plaintiff's injury. Such a cancer is "calculated to weaken and undermine in the public

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9 *Id*. (citing SR:46-69).

10 *Id*. (citing SR:94-95).

11 *See id*. at 6 (citing SR:129).

estimate [the Courts'] prestige so essential to the stability of our democratic form of government." Act of May 15, 1939, H.B. 108, 46th Leg., R.S., ch. 25, 1939 Tex. Gen. Laws 202. If the Courts allow (let alone foster) such a system, it creates "the appearance not that the courts are doing justice, but that they don't know what they are doing." *In re McAllen Med. Ctr., Inc.* 275 S.W.3d 458, 466 (Tex. 2008). The Court cannot "[s]it[] on [its] hands while unnecessary costs mount up" and thereby "contribute[] to public complaints that the civil justice system is expensive and outmoded." *Id.*

But beyond public confidence, the issue at some point arises to constitutional levels. "Due process at a minimum requires notice and an opportunity to be heard at a meaningful time and in a meaningful manner." *Univ. of Tex. Med. Sch. v. Than*, 901 S.W.2d 926, 930 (Tex. 1995); *see Mathews v. Eldridge*, 424 U.S. 319, 333 (1976); *Goldberg v. Kelly*, 397 U.S. 254, 267-68 (1970) (requiring "an effective opportunity to defend"). Keeping litigants in perpetual limbo until they succumb to settlement demands cannot satisfy the core due process hearing requirement.[12] The opposite of due process is "the arbitrary exercise of

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[12] *See Boddie v. Conn.*, 401 U.S. 971, 379 (1971) ("In short, 'within the limits of practicability,' a State must afford to all individuals a meaningful opportunity to be heard if it is to fulfill the promise of the Due Process Clause."

the powers of government," Tex. Const. art. I, § 19.[13] Arbitrary and capricious conduct is what mandamus jurisdiction is intended to correct.[14]

Due process is not the only guarantee at issue. The Texas Constitution also guarantees access to the courts for any wrong, and equally as compelling is the defendant's right to clear his name in the same forum. *See Adair v. Kupper*, 890 S.W.2d 216, 218 (Tex. App.—Amarillo 1995, no writ) ("before being made to suffer, either in person or property, parties are entitled to their day in court"). Without reasonable prospect of a fair trial for factual issues or summary adjudication for legal issues, defendants have little chance of ending vexatious litigation. And without final resolution in the trial court, ordinary appellate remedies are foreclosed.

(quoting *Mullane v. Cent. Hanover Bank & Trust Co.*, 389 U.S. 306 (1950)); *cf Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 429-30 (1982) ("denying potential litigants use of established adjudicatory procedures" is equivalent to denying litigants the opportunity to be heard).

[13] "While the Texas Constitution is textually different in that it refers to 'due course' rather than 'due process,' we regard these terms as without meaningful distinction." *Than*, 901 S.W.2d at 929.

[14] *City of San Benito v. Rio Grande Valley Gas Co.*, 109 S.W.3d 750, 757 (Tex. 2003) ("The test for abuse of discretion [for a writ of mandamus] is . . . whether [the] decision was arbitrary or unreasonable."); *Downer v. Aquamarine Operators, Inc.*, 701 S.W.2d 238, 243 (Tex. 1986) (determining whether the trial court's action was "capricious, arbitrary, or unreasonable" for an abuse of discretion).

C. The Larger Problem Requires A Larger Solution

Even mandamus review has proved inadequate in this case and with this problem. This one dispute has consistently consumed appellate resources of this and other courts for a decade, all apparently to no effect. Thus, while the majority of this Court was correct to grant mandamus relief in *Allied I*, the scope of the problem eluded both the majority and the dissenters. The problem is not "isolated abuse that does not occur often enough . . . to require corrective legislation." *Allied I*, 227 S.W.3d at 663 (Hecht, J., concurring). Yet, the solution cannot await a new "rule or statute." *Id*. at 666 (Jefferson, C.J., dissenting). Nor does the problem abate if the defendants "tee up" additional or different motions in the trial court. *Id*. at 667 (Wainwright, J., dissenting).

"Either/or" is no longer an option. Even the small percentage of cases that reach this court demonstrates that mass tort defendants, particularly in the valley, are routinely deprived of basic discovery necessary to resolve legitimate claims or to dispose of illegitimate ones. This case demonstrates that no single order from this Court can alone cure the problem so long as counsel are willing to evade it and trial courts are willing to facilitate evasion. Yet, this Court has a

constitutional obligation to ensure the "efficient and uniform administration of justice in the various courts." Tex. Const. art. V, § 31(b). It need not restrict itself to one-off orders in original proceedings.

This Court has constitutional and statutory authority to promulgate rules of practice and procedure governing all cases. Tex. Const. art. V, § 31(b); Act of May 15, 1939, H.B. 108, 46th Leg., R.S., ch. 25, 1939 Tex. Gen. Laws 201.[15] Among the Legislature's reasons for granting that authority seventy years ago were the "unnecessary delay to litigants" resulting in "great and unnecessary expense to litigants and to the State, and in unnecessary reversals and new trials." *Id.* at 202. The Legislature found (as the *amici* argue here) that exploitation of cost and delay subjects the courts to criticism calculated to "weaken and undermine in the public estimate their prestige so essential to the stability of our democratic form of government." *Id.*

Beyond resolving this case, the *amici* urge the Court to use its rulemaking and regulatory authority to address the systemic problems

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[15] The powers granted by the 1939 Act are now codified as Section 22.004 of the Texas Government Code. The Court's rule-making authority under that Section is plenary, and all rules adopted by the Court automatically repeal any conflicting laws or rules concerning procedure in civil cases. Tex. Gov't Code Ann. § 22.004 (a), (c) (Vernon 2004).

underlying it. And the burdens should not fall solely upon the litigants. Cases do not file themselves, nor do trial courts act without the intervention of human beings. Lawyers and judges, like litigants, are subject to the administration and regulation of this Court.

Without limitation, the Court could consider options such as:

- A non-discretionary deadline and disclosure framework for basic discovery in mass tort or toxic tort cases not already subject to such regimes;
- A non-discretionary right to dismissal for failure to comply or cure defects in the disclosure requirements;
- Supreme Court appointed special masters for discovery in mass tort cases, even to the extent they do not already qualify for MDL treatment;
- Supreme Court appointed special masters on *Daubert/Havner* issues in toxic tort cases;
- A mandatory and reviewable right to dismissal upon the granting of a case-dispositive challenge to expert testimony;
- Amendment to the Rules of Judicial Administration for the appointment of specialized pretrial judges; and
- Amendment to the Rules of Judicial Administration and Rules of Judicial Conduct to address judicial noncompliance with mandatory, appellate relief.

These types of cases simply need different kinds of rules for the parties, and at some point a case has had a sufficient number of sequels to merit invocation of this Court's regulatory authority. The rules can and should be amended to make them adequate to the task of ensuring

fair access to justice for every type of party, no matter the locality of the judicial district.

III. CONCLUSION AND PRAYER

The basic information that has yet to be disclosed in this case is the type of information that ought to be reasonably investigated ***before*** a case is filed—at least it should be if one takes seriously the certification that there is a good faith basis for the claim to begin with. The fact that the information still has not been provided, 10 years into this litigation, is a clear abuse of the lower court's discretion.

The process contemplated by the rules seems quaint in a case of this sort. Is it naïve to suppose that pleadings are filed, information timely exchanged, legal arguments ruled upon, cases valued, and differences tried and reviewed before a fair tribunal? Apparently so. But this Court has it within its power to effect a cure.

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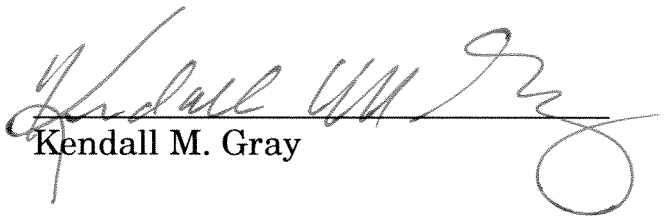

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