Opinion filed September 21, 2017

In The

Eleventh Court of Appeals

No. 11-17-00177-CV

IN RE MONSANTO COMPANY

Original Mandamus Proceeding

M E M O R A N D U M O P I N I O N

Relator, Monsanto Company, has filed in this court an original mandamus proceeding related to an order entered on June 9, 2017, by the 32nd District Court of Mitchell County in Cause No. 16643. In the order, the Honorable Judge Al Walvoord denied Monsanto's motion to quash a subpoena for the production of documents and to issue a protective order. We conditionally grant Monsanto's petition for writ of mandamus.

In the underlying cause, the plaintiffs, whose cotton crops were allegedly damaged by the aerial application of an herbicide and other chemicals toxic to broadleaf plants, sued Helena Chemical Company and other defendants that were

hired by Helena to perform the aerial spraying. The plaintiffs alleged that Helena marketed and sold the herbicide Sendero, which contains clopyralid, a chemical toxic to cotton in miniscule amounts. According to the plaintiffs' allegations, the aerial application of the toxic chemical over two ranches in Coke, Sterling, and Mitchell Counties in July 2015 drifted onto the plaintiffs' cotton crops and caused damages to the plaintiffs' Mitchell County crops and land.

After Helena was sued, it subpoenaed the custodian of records for Monsanto, which is not a party to the underlying cause. Helena sent written deposition questions to Monsanto and also requested that Monsanto produce "any and all records" related to "Bollgard II XtendFlex cotton seed and/or XtendFlex cotton seed." Helena specifically requested the following documents: (1) documents that show the identity of each grower in Reagan County or Mitchell County who purchased the specified cotton seed from January 1, 2014, "through the present"; (2) documents that show the identity of each grower in Reagan County or Mitchell County who purchased any other type of seed with the Xtend trait from January 1, 2014, "through the present"; (3) documents that show the date, type of seed, seller/distributor, and amount of each purchase by the growers described in (1) and (2) above; (4) copies of any warning related to the use of dicamba herbicide provided to the growers described in (1) and (2) above; and (5) technology agreements for each of the growers described in (1) and (2) above.

In response to the subpoena, Monsanto filed a combined motion to quash the subpoena for the production of documents and motion for a protective order. Helena asserts that, by its subpoena, it seeks to determine a potential alternative source for the damage to the plaintiffs' crops, arguing that the growers who purchased dicamba-tolerant seeds may have applied dicamba products to their crops, which may have caused the damage to the plaintiffs' crops. Helena asserts that dicamba

causes physical symptoms in cotton that are indistinguishable from those caused by clopyralid and that dicamba is "more injurious" to cotton than clopyralid. Helena contends that the discovery that it seeks from Monsanto is essential to Helena's investigation of an alternative source of the plaintiffs' alleged crop damage and is likely to lead to the discovery of admissible evidence.

Judge Walvoord denied Monsanto's motion to quash and motion for protective order and ordered Monsanto to provide written answers and to produce documents responsive to Helena's subpoena. Monsanto seeks mandamus relief from that order. Mandamus relief is appropriate only if the trial court has abused its discretion and there is no adequate appellate remedy. *In re CSX Corp.*, 124 S.W.3d 149, 151 (Tex. 2003) (orig. proceeding); *Walker v. Packer*, 827 S.W.2d 833, 839 (Tex. 1992) (orig. proceeding). Monsanto, as the entity resisting discovery, has the burden to establish these matters in this proceeding. *See CSX*, 124 S.W.3d at 151.

The scope of discovery is generally a matter within the trial court's discretion. *Id.* at 152. However, discovery requests must be reasonably tailored to include only relevant matters, and the trial court must make an effort to impose reasonable limits on discovery. *Id.* Discovery is limited to matters that are relevant to the pending action. TEX. R. CIV. P. 192.3(a); *Texaco, Inc. v. Sanderson*, 898 S.W.2d 813, 814 (Tex. 1995) (orig. proceeding). A discovery order that compels production beyond the Texas Rules of Civil Procedure constitutes an abuse of discretion for which mandamus is the proper remedy. *In re Nat'l Lloyds Ins. Co.*, 449 S.W.3d 486, 488 (Tex. 2014) (orig. proceeding). The Texas Supreme Court has stated numerous times that discovery may not be used as a fishing expedition. *Id.* at 489; *CSX*, 124 S.W.3d at 153; *In re Am. Optical Corp.*, 988 S.W.2d 711, 713 (Tex. 1998) (orig. proceeding); *Sanderson*, 898 S.W.2d at 815.

Helena's discovery requests were not limited to the relevant time period and were not reasonably tailored to include only relevant matters. Although discovery related to the use of dicamba that may have drifted onto the plaintiffs' cotton crops and damaged those crops in July 2015 would seem to be a relevant and discoverable matter, Helena's discovery requests were not tailored to discover that information. Instead, Helena's discovery requests to Monsanto constituted a fishing expedition. The discovery of information about the purchasers of certain cotton seed from 2014 through the present in Reagan and Mitchell Counties is not reasonably calculated to lead to the discovery of admissible evidence regarding an alternative source for the damage to the plaintiffs' cotton crops in July 2015. We note that Monsanto informed both the trial court and Helena that no farmers in Reagan or Mitchell County purchased any dicamba-resistant seed in 2015. The information sought in Helena's overly broad discovery requests is not relevant. If a trial court's discovery order is overbroad, the trial court has abused its discretion, and the order must be vacated if an adequate appellate remedy does not exist. *CSX*, 124 S.W.3d at 153. Here, Monsanto, a nonparty to the underlying litigation, has no adequate remedy on appeal. We conclude that Monsanto has met its burden of establishing a right to mandamus relief.

We additionally note that Helena has filed in this court a motion to strike new evidence that Monsanto attached to its reply brief. Because we have not considered the evidence attached to Monsanto's reply brief, we dismiss Helena's motion to strike as moot.

We conditionally grant Monsanto's petition for writ of mandamus. The Honorable Judge Al Walvoord is directed to vacate the June 9, 2017 order in which he ordered Monsanto to provide written answers and produce documents responsive

to Helena's subpoena. A writ of mandamus will issue only if Judge Walvoord fails to act by October 23, 2017.

JIM R. WRIGHT
CHIEF JUSTICE

September 21, 2017

Panel consists of: Wright, C.J.,
Willson, J., and Bailey, J.