IMPORTANT NOTICE
NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28(4)(C), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS BINDING PRECEDENT IN ANY OTHER CASE IN ANY COURT OF THIS STATE; HOWEVER, UNPUBLISHED KENTUCKY APPELLATE DECISIONS, RENDERED AFTER JANUARY 1, 2003, MAY BE CITED FOR CONSIDERATION BY THE COURT IF THERE IS NO PUBLISHED OPINION THAT WOULD ADEQUATELY ADDRESS THE ISSUE BEFORE THE COURT. OPINIONS CITED FOR CONSIDERATION BY THE COURT SHALL BE SET OUT AS AN UNPUBLISHED DECISION IN THE FILED DOCUMENT AND A COPY OF THE ENTIRE DECISION SHALL BE TENDERED ALONG WITH THE DOCUMENT TO THE COURT AND ALL PARTIES TO THE ACTION.

RENDERED: MAY 21, 2009
~~NOT TO BE PUBLISHED~~

FINAL
DATE 6/11/09 Kelly Klaber D.C.

Supreme Court of Kentucky

2008-SC-000223-MR

LARRY J. DUNKEL, EXECUTOR FOR THE ESTATE OF KATHLEEN A. DUNKEL, DECEASED — APPELLANT

V.

ON APPEAL FROM COURT OF APPEALS
CASE NO. 2007-CA-000558-OA
MARSHALL CIRCUIT COURT NO. 06-CI-00126

HON. CHARLES W. BOETLER, JR., JUDGE MARSHALL CIRCUIT COURT; AND — APPELLEE

ARKEMA, INC.; BIG RIVERS ELECTRIC COMPANY; AND GOODRICH CORPORATION — REAL PARTIES IN INTEREST

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Appellant, Larry J. Dunkel, as Executor for the Estate of Kathleen A. Dunkel, filed suit in 2006 claiming that Kathleen contracted malignant mesothelioma as the result of asbestos exposure. Kathleen alleged that she was exposed to asbestos when she would beat and wash the work clothing of her late husband, Ralph Dunkel, who had worked as an insulator at various locations in Indiana, Kentucky, and Ohio during a forty-year career. Ralph died in 2000. Kathleen was diagnosed with mesothelioma in 2005 and later died during the pendency of this case. Her estate has been substituted as a party.

Appellant filed the complaint against the Real Parties in Interest: Arkema, Inc.; Goodrich Corporation; Big Rivers Electric Company; and others. With the complaint, Appellant filed the first "Interrogatories, Requests for Production of Documents, and Requests for Admissions" (the initial discovery request) and served this upon all three of the Real Parties in Interest (Arkema, Goodrich and Big Rivers). The initial discovery request propounded 20 interrogatories, requested 42 documents, and sought 20 admissions. The initial discovery request sought this information for a stated time period of "1951 to 1992."

Arkema, Goodrich, and Big Rivers each objected to Appellant's initial discovery request, arguing that it was overbroad and unduly burdensome, due primarily to the length of time it covered. Following several motions and hearings, the trial court eventually issued a series of orders regarding discovery. On August 23, 2006, the trial court ordered Appellant to more narrowly tailor the initial discovery request with respect to Big Rivers as to time and location. On the same day, it ordered that Goodrich and Arkema would not be required to supplement their responses to the initial discovery request until such time as Appellant presented evidence that Ralph Dunkel had worked at a Goodrich and/or Arkema facility. Discovery proceeded and Appellant served a second "Interrogatories, Requests for Production of Documents, and Requests for Admissions" (the second discovery request) on Arkema, Goodrich, and Big Rivers.

Arkema again objected and sought a protective order. On February 27, 2007, the trial court granted the protective order, directing Arkema to answer only a small portion of the second discovery request, and only with respect to the time period of 1950 to 1954. Appellant was precluded from further discovery until subsequent order of the court.

Appellant then sought a writ of prohibition from the Court of Appeals, asking that the trial court be compelled to set aside its August 23rd and February 27th orders and allow discovery to proceed. The Court of Appeals denied the petition and this appeal followed.

Standard of Review

It is well-established that a writ of prohibition is an extraordinary remedy that will be granted in rare circumstances where a substantial injustice may result. Bender v. Eaton, 343 S.W.2d 799, 800 (Ky. 1961). Writs are primarily granted in two circumstances: (1) when the trial court is acting outside of its jurisdiction; and (2) when the trial court is acting erroneously, although within its jurisdiction. Id. Here, Appellant alleges that the trial court is acting erroneously with respect to its discovery orders. In such circumstances, the petitioner must establish that "the lower court is acting or is about to act erroneously, although within its jurisdiction, and there exists no adequate remedy by appeal or otherwise and great injustice and irreparable injury will result if the petition is not granted." Hoskins v. Maricle, 150 S.W.3d 1, 10 (Ky. 2004). Our review of the Court of Appeals' denial of Appellant's petition is for

an abuse of discretion. Grange Mut. Ins. Co. v. Trude, 151 S.W.3d 803, 810 (Ky. 2004).

In the petition to the Court of Appeals, and in the appeal to this Court, Appellant characterizes the trial court's rulings as a "blanket order" barring discovery. In fact, the trial court's separate orders were specifically directed to each defendant corporation. For this reason, we separately address Appellant's claims with respect to Big Rivers, Goodrich, and Arkema.

Big Rivers

Appellant's initial discovery request specified a "time period at issue" from 1951 to 1992. Big Rivers objected, arguing that the four decade time period rendered the discovery request unduly burdensome and prejudicially expensive. The trial court agreed and on August 23, 2006, issued an order directing Appellant that "the discovery requests should be more narrowly focused . . . with an appropriate designation and limitation of time and place." Subsequently, in response to an interrogatory propounded by Big Rivers, Kathleen indicated that Ralph had worked at Big Rivers' Sebree Powerhouse from 1978 to 1979.

Accordingly, in December of 2006, Appellant issued a second discovery request concerning the time period "1975 to 1979." In February of 2007, Big Rivers responded to the second discovery request. There is nothing in the record to indicate that Appellant continued to object to the trial court's August 23rd order. Nor did Appellant file any further motions concerning the

parameters placed on Big Rivers' discovery requests or Big Rivers' responses to the second set of interrogatories. The trial court's February 27, 2007 order in no way concerns Big Rivers; it is directed entirely at Arkema.

For these reasons, we believe it wholly inappropriate that Big Rivers has been included in Appellant's petition for a writ of prohibition. Indeed, Appellant has failed to clearly articulate in what way the trial court erred with respect to discovery of Big Rivers. It appears the trial court simply narrowed an overly broad request for information spanning forty years to comport with Kathleen's testimony as to the years her husband worked at a Big Rivers' facility. The trial court did not abuse its discretion in reducing Appellant's discovery requests to the relevant time period. See Humana, Inc. v. Fairchild, 603 S.W.2d 918, 922 (Ky. App. 1980) ("It has been a long-recognized principle, with regard to discovery proceedings, that such proceedings must be kept within reasonable bounds and restricted to questions having substantial and material relevancy."); CR 26.02(1).

Goodrich

Goodrich responded to the initial discovery request to a very limited extent, objecting to most of the requests on the grounds that it was overbroad in its stated time period and, therefore, unduly burdensome. Appellant filed a motion to compel, which Goodrich opposed on the grounds that Appellant had failed to make a threshold showing that Ralph had ever worked at a Goodrich facility. In its August 23, 2006 order regarding Goodrich, the trial court stated

that Goodrich would not be required to supplement its answers until Appellant "submits admissible evidence that Ralph Dunkel worked at Goodrich and that establishes the time frame of such work."

In January of 2007, Alton Ambrose, a co-worker of Ralph Dunkel, was deposed. He testified that he had worked with Ralph at Goodrich's Calvert City facility in 1949. Following this deposition, Goodrich responded to Appellant's discovery request with respect to the 1949 time frame. Essentially, Goodrich indicated that it did not own the Calvert City facility in 1949 and, therefore, was unable to locate any responsive documents with respect to the facility or Ralph's work there.

Appellant sought additional discovery by noticing the deposition of a Goodrich corporate representative. Goodrich again moved for a protective order. The trial court granted the motion to a certain extent: "Goodrich shall produce a corporate representative to testify and to produce documents as to those topics identified in Plaintiff's notice of deposition that focus on whether Ralph Dunkel worked at Goodrich and was exposed to asbestos." The deposition was completed on May 8, 2007, although a copy of the testimony has not been included in the record before this Court.

The trial court's August 23, 2006 order required Appellant to make a threshold showing that Ralph Dunkel worked at a Goodrich facility. In the appeal to this Court, Appellant argues that it is unfair to limit discovery to 1949 based solely on the potentially faulty memory of Alton Ambrose.

However, the trial court's subsequent order directed Goodrich to provide a corporate representative to testify and produce documents relating specifically to whether Ralph had worked at a Goodrich facility *at any time*. There is certainly no error in the trial court's decision to limit initial discovery to the threshold question of whether Ralph ever worked at a Goodrich facility and the time frame in which he worked. CR 26.02(1). Furthermore, through deposition of Goodrich's corporate representative, Appellant has been afforded the opportunity to establish this work history.

Arkema

Like Big Rivers and Goodrich, Arkema objected to Appellant's initial discovery request on the basis that it was overbroad and unduly burdensome. Further, Arkema objected that no evidence had been presented by Appellant that Ralph had ever worked at an Arkema facility. Appellant filed a motion to compel. In an August 23, 2006 order, the trial court required Appellant to disclose admissible evidence that Ralph "worked at Arkema's Marshall County, Kentucky facility and the date(s) of such work" before discovery could proceed.

Accordingly, Appellant deposed Alton Ambrose and Gerald Schmidt. Ambrose testified that he had worked with Ralph at Arkema's Pennwalt facility in Calvert City, Kentucky prior to 1952 when Ambrose entered the military. Schmidt testified that he had worked with Ralph at the Pennwalt facility in 1951. Following these depositions, Appellant served Arkema with the second discovery request which narrowed the applicable time period from "1951 to

1992" to "1950 to 1954." Appellant also requested a date to depose an Arkema corporate representative.

In response to the second discovery request, Arkema again moved for a protective order. Arkema argued that the discovery request was irrelevant to Appellant's complaint. In her complaint, and in subsequent depositions, Kathleen alleged that the she was exposed to asbestos when her husband would bring home his work clothing, which she would take outside and beat against a pole before laundering. This is the sole allegation of asbestos exposure in the complaint. Because the Dunkels were not married until 1954 and did not live together prior to their marriage, Arkema argued that discovery concerning any time period prior to the Dunkel marriage is irrelevant.

On February 27, 2007, the trial court issued a second protective order. Although Appellant had still failed to produce any indication that Ralph had worked at an Arkema facility during the Dunkel marriage, the trial court nonetheless ordered Arkema to respond to three items in the second discovery request "only with respect to Ralph Dunkel and Crowe Insulation and limited to the 1950 to 1954 time period." The three discovery requests sought information regarding Ralph's presence, or his employer's presence, at an Arkema facility during that time period. Arkema responded that it had conducted a diligent search and investigation and had not found any documents pertaining to Ralph Dunkel or his employer, Crowe Insulation, from 1950 to 1954. Subsequently, the trial court issued a final protective order

excusing Arkema from responding further to Appellant's discovery requests.

Appellant sought relief from the trial court's February 27, 2007 protective order. A trial court may issue a protective order when discovery would result in undue burden or expense to a party, and the trial court may limit the scope of discovery to relevant matters. CR 26.03. Here, the trial court has not issued a blanket prohibition on discovery of Arkema, as in Volvo Car Corp. v. Hopkins, 860 S.W.2d 777 (Ky. 1993). Rather, the trial court focused Appellant's discovery of Arkema on the initial issue of whether Ralph had ever worked at an Arkema facility. It should be noted that the trial court permitted this limited discovery even after Appellant failed to produce any indication that such work occurred during the Dunkel marriage. In light of these circumstances, the trial court acted well within its broad discretion to determine what discovery is appropriate and to tailor discovery to materially relevant information. Sexton v. Bates, 41 S.W.3d 452, 455 (Ky. App. 2001).

Conclusion

Appellant has failed to demonstrate that the trial court acted erroneously with respect to any of its discovery orders. In fact, we agree with the Court of Appeals that the trial court acted well within its discretion. As such, the Court of Appeals did not abuse its discretion in denying Appellant's petition for a writ of prohibition. The judgment of the Court of Appeals is, therefore, affirmed.

All sitting. All concur.

COUNSEL FOR APPELLANT:

Kenneth L. Sales
Joseph Donald Satterley
Paul Jason Kelley
Rickie A. Johnson
Sales, Tillman, Wallbaum, Catlett & Satterley
1900 Waterfront Plaza
325 West Main Street
Louisville, KY 40202-4251

COUNSEL FOR APPELLEE:

Hon. Charles W. Boetler, Jr.
2423 Ford Avenue
Owensboro, KY 42301

COUNSEL FOR REAL PARTY IN INTEREST,
GOODRICH CORPORATION:

Rosemary D. Welsh
Vorys, Sater, Seymour and Pease, LLP
Suite 2000, Atrium Two
221 East Fourth Street
Cincinnati, OH 45202

COUNSEL FOR REAL PARTY IN INTEREST,
ARKEMA, INC.:

Byron N. Miller
Adam Benjamin Shadburne
Thompson, Miller & Simpson, PLC
600 West Main Street, Suite 500
Louisville, KY 40202

COUNSEL FOR REAL PARTY IN INTEREST,
BIG RIVERS ELECTRIC COMPANY:

James Douglas Harris, Jr.
Michael Scott Vitale
Wyatt, Tarrant & Combs, LLP
918 State Street – Phoenix Place
P. O. Box 1220
Bowling Green, KY 42102-1220

Sara Christine Veeneman
Deborah H. Patterson
Wyatt, Tarrant & Combs, LLP
500 W. Jefferson Street
Suite 2800
Louisville, KY 40202-2898