NOT DESIGNATED FOR PUBLICATION

MARILYN SPITZFADEN, ET AL.	*	**NO. 2002-C-1736**
	*	**COURT OF APPEAL**
VERSUS		
	*	**FOURTH CIRCUIT**
DOW CORNING CORPORATION, ET AL	*	**STATE OF LOUISIANA**
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APPLICATION FOR WRITS DIRECTED TO
CIVIL DISTRICT COURT, ORLEANS PARISH
NO. 92-2589, DIVISION "F"
Honorable Yada Magee, Judge
* * * * * *
Judge Dennis R. Bagneris, Sr.
* * * * * *

(Court composed of Judge James F. McKay III, Judge Dennis R. Bagneris, Sr., and Judge Michael E. Kirby)

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WRIT GRANTED; JUDGMENT OF THE TRIAL COURT REVERSED

Minnesota Mining & Manufacturing Company ("3M"), the relator, applies for supervisory review of the trial court's order granting its exception of no right of action without dismissing the eight intervention petitions filed by 335 interveners. For the following reasons, we grant the writ and reverse the trial court's judgment, which granted 3M's exception of no right of action, severed the plaintiff's actions, and ordered that the newly severed cases be consolidated with the main demand and assigned to its division.

FACTS

This decertified class action was filed in 1992 by ten plaintiffs against various defendants, alleging personal injury from silicone breast implants. Although the trial court originally certified the action as a class action, the trial court recalled its earlier decision, and on December 1, 1997, rendered its judgment decertifying the class. The trial court ordered that the now decertified plaintiffs had one year in which to file their individual lawsuits to preserve whatever rights they might have against any defendant manufacturer of silicone breast implants.

The plaintiffs filed eight petitions for intervention back into the action rather than individual lawsuits, although the relator does not provide copies with the application. The eight interventions contain hundreds of plaintiffs, some of whom the relator alleges have settled with various silicone breast implant manufacturers. On March 23, 2000, the relator filed a number of exceptions in response to the petitions for intervention, including improper cumulation of actions and improper joinder. Another defendant, Baxter Healthcare Corporation ("Baxter"), filed exceptions of no right of action, nonconformity of the petitions, lis pendens, and/or a stay. In May of 2000, the exceptions of the relator and Baxter were heard at the same time, as they each raised the same point: that all of the petitions for intervention should be dismissed because the potential interveners were not authorized to intervene in this action under La. C.C.P. 1091. Supplemental memoranda were ordered on the issue of the alleged connection of the interveners with the main demand. A hearing was held on November 10, 2000, and the trial court denied the relator's exceptions but granted Baxter's exception of no right of action. By order rendered December 1, 2000, the interventions as to Baxter were dismissed.

On January 10, 2002, the relator filed its Exception of No right of Action and its supporting memorandum, requesting that the trial court

dismiss the interventions without prejudice to each intervener to file an individual lawsuit. A hearing was held on July 26, 2002, and the trial court maintained the exception but dismissed the interventions only as to the parties who were not present in opposition. The trial court then ordered as to those parties present in opposition, "that interventions be severed and become individual lawsuits and consolidated back to Division 'F' and we will have them served with the Ruling on the Exception." The relator offered the trial court a proposed order, but as of the date of 3M's application, the trial court had not signed an order in this matter.

DISCUSSION

The relator argues that the trial court erred by failing to dismiss the interventions after maintaining the exception of no right of action and further erred by sua sponte ordering the consolidation of these cases back into the main demand and assignment of these cases to its division. An exception of no right of action is a peremptory exception. La. C.C.P. art. 927. La. C.C.P. art. 934 describes the effect of sustaining a peremptory exception, such as no right of action:

> When the grounds of the objection pleaded by the peremptory exception may be removed by amendment of the petition, the judgment sustaining the exception shall order such amendment within the delay allowed by the court. If the grounds of the objection cannot be so removed, or if plaintiff fails to comply with the order to amend, the action shall be dismissed.

Pursuant to the rules, the trial judge had two options upon maintaining the relator's exception of no right of action: allow the plaintiffs to amend or dismiss the plaintiffs' interventions. The trial judge, instead, severed the interventions and ordered that the petitions be consolidated with the main demand and assigned to her division.

The trial court's order is not in accord with the rules of procedure. The basis for the trial court's ruling on the relator's or Baxter's exceptions of no right of action is not available in the record, and therefore, it is not possible to determine whether the relator is correct in its assertion that the only possible remedy is the dismissal of the plaintiffs' interventions for lack of connexity with the main demand. Nevertheless, we do find that the trial court erred by severing the plaintiffs' actions, a remedy not contemplated by La. C.C.P. art. 934.

We also find merit in relator's second argument, that the trial court further erred by ordering that the newly severed cases be consolidated with the main demand and assigned to its division. As a general rule, La. C.C.P. art. 253.1 requires that all cases filed in Louisiana district courts be randomly assigned. La. C.C.P. art. 253.2 provides exceptions to the random assignment rule, allowing transfer and reassignment of cases under limited circumstances, and states, in pertinent part, as follows:

After a case has been assigned to a particular section or division

> of the court, it may not be transferred from one section or division to another section or division within the same court, unless agreed to by all parties, or unless it is being transferred to effect a consolidation for purpose of trial pursuant to Article 1561.

There is no indication in the record that the parties agreed to transfer the newly severed lawsuits; thus, the only question is whether the case was "transferred to effect a consolidation for purpose of trial pursuant to Article 1561." La. C.C.P. art. 1561 A, in turn, provides as follows:

> When two or more separate actions are pending in the same court, the section or division of the court in which the first filed action is pending may order consolidation of the actions for trial after a contradictory hearing, and upon a finding that common issues of fact and law predominate.

The relator alleges that no party had requested consolidation. The record does not include evidence of the trial court conducting a contradictory hearing or making a finding that common issues of fact and law predominate. Hence, we find that the trial court erred in ordering that the individual cases be consolidated and assigned to its division.

Therefore, we grant the writ, and reverse the trial court's judgment, which granted 3M's exception of no right of action, severed the plaintiff's actions, and ordered that the newly severed cases be consolidated with the main demand and assigned to its division.

WRIT GRANTED; JUDGMENT OF THE TRIAL COURT REVERSED