

IN THE SUPREME COURT OF TEXAS

No. 99-1056

AMERICAN HOME PRODUCTS CORPORATION AND WYETH-AYERST
LABORATORIES, A DIVISION OF AMERICAN HOME PRODUCTS CORPORATION,
PETITIONERS

v.

FAWN C. CLARK, SYLVIA JACOBSON, ANNA KRAUS, SHARLET LAWS, NANCY
WEBSTER, DONNA WELCH, DELIA ZEEH, CAROL BODILY, MARY JO HALL, AND
SHONNA BUSH, RESPONDENTS

ON PETITION FOR REVIEW FROM THE
COURT OF APPEALS FOR THE TENTH DISTRICT OF TEXAS

Argued on September 6, 2000

JUSTICE OWEN, joined by JUSTICE HECHT, dissenting.

Section 15.003 was a cornerstone of the Legislature's tort reform efforts in the 1995 legislative session. It was designed to preclude the joinder of multiple parties in a forum in which venue over their claims does not lie. More to the point in this case, it was intended to give appellate courts the power to bring a quick end to instances of blatant forum shopping. There should be no mistake about legislative intent. The Court disregards that intent. I therefore dissent.

I

The Court today sanctions a sham and a fraud on the legal system. The trial court did not have even a colorable basis for finding that each plaintiff in this multi-plaintiff suit established venue “independently of any other plaintiff.” TEX. CIV. PRAC. & REM. CODE § 15.003(a). Yet, the Court renders itself impotent to deal with the matter by adopting an untenable interpretation of section 15.003.

Eleven plaintiffs have joined in a single suit they filed in Johnson County, Texas. They have alleged that they were injured from taking drugs commonly called Fen-Phen. Seven of the plaintiffs are residents of Utah, and one is a resident of North Carolina. None of these out-of-state plaintiffs received prescriptions for or took Fen-Phen in Texas. The remaining two plaintiffs are Texas residents, but only one of them, Glenda Gallup, is a resident of Johnson County. The other Texas resident had no contact with Johnson County or residents of Johnson County other than to file her suit there. There are nine defendants, but only one of them, Dr. Arthur L. Raines, is a resident of Johnson County. He treated Gallup, but none of the other plaintiffs has had any contact or dealings with Raines, and the plaintiffs do not contend otherwise.

In their petition, the plaintiffs asserted venue under sections 15.002(a)(1) and 15.003 of the Texas Civil Practice and Remedies Code. Several of the defendants, including American Home Products, joined in a motion to transfer venue that also contained objections to venue and joinder. The trial court denied that motion and overruled the objections without stating the grounds for its decision. American Home Products brought an interlocutory appeal.

The court of appeals abated the case and requested the trial court to enter a more specific order. The court of appeals opined in its abatement order that if the basis for the trial court’s ruling

was that the plaintiffs had established venue under section 15.002(a), then the appellate court did not have jurisdiction. The trial court subsequently issued a revised order in which it concluded that because Raines was a resident of Johnson County, each plaintiff had established venue under sections 15.002(a)(2) and 15.005. The trial court further stated in its revised order that it “need not decide the issues” concerning section 15.003. The trial court did not attempt to address the fact that in their “Submission of Venue Evidence,” the plaintiffs, other than Gallup, offered only one basis for venue, which was their contention that the four elements of subsections (1) through (4) of section 15.003 (including essential need and the need for trial in the county of suit) had been met. Nor did the trial court attempt to explain how each plaintiff had established venue under section 15.002 based on Raines’ residency when only one plaintiff had been treated by Raines. There was absolutely no evidence in the record that any plaintiff other than Gallup had even asserted a claim against Raines. Accordingly, there was no evidence that any plaintiff other than Gallup had established venue under sections 15.002 and 15.005 and thus met the requirement under section 15.003 that each plaintiff establish venue “independently of any other plaintiff.” TEX. CIV. PRAC. & REM. CODE § 15.003(a).

The court of appeals held that since the trial court’s ruling at least facially relied on section 15.002(a), “section 15.003(c) cannot be the jurisdictional basis for this appeal.” 999 S.W.2d at 910. The court of appeals therefore refused to consider the merits of the appeal and dismissed it for want of jurisdiction. Justice Gray dissented based on “[t]he plain language of section 15.003.” *Id.* at 911.

I agree with Justice Gray and the three other courts of appeals that have considered the issue presented in this case. In a multi-plaintiff suit, appellate courts are to determine in an interlocutory appeal whether each plaintiff has established venue independently of any other plaintiff as required by section 15.003. *See Dayco Prods., Inc. v. Ebrahim*, 10 S.W.3d 80, 83-84 (Tex. App.—Tyler

1999, no pet.); *Blalock Prescription Ctr., Inc. v. Lopez-Guerra*, 986 S.W.2d 658, 661 (Tex. App.—Corpus Christi 1999, no pet.); *see also Masonite Corp. v. Garcia*, 951 S.W.2d 812 (Tex. App.—San Antonio 1997, orig. proceeding), *mand. granted sub nom In re Masonite*, 997 S.W.2d 194 (Tex. 1999).

II

The Legislature has said in section 15.003 that when there is more than one plaintiff in a case, each plaintiff must establish proper venue independently of any other plaintiff. TEX. CIV. PRAC. & REM. CODE § 15.003(a). If a plaintiff is unable to establish independent venue, then he or she may not join or maintain venue for the suit unless the four requirements set forth in section 15.003(a) are met. *Id.* Both plaintiffs and defendants have a right of interlocutory appeal under section 15.003(c), and appellate courts are directed to determine whether “the joinder or intervention is proper based on an independent determination from the record.” Section 15.003 provides, in its entirety:

§ 15.003. Multiple Plaintiffs and Intervening Plaintiffs

(a) In a suit where more than one plaintiff is joined each plaintiff must, independently of any other plaintiff, establish proper venue. Any person who is unable to establish proper venue may not join or maintain venue for the suit as a plaintiff unless the person, independently of any other plaintiff, establishes that:

(1) joinder or intervention in the suit is proper under the Texas Rules of Civil Procedure;

(2) maintaining venue in the county of suit does not unfairly prejudice another party to the suit;

(3) there is an essential need to have the person’s claim tried in the county in which the suit is pending; and

(4) the county in which the suit is pending is a fair and convenient venue for the person seeking to join in or maintain venue for the suit and the persons against whom the suit is brought.

(b) A person may not intervene or join in a pending suit as a plaintiff unless the person, independently of any other plaintiff:

- (1) establishes proper venue for the county in which the suit is pending; or
- (2) satisfies the requirements of Subdivisions (1) through (4) of Subsection (a).

(c) Any person seeking intervention or joinder, who is unable to independently establish proper venue, or a party opposing intervention or joinder of such a person may contest the decision of the trial court allowing or denying intervention or joinder by taking an interlocutory appeal to the court of appeals district in which the trial court is located under the procedures established for interlocutory appeals. The appeal must be perfected not later than the 20th day after the date the trial court signs the order denying or allowing the intervention or joinder. The court of appeals shall:

- (1) determine whether the joinder or intervention is proper based on an independent determination from the record and not under either an abuse of discretion or substantial evidence standard; and
- (2) render its decision not later than the 120th day after the date the appeal is perfected by the complaining party.

TEX. CIV. PRAC. & REM. CODE § 15.003.

This Court has often said that in determining legislative intent, “we examine the old law, the evil to be corrected, and the object to be obtained.” *E.g., Barshop v. Medina County Underground Water Conservation Dist.*, 925 S.W.2d 618, 629 (Tex. 1996) (citing *Crimmins v. Lowry*, 691 S.W.2d 582, 584 (Tex. 1985)). Similarly, the Legislature has told us that in construing a statute, we may consider factors that include the object the Legislature sought to attain, the circumstances under which the statute was enacted, former statutory provisions, and the consequences of a particular construction. TEX. GOV’T CODE § 311.023. (The Code Construction Act applies to section 15.003 of the Texas Civil Practice and Remedies Code. TEX. CIV. PRAC. & REM. CODE § 1.002.) One example of the evils under the old law that the Legislature attempted to correct when it enacted section 15.003 was exhibited in this Court’s decision in *Polaris Investment Management Corp. v. Abascal*, 892 S.W.2d 860 (Tex. 1995).

In that case, about 2700 plaintiffs sued Polaris in Maverick County. Only one of the plaintiffs was a resident of that county. *Polaris Inv. Mgmt. Corp. v. Abascal*, 890 S.W.2d 486, 487 (Tex. App.—San Antonio 1994, orig. proceeding) (Rickoff, J., concurring). Many of the plaintiffs did not even reside in Texas. The trial court refused to transfer venue, concluding that the non-resident plaintiffs could properly join their claims with those of the sole Maverick County resident and that because venue was proper as to one defendant, it was proper as to all. *Id.* at 488. This Court referred to the plaintiffs’ ability to hold venue in Maverick County against a non-resident defendant as ““tag-along”” venue. *See Polaris*, 892 S.W.2d at 862. At that time, there was no provision in the venue or joinder statutes that permitted an interlocutory appeal of venue or joinder rulings, no matter how egregious. Then, as now, the venue statutes provided that as a general proposition, interlocutory appeals are not available for venue rulings. TEX. CIV. PRAC. & REM. CODE § 15.064. The court of appeals and this Court accordingly denied mandamus relief. *See Polaris*, 892 S.W.2d at 862. In doing so, this Court observed, “the proper forum for dealing with the problems articulated in Polaris’ petition and in the court of appeals’ concurring opinion is the Texas Legislature.” *Id.* Just a few months after we handed down *Polaris*, the Legislature enacted section 15.003 as part of so-called tort reform legislation in Texas.

The consequences of the Court’s construction of section 15.003, to borrow a phrase from the Code Construction Act, is that the evil under the old law will not be remedied. If the Court had *Polaris* before it today, the result would be unchanged. The Court would hold that since the plaintiffs asserted and the trial court found venue under section 15.002(a), there is no right to an interlocutory appeal or other interlocutory relief. The Court’s reading of section 15.003 is plainly at odds with unmistakable legislative intent.

Section 15.003 affirmatively requires each plaintiff to establish venue “independently of any other plaintiff.” TEX. CIV. PRAC. & REM. CODE § 15.003(a). This is the first hurdle erected by section 15.003. If a plaintiff cannot overcome that hurdle, then he or she can attempt to surmount the next hurdle, which is to meet the four requirements set forth in subsections (1) through (4) of section 15.003. Regardless of how the trial court rules, there is a right to an interlocutory appeal under section 15.003(c). “Any person seeking intervention or joinder, who is unable to independently establish venue, or a party opposing intervention or joinder of such a person may contest the decision of the trial court allowing or denying intervention or joinder by taking an interlocutory appeal.” TEX. CIV. PRAC. & REM. CODE § 15.003(c). But the Court says that if a trial court determines that a plaintiff has independently established venue, that is the end of the inquiry for an appellate court. ___ S.W.3d at ___. According to the Court, appellate courts cannot make “an independent determination from the record” of “whether the joinder or intervention is proper,” even though that is what section 15.003(c)(1) contemplates. TEX. CIV. PRAC. & REM. CODE § 15.003(c)(1). The Court says that the trial court is the sole arbiter of whether a person seeking intervention or joinder is “unable to independently establish proper venue” for purposes of interlocutory appeals. *Id.*

The Court’s holding is illogical, and its interpretation of the language used in section 15.003 is tortured. An appellate court is entitled to determine if a party bringing an interlocutory appeal is a person who “may contest the decision of the trial court.” *Id.* § 15.003(c). Nothing in the statute suggests that a trial court decides if an appealing party is properly before an appellate court. The statute says that those who may appeal are (1) “[a]ny person seeking intervention or joinder, who is unable to independently establish proper venue,” or (2) “a party opposing intervention or joinder of

such a person [a person ‘who is unable to independently establish proper venue’].” *Id.* Courts of appeals are entitled under section 15.003(c) to decide whether a plaintiff is “a person who is unable to independently establish proper venue” and whether a defendant is opposing the intervention or joinder of “a person who is unable to independently establish proper venue.” *Id.* If a plaintiff in actuality is unable to establish venue independently, then a defendant has a right to an interlocutory appeal under section 15.003 even if the trial court held that the plaintiff did independently establish venue.

At least three courts of appeals, the Corpus Christi, Tyler, and San Antonio courts, had no trouble in discerning legislative intent as expressed in section 15.003. The controversy in *Blalock Prescription Center, Inc. v. Lopez-Guerra*, 986 S.W.2d 658 (Tex. App.—Corpus Christi 1999, no pet.), was, like this case, part of the Fen-Phen litigation. Limpach, one of the plaintiffs who did not reside in the county of suit, asserted that venue over non-resident defendants was proper under section 15.002(a) and, alternatively, under section 15.003. *Lopez-Guerra*, 986 S.W.2d at 661. The trial court denied the defendants’ motion to transfer venue and objections to Limpach’s joinder. *Id.* In the interlocutory appeal that followed, the court of appeals observed that section 15.003 affirmatively requires a plaintiff to establish venue independently of any other plaintiff. *Id.* The court noted that this could be accomplished by meeting the requirements under the general venue provision, section 15.002. The court of appeals then proceeded to examine whether Limpach met the requirements of section 15.002 and concluded that she did not. *Id.* The court thus made an “independent determination from the record,” as required by section 15.003(c)(1), of whether venue was proper under section 15.002 and whether Limpach was a person “who is unable to independently establish proper venue.” *Id.*; TEX. CIV. PRAC. & REM. CODE § 15.003(a), (c). After determining that

Limpach was indeed a “person who is unable to establish proper venue . . . independently of any other plaintiff,” the court then proceeded to determine whether Limpach met the four requirements set forth in section 15.003(a). *Id.* at 662. The court concluded that she had not and reversed the trial court’s interlocutory venue determination. *Id.* at 666.

Dayco Products, Inc. v. Ebrahim, 10 S.W.3d 80 (Tex. App.—Tyler 1999, no pet.), was another interlocutory appeal under section 15.003. The court of appeals, like the court in *Lopez-Guerra*, considered as a threshold matter whether twenty-three plaintiffs had independently established proper venue in the county of suit. *Ebrahim*, 10 S.W.3d at 83-84. After concluding that they had not, the court said, “we now must look to determine whether they established all four of the elements described in section 15.003(a).” *Id.* at 84. Similarly, in *Masonite Corp. v. Garcia*, 951 S.W.2d 812 (Tex. App.—San Antonio 1997, orig. proceeding), *mand. granted sub nom In re Masonite*, 997 S.W.2d 194 (Tex. 1999), the court of appeals said, albeit in dicta, that section 15.003(c) “necessarily authorizes” an appellate court to review the underlying venue determination in reviewing whether a plaintiff was or was not properly joined:

It is true that section 15.003 requires a trial court to determine whether a plaintiff can independently establish venue in order to decide whether the plaintiff can join in a suit. Because section 15.003(c) authorizes an interlocutory appeal from a trial court’s decision allowing or denying joinder, it necessarily authorizes an interlocutory appeal of the venue determination underlying this decision.

Masonite Corp., 951 S.W.2d at 817 (citation omitted).

Instead of determining, as directed by section 15.003, whether the plaintiffs in this case were unable to meet the requirements of section 15.003, the Court says that its hands have been tied by the Legislature. Even though the Legislature for the first time in our jurisprudence has expressly granted a right to an interlocutory appeal of joinder issues in section 15.003, the Court says there is

nothing it can do to remedy improper joinder until after rendition of a final judgment. That may well be after a full trial on the merits. I am at a loss to understand why the Court denies power to appellate courts that the Legislature clearly wanted them to have.

In granting the right to an interlocutory appeal in section 15.003(c), the Legislature recognized the harm that can occur from forum shopping and the need for prompt relief. This case is a prime example. If the plaintiffs were to obtain a final judgment in their favor in Johnson County, they would face certain reversal on appeal because venue as to ten of the eleven plaintiffs is improper, and reversal is mandatory. TEX. CIV. PRAC. & REM. CODE § 15.064(b) (if venue is improper it “shall be reversible error”); *Ford Motor Co. v. Miles*, 967 S.W.2d 377, 382 (Tex. 1998). Yet the plaintiffs obviously believe that the tactical advantages they will gain from maintaining venue in Johnson County outweigh that consideration.

III

Venue lies in Johnson County only with respect to Gallup’s claims. No plaintiff other than Gallup is a resident of Johnson County. The only defendant who resides in Johnson County is Gaines. No plaintiff other than Gallup makes a claim against Gaines. There is no basis under sections 15.002 and 15.005 for maintaining venue as to the remaining plaintiffs’ claims. Accordingly, those plaintiffs did not “independently of any other plaintiff, establish proper venue.” TEX. CIV. PRAC. & REM. CODE § 15.003(a).

Nor do subsections (1) through (4) of section 15.003(a) rescue the plaintiffs. Our decision in *Surgitek, Bristol-Myers Corp. v. Abel*, 997 S.W.2d 598 (Tex. 1999), dispenses with the plaintiffs’ argument that they have an essential need to maintain venue in Johnson County. They contend only that they need to “pool resources for common experts and issues and to reach trial expeditiously.”

We held in *Surgitek* that the need to pool resources will not carry the day. 997 S.W.2d at 604. Nor will proof that a plaintiff can obtain an earlier trial date in the county of suit suffice. *See id.* We said in *Surgitek* that “essential need” as used in section 15.003 means that it is “indispensably necessary” to try claims in a particular county. *Id.* Speed of trial does not meet the “very high” burden that section 15.003 sets forth. *See id.*

* * * * *

Because the Court seriously undermines the Legislature’s efforts to reform the legal system, I dissent. I would reverse the judgment of the court of appeals and remand this case to the trial court with instructions to grant the motion to transfer.

Priscilla R. Owen
Justice

OPINION DELIVERED: December 21, 2000