

IN THE SUPREME COURT OF TEXAS

=====
No. 03-0179
=====

IN RE KANSAS CITY SOUTHERN INDUSTRIES, INC.

=====
ON PETITION FOR WRIT OF MANDAMUS
=====

Argued November 12, 2003

CHIEF JUSTICE PHILLIPS delivered the opinion of the Court.

JUSTICE HECHT filed a concurring opinion.

The issue in this original proceeding is whether mandamus is appropriate to resolve a dispute about who is entitled to certain settlement proceeds. Relator asserts that because it clearly established the right to a return of part of the proceeds the trial court abused its discretion by subsequently approving the initial settlement without modification. Because we conclude that relator has an adequate remedy by appeal, we deny mandamus relief without reaching the merits of the dispute.

The underlying case involves the claims of over two thousand plaintiffs, about half of them minors, who were allegedly exposed to a hazardous chemical that leaked from a railroad tanker car. One of the defendants, Kansas City Southern Industries, Inc. (KCSI), agreed to settle all of the minors' claims for \$300,300. The precise amount to be paid each minor varied, depending on his or her physical symptoms, extent of treatment, and location at the time of the chemical release. All

parties agree that all minor plaintiffs have fully recovered from any injuries and will have no future damages.

KCSI tendered to plaintiffs' attorneys a check for \$300,300 with the understanding that it would not be negotiated before the documents had been executed releasing all of the minors' claims against KCSI. Plaintiffs' attorneys, however, were unable to obtain releases from about thirty per cent of the minor plaintiffs. In some cases, the minors' parents objected to the settlement; in others, the minors simply could not be found. About two months after tendering its check, KCSI asked the trial court to order plaintiffs' attorneys to return that part of the settlement allocated to those minors for whom releases had not been obtained.¹ Plaintiffs' attorneys and the court-appointed guardian ad litem opposed this motion, supported by the ad litem's affidavit that it was in the best interests of all the children to settle their respective claims, whether their parents or guardians knew of and approved the settlement or not. After the ad litem also provided releases for those minors who had not yet been found, the court rejected KCSI's motion and ordered the entire settlement paid into the registry of the court. The order, titled "Interlocutory Final Judgment," released KCSI from any further liability as to all the named minor plaintiffs regardless of whether a parent or next friend approved, or in some cases even knew about, the settlement.

Rather than obtain a final judgment and appeal, KCSI petitioned the court of appeals for mandamus relief, asserting that approximately \$85,000 of the settlement still in the registry of the

¹ KCSI initially alleged that as many as 432 children could not be found, but by the time of the trial court's ruling the number of missing minors had declined to 374. Counsel advised us during oral argument that more children had been found after the trial court's ruling, reducing the number of missing minors at that time to 285.

court should be immediately returned.² KCSI complained that the trial court abused its discretion in approving settlements for minors that could not be found or might not exist. KCSI argued that the court had impermissibly seized its money by holding the missing minors' share in the court's registry. When the court of appeals declined to grant relief, KCSI petitioned this Court for writ of mandamus.

To obtain a writ of mandamus, a relator must establish not only that the trial court clearly abused its discretion but also that no adequate remedy by appeal exists. *Walker v. Packer*, 827 S.W.2d 833, 839-40 (Tex. 1992). An appeal is inadequate when it comes too late to correct the court's error without the loss of substantial rights to the complaining party. *See Perry v. Del Rio*, 66 S.W.3d 239, 257 (Tex. 2001); *Polaris Inv. Mgmt. Corp. v. Abascal*, 892 S.W.2d 860, 862 (Tex. 1995). KCSI argues that its remedy by appeal is inadequate because the trial court has improperly deprived it of the "valuable use" of its own money. That is not the permanent loss of substantial rights; it is really only a complaint that the normal appellate remedy is too slow. As we have repeatedly held, the cost or delay incident to pursuing an appeal does not make the remedy inadequate. *In re Ford Motor Co.*, 988 S.W.2d 714, 721 (Tex. 1998); *CSR Ltd. v. Link*, 925 S.W.2d 591, 596 (Tex. 1996); *Walker*, 827 S.W.2d at 842; *Hooks v. Fourth Court of Appeals*, 808 S.W.2d

² At oral argument in this Court, KCSI reduced its claim to \$64,000 because some of the missing minors had come forward to claim their settlements. Counsel stated that some of these claims came from children who had reached majority.

56, 60 (Tex. 1991); *Iley v. Hughes*, 311 S.W.2d 648, 652 (Tex. 1958). Because KCSI has not shown that its appellate remedy will cause the permanent loss of substantial rights, we deny the writ.

Thomas R. Phillips
Chief Justice

Opinion delivered: July 2, 2004