

COURT OF APPEAL
FIRST CIRCUIT
STATE OF LOUISIANA

2014-CW-_____

Andre Aaron, et al.,
Plaintiffs-Respondents

versus

Exxon Mobil Corporation,
Defendant-Relator

On application for supervisory writ
to the 19th Judicial District Court, Parish of East Baton Rouge
Honorable William Morvant, Judge
No. C-635,511, Section 23, Division E

**Application of Exxon Mobil Corporation for Supervisory Writ
Volume 1 of 2**

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Civil Case

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¹ As of the time this writ application was filed, undersigned counsel had not yet received a copy of the order setting the return date. Relator will supplement this writ application with the signed order as soon as it has been received.

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Certificate of Verification and Service

State of Louisiana
Parish of Orleans

I verify that the allegations in the application for supervisory writ are true to the best of my knowledge, information, and belief.

A copy of this writ application has been served by e-mail or U.S. Mail on the following persons:

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New Orleans, Louisiana, January 23, 2015.

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Statement of Jurisdiction

This case involves an appeal from Baton Rouge City Court to the Nineteenth Judicial District Court. Defendant-relator, Exxon Mobil Corporation, does not seek substantive review of the city court's judgment. Rather, Exxon seeks review of a 19th JDC order transferring its appeal from the judge to whom it was randomly allotted to another judge, *ex parte*, and over Exxon's objection.

Although this Court does not have appellate jurisdiction, it has supervisory jurisdiction over all cases arising within its circuit, including cases in which it lacks appellate jurisdiction. *See* La. Const. art. V § 10(A); *Foxy's Health & Racquet Club, Inc. v. Allbritton*, 2003-1054 pp. 3–4 (La. App. 1 Cir. 8/15/03), 859 So. 2d 151, 153.

Defendant, Exxon Mobil Corporation, has timely exercised its right to apply to this Court for a supervisory writ. The judgment complained of was rendered and signed on January 8, 2015. On January 20, 2015, Exxon gave the respondent judge notice of its intention to seek a supervisory writ.² As of the time this writ application was filed, the signed order setting the return date had not yet been received. Relator will supplement this application with a copy of the signed order as soon as it has been received.

² *See* writ app. vol. 2 pp. 369 et seq.

Statement of the Case

1. Status in the district court.

The record for the underlying appeal has been lodged in the 19th JDC. A briefing schedule has been established, but oral argument, previously scheduled for March 2, 2015, has been cancelled and has not yet been rescheduled.

2. Introduction.

As stated above, this writ application arises from an appeal from the Baton Rouge City Court to the Nineteenth Judicial District Court. An appeal and cross-appeal from a single judgment were consolidated and decided by Judge Wilson Fields in the plaintiffs' favor. The present appeal, involving a different judgment, different plaintiffs, and different legal issues, was randomly allotted to Judge William Morvant.

About one month after Judge Fields's decision in plaintiffs' favor in the first two appeals, plaintiffs in the current appeal filed a motion to transfer the current appeal to Judge Fields. Even though the motion was opposed, Judge Morvant granted it the day after it was filed, and did so without a contradictory hearing. The transfer order violates La. Code Civ. P. art. 253.2, which prohibits interdivisional transfers over a party's objection except for the purpose of consolidation for trial. It also violates the Louisiana Supreme Court's decision in *State v. Sprint Communications Co.*, 96-3094 (La. 9/9/97), 699 So. 2d 1058, which prohibits interdivisional transfers unauthorized by legislation—including transfers purportedly made for judicial economy and case management. Finally, the *ex parte* transfer for consolidation violates La. Code Civ. P. art. 1561, which requires a contradictory hearing before cases are consolidated.

3. Facts and procedural history.

This litigation arises from a fire at the Exxon refinery in Baton Rouge on August 2, 1993. The fire occurred in the east coker unit of the refinery, about a mile west of Scenic Highway. The plaintiffs are thousands of persons who allege that they lived in the area of Baton Rouge east of the refinery when the fire occurred, i.e. more than a mile away from the east coker unit. An unknown number of plaintiffs allege minor personal injuries caused by smoke from the fire. An equally unknown number allege fear and fright caused by the smoke and the ensuing response (e.g. fire trucks and police cars with sirens blaring, a shelter-in-place order, environmental workers cleaning up debris, etc.). They allege that Exxon's negligence caused the fire or, alternatively, that Exxon is strictly liable.

Litigation resulting from the fire was brought in both federal and state courts. The federal proceedings ended with a judgment in Exxon's favor, rejecting plaintiffs' claims of negligence and strict liability. *In re 1993 Exxon Coker Fire*, 2008 WL 2795146 (M.D. La. 7/18/08). The U.S. Fifth Circuit Court of Appeals affirmed. *In re 1999 Exxon Coker Fire*, 336 Fed. Appx. 431 (5th Cir. 2009).

In state court, plaintiffs elected not to file a class action. Instead, they filed three separate petitions, each cumulating the actions of numerous plaintiffs under La. Code Civ. P. art. 463.³ They alleged two theories of liability: negligence and strict liability. The three petitions were consolidated in Division D of Baton Rouge City Court.

³ See writ app. vol. 1 pp. 16–206.

A. The prior appeals to the 19th JDC have already been decided by Judge Fields.

The city court ordered separate trials of the cumulated actions, as authorized by La. Code Civ. P. art. 465, with the cases to be tried in groups of five to ten plaintiffs. The first trial group, consisting of six plaintiffs, went to a two-day bench trial in December 2013. The trial ended with a judgment in Exxon's favor on the issue of strict liability, but against Exxon on the issue of negligence. The city court awarded \$4,000 to \$7,500 in damages to each of the six plaintiffs.

Exxon appealed, and the first six plaintiffs cross-appealed. Exxon's appeal was lodged first and was allotted to Judge Wilson Fields.⁴ The six plaintiffs' appeal was lodged about a week later and was originally allotted to Judge Todd Hernandez.⁵ Plaintiffs moved to transfer their appeal to Judge Fields's division for consolidation with Exxon's earlier-lodged appeal.⁶ Since both appeals were from the same judgment and involved the same parties, Exxon did not oppose plaintiffs' motion.

After full briefing, Judge Fields held oral argument of the consolidated appeals on November 10, 2014. Exactly one month later, he rendered his decision affirming the city court's judgment in its entirety.⁷ Exxon has since applied to the Louisiana Supreme Court for a writ of certiorari to review Judge Fields's judgment.

⁴ See writ app. vol. 1 p. 229 (appeal allotted to Section 25).

⁵ See writ app. vol. 1 p. 230 (appeal allotted to Section 27).

⁶ See writ app. vol. 1 p. 231.

⁷ See writ app. vol. 2 pp. 287–88.

B. The present appeal, involving a different judgment, different plaintiffs, and different legal issues, was randomly allotted to Judge Morvant.

While the first two appeals were pending before Judge Fields, the thousands of remaining plaintiffs filed a motion in city court for summary judgment on the issue of liability.⁸ Exxon opposed plaintiffs' motion, arguing that the judgment in favor of the first six plaintiffs can neither bind nor benefit the other plaintiffs, who were not parties to the judgment or to the trial from which it resulted. In a hearing held on August 27, 2014, the city court granted plaintiffs' motion.⁹ On September 17, 2014, the city court signed a judgment to that effect, and included a designation of finality under La. Code Civ. P. art. 1915(B).¹⁰

Exxon has appealed the September 17 judgment.¹¹ The issue in this appeal will be purely legal: whether the judgment in favor of the first six plaintiffs is preclusive as to plaintiffs who were not parties to the judgment. The record for this appeal was lodged in the 19th JDC on December 8, 2014, and the appeal was randomly allotted to Judge Morvant.¹² Two days later, Judge Fields rendered his decision in the first two appeals in favor of the first six plaintiffs.¹³

C. After the first two appeals had been decided, plaintiffs sought to transfer the current appeal to Judge Fields.

Eight days after Judge Fields rendered his decision in the first two appeals, plaintiffs' counsel sent a letter to Judges Fields and Morvant, suggesting that

⁸ See writ app. vol. 2 pp. 281 et seq.

⁹ See writ app. vol. 2 p. 277 (transcribed oral ruling).

¹⁰ See writ app. vol. 2 p. 281.

¹¹ See writ app. vol. 2 pp. 282–85.

¹² See writ app. vol. 2 p. 286.

¹³ See writ app. vol. 2 pp. 287–88.

transfer of the current appeal to Judge Fields under La. Dist. Ct. R. 9.4.¹⁴ The same day, Exxon’s counsel responded by letter to Judges Fields and Morvant, stating Exxon’s opposition to the suggested transfer and citing legal authorities in support of Exxon’s position.¹⁵

Twenty days later, plaintiffs filed a motion asking Judge Morvant to transfer the current appeal to Judge Fields.¹⁶ Plaintiffs attached two alternative orders to their motion: the first granting the transfer ex parte, the second setting the motion for a contradictory hearing.¹⁷ Even though the motion recited Exxon’s opposition to a transfer, Judge Morvant granted the motion ex parte the day after it was filed.¹⁸ The same day, his chambers issued a “Cancellation Notice,” cancelling oral argument on the motion to transfer, which had been set for March 2, 2015, and reciting that Exxon’s current appeal “has been consolidated” with the two prior appeals already decided by Judge Fields.¹⁹

Exxon now applies to this Court for a supervisory writ to review the transfer order.

¹⁴ See writ app. vol. 2 p. 290 (referring to “local Rule 9.4”).

¹⁵ See writ app. vol. 2 pp. 293–94.

¹⁶ See writ app. vol. 2 p. 297.

¹⁷ See writ app. vol. 2 pp. 301–02.

¹⁸ See writ app. vol. 2 pp. 366–67.

¹⁹ See writ app. vol. 2 p. 368

Issues Presented for Review

1. The Code of Civil Procedure forbids transfer of a randomly allotted case from one judge to another without all parties' agreement unless the purpose is to consolidate the transferred case with another case for trial. Here, Exxon's current appeal from a different judgment, involving different plaintiffs and different legal issues, was transferred from Judge Morvant to Judge Fields over Exxon's written objection, and after the prior appeals in the same litigation had been fully resolved by Judge Fields. Does the transfer order comply with the law?

2. If all parties do not consent to a consolidation of cases for trial, then consolidation may be ordered only after a contradictory hearing. Here, the plaintiff's motion to transfer for consolidation was granted *ex parte*, over Exxon's written objection, without giving Exxon an opportunity to be heard. Did transfer under these circumstances violate Exxon's right to a hearing?

Assignment of Error

1. The district court erred in transferring Exxon's current appeal to another division of court without Exxon's consent.

2. The district court erred in ordering a transfer for consolidation *ex parte*, without giving Exxon an opportunity to be heard.

Summary of the Argument

Under La. Code Civ. P. art. 253.2, once a case has been randomly allotted to a particular section or division of court, it may not be transferred to another section or division of the same court unless all parties agree or unless the purpose of the transfer is to effect a consolidation for trial under art. 1561. And unless all parties consent to consolidation, La. Code Civ. P. art. 1561 requires a contradictory

hearing before two or more cases are consolidated for trial. The transfer order at issue here violates both articles. Consolidation of Exxon's current appeal with the two prior appeals under art. 1561 is impossible because the prior appeals have already been heard and decided, and the resulting decision is already before the Louisiana Supreme Court on Exxon's writ application. Moreover, the transfer and consolidation was granted *ex parte*, in violation of Exxon's right under art. 1561 to a contradictory hearing.

Argument

1. This Court's supervisory review is required under *State v. Sprint Communications*.

Normally, this Court's exercise of supervisory jurisdiction is discretionary. But an erroneous transfer order "cannot as a practical matter be corrected on appeal." *State v. Sprint Commun. Co.*, 96-3094 p. 2 (La. 9/9/97), 699 So. 2d 1058, 1061. And because the transfer order here is at least arguably incorrect, "relator is entitled to have the court of appeal rule under its supervisory jurisdiction on the merits of the transfer issue." *Id.*, citing *Herlitz Construction Co. v. Hotel Investors of New Iberia, Inc.*, 396 So. 2d 878 (La. 1981).

2. The legality of the transfer order is subject to *de novo* review.

The issue presented by this writ application is purely legal: Does any provision of the Code of Civil Procedure permit the transfer complained of here? The question of whether codal authorization exists for an act is purely legal, warranting *de novo* review. *See Young v. Jindal*, 2010-283 p. 3 (La. App. 3 Cir. 3/9/10), 33 So. 3d 385, 387–88 (interpretation of codal articles reviewed *de novo*). Similarly, when a trial court's decision is based on its erroneous interpretation or application of the law, rather than a valid exercise of discretion, the decision is not

entitled to deference by the reviewing court. *Kem Search, Inc. v. Sheffield*, 434 So. 2d 1067, 1071–72 (La. 1983); *Domingue v. Bodin*, 2008-62 p. 2 (La. App. 3 Cir. 11/5/08), 996 So. 2d 654, 657.

3. The transfer order circumvents random allotment.

Code of Civil Procedure art. 253.1 requires cases to be assigned randomly to a particular section or division of court. Once assigned randomly, a case cannot be reassigned “under the guise of ‘judicial economy and case management.’” *State v. Sprint Commun.*, 96-3094 p. 5 (La. 9/9/97), 699 So. 2d 1058, 1063. Transfers that permit judges to circumvent random allotment to funnel particular types of cases to one judge violate the spirit and purpose of art. 253.1. *Id.* p. 4, 699 So. 2d at 1062. An interdivisional transfer made in disregard of the law, under the guise of “judicial economy and case management,” is void and unenforceable. *Sprint*, p. 5, 699 So. 2d at 1063.

Random assignment procedures promote fairness and impartiality and reduce the dangers of favoritism and bias. *Sprint*, p. 5, 669 So. 2d at 1063. But random assignment becomes meaningless if judges can transfer cases between themselves on a non-random basis. *Id.* Ex parte, non-random transfers allow one side or the other to pick the division of their choice, and act barred by art. 253.1 and public policy. *Id.*

Because law and public policy favor random assignment, any exception to random assignment must be construed narrowly. Article 253.2 makes such an exception, allowing a case to be transferred from one section or division of a court to another, either on agreement of all parties or to allow “a consolidation for purpose of trial pursuant to Article 1561.” La. Code Civ. P. art. 253.2. Article 1561, in turn, allows “consolidation of [two or more] actions for trial” La.

Code Civ. P. art. 1561(A). Under this same article, the consolidation is ordered by “the section or division in which the first filed action is pending” *Id.*

Here, consolidation under arts. 253.2 and 1561 is impossible because the prior appeals have already been decided, and thus are no longer pending before Judge Fields.²⁰ Indeed, plaintiffs themselves stated in their motion that Judge Fields had already decided the prior appeals:

III.

Those appeals were consolidated and after briefing and argument were decided by Judge Wilson Fields, 19th JDC, Division “C” [sic] on December 10, 2014.

...

V.

The appeals already decided by Judge Fields dealt with the issues of ExxonMobil’s liability and damages....²¹

Because the prior appeals have already been decided by Judge Fields, they cannot possibly be consolidated with Exxon’s current appeal. This makes consolidation under arts. 253.2 and 1561 impossible.

Indeed, plaintiffs’ motion to transfer for consolidation did not mention arts. 253.2 or 1561. Instead, plaintiffs referred to “Local Rule 9.4.”²² Assuming they meant La. Dist. Ct. R. 9.4, the rule does not govern here. And even if it did, it cannot be applied in violation of the Code of Civil Procedure. *See* La. Dist. Ct. R. 1 comment (a) (if a Rule conflicts with legislation, the legislation controls).

Rule 9.4(b) allows transfer of “subsequent actions asserting the same claim by the same parties ... to the division to which the first case filed was allotted” Exxon’s current appeal is not “an action” as defined by La. Code Civ. P. art. 421; it

²⁰ Writ app. vol. 2 p. 288.

²¹ Writ app. vol. 2 p. 298.

²² Writ app. vol. 2 p. 298 ¶ VII.

is an appeal from an action commenced by others in Baton Rouge City Court. The current appeal does not “assert[] the same claim” as the prior appeal; rather it seeks appellate review of a different judgment of the city court. Nor does the current appeal involve “the same parties” as the prior appeal. Appellees in the first appeal were the six individual plaintiffs. Appellees in the current appeal are the thousands of remaining plaintiffs in city court.

The issue in the present appeal is likewise different from the issues in Exxon’s first appeal. The issues in the first appeal were fact-intensive: whether the six trial plaintiffs carried their burden of proving negligence, causation, and damages, and whether the damage awards were excessive. The issue in the current appeal is purely legal: whether the city court’s judgment in favor of the first six plaintiffs has preclusive effect as to the thousands of remaining plaintiffs who were not parties to the judgment or the trial from which it resulted. Since the parties and the claims are different between the prior appeals and the current one, Rule 9.4(b) does not apply here.

Moreover, the public policy behind Rule 9.4 militates against its application here. Rule 9.4(b) is designed to protect random allotment and prevent judge shopping. Specifically, it is designed to prevent the practice of repeatedly filing the same lawsuit until one is assigned to a judge of the litigant’s liking, then voluntarily dismissing all suits except the one assigned to the favored judge. Nothing of that sort happened here. Exxon took but one appeal from the city court’s partial summary judgment on liability. Exxon had no control over the lodging of the record in the 19th JDC or, upon lodging, the random assignment of the appeal to Judge Morvant.

Plaintiffs may argue that the transfer order is authorized by 19th JDC Rule 9.3. That rule allows transfer of “[s]uits or proceedings not in their nature original,

but growing out of suits or proceedings previously pending, such as actions of nullity of judgment, or to restrain or regulate the execution of process, mesne or final, in suits previously pending” That rule does not apply here, because Exxon’s current appeal does not “grow[] out of” its prior appeal. The current appeal seeks review of a different judgment of the city court, rendered in favor of different plaintiffs, and involving different issues.

If 19th JDC Rule 9.3 were somehow interpreted to apply, its application here would violate La. Code Civ. P. art. 253.2. In that case, the local rule would have to yield to the Code of Civil Procedure. *See* La. Dist. Ct. R. 1, comments (a) and (b).

4. The ex parte granting of plaintiffs’ motion violated Exxon’s right to a contradictory hearing.

As explained above, the only valid basis to transfer a randomly allotted proceeding from one section or division of court to another is to effect a consolidation for trial under La. Code Civ. P. art. 1561. And unless all parties consent, a court may order consolidation only after a contradictory hearing:

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

La. Code Civ. P. art. 1561(A).

Here, the transfer order was rendered ex parte, without affording Exxon its right to a contradictory hearing under art. 1561(A). Thus, the transfer and consolidation violates Exxon’s statutory right. And denial of Exxon’s statutory right even to be heard violates due process.

Prayer for Relief

In this Court, successive appeals arising from the same underlying litigation are not routed to the same panel that decided the first appeal; rather, they are randomly assigned and are treated as separate, distinct appeals. They are not heard and decided by the same panel unless they have been consolidated for hearing and disposition. Similarly, successive appeals from Baton Rouge City Court to the 19th JDC should be randomly allotted; they should not be transferred to another section of court just because the other section happened to hear and decide a prior appeal arising from the same litigation. Transfer is appropriate only when the purpose is to consolidate the appeals for hearing and disposition. Such a consolidation is impossible here because the prior appeals have already been decided.

Exxon prays that this Court grant a supervisory writ, reverse the transfer order, and return Exxon's current appeal to the judge to whom it was randomly allotted.

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Appendix