COURT OF APPEALS
SECOND DISTRICT OF TEXAS
FORT WORTH

NO. 2-00-430-CV

MOBIL OIL CORPORATION; MOBIL PRODUCING TEXAS & NEW MEXICO, INC.; MOBIL CORTEZ PIPELINE, INC.; CORTEZ PIPELINE COMPANY; SHELL CORTEZ PIPELINE COMPANY; SHELL CO_2 COMPANY, LTD.; SHELL OIL COMPANY; SHELL WESTERN E & P, INC.; AND SWEPI LP — APPELLANTS

V.

GARY H. SHORES, JOHN W. BARFIELD, AND FRANK GIBSON, IN THEIR REPRESENTATIVE CAPACITIES AS COTRUSTEES OF THE ALICIA L. BOWDLE TRUST; WILLIAM G. KEMP AND MARIE J. BENCH, IN THEIR REPRESENTATIVE CAPACITIES AS COTRUSTEES OF THE BERNARD M. BENCH FAMILY TRUST; BONNIE LYNN WHITEIS, INDIVIDUALLY; WILLIAM C. ARMOR, JR., INDIVIDUALLY; AND THE CLASS OF ALL OVERRIDING ROYALTY INTEREST OWNERS FROM AUGUST 24, 1982 TO DATE UNDER LEASES TO DEFENDANTS IN ANY OIL, GAS, OR MINERAL PROPERTY THAT BECAME UNITIZED BY VIRTUE OF THE McELMO DOME UNIT AGREEMENT — APPELLEES

NO. 2-01-072-CV

IN RE MOBIL OIL CORPORATION; MOBIL PRODUCING TEXAS AND NEW MEXICO, INC.; AND MOBIL CORTEZ PIPELINE, INC. — RELATORS

NO. 2-01-075-CV

IN RE RELATORS
SHELL CORTEZ PIPELINE COMPANY; SHELL CO_2
COMPANY, LTD.; SHELL OIL COMPANY; SHELL
WESTERN E & P, INC.; AND SWEPI LP

FROM THE PROBATE COURT OF DENTON COUNTY

OPINION

These proceedings involve accelerated interlocutory appeals pursuant to civil practice and remedies code section 15.003(c) and petitions for writs of mandamus. TEX. CIV. PRAC. & REM. CODE ANN. § 15.003(c) (Vernon Supp. 2001); TEX. R. APP. P. 52. Three sets of defendants in this multiplaintiff lawsuit perfected interlocutory appeals from the trial court's general order denying their motions to transfer venue to Harris County. Two sets of defendants also filed separate petitions for writs of mandamus asserting that the trial court lacks subject matter jurisdiction over plaintiffs' claims. We consolidated the original proceedings with the appeals. Concerning the appeals, we will dismiss in part, affirm in part, and reverse and remand in part. We will deny the petitions for writs of mandamus.

FACTUAL AND PROCEDURAL BACKGROUND

The underlying litigation is a suit to recover under-paid carbon dioxide royalties. The plaintiffs are: Gary Shores, Frank Gibson, and John Barfield, in their representative capacities as cotrustees of the Alicia L. Bowdle Trust (collectively the "Bowdle Trust"); William G. Kemp and Marie J. Bench, in their representative capacities as cotrustees of the Bernard M. Bench Family Trust (collectively the "Bench Family Trust"); Bonnie Lynn Whiteis ("Whiteis"); and William C. Armor, Jr. ("Armor").[1] Plaintiffs brought suit in the probate court of Denton County, Texas against defendants Mobil Oil Corporation, Mobil Producing Texas and New Mexico, Inc., Mobil Cortez Pipeline, Inc. (collectively the "Mobil defendants"), Cortez Pipeline Company ("Cortez"), Shell Cortez Pipeline Company, Shell CO_2 Company, Ltd., Shell Oil Company, Shell Western E & P Inc., SWEPI LP (collectively the "Shell defendants"), Richard Timothy Bradley ("Bradley"), and Deborah Sue Hartsfield ("Hartsfield").[2] Plaintiffs are overriding royalty interest owners of a unitized carbon dioxide pool, the McElmo

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[1]Because this case involves a joinder appeal and two petitions for writs of mandamus, we will refer to the parties throughout this opinion simply as "plaintiffs" and "defendants" rather than in their various capacities in the different filings with this court.

[2]Defendants Bradley and Hartsfield did not file notices of appeal. Consequently, they are not parties to this appeal. *See* TEX. R. APP. P. 25.1(c).

Dome Unit, in Colorado and claim that since 1982 defendants have under-paid royalties for carbon dioxide produced from that pool.

The Bowdle Trust is a Texas inter vivos trust with its principal place of business and situs of administration in Denton County, Texas. The Bench Family Trust is a Colorado inter vivos and charitable trust with its principal office located in Denver County, Colorado. Whiteis is a Texas citizen who resides in Wichita Falls, Wichita County, Texas. Armor is a citizen of Florida who resides in Martin County, Florida. Denton County is not the location of any defendants' principal Texas office.

Plaintiffs pleaded:

<u>Venue</u>

> 4.1. Venue is mandatory in this Court in Denton County, Texas under . . . . Texas Trust Code § 115.001 (and especially § 115.001(d)) and is a proceeding concerning trusts, including a charitable trust, and the situs of administration of the Bowdle Trust is maintained in Denton County, Texas and/or has been maintained in Denton County, Texas at any time during the preceding four years.
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> 4.2. Alternatively, venue is mandatory in Wichita County, Texas under Texas Trust Code §§ 115.002(a) and (c) because this action arises under Texas Trust Code § 115.001 and is a proceeding concerning trusts, including a charitable trust, and the situs of administration of the Bowdle Trust has been maintained in Wichita County, Texas at any time during the preceding four years.
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> 4.3. Additionally and alternatively, venue is also proper in this Court in Denton County, Texas under Texas Civil Practice and

> Remedies Code § 15.002(a)(1) because a substantial part of the events and omissions giving rise to the claims hereunder occurred in Denton County, Texas, including (but not limited to) the Bowdle Trust's regular receipts of the false, fraudulent, and erroneous royalty payments, monthly oil and gas detail statements, and information returns (Forms DR 21W) and the Bowdle Trust's receipt and review of other false and misleading information from Defendants.

Defendants filed motions and amended motions to transfer venue to Harris County and pleas to the trial court's jurisdiction. They claimed that the Texas Trust Code's venue provision did not apply, that venue was not proper in Denton County, and that the case should be transferred to Harris County. They specifically denied "all of the venue allegations" contained in plaintiffs' pleading. Defendants filed various affidavits, documents, and discovery in support of their motions to transfer venue to Harris County.

Plaintiffs filed a response asserting that defendants waived their venue objections by filing motions seeking affirmative relief on other issues. Plaintiffs also alleged that jurisdiction and venue were mandatory in the Denton County Probate Court under Texas Trust Code sections 115.001 and 115.002 and that venue was proper in Denton County under civil practice and remedies code section 15.002(b). As prima facie venue evidence, plaintiffs filed five affidavits with attachments. Defendants filed replies asserting, for the first time, that the

Bench Family Trust, Whiteis, and Armor were improperly joined in the lawsuit under section 15.003.

After a hearing, the trial court signed a November 30, 2000 order denying defendants' motions to transfer venue. The court's order did not specify the basis for its ruling. Pursuant to section 15.003(c), all defendants except Bradley and Hartsfield perfected accelerated, interlocutory appeals to this court from the trial court's order.

Approximately one week after denying defendants' motions to transfer venue, the trial court conducted an evidentiary hearing on plaintiffs' "Motion to Certify Plaintiff Class." On December 15, 2000, the trial court signed a class certification order. The order made plaintiffs Shores, Barfield, and Gibson, in their representative capacities as cotrustees of the Bowdle Trust, the designated class representatives. It named plaintiffs Kemp and Bench, in their representative capacities as cotrustees of the Bench Family Trust, Whiteis, and Armor as "additional parties Plaintiff and Class representatives in order to insure the adequacy of representation." The Shell defendants and the Mobil defendants perfected interlocutory appeals from the trial court's class certification order. TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(a)(3) (Vernon

Supp. 2001). The class certification appeal is pending before this court under a different cause number.[3]

A few days prior to submission of this appeal, plaintiffs filed a "Motion to Dismiss Interlocutory Appeal for Mootness and Lack of Jurisdiction, or, Alternatively, to Abate for Trial Court Clarification." The week after submission, the Mobil defendants and the Shell defendants each filed a petition for writ of mandamus asserting that the probate court of Denton County lacks subject matter jurisdiction over the underlying litigation. Approximately one week prior to the date on which we are statutorily required to render our decision, plaintiffs filed a "Second Motion to Dismiss Interlocutory Appeal and Mandamus Petitions for Mootness and Lack of Jurisdiction."

APPELLATE COURT JURISDICTION

In sorting out the issues presented by the parties, we begin by addressing plaintiffs' argument that we lack jurisdiction over this appeal. *See McClennahan v. First Gibraltar Bank*, 791 S.W.2d 607, 608 (Tex. App.—Dallas

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[3]We chose not to consolidate the class certification appeal with this joinder appeal because the two appeals involve different records, different issues, and different appellate time-frames. *Compare* TEX. CIV. PRAC. & REM. CODE ANN. § 15.003(c)(2) ("The court of appeals shall . . . render its decision *not later than the 120th day* after the date the appeal is perfected by the complaining party.") (emphasis added) *with Id.* § 51.014(a)(3) (imposing no deadline concerning our disposition of a class certification appeal).

1990, no writ) (noting the initial inquiry an appellate court must make is whether it has jurisdiction to entertain the appeal). Generally, a party may appeal only a final order or judgment. *Jack B. Anglin Co. v. Tipps*, 842 S.W.2d 266, 272 (Tex. 1992). An interlocutory appeal from a nonfinal order or judgment is permitted only when authorized by statute. *Cherokee Water Co. v. Ross*, 698 S.W.2d 363, 365 (Tex. 1985). An interlocutory appeal is specifically not available from a venue determination. TEX. CIV. PRAC. & REM. CODE ANN. § 15.064(a) (Vernon 1986) ("[n]o interlocutory appeal shall lie from the [venue] determination"); *see also Am. Home Prods. Corp. v. Adams,* 22 S.W.3d 121, 123 (Tex. App.—Fort Worth 2000, pet. filed) (holding that a trial court's venue determination is unreviewable).

In 1995, the Legislature added section 15.003 to the civil practice and remedies code. TEX. CIV. PRAC. & REM. CODE ANN. § 15.003. The purpose of section 15.003 is to eliminate the ability of plaintiffs who are unable to independently establish venue to "piggyback" their claims onto the claims of a coplaintiff able to establish venue in the desired forum. *See Masonite Corp. v. Garcia*, 951 S.W.2d 812, 817 (Tex. App.—San Antonio 1997), *rev'd on other grounds*, *In re Masonite*, 997 S.W.2d 194 (Tex. 1999)(orig. proceeding). The statute therefore prohibits a plaintiff who is unable to independently establish proper venue from maintaining suit in the chosen forum unless he establishes:

(1) that joinder is proper under the rules of civil procedure; (2) that his joinder will not unfairly prejudice another party; (3) that an essential need exists to have his suit tried in the county in which suit is pending; and (4) that the county of suit is a fair and convenient venue for the joining plaintiff and the defendants. TEX. CIV. PRAC. & REM. CODE ANN. § 15.003(a); *Bristol-Meyers Squibb Co. v. Goldston*, 983 S.W.2d 369, 372-73 (Tex. App.—Fort Worth 1998, pet. dism'd by agr.). The Legislature authorized interlocutory appellate review of a trial court's decision to allow or to disallow a plaintiff to maintain his suit in the filed venue based on these four joinder factors. TEX. CIV. PRAC. & REM. CODE ANN. § 15.003(c).

Plaintiffs contend that this appeal is an impermissible interlocutory appeal from the trial court's venue determination. They claim they raised six independent grounds below on which the trial court could have properly based its decision to deny defendants' motions to transfer venue: (1) that defendants "generally waived" their objections to venue by seeking affirmative relief; (2) that defendants "specifically waived" their section 15.003(c) joinder arguments by failing to comply with rules 86 and 87 of the rules of civil procedure; (3) that all plaintiffs established proper venue in Denton County under section 15.002(b); (4) that joinder and venue were proper under rule 42(c)(1) of the rules of civil procedure; (5) that "Texas Probate Code §§ 5 and 5A concerning

probate court subject matter jurisdiction 'trump' the venue provisions" of the civil practice and remedies code; and (6) that venue was mandatory in Denton County under the Texas Trust Act, triggering mandatory venue under sections 15.016 and 15.004 of the civil practice and remedies code. Plaintiffs assert that, under the supreme court's decision in *American Home Products v. Clark*, if the trial court could have based its decision to deny defendants' motions to transfer venue on any of the above grounds, even erroneously, then defendants cannot appeal. *See* 44 Tex. Sup. Ct. J. 284, 286, 2000 WL 1862929, at *3 (Dec. 21, 2000). According to plaintiffs, if any possible procedural or substantive grounds exist supporting the trial court's general order denying defendants' motions to transfer venue, then the trial court's order does not "necessarily determine" an intervention or joinder issue, and an interlocutory appeal will not lie.

We agree that a trial court's venue ruling must "necessarily determine" an intervention or joinder issue under section 15.003(a) to be appealable under section 15.003(c). *Am. Home Prods.*, 44 Tex. Sup. Ct. J. at 286, 2000 WL 1862929, at *3; *Surgitek, Bristol-Meyers Corp. v. Abel*, 997 S.W.2d 598, 601 (Tex. 1999); *Adams*, 22 S.W.3d at 124; *Surgitek, Inc. v. Adams,* 955 S.W.2d 884, 887-88 (Tex. App.—Corpus Christi 1997, pet. dism'd by agr.) (all holding that an interlocutory appeal is available when a trial court's order "necessarily

determines" the propriety of a plaintiff's joinder under section 15.003(a)). We disagree, however, with plaintiffs' contention that simply raising alternative bases purportedly supporting the trial court's general denial order means the order did not necessarily determine joinder and automatically defeats this court's jurisdiction under section 15.003(c). The supreme court expressly rejected such a "formalistic" approach to determining appellate court jurisdiction under section 15.003. *Abel*, 997 S.W.2d at 601 (specifically rejecting the formalistic approach utilized in *Shubert v. J.C. Penney Co.*, 956 S.W.2d 634 (Tex. App.—Texarkana 1997, pet. denied)). Instead, we hold that defendants, as appellants, bear the burden of establishing this court's jurisdiction by presenting a record demonstrating that the trial court's order "necessarily determined" the propriety of plaintiffs' joinder under section 15.003(a). *Accord Abel*, 997 S.W.2d at 601 (holding that appellate court's section 15.003(c) jurisdiction is invoked by an order that necessarily determines the propriety of a plaintiff's joinder). That is, because they are challenging a trial court's general order denying a motion to transfer venue, defendants must refute all properly raised alternative grounds for the trial court's ruling to establish that the trial court's order "necessarily determined" the propriety of plaintiffs' joinder.[4]

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[4]Defendants did not seek abatement to obtain a trial court order specifying the basis for the court's denial of their motions to transfer venue.

We now address whether the record before us demonstrates that the trial court's order necessarily determined the propriety of plaintiffs' joinder under section 15.003(a). We will review the merits of the alternative grounds purportedly supporting the trial court's order denying the defendants' motions to transfer venue. In our review, we apply the appropriate standards outlined below.

I. Standards of Review

A. Concerning Plaintiffs' Venue Theories

When the trial court enters a general order denying a motion to transfer venue, to avoid impermissibly reviewing any venue determination, we simply ascertain whether each plaintiff has independently, properly asserted any legally cognizable theory supporting venue in the county of suit. If a plaintiff has properly asserted a legally cognizable venue theory, the "inquiry is over" and review of the trial court's general denial of a motion to transfer venue concerning that plaintiff's claims must wait until direct appeal following a final

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They claim that they have met their burden of establishing this court's jurisdiction by refuting all properly raised alternative grounds for the trial court's ruling, that the trial court's order necessarily determines the propriety of plaintiffs' joinder, and that abatement for a clarifying order by the trial court would be "a waste of time." Plaintiffs did seek abatement for a clarifying order. Because defendants must establish our jurisdiction and they are satisfied with the record before this court, we decline to abate.

judgment. TEX. CIV. PRAC. & REM. CODE ANN. § 15.064(a); *Am. Home Prods.,* 44 Tex. Sup. Ct. J. at 286, 2000 WL 1862929, at *3. We will not usurp the trial court's decision to deny a motion to transfer venue, even if that decision is erroneous, if each plaintiff independently, utilizing proper venue proofs, has asserted a legally cognizable venue theory. *See Am. Home Prods.*, 44 Tex. Sup. Ct. J. at 286, 2000 WL 1862929, at *3; *Abel*, 997 S.W.2d at 602; *see also Adams*, 22 S.W.3d at 123; *Goldston*, 983 S.W.2d at 375 (holding that in section a 15.003(c) appeal we must defer to the trial court's determination of the nature of the underlying lawsuit and the situation of the parties).

B. Concerning the Joinder Issue

If the trial court's order necessarily determines a joinder issue, we conduct an independent, de novo review of the record to ascertain the correctness of that ruling. TEX. CIV. PRAC. & REM. CODE ANN. § 15.003(c)(1); *Goldston*, 983 S.W.2d at 375. We do not apply an abuse of discretion or substantial evidence standard of review. TEX. CIV. PRAC. & REM. CODE ANN. § 15.003(c)(1).

II. The Six Alleged Independent Grounds for the Trial Court's Ruling

A. General Waiver of Venue Objections Theory

Plaintiffs contend that defendants waived their venue objections by filing various motions with the trial court before obtaining a ruling on their motions

to transfer venue. Defendants' motions were filed to request that the trial court refrain from taking action concerning the class certification issue until after the venue issue was resolved, or to compel discovery "propounded specifically" concerning the venue issue. We hold that defendants did not waive their venue objections by filing these motions. *See Gen. Motors Corp. v. Castaneda*, 980 S.W.2d 777, 785-86 (Tex. App.—San Antonio 1998, pet. denied)(Butts, J., dissenting) (holding that the filing of a motion for continuance and of motions seeking protection from discovery did not constitute a waiver of venue objections); *Gentry v. Tucker,* 891 S.W.2d 766, 768 (Tex. App.—Texarkana 1995, no writ) (holding that the filing of a motion for continuance on a preliminary matter did not constitute a waiver of venue objections); *Petromark Minerals, Inc. v. Buttes Resources*, 633 S.W.2d 657, 659 (Tex. App.—Houston [14th Dist.] 1982, dism'd w.o.j.) (holding that taking of depositions, making or answering requests for admissions, and seeking protection from discovery did not constitute a waiver of venue objections).

B. Specific Waiver of Joinder Objections Theory: Whose Burden to Raise Joinder ?

Defendants' motions and amended motions to transfer venue did not allege any improper joinder by any plaintiffs and did not seek severance of any plaintiff's claims. In short, defendants filed motions seeking only transfer of

venue concerning all plaintiffs' claims to Harris County. In their replies to plaintiffs' venue response, defendants asserted for the first time that only the Bowdle Trust had attempted to establish venue in Denton County, that the other plaintiffs were improperly joined, and that the trial court should sever the claims of these other plaintiffs and transfer them to Harris County.

Plaintiffs contend that rule 86 of the rules of civil procedure required the defendants to state in their *motions to transfer venue*, not in their replies, the legal and factual basis for the transfer of the action, including any allegations of improper joinder. TEX. R. CIV. P. 86(3)(b) ("The motion [to transfer venue] shall state the legal and factual basis for the transfer of the action.") Plaintiffs argue that defendants "specifically waived" their section 15.003(c) joinder arguments by not raising them in their motions to transfer venue.

We first address the issue of who possesses the burden to initially raise a section 15.003 joinder issue. The Texas Supreme Court recently explained the burden of establishing proper venue in a case involving multiple plaintiffs as follows:

> Texas venue law is established. The plaintiff has the first choice to fix venue in a proper county; this the plaintiff does by filing the suit in the county of his choice. If a defendant, through a venue transfer motion, objects to the plaintiff's venue choice, the plaintiff must prove that venue is proper in the county of suit. *Where there are multiple plaintiffs joined in a single suit, each plaintiff, independently of the others, must establish proper venue*

> *. . . .* If the plaintiff fails to establish proper venue, the trial court must transfer venue to the county specified in the defendant's motion to transfer, provided that the defendant has requested transfer to another county of proper venue.

In re Masonite, 997 S.W.2d 194, 197 (Tex. 1999) (emphasis added) (footnotes omitted). Likewise, section 15.003(a) provides, in pertinent part:

> 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 a suit* as a plaintiff unless the person, independently of any other plaintiff, establishes [the four joinder factors].

TEX. CIV. PRAC. & REM. CODE ANN. § 15.003(a) (emphasis added). Thus, by simply filing a motion to transfer venue, a defendant in a multiplaintiff lawsuit puts each plaintiff to the burden of establishing either proper venue in the county of suit or proper joinder under applicable venue and joinder rules.[5] *See Abel,* 997 S.W.2d at 602 (holding that "[w]hen a plaintiff cannot establish proper venue, section 15.003(a) expressly places the burden on the plaintiff to 'establish' four elements before she can join venue for the suit"); *Dayco v. Ebrahim,* 10 S.W.3d 80, 84 (Tex. App.—Tyler 1999, no pet.) (holding that

[5]We recognize that traditional venue standards of proof govern a plaintiff's attempt to establish independent venue facts while a broader range of proof, including live testimony, may be considered in making a joinder determination concerning a plaintiff who is unable to independently establish proper venue. *See Abel*, 997 S.W.2d at 602.

"[s]ince twenty-two of the twenty-three plaintiffs failed to establish proper venue in Gregg County, we now must look to determine whether they established all four of the elements described in section 15.003(a)"); s*ee also Wichita County v. Hart*, 917 S.W.2d 779, 781 (Tex. 1996); *Wilson v. Tex. Parks & Wildlife Dep't*, 886 S.W.2d 259, 260 (Tex. 1994) (both holding that a defendant raises the question of proper venue by objecting to a plaintiff's venue choice through a motion to transfer venue).

Rule 86 does not, as plaintiffs suggest, place on the defendants the burden of specifically pleading improper joinder as a legal and factual basis for a motion to transfer venue. Instead, it merely requires that the defendants object to venue in the county of suit and state grounds for transferring the action to a county of proper venue. Defendants filed motions and amended motions to transfer venue to Harris County and, in accordance with rule 86, stated the legal and factual basis for their motions, *i.e.,* that venue was not proper in Denton County as to any of the named plaintiffs, that all or a substantial part of the events giving rise to the claims occurred in Harris County, that two defendants reside in Harris County, and that two groups of defendants' principal offices in Texas are in Harris County. We hold that this satisfies the pleading requirements of rule 86. Requiring the defendants in this case to specifically plead improper joinder as a legal or factual basis for their

motions to transfer venue would be unreasonable because, at the time their motions were filed, the defendants did not know whether all plaintiffs would be able to independently establish proper venue, or whether one or more of the plaintiffs would be forced to establish section 15.003(a)'s four joinder factors in order to maintain venue for their particular suit.

We also find support for this conclusion in rule 87, entitled "Determination of Motion to Transfer." Nothing in rule 87 requires a defendant to plead improper joinder in his motion to transfer venue. Improper joinder is not an issue unless, applying rule 87's procedures and proof standards, a plaintiff is not able to independently establish proper venue. *See Abel*, 997 S.W.2d at 602 (holding that section 15.003(a) takes as its starting point a person who is unable to establish proper venue).

We hold that, under section 15.003, existing case law, and rules 86 and 87 of the rules of civil procedure, after defendants filed their motions to transfer venue to Harris County, each plaintiff bore the burden of independently establishing proper venue in Denton County or of establishing proper joinder to maintain venue in Denton County under section 15.003(a). We further hold that defendants' failure to raise improper joinder in their motions and amended motions to transfer venue did not constitute waiver of their joinder complaint.

C. Section 15.002(b) Venue Theory

Section 15.002(b) provides, in pertinent part:

> For the convenience of the parties and witnesses and in the interest of justice, a court *may transfer* an action from a county of proper venue under this subchapter or Subchapter C to any other county of proper venue *on motion of a defendant* . . . .

TEX. CIV. PRAC. & REM. CODE ANN. § 15.002(b) (Vernon Supp. 2001) (emphasis added). Plaintiffs argue that they "submitted prima facie venue evidence concerning the location of all Plaintiffs' books and records and the principal residences of the Joined Plaintiffs" and that they therefore all independently established proper venue in Denton County under section 15.002(b). Defendants contend that section 15.002(b) is inapplicable to plaintiffs because plaintiffs have the opportunity to select the county of venue in the first instance and because the statute provides that venue may be *transferred* under this section only *on motion of the defendant*. Defendants argue that this subsection governs *transfers* of venue to a more convenient forum *based on a defendant's motion* and that it cannot be utilized by a plaintiff to independently establish proper venue in the county in which suit was filed.

We agree with defendants' interpretation. A plaintiff has the first choice of venue, but not the second. *Masonite,* 997 S.W.2d at 197-98 (holding that "[t]he trial court had no discretion to, in effect, grant the plaintiffs a transfer of

venue; the plaintiffs had the first choice, but not the second, of a proper venue"); *Tenneco, Inc. v. Salyer*, 739 S.W.2d 448, 449 (Tex. App.—Corpus Christi 1987, orig. proceeding) (holding that a plaintiff may not correct an improper venue choice by filing a motion to transfer venue). By its express terms, section 15.002(b) applies only to motions to transfer venue, and motions to transfer venue may be filed only by defendants. Courts are responsible for giving a true and fair interpretation of the statutes as written, which means an interpretation that is not forced or strained but one that the ordinary meaning of the words of the statute will fairly sanction and clearly sustain. *WTFO, Inc. v. Braithwaite*, 899 S.W.2d 709, 718 (Tex. App.—Dallas 1995, no writ). Giving section 15.002(b) a true and fair interpretation, we hold that plaintiffs' section 15.002(b) venue allegations do not constitute a legally cognizable basis for Denton County venue and do not constitute an "independent ground" on which the trial court could have based its denial of defendants' motions to transfer venue.

D. Class Certification Venue Theory

Plaintiffs argue that they all independently established proper venue or are excused from independently establishing proper venue under Texas Rule of Civil Procedure 42(c), the class certification rule. TEX. R. CIV. P. 42(c). Plaintiffs assert, "the trial court's Venue Order clearly contemplates that the three Joined

Plaintiffs have independently established proper joinder under Rule 42(c) and proper venue in accordance with the class-action authorities."[6] (emphasis in original).

We are not persuaded that the subsequent class certification order retroactively satisfied plaintiffs' section 15.003(a) obligation to independently establish either proper venue or proper joinder in Denton County. We hold that plaintiffs' class certification venue theory, for purposes of this appeal, does not constitute a legally cognizable basis for Denton County venue and does not constitute an "independent ground" on which the trial court could have based its denial of defendants' motions to transfer venue.

E. Probate Court Subject Matter Trumps Venue Theory

As an additional "independent ground" purportedly supporting the trial court's denial of defendants' motions to transfer venue, plaintiffs contend that "Texas Probate Code §§ 5 and 5A concerning probate court subject matter jurisdiction 'trump' the venue provisions" of the civil practice and remedies code. Plaintiffs rely on *Herring v. Welborn*, 27 S.W.3d 132, 141 (Tex. App.—San Antonio 2000, pet. denied). In *Herring*, the San Patricio County

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[6]We will not address the class certification issue in this appeal. Whether plaintiffs are properly joined under the trial court's class certification order is a determination wholly independent of this court's review of any implied trial court finding of proper section 15.003 joinder.

Court at Law ordered the sale of certain property in connection with the probate of an estate. *Id.* at 135. When the decedent's husband was dissatisfied with the outcome in the San Patricio County Court at Law and the appeals he pursued from that court's action with regard to the sale of the property, he filed suit in the district court where the land was located. *Id.* at 136. The district court granted the defendants' pleas to the jurisdiction. *Id.* The appellate court held that the San Patricio County Court at Law's continuing administration of the decedent's estate triggered that court's authority to deal with all matters incident to that estate to the exclusion of the district court where the land was located. *Id.* at 140.

Herring is inapplicable to the facts presented to the trial court at the venue hearing. This suit was not filed incident to any estate or ancillary to any existing action pending in the Denton County Probate Court. We hold that plaintiffs' jurisdiction-trumps-venue argument does not constitute a legally cognizable basis for plaintiffs' independent establishment of proper Denton County venue and does not constitute an "independent ground" on which the trial court could have based its denial of defendants' motions to transfer venue.

Plaintiffs assert new, additional jurisdiction-trumps-venue facts and arguments on appeal in their second motion to dismiss the interlocutory appeal and mandamus petitions for mootness. Plaintiffs base their second motion on

actions and filings in the trial court that occurred *after* the hearing on defendants' motions to transfer venue.[7] In determining the merits of plaintiffs' jurisdiction-trumps-venue argument, we will not consider these subsequently occurring events that were not before the trial court at the time it made its order denying a venue transfer.

F. Mandatory Venue Theory

Plaintiffs contend that venue concerning the Bowdle Trust is mandatory in Denton County under the Texas Trust Act. *See* TEX. PROP. CODE ANN. § 115.002 (Vernon Supp. 2001). This mandatory Bowdle Trust venue, plaintiffs argue, triggers mandatory Denton County venue for all other plaintiffs under sections 15.004 and 15.016 of the civil practice and remedies code. *See* TEX. CIV. PRAC. & REM. CODE ANN. §§ 15.004, 15.016 (Vernon 1986 & Supp. 2001).

1. Bowdle Trust

The Texas Trust Act provides that venue for actions brought under property code section 115.001 is proper "in the county in which the situs of administration of the trust is maintained or has been maintained at any time

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[7]Apparently, an administration of Margaret Bridwell Bowdle's estate, dormant for twenty-four years in Wichita County, Texas, was transferred to the probate court of Denton County. Shores was appointed administrator of the estate, and in his representative capacity, he has filed an administrator's petition in intervention in this lawsuit in Denton County.

during the four-year period preceding the date the action is filed . . . ." TEX. PROP. CODE ANN. § 115.002(c). The Bowdle Trust asserts that some or all of its claims against defendants constitute actions brought under property code section 115.001. Property code section 115.001 provides, in pertinent part:

> **§ 115.001 Jurisdiction**
>
> (a) Except as provided by Subsection (d) of this section, a district court has original and exclusive jurisdiction over all proceedings concerning trusts, including proceedings to:
>
> . . .
>
> (6) *make determinations of fact affecting the administration, distribution,* or duration *of a trust*;
>
> (7) *determine a question arising in the administration or distribution*, or duration *of a trust*;
>
> . . . .
>
> (d) The jurisdiction of the district court over proceedings concerning trusts is exclusive *except for jurisdiction conferred by law on a statutory probate court* or a court that creates a trust under Section 867, Texas Probate Code.

Id. § 115.001(a), (d) (emphasis added).

As outlined above, plaintiffs pleaded that the Bowdle Trust was a Texas inter vivos trust with its principal place of business and situs of administration in Denton County and that venue was therefore mandatory in Denton County under section 115.001. Plaintiffs also pleaded that venue was proper in Denton

County pursuant to Texas Civil Practice and Remedies Code section 15.002(a)(1) because a substantial part of the events and omissions giving rise to the claims occurred in Denton County, including the Bowdle Trust's regular receipt of erroneous royalty payments, statements, division orders, and other documents from defendants.

Plaintiffs' response to defendants' motions and amended motions to transfer venue, along with their prima facie venue evidence, shows that Alicia Bowdle established the Bowdle Trust in 1989 and that from its inception until December 17, 1999, three days before plaintiffs filed this lawsuit, the principal office and situs of administration of the Bowdle Trust was in Wichita Falls, Wichita County, Texas. On December 17, 1999, the principal office and situs of administration of the Bowdle Trust was moved to Denton County. In venue affidavits, the Bowdle Trust's cotrustees swore:

> If, through this cause of action, the Trust obtains the declaratory judgment requested by the Plaintiffs herein concerning the future calculation and payment of overriding royalties and the proper transportation costs and expenses or the Trust recovers a judgment against Defendants concerning Plaintiffs' claims regarding proper calculation and payment of overriding royalties, proper transportation costs and expenses, and/or improper pricing of dispositions of carbon dioxide from the Unit, such a judgment will certainly establish facts that will affect the administration and distribution of assets of the Trust and will answer questions that have arisen in the administration of the Trust.

Thus, the Bowdle Trust asserts that, giving the terms "affecting," "administration," and "distribution" their ordinary meanings, its claims affect the administration or distributions of the Bowdle Trust and therefore constitute claims falling within section 115.001 of the property code.

Defendants point out that the Bowdle Trust is asserting contract and tort claims and argue that just because a plaintiff is a trust does not mean its claims fall within property code section 115.001. Defendants assert that the relocation of the Bowdle Trust's situs of administration to Denton County only three days before this lawsuit was filed in Denton County constitutes "blatant forum shopping." The Mobil defendants claim plaintiffs' pleading that venue is proper in Denton County under section 15.002(a)(1) is fraudulent because plaintiffs' own venue affidavits demonstrate the situs of administration of the Bowdle Trust was moved to Denton County only three days before this lawsuit was filed and plaintiffs did not provide venue evidence that any such royalty payments, statements, division orders, or other documents were sent to Denton County before the filing of this lawsuit.

We are troubled by the venue issue we have outlined above. *See Am. Home Prods.*, 44 Tex. Sup. Ct. J. at 288, 2000 WL 1862929, at *5-6 (Enoch, J., concurring) (writing that the trial court's venue ruling was troubling and baffling but, nonetheless, unreviewable). It is, however, just that: a venue

issue. The Bowdle Trust properly asserted legally cognizable venue theories. If the trial court, even erroneously, decided that venue as to the Bowdle Trust's claims was proper in Denton County under section 15.002(a) of the civil practice and remedies code or under section 115.002 of the property code, an interlocutory appeal under section 15.003(c) is unavailable. *See id.* at 286, 2000 WL 1862929, at *3 (holding that "if the trial court, even erroneously, decides that venue is proper . . . an interlocutory appeal . . . is unavailable."). We hold that the Mobil defendants have failed to meet their burden of showing that the trial court's denial of the motions to transfer venue of the Bowdle Trust's claims "necessarily determined" the propriety of the Bowdle Trust's joinder under section 15.003. We further hold that we do not have jurisdiction over the Mobil defendants' appeal of this portion of the denial order.[8]

2. All other plaintiffs

Plaintiffs did not plead any venue facts concerning the Bench Family Trust, Whiteis, or Armor. The only venue evidence concerning plaintiffs other than the Bowdle Trust is the affidavit of William G. Kemp. This affidavit and its attachments establish that the Bench Family Trust is a Colorado charitable

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[8]The Mobil defendants are the only parties who appealed the denial order as to the Bowdle Trust's claims.

trust, but fail to assert any connection between the Bench Family Trust or its claims and Denton County.

We agree with defendants that, based on the record before us, the Bench Family Trust, Whiteis, and Armor did not attempt to independently establish proper venue in Denton County. Instead, they maintained that venue was proper in Denton County for the Bowdle Trust, and that therefore venue was proper as to them pursuant to sections 15.004 and 15.016 of the civil practice and remedies code. *See* TEX. CIV. PRAC. & REM. CODE ANN. §§ 15.004, 15.016. We will address plaintiffs' section 15.004 and 15.016 arguments separately.

Section 15.004 provides:

> In a suit *in which a plaintiff* properly joins two or more claims or causes of action arising from the same transaction, occurrence, or series of transactions or occurrences, and one of the claims or causes of action is governed by the mandatory venue provisions of Subchapter B, the suit shall be brought in the county required by the mandatory venue provision.

Id. § 15.004 (emphasis added). Thus, section 15.004 permits proper venue for multiple claims belonging to *a single plaintiff* in the county of mandatory venue for any one of those claims. Plaintiffs cite no authority for the proposition that all claims of multiple plaintiffs are proper in any county of mandatory venue for any plaintiff's claim. Such a construction of section 15.004 would be contrary to the clear language of the statute and would render section 15.003,

specifically addressing venue in multiplaintiff cases, meaningless. *See Fitzgerald v. Advanced Spine Fixation Sys.*, 996 S.W.2d 864, 865-60 (Tex. 1999) (holding that we should not construe a statute to create an absurd result); *Sorokolit v. Rhodes*, 889 S.W.2d 239, 241 (Tex. 1994) (holding that when construing a statute, our primary goal is to give effect to the legislature's intent).

We therefore decline to adopt plaintiffs' argument that section 15.004 provides an independent ground that could support the trial court's order denying defendants' motions to transfer venue as to the Bench Family Trust, Whiteis, and Armor. We hold that section 15.004 does not excuse these plaintiffs from independently establishing proper venue in Denton County or proper section 15.003(a) joinder in Denton County when faced with defendants' motions to transfer venue.

Section 15.016 provides:

> An action governed by any other statute prescribing mandatory venue shall be brought in the county required by that statute.

TEX. CIV. PRAC. & REM. CODE ANN. § 15.016. Plaintiffs assert that venue for the Bowdle Trust's claims is mandatory in Denton County, the current situs of administration of the Bowdle Trust, under section 115.002 of the property code. Plaintiffs then attempt to "piggyback" the Bench Family Trust's claims,

Whiteis's claims, and Armor's claims via section 15.016 to this purported mandatory Denton County Bowdle Trust venue. We disagree with plaintiffs' contention that section 15.016 makes the mandatory venue of a single plaintiff's claim a permissive venue as to all other plaintiffs. Plaintiffs cite no authority for this proposition and, again, such a construction would be contrary to the clear language of the statute and would render section 15.003 meaningless. We hold that section 15.016 does not excuse the Bench Family Trust, Whiteis, and Armor from independently establishing either proper venue in Denton County or proper section 15.003(a) joinder in Denton County when faced with defendants' motions to transfer venue.

In summary, the Bench Family Trust, Whiteis, and Armor failed to plead a legally cognizable Denton County venue theory and failed to offer any prima facie venue evidence supporting a Denton County venue theory. Therefore, the Bench Family Trust, Whiteis, and Armor, are all "person[s] who [are] unable to establish proper venue." TEX. CIV. PRAC. & REM. CODE ANN. § 15.003(a). As such, they fall within section 15.003 and cannot join or maintain venue in Denton County *unless* they each independently satisfied section 15.003(a)'s four joinder factors. Because the trial court denied defendants' motions to transfer venue, he "necessarily determined" that the Bench Family Trust, Whiteis, and Armor did each independently satisfy section 15.003(a) joinder

requirements. Accordingly, we possess jurisdiction over defendants' appeals of the trial court's denial of their motions to transfer venue of the Bench Family Trust's claims, Whiteis's claims, and Armor's claims.

MOOTNESS

The trial court denied defendants' motions to transfer venue by order signed December 1, 2000. The Mobil defendants perfected their interlocutory appeal on December 6, 2000. The trial court signed its class certification order, certifying all named plaintiffs as class representatives, on December 15, 2000.

Plaintiffs raise a cross-point asserting that the trial court's class certification order moots this joinder appeal. In a motion, they also seek dismissal of this appeal and the mandamus proceedings for mootness and lack of jurisdiction because Shores, in his representative capacity as administrator of the estate of Margaret Bridwell Bowdle, last week filed an "administrator's plea in intervention" in the trial court. Plaintiffs claim that Shores's intervention moots this appeal and the two mandamus proceedings.

Texas Rule of Appellate Procedure 29.5 provides that while an appeal from an interlocutory order is pending, the trial court must not make an order that interferes with or impairs the jurisdiction of the appellate court or the effectiveness of any relief sought or that may be granted on appeal. TEX. R. APP. P. 29.5. This rule is designed to prevent an "end run" around an

interlocutory appeal. *See In re M.M.O.*, 981 S.W.2d 72, 79 (Tex. App.—San Antonio 1998, no pet.); *St. Louis S.W. Ry. Co. v. Voluntary Purchasing Groups, Inc.*, 929 S.W.2d 25, 33 (Tex. App.—Texarkana 1996, no writ); *Cobb v. Thurmond*, 899 S.W.2d 18, 19 (Tex. App.—San Antonio 1995, writ denied); *Hopper v. Safeguard Bus. Sys.,* 787 S.W.2d 624, 626-27 (Tex. App.—San Antonio 1990, no writ) (all applying rule 29.5's predecessor, rule 43(d)). Typically, an appellate court declares invalid a subsequent trial court order that interferes with the appellate court's jurisdiction over a pending interlocutory appeal. *See, e.g.*, *St. Louis S.W. Ry.*, 929 S.W.2d at 33 (declaring second order entered by the trial court during the course of the interlocutory appeal dissolved); *Cobb*, 899 S.W.2d at 19-20 (declaring subsequent trial court order invalid).

Here, however, we decline to declare the trial court's class certification order invalid. We see no benefit to declaring the order invalid and requiring the plaintiffs, if they are able, to obtain a second, post-joinder-appeal class certification order and requiring the defendants, if necessary, to perfect a second class certification appeal. Instead, we simply construe rule 29.5 as preserving our jurisdiction over this joinder appeal despite the trial court's subsequent class certification order. TEX. R. APP. P. 29.5. Hence, we overrule plaintiffs' cross-point.

Likewise, we decline to address the mootness issues raised by plaintiffs in their second motion to dismiss this interlocutory appeal. Plaintiffs' mootness arguments are based on events that occurred in the trial court well after the venue hearing. We will not construe the unusual subsequent proceedings occurring in the trial court as interfering with our jurisdiction over these interlocutory appeals or as impairing the relief we may grant. *Id.*

JOINDER

We now turn to the question of whether the plaintiffs who cannot independently establish venue in Denton County—the Bench Family Trust, Whiteis, and Armor—satisfied the four-part test set out in section 15.003(a). That is, did they each independently establish: (1) that joinder is proper under the rules of civil procedure; (2) that their joinder will not unfairly prejudice another party; (3) that an essential need exists to have their suits tried in the county in which suit is pending; and (4) that the county of suit is a fair and convenient venue for them and defendants. TEX. CIV. PRAC. & REM. CODE ANN. § 15.003(a). Applying the required de novo standard of review, we hold that they have not. *Compare Abel,* 997 S.W.2d at 604; *Am. Home Prods. Corp. v. Burrough,* 998 S.W.2d 696, 700 (Tex. App.—Eastland 1999, no pet.); *Am. Home Prods. Corp. v. Bernal,* 5 S.W.3d 344, 347 (Tex. App.—Corpus Christi 1999, no pet.). The Bench Family Trust, Whiteis, and Armor failed to plead the

joinder factors or to offer any evidence whatsoever concerning the four joinder factors. We hold that the trial court erred by necessarily determining that the Bench Family Trust, Whiteis, and Armor were properly joined in this lawsuit.

PROPER RELIEF

Having determined that the Bench Family Trust's, Whiteis's, and Armor's, joinder is improper, we must now ascertain the appropriate relief to be afforded defendants. Defendants urge us to order these plaintiffs' claims transferred to Harris County as requested in the motions to transfer venue. We are concerned that such an order may cross the line drawn by the Legislature between "joinder" and "venue." *Compare* TEX. CIV. PRAC. & REM. CODE ANN. §§ 15.003(c) (allowing interlocutory review of a "joinder" determination) and 15.064(a) (disallowing interlocutory review of a "venue" determination); *see also Masonite*, 951 S.W.2d at 817-18 (holding that a mere challenge to the venue selected by the trial court in its transfer orders, in the absence of a challenge to the trial court's joinder determination, was not appealable under section 15.003).

We begin with an examination of section 15.003, which states that 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.

TEX. CIV. PRAC. & REM CODE ANN. § 15.003(c). Section 15.003 authorizes us to determine the propriety of a plaintiff's joinder, but provides no guidance as to the appropriate relief to be afforded upon a determination of improper joinder.

We next examine existing case law. After finding improper joinder, the Tyler Court of Appeals in *Dayco* reversed the trial court order necessarily determining the propriety of twenty-two plaintiffs' joinder and remanded the improperly joined claims to the trial court for further orders consistent with the court's decision. 10 S.W.3d at 84. Likewise, the Corpus Christi Court of Appeals in *Blalock Prescription Ctr. v. Lopez-Guerra*, after finding improper joinder, reversed the trial court's order denying the defendants' motion to transfer venue of the improperly joined claims and remanded those claims to the trial court for further proceedings consistent with the court's opinion. 986 S.W.2d 658, 666 (Tex. App.—Corpus Christi 1998, no pet.). However, in *American Home Products v. Burrough*, the Eastland Court of Appeals reversed the trial court as to the improperly joined plaintiffs' claims and "rendered that the causes of action of [the improperly joined plaintiffs] are transferred to Dallas County, Texas," defendants' venue choice in their motion to transfer venue. 998 S.W.2d at 700.

The supreme court has not addressed the relief to be granted by an appellate court that determines joinder was improper. Justice Owen, joined by Justice Hecht, in her dissent in *American Home Products v. Clark*, stated that after determining improper joinder she would "remand this case to the trial court with instructions to grant the motion to transfer." 44 Tex. Sup. Ct. J. at 292, 2000 WL 1862929, at *12 (Owen, J., dissenting).

The question of the appropriate relief to be granted in this case is compounded by the fairly recent changes in Texas venue practice. The supreme court discussed these changes in *GeoChem Tech Corp. v. Verseckes*, 962 S.W.2d 541, 543 (Tex. 1998). The supreme court explained that we no longer have a "plea of privilege" under our venue rules and statutes. *Id*. Previously, a properly filed plea of privilege constituted prima facie proof of a defendant's right to obtain a transfer. *Id*. Now a defendant must file a motion to transfer venue specifically objecting to the plaintiff's venue choice. *Id.* The venue facts properly pleaded by either party in support of that party's desired venue are taken as true unless specifically denied by the adverse party. *Id.*; *see also* TEX. R. CIV. P. 87(3)(a); *Maranatha Temple, Inc. v. Enter. Prods. Co.*, 833 S.W.2d 736, 740 (Tex. App.—Houston [1st Dist.] 1992, writ denied) (explaining that "[w]hen a venue fact is specifically denied, the party pleading the venue fact must make prima facie proof of it."). Thus, the pleadings may or may not

establish a prima facie case of proper venue, depending on what has been filed by the plaintiff and by the defendant. *Verseckes*, 962 S.W.2d at 543.

Applying *Verseckes* to the present case, in order to determine whether defendants are entitled a judgment from this court requiring the trial court to transfer the Bench Family Trust's claims, Whiteis's claims, and Armor's claims to Harris County, we have reviewed the parties' pleadings and venue evidence to see if the defendants established a prima facie case of venue in Harris County. *See id.* Defendants all pleaded in their motions to transfer venue that Harris County was a county of proper venue because all or a substantial part of the events giving rise to plaintiffs' claims occurred in Harris County. The Shell defendants also pleaded that their corporate principal office is and has been in Harris County. Plaintiffs did not specifically deny any of these pleaded venue facts. Therefore, defendants met their burden of providing prima facie proof of proper Harris County venue, *i.e.*, pleaded venue facts that were not denied. *See* TEX. R. CIV. P. 87(2)(a), (3)*; Masonite*, 997 S.W.2d at 197; *Peyson v. Dawson*, 974 S.W.2d 377, 380 (Tex. App.—San Antonio 1998, no pet.) (recognizing that a defendant's properly-pleaded venue fact is established as true if the plaintiff fails to specifically deny the pleaded fact.) We hold that, in this case, the proper remedy based on the trial court's erroneous implied joinder of the Bench Family Trust, Whiteis, and Armor is the reversal of the trial court's

denial of defendants' motions to transfer venue of these plaintiffs' claims with instructions that these claims be transferred to Harris County. *Accord Masonite*, 997 S.W.2d at 197-98 (if joinder of plaintiff's claims is improper, the trial court possesses no discretion not to transfer venue to defendant's selected forum if defendant offers prima facie proof that its selected forum is a proper venue).

THE TRIAL COURT'S SUBJECT MATTER JURISDICTION

I. Section 15.003(c) Appeal

Defendants all challenged the trial court's jurisdiction by filing pleas to the jurisdiction. The trial court denied the defendants' pleas to the jurisdiction in the order denying their motions to transfer venue. Defendants raise issues in their section 15.003(c) appeals challenging the trial court's subject matter jurisdiction over this case. In light of our holdings that we lack jurisdiction over the Mobil defendants' appeal from the trial court's venue determination as to the Bowdle Trust and that the Bench Family Trust, Whiteis, and Armor are improperly joined in Denton County, we believe that defendants' subject matter jurisdiction claims may be more properly raised in a direct appeal after final judgment. *Accord Surgitek*, 955 S.W.2d at 887 ("the statute [section 15.003(c)] limits this Court's inquiry to a single question: whether joinder or

intervention is proper."). We decline to review the trial court's ruling on defendants' pleas to the jurisdiction in this section 15.003(c) appeal.

II. Defendants' Petitions for Writ of Mandamus

The Shell and Mobil defendants also assert in two separate original proceedings that they are entitled to writs of mandamus compelling the trial court to dismiss all of plaintiffs' claims for lack of subject matter jurisdiction. The Texas Supreme Court has repeatedly held that mandamus relief is not available even if a trial court erroneously asserts subject matter jurisdiction over a claim because the relator possesses an adequate remedy by appeal. *In re Bay Area Citizens Against Lawsuit Abuse*, 982 S.W.2d 371, 374-75 (Tex. 1998); *Canadian Helicopters Ltd. v. Wittig,* 876 S.W.2d 304, 306, 308-09 (Tex. 1994); *Bell Helicopter Textron, Inc. v. Walker*, 787 S.W.2d 954, 955 (Tex. 1990).

Defendants argue, however, that the probate court of Denton County's assertion of subject matter jurisdiction over a nationwide class action lawsuit involving carbon dioxide royalties from a Colorado pool shows "such disregard for guiding principles of law that the harm [is] irreparable." Defendants contend that they fall within the "exceptional circumstances" exception to the mandamus requirement that they must have no adequate remedy at law to obtain relief. *See Masonite*, 997 S.W.2d at 198. In *Masonite*, the supreme

court recognized a limited exception to the requirement that an individual relator must establish it has no adequate remedy at law to obtain mandamus relief. This limited exception occurs when the trial court's abuse of discretion builds "automatic reversible error" into a case, resulting in "blatant injustice" constituting an "irreversible waste of judicial and public resources." *Id.*

We hold that defendants do not fall within the "exceptional circumstances" exception. Unlike Masonite, these defendants are not being forced to defend against claims in sixteen improper venues. *Id.* at 196. Instead, in accordance with our holdings above, the Bench Trust's claims, Whiteis's claims, and Armor's claims against defendants will be transferred to Harris County, defendants' venue choice. Defendants will be required to defend the Bowdle Trust's claims in Denton County, but may challenge the trial court's venue ruling as to the Bowdle Trust in an appeal after entry of a final judgment. Additionally, the Shell and Mobil defendants have perfected appeals from the trial court's class certification order. If the certification order is incorrect, some interlocutory relief is available to them. For these reasons, we do not believe that the trial court's abuse of discretion, if any, has built in automatic reversible error resulting in blatant injustice constituting an irreversible waste of judicial and public resources. We deny defendants' petitions for writ of mandamus.

CONCLUSION

We summarize our disposition of these proceedings as follows:

(1) we dismiss for want of jurisdiction the Mobil defendants' appeal of the trial court's venue ruling concerning the Bowdle Trust and the appeals of the trial court's ruling on the pleas to the jurisdiction;

(2) we reverse the trial court's order denying defendants' motions to transfer venue of the Bench Family Trust's claims, Whiteis's claims, and Armor's claims, and remand these claims to the trial court with instructions that they be transferred to Harris County;

(3) we affirm the remainder of the trial court's order denying the motions to transfer venue; and

(4) we deny the Shell and Mobil defendants' petitions for writs of mandamus.

SUE WALKER
JUSTICE

PANEL A: CAYCE, C.J.; DAY and WALKER, JJ.

PUBLISH

[DELIVERED APRIL 5, 2001]