

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

FOSTER WHEELER LLC,

Petitioner,

v.

THE SUPERIOR COURT OF SAN
FRANCISCO COUNTY,

Respondent;

JERSEY GRAY et al.,

Real Parties in Interest.

A119429

(San Francisco County
Super. Ct. Nos. CGC 07-274042, CGC
05-440328)

BY THE COURT:¹

Petitioner Foster Wheeler LLC is the defendant in two separate asbestos cases that were consolidated for trial after voir dire had already begun in one of the cases. Two days after the court ordered the cases consolidated, petitioner filed a petition for writ of mandate seeking immediate relief from the trial court's order of October 16, 2007, consolidating the cases entitled *Jersey Gray and Shirley Gray v. Asbestos Defendants (B-P)*, San Francisco Superior Court Case No. CGC-07-274042 (hereafter *Gray* case) and *Judy Oxford, et al. v. Asbestos Defendants (B-P)*, San Francisco Superior Court Case No. CGC-05-440328 (hereafter *Oxford* case), for trial. Pending determination of the petition, we issued a temporary stay of the October 16 order consolidating the cases for

¹ Before Kline, P.J., Lambden, J and Richman, J.

trial and requested real parties in interest to file points and authorities in opposition to the petition. Plaintiff real parties in interest have filed a brief in opposition to the petition, and two defendant real parties in interest have filed briefs in support of the petition.

On October 9, 2007, the *Oxford* case was sent to Judge Tomar Mason in Department 608 for trial. The jurors had filled out questionnaires, been examined for hardship, and were to begin voir dire on October 16, 2007. Before the beginning of voir dire, the *Gray* case was also sent to Judge Mason for trial on October 16, 2007. The parties appeared before Judge Mason to discuss scheduling matters regarding both cases. At that time the *Oxford* case was a group of three wrongful death actions involving decedents who died from mesothelioma.² The *Gray* case is a personal injury action involving a plaintiff who is suffering from renal (kidney) cancer and his wife who is seeking damages for loss of consortium. The *Gray* case was granted trial preference on May 22, 2007, because of substantial medical doubt that Mr. Gray would survive beyond six months. Brayton Purcell, counsel for plaintiffs in both cases, asked the court to either send the *Gray* case back to the presiding judge for reassignment because of serious concerns that Mr. Gray would die soon, or to allow it to be tried first with the jury panel then being called, or failing those two options, to consolidate the *Oxford* and *Gray* cases for purposes of trial.

Judge Mason said she was “not in a position” to request the master calendar court to reassign the *Gray* case and stated that as between the available alternatives, advancing the *Gray* case or consolidating the cases, she was inclined to consolidate the two cases. Judge Mason does not appear to have seriously considered the option of advancing the *Gray* case. Indeed, she gave no reason for rejecting that option. Defense counsel in both cases objected to consolidating them, noting that they involve different diseases, work situations, and causes of action. Defense counsel asserted that there are serious causation issues in the *Gray* case that are not present in the *Oxford* case. Defense counsel urged

² The opposition brief filed by plaintiff real parties in interest states that the *Oxford* group of cases has since dropped to only the *Oxford* cause of action.

advancing the *Gray* case and trying it before the *Oxford* case. The court, however, reaffirmed its intention to consolidate the cases, finding that under Code of Civil Procedure section 1048, the actions involve a common question of law or fact and that a joint trial in these would be just and would tend to avoid unnecessary costs or delays. The court concluded that limiting instructions and instructions in general to the jury would allay the defense fears of prejudice.

Code of Civil Procedure section 1048, subdivision (a) provides: “When actions involving a common question of law or fact are pending before the court, it may order a joint hearing or trial of any or all the matters in issue in the actions; it may order all the actions consolidated and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay.” (Hereafter referred to as section 1048(a).) The decision whether to consolidate cases pursuant to section 1048(a) lies within the trial court’s discretion. (*Todd-Stenberg v. Dalkon Shield Claimants Trust* (1996) 48 Cal.App.4th 976, 978- 979.) Such discretion is not unlimited; it is subject to the legal principles governing the subject of its action and to reversal where no reasonable basis for the action is shown. (*Westside Community for Independent Living, Inc. v. Obledo* (1983) 33 Cal.3d 348, 355.)

Section 1048(a) is virtually identical to Federal Rule of Procedure 42(a), which was considered in *Malcolm v. National Gypsum Co.* (2d Cir. 1993) 995 F.2d 346, where the Second Circuit articulated the criteria commonly used by federal courts for evaluating whether the trial court had abused its discretion in consolidating asbestos cases: (1) common worksite, (2) similar occupation, (3) similar time of exposure, (4) type of disease, (5) whether injured workers are living or deceased, (6) status of discovery in each case, (7) whether all plaintiffs are represented by the same counsel, and (8) type of cancer alleged. (*Id.* at pp. 350-351.) Given the virtual identity of our statute and the federal rule, and the familiarity of courts and counsel in California with these criteria, we think it appropriate to employ them. (See *Hypertouch, Inc. v. Superior Court* (2005) 128 Cal.App.4th 1527, 1544.)

The only factor listed in *Malcolm* clearly supporting consolidation in this case is that the same counsel represents all plaintiffs.³ Virtually all other factors militate against consolidation. The worksites were different. Mr. Gray worked at a power plant, gas station and municipal buildings. Mr. Oxford worked in shipyards and bases and naval vessels. The occupations were different. Mr. Gray was a mechanic and custodian, whereas Mr. Oxford was a boiler tender. The times of exposure differed. Mr. Gray's exposure was between 1970-2006, and Mr. Oxford's was between 1963-1967. The types of disease are different. Mr. Gray has renal cancer, and Mr. Oxford died of mesothelioma. One victim is living and the other is dead. The types of cancer are also different. Mesothelioma and renal cancer have different etiology and pathology, and there appears to be a substantial question regarding causation in the *Gray* case.

Given the predominance of dissimilar issues in this case and the absence of any meaningful consideration to the option of trying the *Gray* case first, we conclude that the trial court abused its discretion in ordering the cases consolidated for trial. We are not convinced that instructions to the jurors will be sufficient to dispel the potential prejudice to the defendants from having one jury try these two cases with issues involving different diseases, different exposure sites, different time periods, and damage claims. An additional aspect of prejudice to the defendants is the time and expense incurred from having to sit through lengthy portions of a trial in which they have no involvement. At least two of the defendants are involved in only one of the trials.

We have reached our decision after notice to all parties that we might act by issuing a peremptory writ in the first instance. (*Palma v. U.S. Industrial Fasteners, Inc.* (1984) 36 Cal.3d 171, 177-189.) The entitlement to relief is obvious and there is a compelling need for immediate action. (See *Alexander v. Superior Court* (1993) 5 Cal.4th 1218, *Ng. v. Superior Court* (1992) 4 Cal.4th 29.) Accordingly, let a peremptory writ of mandate issue commanding respondent court to vacate its order consolidating its order of October 16, 2007, consolidating for purposes of trial *Judy*

³ There appeared to be some dispute about the status of discovery.

Oxford, et al. v. Asbestos Defendants (B-P), San Francisco Superior Court Case No. CGC-05-440328, with *Jersey Gray, et. al. v. Asbestos Defendants (B-P)*, San Francisco Superior Court Case No. CGC-07-274042. The temporary stay of the order previously imposed is hereby dissolved. Petitioner is awarded costs. (Cal. Rules of Court, rule 8.490(m).) Our decision is final as to this court immediately. (See Cal. Rules of Court, rule 8.264(b)(3).)