18-C-272

IN THE SUPREME COURT OF THE STATE OF LOUISIANA

EMMA BRADFORD, ET AL.,

Plaintiffs/Respondents,

v.

CITGO PETROLEUM CORPORTATION, ET AL.,
Defendants/Petitioners.

On Writ of Review to the Court of Appeal, Third Circuit, Parish of Calcasieu, No. 17-296 consolidated with 17-297 through 17-321

BRIEF OF *AMICI CURIAE* THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND NATIONAL ASSOCIATION OF MANUFACTURERS IN SUPPORT OF THE WRIT APPLICATION

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

TABLE OF AUTHORITIES
(continued)

Page(s)

Other Authorities

INTEREST OF THE *AMICI CURIAE*[1]

The Chamber of Commerce of the United States of America ("the Chamber") is the world's largest business federation. It represents 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before the courts, Congress, and the Executive Branch. To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of vital concern to the nation's business community.

The National Association of Manufacturers ("NAM") is the largest manufacturing association in the United States, representing small and large manufacturers in every industrial sector and in all 50 states. Manufacturing employs more than 12 million men and women, contributes $2.25 trillion to the U.S. economy annually, has the largest economic impact of any major sector and accounts for more than three-quarters of all private-sector research and development in the nation. NAM is the voice of the manufacturing community and the leading advocate for a policy agenda that helps manufacturers compete in the global economy and create jobs across the United States.

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[1] No party or counsel for a party in the pending appeal authored the proposed *amicus* brief in whole or in part or made a monetary contribution intended to fund the preparation or submission of the brief. No person or entity, other than the *amici curiae*, their members, and their counsel, made a monetary contribution intended to fund the preparation or submission of this brief.

The decision of the Court of Appeal is of concern to the *amici* because it represents a dangerous departure from the traditional requirement that a plaintiff alleging harm from an environmental release must produce reliable evidence establishing that he actually experienced a harmful exposure to the chemical released by the defendant. Abandoning that requirement, the Court of Appeal inferred that the plaintiffs in this case must have been exposed to chemicals released from CITGO's refinery and that the extent of their exposure was sufficient to cause their symptoms because (1) the trial judge deemed plaintiffs' non-expert representations that they were exposed to be "credible" and (2) the symptoms to which plaintiffs testified were consistent with some level of exposure.

The Chamber and NAM have a significant interest in obtaining this Court's review and reversal of that aberrant decision. If the Court of Appeal's decision is allowed to stand, the *amici*'s members in the energy, manufacturing, and chemical sectors—among other sectors of Louisiana's economy—would face dramatically expanded liability in Louisiana from any industrial incident without proof of an actual harm or threat. This not only is a disincentive to doing business in Louisiana—as opposed to surrounding states where plaintiffs still must prove an actual harmful exposure through reliable expert testimony in order to recover—but creates a legal regime that separates tort liability from proof of harm.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Court of Appeal's decision would open the purse strings of a business that experiences an environmental release for any individual in the vicinity who can tell a "credible" story about seeing or smelling a chemical and experiencing everyday symptoms consistent with exposure. Under this approach, testimony that a plaintiff "noticed a bad smell and saw a sheen or rainbow effect on the water" (Op. 21), is sufficient to establish a direct causal link from a defendant's release to the plaintiff's alleged injuries. Details such as whether the release actually reached the plaintiff and, if it did, whether the concentration of chemicals at that point was sufficient to cause the health effects of which the plaintiff complains (or any health effects at all) no longer matter. Liability no longer is limited to claims that can be proved through reliable scientific methods, but now includes the claims of anyone for whom the trial judge—trying the case without a jury thanks to the plaintiffs' strategy of seeking no more than $50,000 (each) in damages—chooses to provide compensation. Given the geographic scope of many environmental releases, and the number of people who could claim to be "in the vicinity" of such releases, the financial repercussions of the legal regime endorsed by the Court of Appeal are potentially enormous.

By allowing plaintiffs to substitute lay testimony for expert scientific testimony or other reliable evidence establishing a harmful exposure, the Court of Appeal deviated from settled principles of tort law. The Court of Appeal's approach

of permitting compensation without scientifically reliable proof of causation is decidedly at odds with both prior precedent under Louisiana law and the traditional system of law—designed to afford fairness and accuracy to ***all*** parties—still followed in neighboring jurisdictions.

ARGUMENT

I. Expert Testimony Establishing A Harmful Exposure Is Necessary To Prove Causation In An Environmental-Release Case.

A. The Court of Appeal's opinion is at odds with fundamental principles of tort law.

It has long been settled law that "scientific knowledge of the harmful level of exposure to a chemical, plus knowledge that the plaintiff was exposed to such quantities, are minimal facts necessary to sustain the plaintiffs' burden in a toxic tort case." *Allen v. Penn. Eng'g Corp.*, 102 F.3d 194, 198-99 (5th Cir. 1996). This is because any personal-injury plaintiff bears the burden of proving a causal relationship between his injuries and the defendant's actions. In toxic-tort cases, plaintiffs must prove both "general causation"—*i.e.*, that a substance is capable of causing the alleged injury or condition—and "specific causation"—*i.e.*, that a substance attributable to the defendant actually caused the plaintiff's injury. *See, e.g.*, *Aaron v. McGowan Working Partners*, 16-696 (La. App. 5 Cir. 6/15/17) 223 So. 3d 714, 735. To meet this burden, toxic-tort plaintiffs generally must produce "evidence from an expert on (1) whether the disease (or injury) can be related to chemical exposure by a biologically plausible theory; (2) whether the plaintiff was

exposed to the chemical in a manner that can lead to absorption in the body; and (3) whether the dose the plaintiff was exposed to is sufficient to cause the disease (or injury)." *Baker v. Energy Transfer Co.*, 2011 WL 4978287, *5 (Tex. Ct. App. 2011).

In *Arabie v. CITGO Petroleum Corp.*, 2010-2605 (La. 3/13/12) 89 So. 3d 307, this Court found sufficient evidence that injuries suffered by plaintiffs who worked for weeks surrounded by the slop oil released from CITGO's refinery were attributable to the release. *Id.* at 320-22. In *Arabie*, however, it was undisputed that the plaintiffs had been exposed to slop oil and they presented expert testimony that, among other things, "plaintiffs were exposed to levels of benzene, hydrogen sulfide, and sulfur dioxide above regulatory limits" and "that their exposure took place over a period of weeks." *Id.* at 321. In those circumstances, the Court held that those plaintiffs had proved an exposure sufficient to cause their symptoms "even though that determination is not supported by air monitoring data"—*i.e.*, even though they did not have contemporaneous measurements of their exposure levels. *Id.* at 322. The Court did not, however, dispense with the traditional tort-law requirement that plaintiffs alleging a toxic exposure must prove that their injuries were caused by the defendant through reliable evidence of a harmful exposure to a chemical released by the defendant.

Other courts routinely have granted summary judgment for defendants in cases in which the plaintiff alleges harm from an environmental exposure but fails to produce reliable expert testimony establishing a harmful exposure to the

chemical because "[t]he requirement of expert testimony" in such cases "is obvious." *Baker*, 2011 WL 4978287, at *6 (affirming summary judgment for defendant because plaintiffs offered no reliable expert testimony on exposure and dose).

For example, the U.S. Court of Appeals for the Third Circuit affirmed summary judgment for the defendant in a case arising out of the nuclear reactor accident at Three Mile Island because the plaintiffs failed to produce reliable expert testimony that they were exposed to sufficient radiation to cause their alleged injuries. *In re TMI Litig.*, 193 F.3d 613, 716 (3d Cir. 1999). As the court noted, "[t]he District Court's grant of summary judgment in favor of the defendants was the inevitable result of its exclusion of the testimony of the Trial Plaintiffs' dose exposure witnesses." *Id.*

The Eighth Circuit also has entered a defense judgment when the plaintiff failed to produce reliable expert testimony on exposure and dose, explaining: "At a minimum, we think that there must be evidence from which the fact-finder can conclude that the plaintiff was exposed to levels of that agent that are known to cause the kind of harm that the plaintiff claims to have suffered." *Wright v. Willamette Indus., Inc.*, 91 F.3d 1105, 1107 (8th Cir. 1996).

State courts too regularly follow this rule. *See, e.g.*, *Abraham v. Union Pac. R.R.*, 233 S.W.3d 13, 22 (Tex. Ct. App. 2007) ("A plaintiff must prove the level of exposure using techniques subject to objective, independent validation in the scientific community."); *Richardson v. Union Pac. R.R.*, 386 S.W.3d 77, 99 (Ark. Ct.

App. 2011) (affirming judgment for defendant following exclusion of plaintiff's specific-causation expert: "The fact that some studies showed that higher levels of benzene could cause multiple myeloma does not prove that the lower levels of that chemical found in diesel exhaust and fuel played a role in causing appellant's disease. Appellant produced no reliable data of his actual exposure to diesel exhaust or benzene."); *Missouri Pac. R.R. v. Navarro*, 90 S.W.3d 747, 756-57 (Tex. Ct. App. 2002) (reversing jury verdict and entering judgment for defendant after excluding expert testimony estimating plaintiff's level of exposure to diesel fumes as unreliable).

Indeed, federal courts applying Louisiana law have regularly dismissed toxic-exposure claims—including claims arising out of the release from CITGO's refinery at issue here—when the plaintiff failed to produce reliable expert testimony establishing a harmful exposure:

- *Shanley v. Chalmette Refining, LLC*, 2014 WL 6835771, at *4 (E.D. La. 2014) (dismissing claims of bellwether plaintiffs in case arising out of refinery release because, unlike the plaintiffs in *Arabie*, they did not produce reliable expert testimony establishing their exposure to harmful levels of released chemicals);
- *Blakely v. CITGO Petroleum Corp.*, 737 F. Supp. 2d 599, 602-04 (W.D. La. 2010) ("while plaintiff alleges that he was exposed to 'toxins' in the oil, he makes no attempt to identify what these alleged toxins were or to quantify

his level of exposure"; "plaintiff fails to offer any evidence that he was exposed to levels that would be capable of causing any injury");

- *Leija v. Penn Maritime, Inc.*, 2009 WL 211723, at *2-3 (E.D. La. 2009) (entering judgment for defendant following exclusion of causation expert in part because "there is no evidence that [expert] had any evidence of plaintiff's level of occupational exposure");
- *Molden v. Georgia Gulf Corp.*, 465 F. Supp. 2d 606, 611-13 (M.D. La. 2006) ("In a tort action for personal injury in Louisiana, a plaintiff must establish by a preponderance of the evidence that it is more probable than not that the personal injury of which he complains was caused by the defendant's conduct. In exposure cases, it is clear that the causation element requires scientific evidence. … Plaintiffs in the instant case have failed to introduce evidence of exposure to a harmful level of phenol or any other hazardous substance to create a material issue of fact in dispute.");
- *Atkins v. Ferro Corp.*, 534 F. Supp.2d 662, 666 & n.5 (M.D. La. 2008) ("plaintiffs have not produced any expert testimony or report to establish" that they "were actually exposed to a harmful level of the chemical" because their expert testified that fire at plant resulted in a "plume" that traveled to plaintiffs' location but could not identify concentration of chemicals in that plume when it reached plaintiffs).

All of these cases now stand in stark contrast to the approach endorsed by the Court of Appeal, under which recovery in a toxic-exposure case may be based entirely on the plaintiff's "credible" assertion that he or she may have been exposed to some level of toxin and has symptoms consistent with exposure. That is, according to the Court of Appeal, once the plaintiff has produced evidence of general causation—*i.e.*, that the released chemical can, at a sufficient exposure level, cause the symptoms of which the plaintiff complains—then the plaintiff need only tell a good story about being in the general vicinity of the release and seeing or smelling something consistent with exposure. Such a regime improperly ignores the traditional proof required of plaintiffs in toxic-exposure cases and places Louisiana at odds with not only its own prior case law, but also the traditional tort jurisprudence still followed by neighboring jurisdictions.

B. The only authority cited by the Court of Appeal does not support relieving plaintiffs of their traditional burden of proving a harmful exposure through reliable expert testimony.

In concluding that reliable expert testimony establishing a harmful exposure is not necessary, the Court of Appeal relied exclusively on the observation that lay testimony can be sufficient to prove a harmful exposure in an asbestos case involving a plaintiff diagnosed with mesothelioma. *See* Op. 6-7 (quoting *Bell v. Foster Wheeler Energy Corp.*, 2017 WL 889083, *2-3 (E.D. La. Mar. 6, 2017)); *see also* Op. 22-23 (again citing *Bell*). Asbestos cases present a unique legal context, however, given the strong association between exposure to asbestos and some forms

of diseases like asbestosis and mesothelioma. Moreover, while lay witnesses sometimes can identify which defendant's asbestos-containing product the plaintiff used, lay witnesses generally are unqualified to identify a specific chemical in the environment, let alone its source. Notably, even in the asbestos context, expert testimony often is necessary to establish that the plaintiff experienced a harmful exposure from his or her use of a particular product. *See, e.g.*, *Borg-Warner Corp. v. Flores*, 232 S.W.3d 765, 769-74 (Tex. 2007) (entering judgment for defendant because plaintiff failed to produce expert testimony that exposure to defendant's product in particular was a substantial factor in causing his mesothelioma); *Butler v. Union Carbide Corp.*, 712 S.E.2d 537, 544 (Ga. Ct. App. 2011) ("Causation is an essential element of a toxic tort case, and proof of causation in such cases 'generally requires reliable expert testimony.' Absent reliable expert testimony that exposure to a Union Carbide product contributed to the development of Mr. Butler's mesothelioma, there is insufficient evidence to create a jury issue as to causation.").

In a wide spread environmental-release case like this, in contrast, lay testimony is inadequate to prove exposure to any of the substances involved in the release at issue, and the symptoms of which the plaintiffs complained are not uniquely associated with exposure to the chemicals released from CITGO's refinery.

1. The evidence of exposure that the trial court found to be "credible" consisted of the plaintiffs' lay impressions of smells and "films" that they claimed to see on water. For example, the court found that one plaintiff had proved exposure

to chemicals from CITGO's refinery because she said that she "smelled a strong odor and saw dead fish in the water." Op. 22. Another plaintiff's evidence consisted of testimony that she "noticed a bad smell and saw a sheen or rainbow effect on the water." Op. 21.

None of the plaintiffs, however, claimed to have expertise in identifying chemicals based on smell or sight. And even setting aside questions of credibility and reliability, there are many things that could have caused a film to appear on water or a bad smell in the air. Notably, there are numerous industrial sites in the vicinity. Indeed, one of the plaintiffs admitted that he could not "pinpoint" the odor on which he based exposure "because there were daily odors in the area of the refineries," referring to the multiple refineries in the area. Op. 28. Yet that plaintiff's admitted inability to attribute the odor he smelled to a chemical released from CITGO's refinery did not stop the Court of Appeal from finding his testimony sufficient to prove exposure to chemicals from CITGO's release. Even plaintiffs who gave testimony affirmatively inconsistent with exposure to chemicals released by CITGO were found to have met their burden of proof—for example, one plaintiff said that she smelled ammonia, which is not consistent with the chemicals released from CITGO's refinery, so the court ignored that testimony and simply focused on the fact that her symptoms were consistent with exposure. Op. 18.

Moreover, even if the plaintiffs' testimony about smells and films on water were a reliable way of identifying chemicals attributable to the release from

CITGO's refinery, that testimony would be inadequate to establish that a particular plaintiff received a harmful exposure. Notably, most of the plaintiffs were awarded damages for weeks or months of symptoms following an alleged exposure that lasted minutes and occurred miles from the release site and in some cases days after the release. The Court of Appeal's opinion ignores the question whether these alleged exposures, even if attributable to CITGO's release, resulted in exposure levels sufficient to have such long-lasting health effects.

2. The symptoms of which the plaintiffs complain—headaches, dizziness, throat and eye irritation, vomiting, diarrhea, fatigue (*see* Op. 17-22, 28-33)—cannot be uniquely attributed to exposure to slop oil or hydrogen sulfide and sulfur dioxide gasses. On the contrary, they are common health complaints with numerous everyday causes. Indeed, many of the plaintiffs alleged only that their exposure aggravated symptoms that they already were experiencing due to other causes. *See, e.g.*, Op. 18 (plaintiff alleged aggravation of "pre-existing respiratory problems"); 21 (plaintiff "had some of these symptoms prior to the exposure"); 29-30 (plaintiff "admitted to have [headaches] prior to her exposure").

In sum, the health conditions at issue here have many potential causes and cannot be uniquely attributed to any particular type of exposure. Moreover, lay witnesses' impressions are wholly inadequate to reliably identify the chemical to which a plaintiff is exposed, let alone identify the entity responsible for that

chemical and the quantity of the chemical to which the plaintiff was exposed. In cases like this, reliable expert testimony is necessary to prove that the plaintiff actually was exposed to chemicals released by the defendant in sufficient quantities to cause the symptoms of which the plaintiff complains.

II. The Court Of Appeal's Decision Imposes Liability Without Proof Of Responsibility And Is Thus Harmful To The Businesses That Drive Louisiana's Economy.

Although the Court of Appeal's ruling may have repercussions for other areas of tort law, it will have an obvious and immediate effect on those industries that occasionally experience industrial accidents that result in the release of chemicals into the environment. Most obviously, the Court of Appeal's ruling will have a significant effect on risk exposure in the energy, manufacturing, and chemical sectors. Those industries, which will bear the brunt of the expanded liability created by the Court of Appeal's ruling, are the very sectors that are driving Louisiana's economy.

The energy sector in Louisiana employs approximately 300,000 people, with a payroll that directly contributes $20 billion in income to Louisiana's economy each year (over 10% of the total income earned in the state). *See* Loren C. Scott, *The Energy Sector: Still A Giant Economic Engine For The Louisiana Economy*, www.lmoga.com/assets/2014_Loren_Scott_Economic_Impact_Study_FINAL.pdf. The industry also pays billions of dollars in state and local taxes, licenses, and fees each year and alone accounts for a significant share of the State's tax revenues. *Id.*

Louisiana currently ranks second among the states in oil production, natural gas production, and refining capacity. *Id.*

The manufacturing sector directly employs over 136,000 people in Louisiana. *See* NAM, *Louisiana Manufacturing Facts*, www.nam.org/Data-and-Reports/State-Manufacturing-Data/2014-State-Manufacturing-Data/Manufacturing-Facts--Louisiana/. The nearly 3,000 manufacturing firms in the state account for over 20% of Louisiana's gross state product. *Id.*

The chemical industry in particular accounts for 23,000 direct jobs and over 125,000 related jobs in Louisiana, directly paying $2.2 billion in payroll each year. *See* American Chemistry Council, *Louisiana*, ex.democracydata.com/ACHEMC/sites/ImpactChem/docs/Louisiana.pdf. Companies in the chemical industry pay $670 million in state and local taxes each year within Louisiana. *Id.* Louisiana currently is the second largest chemical producing state. *Id.*

These industries are the driving forces behind economic prosperity and growth in Louisiana. Attracting and retaining businesses within these sectors is critical to the future economic prospects of the state and its citizens. Yet the Court of Appeal has adopted legal principles that unfairly disadvantage these industries. It has removed the traditional burden of proof placed on plaintiffs claiming injury from an environmental release of chemicals, relieving plaintiffs of the duty to produce reliable evidence from a qualified expert establishing actual exposure to chemicals from the release in sufficient quantities to cause the harm for which they

are seeking compensation. Now, such plaintiffs can exact tens of thousands of dollars from a business (and hundreds of thousands or millions in the aggregate) merely by claiming symptoms consistent with exposure to a released chemical (at some exposure level) and telling a "credible" story about seeing or smelling a chemical.

The awards to individual plaintiffs may be modest, but the cumulative effect of this legal regime is potentially enormous. The 20 plaintiffs in this appeal who received awards without establishing actual exposure to chemicals from CITGO's release or exposure to amounts of those chemicals sufficient to cause the symptoms of which they complained received over a quarter million dollars in total. And this is only a small part of the ongoing process for issuing awards arising out of the CITGO release based on judicial assessment of the credibility of the stories told by the claimants.

Moreover, the environmental release of chemicals often affects a large geographic area, even though the concentrations of chemicals present in most of that area may not be significant enough to affect human health. In the Lake Charles metropolitan area, for example, there are likely tens of thousands of people who could plausibly claim to be within the geographic boundaries of a release from one of the numerous refining or manufacturing firms along the Calcasieu River—even if that release does not cause any actual harm. The same is true for many cities in parishes across the state. If the Court of Appeal's ruling becomes accepted

law, the next release from one of Louisiana's energy, manufacturing, or chemical firms is likely to result in many opportunistic (or simply mistaken) claims by individuals suffering from common ailments who testify that they saw or smelled chemicals following the release. Without the requirement of reliable expert testimony, and with sizeable payouts available, the legal regime endorsed by the Court of Appeal is an invitation to systematic abuse.

This Court should act to restore traditional rules of tort law, require environmental tort plaintiffs to prove an actual harmful exposure through reliable expert testimony, and send a message to the critical energy, manufacturing, and chemical industries that all parties are treated fairly before the law in Louisiana.

CONCLUSION

The writ application should be granted and the decision of the Court of Appeals reversed.

Dated: February 9, 2018

Respectfully submitted.

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CERTIFICATE OF SERVICE

I, hereby certify that on February 9, 2018, I electronically filed the foregoing with the Clerk of Court by using the CM/ECF system which will send a notice of the electronic filing to counsel of record. I further certify that I mailed the foregoing document and the notice of electronic filing by first-class mail to the following non-CM/ECF participants:

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