JONES WALKER

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The Jones Walker Energy E*Zine reviews and discusses developments in the energy industry, with a particular focus on matters that affect Louisiana. It addresses all legal disciplines within the energy industry, including the exploration and production of oil, gas, and other hydrocarbons; as well as the processing, marketing, and valuation of these products.

THE TEXAS SUPREME COURT, DECIDING AN ISSUE OF FIRST IMPRESSION, GRANTS MANDAMUS IN A DISCOVERY DISPUTE RESULTING IN THE PROTECTION OF TRADE SECRET EVALUATIONS AND RECOMMENDATIONS CONCERNING OIL AND GAS PROSPECTS

In Re Hal G. Kuntz, No. 02-0375 (Tex. December 19, 2003, orig. proceeding)

In post-divorce proceedings initiated by an ex-wife, a Texas trial court ordered Hal Kuntz, the ex-husband, to produce in unredacted form all "positive" letters of recommendation on oil and gas prospects generated during the couple's fifteen and one-half year marriage. The responsive documents, which numbered in the thousands, contained trade secret evaluations and recommendations concerning the oil and gas prospects. Although McMoRan Oil & Gas, L.L.C. ("McMoRan") owned the letters of recommendation, its primary geophysical and geological consultant, CLK Company, L.L.C. ("CLK"), prepared and possessed them. Hal Kuntz, as a member and general manager of CLK, had access to the letters of recommendation ("LORs"). The ex-wife asserted that her ex-husband had failed to pay her a contractually specified percentage of overriding royalty interests resulting from assignments of the interests to him in connection with recommendations contained in LORs prepared during their marriage.

Unlike the Fourteenth Court of Appeals for the State of Texas, which denied Hal Kuntz's request for mandamus relief, the Texas Supreme Court conditionally granted the extraordinary remedy of mandamus, directing the trial court to vacate its discovery order. In doing so, the Texas Supreme Court noted that the consulting agreement between McMoRan and CLK provided that the LORs belonged exclusively to McMoRan and prohibited their disclosure without McMoRan's written consent and further that CLK's operating agreement obligated Hal Kuntz to maintain their confidentiality and prohibited their disclosure without the written consent of CLK's board.

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The Texas Supreme Court's decision to grant mandamus turned on its interpretation of the standard set forth in Texas Rule of Civil Procedure 192.7 (b) for obtaining discovery, requiring a party to produce documents in his "possession, custody, or control." Agreeing with Hal Kuntz and with McMoRan, as amicus, the Texas Supreme Court held that Hal Kuntz's "mere access" to the LORs failed to satisfy the "possession, custody, or control" standard. The court also observed that requiring Hal Kuntz to produce the documents would force him to violate the CLK/McMoRan consulting agreement and CLK's operating agreement, subjecting him to significant damages.

Two concurring opinions were issued. In the first, four Justices agreed that Hal Kuntz did not have "possession, custody, or control" of the LORs. The concurring Justices further concluded that the trial court erred in ordering disclosure of the LORs to the ex-wife because the documents "are privileged trade secrets under Rule 507 of the Texas Rules of Evidence," finding that the ex-wife had failed to establish, "as she must, that they are essential to the fair adjudication of her claims." Noting that the trial court had concluded that the LORs constituted privileged trade secrets, the concurring Justices observed that the ex-wife had not shown that the trial court erred in its trade secret determination.

Examining the ex-wife's failure to sustain her burden to overcome the trade secret privilege, the concurring Justices rejected her argument that she needed the LORs for a fair adjudication of her claims, pointing to her acknowledgment that McMoRan would not drill all or even most of the prospects covered by the LORs. They therefore found that the ex-wife had not provided adequate justification for "the disclosure of a large amount of privileged information" that she "concedes is completely irrelevant to her claims, since most LORs will never be a basis of payments to Hal" Kuntz. Concluding, the Justices added that the ex-wife's failure to satisfy her burden to show that the trade secrets were necessary to a fair adjudication of her claims provided another reason to direct the trial court to set aside its discovery order.

The second concurrence by one Justice noted that the trial court had been "asked to balance a myriad of interests" and that the ex-wife's attempt to obtain the documents from Hal Kuntz rather than McMoRan further complicated the matter. While agreeing with the majority opinion, the concurring Justice stressed further: "I do not disagree with the implication in the opinion of the Court that the documents should be obtained, if at all, from" McMoRan.

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As reported in the January 5, 2004 edition of the Texas lawyer, the *Kuntz* mandamus decision is expected to have a far-reaching effect on Texas discovery with respect to its distinction between "access" and "possession, custody or control." Jones Walker represented McMoRan as amicus in the lower Texas courts and before the Texas Supreme Court.

By Alida C. Hainkel

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LOUISIANA FIRST CIRCUIT REINSTATES RELATIVELY MODEST JURY AWARD IN OIL AND GAS PROPERTY RESTORATION CASE AND DENIES LANDOWNERS' REQUEST FOR REHEARING AND REMAND, FINDING ACT 1166, THE "CORBELLO" LEGISLATION, INAPPLICABLE

***Simoneaux v. Amoco Production Co.*, 2002-1050, 2003 La. App. Lexis 2581 (La. App. 1 Cir. 9/26/03); rehearing denied, 2002-1050, 2003 La. App. Lexis 3310 (La. App. 1 Cir. 12/4/03)**

The Louisiana First Circuit Court of Appeal found that a trial judge committed legal error when he overturned a jury award of $375,000 in oilfield remediation costs and entered his own judgment of nearly $13,000,000 for the plaintiffs. Holding that the trial judge improperly substituted his own evaluation of the case for that of the jury, the First Circuit reinstated the jury verdict.

In this suit plaintiffs owned property in the Napoleonville Field in Assumption Parish that had been leased to various entities that conducted oil and gas exploration and production activities on the property over a number of years. Plaintiffs contended their property had been contaminated by the lessees' use of earthen pits to contain various oilfield wastes. According to plaintiffs and their experts, hazardous wastes had migrated from the pits into surrounding areas. Plaintiffs sought money damages to have their property restored to its original condition as well as personal injury damages for their claimed fear of contracting cancer and other illnesses.

After hearing conflicting opinions from experts on both sides the jury returned a verdict finding that only one of seven contested sites required cleanup. The jury awarded $375,000 for costs of restoration and declined to award anything for fear of future illness.

The plaintiffs moved for judgment notwithstanding the verdict asking the trial judge to increase the jury award. The trial judge granted the motion finding that all seven well sites were contaminated. In doing so, he entered an award of almost $13,000,000. The defendants appealed.

The defendants raised an initial question concerning whether the plaintiffs had the right to bring such a suit without first seeking the intervention of certain Louisiana administrative agencies. Relying on the Louisiana Supreme Court's recent decision in *Corbello v. Iowa Production*, the First Circuit held that the private landowner plaintiffs had a right to sue directly for remediation of oilfield sites without first seeking administrative relief before the Louisiana Office of Conservation or the Louisiana Department of Environmental Quality.

The First Circuit then turned to the trial court's decision to grant the plaintiffs' motion for judgment notwithstanding the verdict. The court reviewed in detail the testimony of plaintiffs' experts and defendants' experts.

Based upon results of testing done by ICON Environmental Services, plaintiffs' three experts testified that there was widespread contamination in the Napoleonville Field

and that remediation was necessary to prevent further spread into the aquifer and to protect human health. One of plaintiffs' experts estimated the costs of cleanup as being between $21 and $33.5 million.

Defendants' expert witnesses disagreed with plaintiffs' experts on every point, including the existence of contamination, whether remediation was even necessary, and, if so, the extent of the remediation. According to the defense witnesses the plaintiffs' property met Louisiana's regulatory guidelines for oilfield wastes. One expert even testified that the Napoleonville Field was the lowest risk site he had ever evaluated. Other defense witnesses criticized the plaintiffs' remediation plan, which required the removal of 1.25 million cubic yards of dirt, questioning whether such a massive excavation plan could even be approved by the Department of Natural Resources.

One defense expert, an environmental engineer, acknowledged there was some surface damage to the property around one of the pits. He recommended excavating this one pit and placing wells strategically around the site to monitor the aquifer. The cost of this plan was $375,000. Some of the other defense witnesses agreed that this plan was an appropriate protective measure, while still others thought even this was overkill.

The jury rendered their verdict by means of special interrogatories with the jury finding that only one site merited cleanup and awarding exactly $375,000, in accordance with the testimony of the defendants' environmental engineer.

The First Circuit Court of Appeal found that the jury verdict was substantially consistent with the testimony of the defense experts, indicating that the jury believed them and not the plaintiffs' experts. Noting that the trial judge improperly substituted his own credibility determinations for those of the jury, the First Circuit reversed the trial judge's entry of judgment notwithstanding the verdict. In ruling on a such a motion, the trial court must answer the question: do the facts and inferences point so strongly and overwhelmingly in favor of the moving party that reasonable persons could not arrive at a contrary verdict? If a reasonable juror in the exercise of impartial judgment could have reached the conclusion that the jury did, the motion should not be granted:

> [The finding of the jury] was entirely reasonable based on the evidence, and is supported by the testimony of Mr. Stover, Dr. Deuel, Dr. Frazier, Dr. Droy and Mr. Pisani. Their collective testimony established that: (1) there was no hazardous contaminant at any of the seven well sites posing a risk of harm requiring removal; (2) the only constituent presenting any problem at the site was excess salt; (3) the only site requiring remediation was Simoneaux 1, where the centralized facility had been located, and where nearly all of the testimony for both sides at trial was focused; and (4) the cost to repair the salt damage was $375,000.00. In this case, the defense experts refuted plaintiffs' experts' testimony on the necessity, method and cost of cleanup of the Napoleonville Field. The jury weighed the evidence and accepted the defense witnesses' testimony. Because a reasonable jury could clearly have found that only one site required remediation and the cost of that cleanup was $375,000.00, the judge was not empowered to substitute his own evaluation of the evidence to overturn the damage award.

Thus, the First Circuit reinstated the jury verdict.

After the First Circuit reinstated the jury verdict, the landowners applied for rehearing and sought remand. In requesting remand, the landowners relied upon Act 1166 of 2003, urging that Act 1166 obligated the First Circuit to remand the matter to the trial court for a determination of an appropriate remediation plan to address ground water contamination.

The Louisiana Legislature enacted Act 1166 in reaction to the decision rendered by the Louisiana Supreme Court in *Corbello v. Iowa Production*, 2002-0826 (La. 2/25/03), 850 So.2d 686, *reh'g granted in part for clarification* (La. 6/20/03). In *Corbello*, the Louisiana Supreme Court affirmed a $33 million property restoration damage award against a surface lessee based on the lessee's failure to restore the property it leased to its original condition. In affirming the award, the Louisiana Supreme Court rejected the argument that the private award erroneously included $28 million for "public" injury to the Chicot Aquifer. Even though the plaintiff landowners had no legal duty to use the award to remediate the ground water contamination, the court found that the Oilfield Site Restoration Law, La. R.S. 30:80, *et seq.*, did not preclude a private landowner's right to seek redress against an oil company. Immediately following *Corbello*, the legislature enacted Act 1166 to address litigation involving claims seeking damages for remediation of "usable ground water." Generally, Act 1166 requires party seeking damages for ground water contamination to notify the Louisiana Department of Natural Resources ("DNR") and the Louisiana Department of Environmental Quality ("DEQ"), granting the agencies the opportunity to intervene in the litigation. It also requires a court that finds that ground water contamination exists to adopt a plan for remediation and to seek input from DNR and DEQ in adopting the plan. The Act further requires the courts to administer and hold in escrow in the court registry the funding for the remediation and to issue all orders necessary to ensure that the funds are actually expended for the evaluation and remediation of the contamination. The Act additionally specifies that it is to be applied retroactively (with certain exceptions) to all cases filed after August 1, 1993.

Seeking to take advantage of the new legislation, the *Simoneaux* plaintiffs contended that the trial court had determined that contamination existed requiring evaluation or remediation to protect usable ground water, thus triggering the procedural requirements of Act 1166. Requesting remand, plaintiffs argued that the Act required the trial court to adopt a plan to protect usable ground water after receiving and examining proposed plans from all parties and DNR and DEQ.

Denying, with written reasons, the *Simoneaux* plaintiffs' application for rehearing and request for remand, the First Circuit concluded that the provision contained in Act 1166 requiring a trial court to adopt the most feasible plan to protect usable ground water "requires a finding by a court that contamination exists which poses a threat to public health requiring an evaluation or remediation to protect usable ground water." Disagreeing with plaintiffs' argument that the Act applied, the court observed that "A finding of liability by the jury does not equate to ground water contamination or automatically trigger the provisions of the Act." The court stressed that the jury finding of liability failed to satisfy the Act's requirement that there by a "judicial determination that contamination exists." Accordingly, the court found Act 1166 inapplicable.

Dissenting in part, Judge Fitzsimmons opined that the trial court's findings concerning ground water triggered the provisions of Act 1166 requiring the trial court to consider and adopt a remediation plan.

Although Act 1166 specifies that it is to be applied retroactively, the First Circuit's denial of plaintiffs' request for rehearing and remand indicates that Louisiana courts may be reluctant to find that the Act applies to matters that were tried before the enactment of Act 1166. Meanwhile, in the flood of cases that have been filed following *Corbello* and the enactment of Act 1166, many plaintiff landowners, although seeking recovery of damages related to ground water contamination, disclaim application of Act 1166 by pleading that they do not seek to recover damages for contamination of "usable" ground water. The courts' treatment of this pleading tactic remains to be seen.

By Madeleine Fischer and Alida C. Hainkel

Remember that these legal principles may change and vary widely in their application to specific factual circumstances. You should consult with counsel about your individual circumstances. For further information regarding these issues, contact:

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