

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

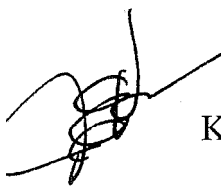
NUMBER 2004 CA 0988

JAN 11 2006

MSOF CORPORATION AND JAY PAUL LEBLANC

VERSUS

EXXON CORPORATION, EXXON CHEMICAL COMPANY, U.S.S. CHEMICAL COMPANY, COPOLYMER RUBBER AND CHEMICAL CORPORATION, UNIROYAL CORPORATION, DOW CHEMICAL COMPANY, ETHYL CORPORATION, SHELL CHEMICAL CORPORATION, AMERICAN HOECHST CO. (f/k/a FOSTER GRANT COMPANY), ALLIED CHEMICAL CORPORATION, RUBICON CHEMICAL COMPANY, PETRO PROCESSORS OF LOUISIANA, INC., ROLLINS ENVIRONMENTAL SERVICES (LA), INC., ROBERT BOLGER, J.W. STREET, W.L. RAINEY, NPC SERVICES, INC., AND XYZ INSURANCE COMPANY



Kuhn, J., concurring.

I concur in the majority's finding that the trial court improperly granted defendants' motion for summary judgment. In granting the summary judgment, the trial court improperly excluded the affidavits of Drs. Link and Templet. Because defendants did not directly challenge these affidavits by filing a motion to strike or by otherwise objecting to the affidavits, defendants waived any challenge to the expert testimony set forth in these affidavits. *See Independent Fire Ins. Co. v. Sunbeam Corp.*, 99-2181, p.16 (La. 2/29/00), 755 So.2d 226, 235 n. 4. Accordingly, the portions of the majority opinion addressing whether the affidavits were admissible under the standards of *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993) is *obiter dictum*.

Further, under motion for summary judgment considerations, the trial court is not allowed to evaluate the persuasiveness of competing expert

opinions. *See Independent Fire Ins. Co. v. Sunbeam Corp.*, 99-2181 at p. 17, 755 So.2d at 236. In this case, improper credibility calls that resulted in an improper weighing of the expert testimony were made. Based on the expert testimony presented, however, genuine issues of material fact remain regarding whether contamination released from the PPI waste sites is present on plaintiffs' property.

I additionally note that the majority's discussion regarding plaintiffs' nuisance claim is also dictum that should not have any bearing on the resolution of this matter upon its remand. For these reasons, I concur in the result reached by the majority.