Supreme Court of Louisiana

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FROM: CLERK OF SUPREME COURT OF LOUISIANA

The Opinions handed down on the **13th day of March, 2012**, are as follows:

BY CLARK, J.:

2010-C -2605 CRAIG STEVEN ARABIE, ET AL. v. CITGO PETROLEUM CORPORATION, ET AL. (Parish of Calcasieu)

For the foregoing reasons, we reverse the rulings of the courts below in part, affirm in part, and render judgment.

JOHNSON, J., concurs in part and dissents in part for reasons assigned by Knoll, J.
KNOLL, J., concurs in part and dissents in part with reasons.
GUIDRY, J., concurs in the result and assigns reasons.

03/13/12

SUPREME COURT OF LOUISIANA

NO. 2010-C-2605

CRAIG STEVEN ARABIE, ET AL.

VERSUS

CITGO PETROLEUM CORPORATION, ET AL.

ON WRIT OF CERTIORARI TO THE COURT OF APPEAL,
THIRD CIRCUIT, PARISH OF CALCASIEU

CLARK, Justice

We granted this writ application in order to determine whether the courts below erred as to the allocation of fault, in awarding damages for fear of future injury, and in awarding punitive damages. For the reasons which follow, we affirm in part, reverse in part, and render judgment.

FACTS and PROCEDURAL HISTORY

On the night of June 18 and the morning of June 19, 2006, southwest Louisiana experienced a severe rainstorm. As a consequence of the storm, the stormwater drainage and storage system, including the wastewater treatment facility, at the Lake Charles, Louisiana, refinery of defendant, CITGO Petroleum Company (CITGO), was filled beyond available capacity and overflowed, resulting in a major oil spill. The system was designed to collect the water used in day-to-day operations at the refinery and the runoff from most areas of the refinery due to rainfall.

The system contained two 10 million gallon storage tanks with floating roofs, in which water was to be collected until it could be treated and released. The two tanks were equipped with "skimmers," which were to remove any "slop oil"[1]

[1] "Slop oil" is the generic term for a mixture of oil, chemicals and water derived from

from the wastewater. In addition, the tanks had fittings which would allow excess oil to be drained from the tanks into vacuum trucks. According to the CITGO standard operating procedure, the level of liquid in the tanks was to be maintained at five feet or less to maximize capacity. The tanks were enclosed in a concrete-floored area surrounded by concreted levees or "dikes." This area was designed to contain any overflow from the tanks.

Due to the ongoing construction of a third tank of similar capacity, a portion of the concrete dike system had been removed and the enclosed area was enlarged. The part of the dike surrounding the newly enclosed area was made of earth, as was its "floor." Cementing of the floor and of the dike walls was not scheduled until after the third tank was completed. A pipeline ran under the newly enclosed area and a "junction box" was installed where the pipeline made a ninety degree turn. The junction box was made of cement and the cement cover was not sealed against leaks. The junction box was covered with unpacked earth. In addition, there were several pipes going through the dike wall.

Over 21 million gallons of waste, including 17 million gallons of contaminated wastewater and 4.2 million gallons of slop oil, escaped from the two existing wastewater storage tanks into an area around the tanks which was surrounded by levees or dikes. R. at 25,978. Of the 4.2 million gallons of slop oil which escaped, over 1 million gallons were released into the Calcasieu River. R. at 25,979. The oil spill, which was described at trial as "major" and "catastrophic," eventually contaminated over 100 miles of shoreline along the Calcasieu River, and required several months to clean up.

The fourteen plaintiffs, employees of Ron Williams Construction (RWC) working at the Calcasieu Refining Company (CRC) located 2.7 miles south of the CITGO refinery, filed suit against CITGO and R&R Construction, Inc. (R&R), in

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various locations in an oil refinery.

the Fourteenth Judicial District Court in Calcasieu Parish, alleging various injuries due to their exposure to noxious gases emanating from the spill. CITGO and R&R stipulated that they were liable for the spill and agreed to "pay plaintiffs for all their compensatory damages assessed to CITGO and R&R, if any, that plaintiffs are able to prove to the Court were proximately caused by such release from the CITGO refinery in Calcasieu Parish, Louisiana, on or about June 19, 2006."

After a two week bench trial, the district court ruled that plaintiffs had proved their injuries, more likely than not, were caused by CITGO's admitted negligence in allowing the spill. The court awarded plaintiffs general damages, including damages for fear of developing cancer in the future, ranging from $7000 to $15,000. Determining that Louisiana's choice of law statutes favored the imposition of either Texas' or Oklahoma's punitive damages laws, the court further awarded each plaintiff $30,000 in punitive damages. The court of appeal affirmed, holding that the district court's finding the spill caused plaintiffs' injuries was not an abuse of discretion, the fear of future disease award was supported by the record, there was no evidence of fault on the part of either plaintiffs or their employer, the application of the punitive damages law of Texas was not error, and that, as required for recovery under Texas' punitive damages law, CITGO was grossly negligent. *Arabie v. CITGO Petroleum Corp*., 10-244 (La.App. 3 Cir. 10/27/10), 49 So.3d 529. Defendants filed in this Court a Writ of Certiorari and/or Review, which was granted. *Arabie v. CITGO Petroleum Corp*., 2010-2605 (La. 2/4/11), 56 So.3d 981.

DISCUSSION

CITGO asserts five assignments of error: (1) Louisiana law should apply to plaintiffs' punitive damage claims, (2) the award of punitive damages violates CITGO's due process rights under the United States Constitution, (3) the damage award changes the burden of proof in chemical exposure cases, (4) the lower courts

failed to follow this Court's jurisprudence in awarding damages for fear of future injury, and (5) the lower courts did not allocate fault to all individuals responsible for plaintiffs' alleged injuries.

Standard of Review

It is well-settled that a reviewing court may not disturb the factual findings of the trier of fact in the absence of manifest error. *Rosell v. ESCO*, 549 So.2d 840, 844 (La.1989); *Arceneaux v. Domingue*, 365 So.2d 1330, 1333 (La. 1979). In *Arceneaux*, we set forth a two-part test for the appellate review of facts: (1) the appellate court must find from the record that there is a reasonable factual basis for the finding of the trial court, and (2) the appellate court must further determine that the record establishes the finding is not clearly wrong or manifestly erroneous. *Arceneaux*, 365 So.2d at 1333; *see also Mart v. Hill*, 505 So.2d 1120, 1127 (La. 1987). If the trial court's findings are reasonable in light of the record reviewed in its entirety, the appellate court may not reverse. *Sistler v. Liberty Mutual Ins. Co*., 558 So.2d 1106, 1112 (La. 1990). Consequently, when there are two permissible views of the evidence, the factfinder's choice between them cannot be manifestly erroneous. *Stobart v. State, Through Department of Transportation and Development*, 617 So.2d 880, 883 (La.1993); *Sistler*, 558 So.2d at 1112.

Punitive Damages Claims

Our analysis of whether Louisiana law or another state's laws should be applied with regard to punitive damages is controlled by Louisiana Civil Code Book IV, Conflict of Laws, Title VII, Delictual and Quasi-Delictual Obligations, Articles 3542 through 3548. The fundamental question in all cases involving statutory interpretation is legislative intent. *City of DeQuincy v. Henry*, 2010-0070 (La. 3/15/11), 62 So.3d 43, 46. Further, according to the general rules of statutory interpretation, our interpretation of any statutory provision begins with the language of the statute itself. *In re Succession of Faget*, 10-0188, p. 8

(La.11/30/10), 53 So.3d 414, 420. While the Official Revision Comments are not the law, they may be helpful in determining legislative intent. *See, e.g., State v. Jones*, 351 So.2d 1194, 1195 (La. 1977).

We recently reiterated many of the rules of statutory interpretation, stating:

> When [a] provision is clear and unambiguous and its application does not lead to absurd consequences, its language must be given effect, and its provisions must be construed so as to give effect to the purpose indicated by a fair interpretation of the language used. Unequivocal provisions are not subject to judicial construction and should be applied by giving words their generally understood meaning.
>
> Words and phrases must be read with their context and construed according to the common and approved usage of the language. "The word 'shall' is mandatory and the word 'may' is permissive." Further, every word, sentence, or provision in a law is presumed to be intended to serve some useful purpose, that some effect is given to each such provision, and that no unnecessary words or provisions were employed. Consequently, courts are bound, if possible, to give effect to all parts of a statute and to construe no sentence, clause, or word as meaningless and surplusage if a construction giving force to and preserving all words can legitimately be found.
>
> Where two statutes deal with the same subject matter, they should be harmonized if possible, as it is the duty of the courts, in the construction of statutes, to harmonize and reconcile laws. However, if there is a conflict, the statute specifically directed to the matter at issue must prevail as an exception to the statute more general in character.

McGlothlin v. Christus St. Patrick Hospital, 2010-2775 (La. 7/1/2011), 65 So.3d 1218, 1228-29 (citations omitted).

The trial court, in its reasons for judgment, began its analysis of whether another state's punitive damages law should apply in this case by recognizing that punitive damages are not allowable unless expressly authorized by statute. The court then paraphrased Civil Code Article 3546, stating:

> Punitive damages may not be awarded by Louisiana courts except when two of the following three are present:
>
> (1) Punitive damages are authorized by the law of the state where the injurious conduct occurred

> (2) Punitives are authorized by the law of the state where the injury occurred
>
> (3) Punitives are authorized by the law of the place where the person who caused the injury was domiciled
>
> . . . [I]n determining in what state the injurious conduct occurred, it is necessary to determine whether the location of the corporate headquarters should be used, rather than the location of the local situs (in this case, refinery). In order for this to happen, the management or corporate level decisions and actions should "outweigh or equal the allegedly tortious conduct that occurred" locally. Similarly, an isolated corporate act will not outweigh "considerable business activities" conducted locally.

R. at 25,046 (citations omitted). As referenced, the trial court felt that the determining factor was the location of the injurious conduct. It found, without providing its analysis, that CITGO's domicile was in Texas or Oklahoma. The court of appeal, in agreeing with the trial court's ruling, did explore CITGO's domiciliary location, holding that CITGO was domiciled in Texas for the purpose of Louisiana's conflict of laws statutes. It is undisputed by the parties and the lower courts that the site of the injury is Louisiana.

CITGO argues that an analysis of Louisiana's conflict of laws statutes indicates that the application of either Texas or Oklahoma punitive damages laws is erroneous. CITGO further argues that the lower courts erred in determining that CITGO was not a domiciliary of Louisiana and that the place of injurious conduct was in Texas or Oklahoma. Plaintiffs, as may be expected, argue in opposition that the lower courts were correct in making these two determinations.

According to the Civil Code, punitive damages may only be awarded under certain conditions. We begin our analysis by examining Article 3546 of the Code, entitled "Punitive damages," which reads:

> Punitive damages may not be awarded by a court of this state unless authorized:
>
> (1) By the law of the state where the injurious conduct occurred and by either the law of the state where the resulting injury occurred or the law of the place where the person whose conduct caused the

injury was domiciled; or

> (2) By the law of the state in which the injury occurred and by the law of the state where the person whose conduct caused the injury was domiciled.

C.C. art. 3546.

Subparagraph (2) of the article requires that punitive damages be authorized by both the state in which injury occurred and the state of domicile of the person who caused the injury. Because it is undisputed that all the injuries occurred in Louisiana, subparagraph (2) clearly does not apply.

Likewise, the first instance described in subparagraph (1) of the article is not applicable, as both the injurious conduct and the resulting injuries are required to have occurred in a state which authorizes punitive damages. As pointed out above, the injuries, at least, occurred in Louisiana.

Under the second instance described in subparagraph (1), both CITGO's domicile and the place of injurious conduct must have been in Texas or Oklahoma for the Texas or Oklahoma punitive damages laws to apply, as found by the trial court.

As pertains to conflict of laws questions, a party's domicile shall be determined according to Articles 3518 and 3548 of the Civil Code.

Article 3518 reads:

> For the purposes of this Book [Book IV, Conflict of Laws], the domicile of a person is determined in accordance with the law of this state. A juridical person may be treated as a domiciliary of either the state of its formation or the state of its principal place of business, whichever is most pertinent to the particular issue.

C.C. art. 3518.

Article 3548, in turn, reads:

> For the purposes of this Title [Title VII, Delictual and Quasi-Delictual Obligations], and provided it is appropriate under the principles of Article 3542, a juridical person that is domiciled outside this state, but which transacts business in this state and incurs a delictual or quasi-delictual obligation arising from activity within this

state, shall be treated as a domiciliary of this state.

C.C. art. 3548. As stated above, when two statutes apply to the same subject matter and their language cannot be harmonized, the language of the more specific statute applies, which, in this case involving delictual obligations, would be Article 3548. Here, though, the two statutes can be harmonized.

CITGO is a Delaware corporation with its corporate headquarters located in Houston, Texas. As such, it is a juridical person domiciled outside this state per Article 3518. CITGO also operates its refinery in Lake Charles, Louisiana, the place at which the oil spill occurred. Under Article 3548, juridical persons domiciled outside Louisiana, as is CITGO under Article 3518, who incur a delictual obligation, shall be treated as a domiciliary of Louisiana if appropriate under the principles contained in Article 3542. Thus, under Article 3548, CITGO must be treated as a domiciliary of Louisiana if such treatment is appropriate under the principles of Article 3542, and, if so, the second instance described in Article 3546, subparagraph (1) is inapplicable. The court of appeal recognized the interplay between Articles 3548 and 3542, but in its analysis of CITGO's domicile, listed only those facts which would tend to support the trial court's ruling on domicile, but neglected to address the facts which would support a finding that CITGO should be considered a domiciliary of Louisiana.

We turn, then, to the analysis of Article 3542 to determine, under the principles set out therein, whether it would be appropriate to consider CITGO a Louisiana domiciliary under Article 3548.

Article 3542 states:

> Except as otherwise provided in this Title, an issue of delictual or quasi-delictual obligations is governed by the law of the state whose policies would be most seriously impaired if its law were not applied to that issue.
>
> That state is determined by evaluating the strength and pertinence of the relevant policies of the involved states in the light of:

> (1) the pertinent contacts of each state to the parties and the events giving rise to the dispute, including the place of conduct and injury, the domicile, habitual residence, or place of business of the parties, and the state in which the relationship, if any, between the parties was centered; and (2) the policies referred to in Article 3515, as well as the policies of deterring wrongful conduct and of repairing the consequences of injurious acts.

C.C. art. 3542.

We recently examined the interplay of factors contained in Article 3542 in our opinion in *Wooley v. Lucksinger*, 09-571 (La. 4/1/11), 61 So.3d 507, 567. In that case, the Louisiana Commissioner of Insurance filed tort and contract suits against several defendants on behalf of a failing health maintenance organization (HMO). The Oklahoma Commissioner of Insurance and a receiver appointed by the Texas Commissioner of Insurance intervened as plaintiffs in the tort cases on behalf of affiliated HMOs, organized and doing business in those states, which had similar tort causes of action against the defendants. The three lawsuits—which alleged causes of action in negligence, negligent misrepresentation, conspiracy, fraud, breach of fiduciary duty, unfair or deceptive acts or practices, and contractual liability—were consolidated. The scheme that formed the core of the matter was relatively simple: after regulatory approval for the sale of the HMOs was obtained in all three states, the parties drafted a final sale document which re-characterized the HMOs' premium deficiency reserves, the amount an insurance company is required to keep on hand to cover claims which cost more money than has been received in premiums, as a restructuring reserve. This sole action had the effect of increasing the assets of the HMOs as of the day before the sale, which allowed the parent corporation—under the expressly-approved sale terms—to take out more of the assets of the HMOs than regulators believed would happen in the transaction. Thus stripped of their reserves, the HMOs were left in a financially unsustainable position from which they never recovered. The trial court determined that Texas law applied to the tort cases.

During our review of that decision under the factors contained in Article 3542, we noted that two of the defendants in the case were domiciled in Texas, while the other two were domiciled in Oklahoma and Louisiana, respectively. We determined that the majority of the tortious conduct occurred in Texas, and we noted that the tortious conduct which occurred in Texas had consequences and caused injury in Louisiana, Oklahoma, and Texas, but the most severe harm, in terms of the number of injuries and dollar amounts of damage occurred in Texas. Under those facts, we determined that the trial court did not err in finding that Texas had the most significant contacts under Article 3542.

As stated in its first paragraph, the objective of the article is to identify the state whose policies would be most seriously impaired if its law were not applied. To accomplish this, the statute lists several nonexclusive factors to be considered in determining choice of law questions: (1) The pertinent contacts of each state to the parties; (2) their contacts to the events giving rise to the dispute, including the place of conduct and injury; (3) the domicile, habitual residence, or place of business of the parties; (4) the state in which the relationship between the parties was centered; (5) deterring wrongful conduct; and (6) repairing the consequences of injurious acts. The article also imports from Article 3515 the following factors: (7) the relationship of each state to the parties and the dispute; and (8) the policies and needs of the interstate system, including the policies of upholding the justified expectations of the parties and of minimizing the adverse consequences that might follow from subjecting a party to the law of more than one state. As stated in the comments to the article:

> [T]his article provides an illustrative list of the most important factual contacts in light of which to evaluate the strength and pertinence of the above policies. These contacts will serve the dual role of helping, first, to identify the potentially concerned states, and, then, to assess the pertinence and strength of their respective policies and the impacts of the decision on such policies. The listing of contacts is neither exhaustive nor hierarchical, and is intended to discourage a

> mechanistic counting of contacts as a means of selecting the applicable law. . . [T]he evaluation of factual contacts should be qualitative rather than quantitative, and should be made in the light of the policies of each contact-state that are pertinent to the particular issue in dispute.

C.C. art. 3542, Revision Comment (a).

In his reasons for judgment, the trial judge began his discussion of choice of law with regard to punitive damages with an analysis of Article 3542. The court did not discuss each state's contacts in the terms laid out by the statute. Although, the factors listed in Article 3542 are merely "illustrative," the factors are also "the most important factual contacts" to which a court should turn in determining choice of law questions.

Here, in its reasons for judgment, the court found:

> (1) that a serious spill occurred in Louisiana; (2) that the defendant's home office was located in Texas at the time of the spill; (3) that significant funding, steerage, and budget decisions leading to the under building of the wastewater treatment facility, and ultimately the spill, were made at corporate headquarters in Texas and Oklahoma in furtherance of profit enhancement; (4) this Court's previous ruling that the defendant engaged in civil fraud prior and subsequent to the spill; (5) the defendant failed to adequately warn the local populace of their existing Material Safety Data Sheet (MSDS) for the spilled product; and (6) the defendant cognizantly misinformed government agencies of the status and capabilities of their Waste Water Treatment Unit.

R. at 25,048. We recently looked at a trial court's failure to expressly analyze each factor contained in a statute, in terms of child relocation, in the case of *Gathen v. Gathen*, 10–2312 (La. 5/10/11), 66 So.3d 1. In that case, we held that a trial court is not required to expressly analyze each statutorily listed factor in its oral or written reasons, and the court's failure to do so does not constitute an error of law which would allow *de novo* review. *Gathen*, 66 So.3d at 13. We went on to look at the reasons and factors the trial court did expressly take into account in reaching its ultimate determination, and we examined the factors the trial court did not expressly discuss to determine whether the trial court's failure to give weight to

these factors led the court to err in reaching its determination. *Gathen*, 66 So.3d at 13. Here, we will do the same.

With regard to each state's pertinent contacts with the parties, the trial court mentioned that CITGO's corporate offices were in Texas at the time of the spill. The court did not discuss the fact that CITGO operated one of the largest refineries in Louisiana, covering 500 acres and employing 900 CITGO personnel and 500 to 900 contractors, or that all of the plaintiffs resided and were employed in Louisiana. There is no evidence that either Texas or Oklahoma had any contacts with the plaintiffs. Texas, then, had contact only with CITGO, while Louisiana had contacts with all parties. This factor favors the imposition of Louisiana law.

With regard to the second factor, the states' contacts to the events giving rise to the dispute, including the place of conduct and injury, the trial court found that "significant funding, steerage, and budget decisions leading to the underbuilding of the wastewater treatment facility, and ultimately the spill, were made at corporate headquarters in Texas and Oklahoma in furtherance of profit enhancement." R. at 25,048. This finding is belied by the undisputed facts. In making the finding, the court cited to *In Re Train Derailment*, 2004 WL 169805 (E.D. La.) for the idea that "management or corporate level decisions and actions [must] 'outweigh or equal the allegedly tortious conduct that occurred' locally." Further, the trial court referenced *Security Title Guarantee Corp. of Baltimore v. United General Title Ins. Co.*, 91 F.3d 137 (5th Cir. 1996), in saying that an isolated corporate act will not outweigh "considerable business activities" conducted locally. Although the cited cases are merely persuasive, rather than precedential, we agree, more or less, with these propositions, though we find the latter more accurate than the former, based on our legislature's decision to disallow punitive damages except in specific situations. In light of the State's general policy against punitive damages, we hold that, in determining the location where injurious conduct occurred, management or

corporate level decisions must outweigh tortious activity which occurs locally in order for the location of the corporate or management decision to be considered the locale of the injurious conduct.

The underbuilding of the wastewater treatment facility found by the lower courts consisted primarily of CITGO's delaying the construction of a third 10 million gallon storage tank as part of the unit. The courts, though, ignored the physical impossibility of containing the spill within the planned third tank. As stated earlier, the planned third tank, like the two existing tanks, was designed to hold 10 million gallons of wastewater. R. at 25,971. However, over 21 million gallons of waste, including 17 million gallons of contaminated wastewater and 4.2 million gallons of slop oil overflowed from the two existing tanks. R. at 25,978. The spill occurred after the tanks overflowed from the top. The slop oil was the first substance to escape from the tanks, as oil floats on top of water. R. at 26,105-26,106. This 21 million gallons of waste obviously could not have been contained in a 10 million gallon tank, even had it been built. The trial court also found that CITGO, in Louisiana, failed to adequately warn the local populace of their existing Material Safety Data Sheet for the spilled product.

Other factors not mentioned by the trial court, but which also had a great impact in causing the spill were:

> (1) the oil escaped from the containment area through a junction box under the earthen floor of the diked area to an area which was not contained within the dikes, R. at 26,125-26,128;
>
> (2) the lid of the junction box was improperly sealed, and the earth covering the junction box was improperly packed, R. at 26,127-26,128;
>
> (3) the seepage of oil through the earthen portion of the dike surrounding the wastewater treatment facility, R. at 26,112;
>
> (4) the escape of oil through an 18 inch pipe which went through the dike wall, R. at 29,914;
>
> (5) the disrepair of the oil skimmers which were to have removed

> waste oil from the water for treatment, resulting in slop oil floating on top of the stormwater, R. at 26,139;
>
> (6) leaking at the seals of several pipes extending through the dikes, R. at 26,110;
>
> (7) the failure to close valves allowing excess water from the intermediate tank farm to drain into the stormwater system, R. at 26,141;
>
> (8) the temporary taking out of service of several dikes, which allowed excess water to enter the stormwater system, R. at 26,141-26,142; and
>
> (9) the failure to maintain a liquid level of 5.5 feet or less in the existing tanks, R at 26,137.

Plaintiffs' expert testified that the disrepair of the oil skimmers, the substandard dikes, and the failure to keep the liquid in the tanks at a level of 5.5 feet, the nonfunctional emergency side draws and substandard preventive maintenance prevented the existing wastewater system from having the capacity to handle a twenty-five year rain event. R. at 26,304. All of these latter problems occurred in and could have been corrected in Louisiana. Further, all of plaintiffs' injuries occurred in Louisiana. Because the overflow likely would have occurred whether or not the third tank had been built, CITGO's decision to delay the tank's construction did not outweigh the allegedly tortious conduct that occurred locally. This factor, likewise, favors the imposition of Louisiana law.[2]

With regard to the third factor, the domicile, habitual residence, or place of business of the parties, CITGO is incorporated in Delaware with its principal place of business first in Tulsa, Oklahoma, and then in Houston, Texas. CITGO operated a large refinery in Louisiana, employing 1,400 to 1,800 workers. The plaintiffs were all residents of Louisiana and were employed in Louisiana. Again, this factor favors the imposition of Louisiana law.

[2] We realize that, having determined that the "injurious conduct" occurred in Louisiana, we have likewise found that Article 3546 does not provide for the imposition of punitive damages. For the purposes of determining CITGO's domicile only, we will assume that the injurious conduct occurred in Texas.

The state in which the relationship between the parties was centered, the fourth factor, was Louisiana. The only contact between the parties was the spill, which occurred in Louisiana and caused plaintiffs' injuries in Louisiana. This factor heavily favors the imposition of Louisiana law.

The fifth factor, deterring wrongful conduct, appears to favor the imposition of punitive damages, the purpose of which is to punish wrongful conduct. The strength of this factor, however, is diminished by Louisiana's policy disfavoring punitive damages in general.[3] As a result, this factor is neutral.

The imposition of punitive damages, however, has no bearing on the sixth factor, that of repairing the consequences of injurious acts. The plaintiffs have been made whole through the award of compensatory damages, which was done here under Louisiana law. This factor, likewise, is neutral.

Some of the facts contained in the seventh factor, the relationship of each state to the parties and the dispute, have been discussed above. The sole relationship between Texas or Oklahoma and the parties is that CITGO's corporate headquarters was first in Tulsa and then Houston, and the decision to delay building a third stormwater tank was made at corporate headquarters in Houston. Louisiana's relationship with the parties includes CITGO's operation of the refinery in Louisiana, CITGO's employment of 1,400 to 1,800 Louisiana residents at the refinery in question, the Louisiana Department of Environmental Quality's regulation of the refinery in question, and the residence and place of employment of the plaintiffs. The dispute centers on a major oil spill which occurred only in Louisiana, and which caused damage and injuries only in Louisiana. The suit was filed in Louisiana. Again, this factor favors the imposition of Louisiana law.

The final factor takes account of the policies and needs of the interstate

[3] As we have previously discussed, the legislature has seen fit to authorize punitive damages only in certain specific instances. The fact that punitive damages are only authorized in particular situations shows that the State has a general policy against punitive damages.

system, including the policies of upholding the justified expectations of parties and of minimizing the adverse consequences that might follow from subjecting a party to the law of more than one state. Here, it is unlikely that CITGO anticipated that ordinary budget decisions made at corporate headquarters would result in the imposition of Texas law for an oil spill which occurred in Louisiana, damaged property only in Louisiana, and injured only Louisiana residents. Likewise, CITGO could have likely anticipated that an oil spill in Louisiana caused by actions and failures to act in Louisiana, which resulted in injuries and damage only to Louisiana residents and Louisiana property would be controlled by Louisiana law. Finally, neither Texas nor Oklahoma has an overriding interest in applying their laws to the decisions of their corporate domiciliaries, when those decisions have no effect in those states, and when those decisions are not the primary cause of injury in another state.

Based on the above, it is appropriate under the principles of Article 3542 for CITGO to be considered a domiciliary of Louisiana under Article 3548. Because both CITGO's domicile and the place of injurious conduct must have been in Texas or Oklahoma for either of those state's punitive damage laws to apply under the second instance described in subparagraph (1) of Article 3546, CITGO is not liable for punitive damages under that Article. In finding to the contrary, the trial court erred. In reaching this conclusion, we in no way criticize our finding in *Wooley*, the result in which was based upon the facts contained in that case.

Next, we turn to Civil Code Article 3543, which plaintiffs argue, and the court of appeal found, also applies in this matter and results in the imposition of another state's punitive damages laws. We disagree with both plaintiffs and the court of appeal. Article 3543 reads:

Art. 3543. Issues of conduct and safety

> Issues pertaining to standards of conduct and safety are governed by the law of the state in which the conduct that caused the injury occurred, if the injury occurred in that state or in another state whose law did not provide for a higher standard of conduct.
>
> In all other cases, those issues are governed by the law of the state in which the injury occurred, provided that the person whose conduct caused the injury should have foreseen its occurrence in that state.
>
> The preceding paragraph does not apply to cases in which the conduct that caused the injury occurred in this state and was caused by a person who was domiciled in, or had another significant connection with, this state. These cases are governed by the law of this state.

C.C. art. 3543.

First, as we stated above, when two statutes apply to the same subject matter and their language cannot be harmonized, the language of the more specific statute applies. *McGlothlin*, 65 So. 2d at 1229. Here, when determining whether another state's punitive damages laws should apply, Article 3546, "Punitive damages," is more specific to the issue than is Article 3543, "Issues of conduct and safety."

However, even if Article 3546 were to apply, the first paragraph of the Article provides that issues pertaining to standards of conduct are governed by the law of the state in which the injurious conduct occurred. As we previously discussed, the most significant conduct occurred in Louisiana. In either case, Article 3543 does not authorize the imposition of punitive damages in this case.

Finally, the trial court found "additionally and alternatively" that Civil Code Article 3547, the escape clause, applies in this case and "permits the application of Texas and Oklahoma law regarding punitive damages." R. at 25,048. Article 3547 reads:

> Art. 3547. Exceptional cases
>
> The law applicable under Articles 3543-3546 shall not apply if, from the totality of the circumstances of an exceptional case, it is clearly evident under the principles of Article 3542, that the policies of another state would be more seriously impaired if its law were not applied to the particular issue. In such event, the law of the other state

shall apply.

C.C. art. 3547.

As our previous analysis of the factors contained in Article 3542 shows, it is not "clearly evident" that that the policies of Texas or Oklahoma would be more seriously impaired if the law of either of those states were not applied to this issue.

The dissent states that "the primary question presented by article 3542 is which state's policies would be 'most seriously impaired if its laws were not applied to the issue.'" The dissent fails to consider, though, for the most part, the factors listed in Article 3542, which comment (a) to the Article calls "the most important factual contacts in light of which to evaluate the strength and pertinence of the . . . policies," in reaching its contrary position, while the majority has applied each and every factor.

Because plaintiffs are not authorized to recover an punitive damages under Articles 3546 or 3543, and because this matter does not qualify as an exceptional case under Article 3547 through the application of the factors contained in Articles 3542 and 3515, we find that the punitive damages laws of Texas and Oklahoma are not authorized under Louisiana's conflict of laws statutes, and the rulings of the courts below to the contrary were in error.

Due Process Rights

In its second assignment of error, CITGO argues that the trial court's award of punitive damages to plaintiffs violates CITGO's due process rights under the United States Constitution. Because we have determined that CITGO is not subject to the imposition of punitive damages, this issue is moot.

Burden of Proof

In the third assignment of error, CITGO claims that the trial court's award of damages to plaintiffs, and the appellate court's affirmation of the same, changes the burden of proof in chemical exposure cases.

CITGO argues that plaintiffs were required to prove causation by means of scientific evidence showing exposure levels sufficient to cause the injuries alleged, that none of the available air monitoring data points revealed exposure levels above government health-protective standards, and that plaintiffs only presented evidence that their symptoms were consistent with symptoms which could result from overexposure to certain chemicals in the oil. Plaintiffs counter with the argument that, even though an opinion on exposure can be based upon circumstantial evidence or a patient's statements or subjective symptoms, plaintiffs in this case offered far more than circumstantial evidence of exposure or plaintiffs' testimony.

The test for determining the causal relationship between the tortious conduct and subsequent injuries is whether the plaintiff proved through medical testimony that it was more probable than not that subsequent injuries were caused by the accident. *Lasha v. Olin Corp*., 625 So.2d 1002, 1005 (La.1993).

Here, the spill caused the refinery at which the plaintiffs worked to be surrounded by slop oil. This slop oil, according to CITGO's MSDS, contained various levels of hydrogen sulfide, benzene, xylene, toluene, n-Hexane, ethylbenzene, heptanes, octane, nonane, and trimethylbenzene, and inhalation of its vapors can cause symptoms ranging from nausea, headache, dizziness, fatigue, drowsiness, and unconsciousness to organ damage, cancer, and death. R. at 3178-3179.

Plaintiffs all testified that they experienced contemporaneous or near-contemporaneous symptoms of eye irritation, nausea, nasal and throat irritation, and difficulty in breathing when exposed to the odors and fumes from the slop oil spill. Plaintiffs presented evidence from experts in toxicology, air dispersion modeling, environmental chemistry, exposure monitoring, odor, industrial hygiene, epidemiology, and occupational and environmental medicine. These experts

agreed that plaintiffs' reported symptoms were consistent with exposure to toxic chemicals contained in the slop oil.

Plaintiffs' air modeling expert, Dr. Paul Rosenfeld, testified that his models showed that plaintiffs were exposed to levels of benzene, hydrogen sulfide, and sulfur dioxide above regulatory limits, that their exposure took place over a period of weeks, and that just the noxious odor of the slop oil could cause some of plaintiffs' symptoms.

Plaintiffs' industrial hygiene expert, Frank Parker, testified that slop oil contains chemicals which are both an immediate and a delayed health hazard. He further testified that breathing the vapors can cause nausea, headache, dizziness, fatigue, drowsiness, unconsciousness, and death. He also testified that if a person smells slop oil, they have been exposed.

Dr. Barry Levy, plaintiffs' expert in epidemiology and occupational and environmental medicine, testified that the symptoms of each individual plaintiff were related to the oil spill to a reasonable medical probability, although he admitted that some of the plaintiffs' symptoms were not related. He testified that he did not know the quantitative level of exposure for any of the chemicals contained in the slop oil, but, based on the fact that the odor was present for an extended period, he had qualitative information which led him to believe that the plaintiffs were exposed to a substantial amount of the constituents of the slop oil.

Finally, plaintiffs' medical records indicated that their treating physicians were of the opinion that their symptoms were consistent with exposure to the toxic chemicals contained in the slop oil.

As stated previously, CITGO argues that in order to prove causation, plaintiffs were required to prove exposure by means of scientific evidence such as air monitoring data. We find instructive our holding in the case of *Edwards v. Sawyer Industrial Plastics, Inc*., 99-2676 (La. 6/30/00), 765 So.2d 328. That

worker's compensation matter involved a plaintiff who had been exposed to styrene fumes in the workplace over a period of about eighteen months. The plaintiff introduced both lay and expert testimony, including that of fellow workers who testified as to their symptoms while in the workplace, and that of an expert in internal, occupational, environmental and forensic medicine, who testified that the plaintiff's symptoms were consistent with exposure to toxic chemicals. The worker's compensation judge found that the plaintiff suffered from an occupational disease and was permanently and totally disabled. The court of appeal reversed, holding that the plaintiff had failed to meet his burden of establishing that his disabling condition was caused by exposure to toxic chemicals on the job. This Court, in turn, reinstated the worker's compensation judge's decision, on the basis of the lay and expert testimony, and in spite of the absence of "scientific evidence" as to the level of exposure. Here, as in *Edwards*, there is substantial evidence supporting the trial court's determination that plaintiffs' injuries were caused by exposure to toxic chemicals contained in the slop oil, even though that determination is not supported by air monitoring data.

Fear of Future Injury

In its fourth assignment of error, CITGO argues that the lower courts failed to follow this Court's jurisprudence in awarding damages for fear of future injury, citing this Court's opinion in *Bonnette v. Conoco, Inc*., 01-2767 (La. 1/28/03), 837 So.2d 1219, for the proposition that fear of future injury must be supported by a showing that the alleged fear is more than speculative or merely possible. CITGO claims that there is no such evidence. Plaintiffs argue, on the other hand, that *Bonnette* is inapposite to the present matter, as it dealt with damages for mental anguish in the absence of physical injury, which are present here.

In *Bonnette*, the plaintiffs were exposed to a *de minimis* amount of asbestos, a known cancer-causing substance. This court reversed the lower courts' rulings

that the plaintiffs were entitled to damages for the fear of developing asbestos related cancer, citing the holding in *Moresi v. State, Dept. of Wildlife & Fisheries*, 567 So.2d 1081 (La. 1990). That case held that a defendant will not be held liable where his conduct is merely negligent and causes only emotional injury unaccompanied by physical injury. *Bonnette*, 837 So.2d at 1234, 2001-2767 La. 23-24. The *Bonnette* court, distinguished its holding from that in *Anderson v. Welding Testing Laboratory, Inc.*, 304 So.2d 351 (La. 1974), recognizing that fear of contracting cancer, when accompanied by physical injury, as has occurred in the instant matter, is compensable.

Here, each plaintiff testified to a fear of contracting cancer in the future as a result of his exposure to the toxic chemicals contained in the slop oil for a period of weeks. As we said in *Anderson*, "While to a scientist in his ivory tower the possibility of cancerous growth may be so minimal as to be untroubling, we are not prepared to hold that the trier of fact erred in finding compensable this real possibility to th[ese] worrying workmen." Anderson, 304 So.2d at 353. We find that the lower courts did not err in awarding plaintiffs damages for fear of future injury.

Fault Allocation

Finally, CITGO argues that the lower courts did not allocate fault to all individuals responsible for plaintiffs' alleged injuries. This issue was decided on plaintiffs' motion for summary judgment at the trial court in favor of plaintiffs.

This court recently discussed the method of review of motions for summary judgment as follows:

> A summary judgment is reviewed on appeal de novo, with the appellate court using the same criteria that govern the trial court's determination of whether summary judgment is appropriate; i.e. whether there is any genuine issue of material fact, and whether the movant is entitled to judgment as a matter of law.
>
> * * *
>
> A motion for summary judgment will be granted "if the pleadings,

> depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to material fact, and that mover is entitled to judgment as a matter of law." La. C.C. P. art. 966(B). This article was amended in 1996 to provide that "summary judgment procedure is designed to secure the just, speedy, and inexpensive determination of every action . . . The procedure is favored and shall be construed to accomplish these ends." La. C.C.P. art. 966(A)(2). In 1997, the legislature enacted La. C.C.P. art. 966 C(2), which further clarified the burden of proof in summary judgment proceedings, providing:
>
> > The burden of proof remains with the movant. However, if the movant will not bear the burden of proof at trial on the matter that is before the court on the motion for summary judgment, the movant's burden on the motion does not require him to negate all essential elements of the adverse party's claim, action, or defense, but rather to point out to the court that there is an absence of factual support for one or more elements essential to the adverse party's claim, action, or defense. Thereafter, if the adverse party fails to produce factual support sufficient to establish that he will be able to satisfy his evidentiary burden of proof at trial, there is no genuine issue of material fact.

Samaha v. Rau, 2007-1726 (La. 2/26/08), 977 So.2d 880, 883-4.

Here, the burden of proof at trial to show comparative fault would have been on CITGO. In support of their motion, and in addition to pointing out that CITGO had no evidence to show that third parties or plaintiffs were at fault, plaintiffs attached to their motion deposition testimony from William Hatch, CITGO's chief of operations, who testified that oil skimmers in the wastewater tanks were not operational, that the water and oil level in the tanks was at seventeen feet rather than the required five and one half feet, and that both of those problems violated CITGO policy and were preventable. Plaintiffs also attached the deposition testimony of Matteson Bell, a cleanup operator, who stated that the oil spill went south to CRC and that he did not install booms there until the second day of the spill. The deposition testimony of David Hollis, CITGO's environmental manager, was also attached. He also testified that the oil spill moved south toward CRC.

In its answers to interrogatories on file, CITGO responded to Interrogatory

No. 7, which inquired as to parties or non-parties that CITGO contended were at fault, by declaring that it was investigating whether there was fault on the part of R&R Construction for faulty design or construction of the concrete junction box and for disturbing its clay barrier cap, and that it was investigating whether there was any fault on the parts of Marine Spill Response Corp., National Response Corp., and Global Pollution Services for their response efforts. In its response to Interrogatory No. 9, inquiring as to plaintiffs' fault, CITGO replied that it was investigating the use of protective equipment by certain plaintiffs responding to the spill.

This evidence sufficed to make a prima facie case that CITGO alone was at fault in causing the spill and, in turn, plaintiffs' injuries. The burden then shifted to CITGO to prove that it could produce evidence to show plaintiffs' or third party fault at trial.

In its opposition to plaintiffs' motion for summary judgment, CITGO attached to its memorandum in opposition the policy statement contained in CRC's company safety manual. The policy statement declared that CRC would establish safety and health programs, provide necessary equipment, clothing, and services required for the protection of employees, control hazards to employees, require the use of safety devices, protective equipment, and clothing, and provide a safe and healthful environment for its employees.

CITGO also attached a form from Ron Williams Construction, plaintiffs' employer, entitled Supervision Safety Requirements, which related that supervisors were to provide a safe work environment for employees.

CITGO also attached portions of the depositions of two of the plaintiffs, in which they described the smell of the spill and their immediate reaction to the odor. Dexter Breaux also testified that CITGO never told him that there was a chemical exposure. Bennett Talbot testified that the plaintiffs did not think there

was any special danger from the spill.

CITGO did not carry its burden of proving at the hearing on the motion for summary judgment that it would be able to show plaintiffs' or third party fault at trial. The trial court, therefore, did not err in granting plaintiffs' motion for summary judgment as to third party fault.

CONCLUSION

In sum, we hold that Louisiana's conflict of laws statutes do not provide for the application of the punitive damages laws of Texas or Oklahoma under the facts of this case, that plaintiffs proved that their damages were caused by their exposure to toxic chemicals contained in the oil spill, that plaintiffs are entitled to damages for fear of contracting cancer, and that CITGO did not produce at the hearing on summary judgment factual support sufficient to establish that it would be able to satisfy its evidentiary burden of proof at trial.

DECREE

For the foregoing reasons, we reverse the rulings of the courts below in part, affirm in part, and render judgment.

03/13/12

SUPREME COURT OF LOUISIANA

NO. 2010-C-2605

CRAIG STEVEN ARABIE, ET AL.

VERSUS

CITGO PETROLEUM CORPORATION, ET AL.

**ON WRIT OF CERTIORARI TO THE COURT OF APPEAL,
THIRD CIRCUIT, PARISH OF CALCASIEU**

JOHNSON, J. concurs in part and dissents in part for the reasons assigned by Knoll, J.

03/13/12

SUPREME COURT OF LOUISIANA

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VERSUS

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ON WRIT OF CERTIORARI TO THE COURT OF APPEAL,
THIRD CIRCUIT, PARISH OF CALCASIEU

Knoll, J., concurring in part and dissenting in part.

I concur with the portion of the majority opinion affirming the trial court's award of compensatory damages. Plaintiffs unquestionably suffered compensable injuries as a direct result of exposure to noxious chemicals released during the environmental disaster caused by Citgo's grossly negligent acts.

With all due respect, I strongly dissent from the portion of the majority opinion reversing the trial court's award of punitive damages under Texas and Oklahoma law. Under the conflicts of laws principles set forth in our Civil Code, punitive damages may be awarded in tort cases where the law of the state of the tortfeasor's domicile and the law of the state of the tortfeasor's injurious conduct permit the imposition of punitive damages. The trial court found that Citgo is domiciled in a state which permits punitive damages and that the injurious conduct occurred there. The trial court made no error of fact or law, and I would affirm.

The evidence fully confirms the factual findings of the trial court. Defendant Citgo is a multinational corporation currently headquartered in Houston and domiciled in Texas. Citgo owns and operates a large oil refinery in Calcasieu Parish, Louisiana. In 1994, Citgo began construction of two on-site storage tanks designed to hold wastewater, slop oil, and other byproducts of the petroleum

refining process. At the time, Citgo was headquartered in Tulsa, Oklahoma. There was an internal dispute among Citgo employees over the number of 10 million gallon storage tanks necessary to safely contain the refinery's waste products. The original plans called for three tanks. However, in an attempt to keep down costs, Citgo headquarters made the budgetary decision to build the refinery with only two tanks. As stated in a Citgo internal memorandum, "[b]ecause of the high capital costs involved, the design of the WWTP [wastewater treatment plant] was intentionally limited in capacity."[1] As early as 1995, Citgo employees and outside contractors circulated memoranda warning Citgo headquarters of the storage tanks' insufficient capacity: "there have been several near miss events in terms of exceeding the capacity of the stormwater tanks" and the "potential for an overflow situation well short of the 25 year event is high." A 1997 internal memorandum noted there was "little or no extra room to handle major refinery upsets or a heavy rainfall event." Nonetheless, by not building the third wastewater tank, Citgo saved approximately $12 million.

In 2004, Citgo moved its headquarters to Houston. In 2005, Citgo management finally approved construction of a third tank. However, Citgo headquarters required the refinery to hire a Venezuelan[2] engineering firm for budgetary reasons, and the construction was delayed. On June 19, 2006, after heavy rains, the storage tanks overflowed. At least 4 million gallons of toxic slop oil and 17 million gallons of wastewater discharged into the Calcasieu River, temporarily shutting down the Calcasieu Ship Channel and wreaking environmental havoc. Cleanup took weeks and cost (in Citgo's estimate) $65

[1] The same Citgo memorandum referred to the wastewater treatment plant as a "non-return project" that "had no monetary payback." There was a concern that "money spent on non-return projects reduces the amount of money that could be spent elsewhere on higher return."

[2] Citgo is wholly owned by Petróleos de Venezuela, S.A., the state-owned oil company of the Bolivarian Republic of Venezuela.

million. In September 2008, Citgo pleaded guilty in federal court to violations of the Clean Water Act and was fined $13 million in criminal penalties, the largest such fine in Louisiana history, and an additional $9 million in civil penalties.

Plaintiffs, who worked slightly downriver from the Citgo refinery, were exposed to the slop oil and other noxious chemicals and complained of headaches, sinus problems, nausea, and eye irritation. Although some plaintiffs complained of only short term irritation, others suffered long-term health effects as a result of the exposure. The toxins lingered near plaintiffs' work area for approximately two months after the spill.

Plaintiffs sued, and Citgo stipulated to fault. The only issues presented for trial were causation, quantum of compensatory damages, and punitive damages. I agree with the majority's affirmation of the lower courts' rulings on causation and compensatory damages. However, the majority clearly errs in its legal analysis of the choice of law issue, thus compelling my dissent.

Book IV of the Civil Code sets forth a comprehensive statutory framework for resolving choice of law issues in cases involving contacts with more than one state or foreign country. The guiding principle of Book IV is determining which state's policies would be most impaired if its law were not applied to the dispute:

> Except as otherwise provided in this Book, an issue in a case having contacts with other states is governed by the law of the state whose policies would be most seriously impaired if its law were not applied to that issue.
>
> That state is determined by evaluating the strength and pertinence of the relevant policies of all involved states in the light of: (1) the relationship of each state to the parties and the dispute; and (2) the policies and needs of the interstate and international systems, including the policies of upholding the justified expectations of parties and of minimizing the adverse consequences that might follow from subjecting a party to the law of more than one state.

La. Civ. Code art. 3515.

La. Civ. Code arts. 3542 and 3546 set forth more specific rules dealing with delictual actions in general and punitive damages in particular:

> Except as otherwise provided in this Title, an issue of delictual or quasi-delictual obligations is governed by the law of the state whose policies would be most seriously impaired if its law were not applied to that issue.
>
> That state is determined by evaluating the strength and pertinence of the relevant policies of the involved states in the light of: (1) the pertinent contacts of each state to the parties and the events giving rise to the dispute, including the place of conduct and injury, the domicile, habitual residence, or place of business of the parties, and the state in which the relationship, if any, between the parties was centered; and (2) the policies referred to in Article 3515, as well as the policies of deterring wrongful conduct and of repairing the consequences of injurious acts.

La. Civ. Code art. 3542.

> Punitive damages may not be awarded by a court of this state unless authorized:
>
> (1) By the law of the state where the injurious conduct occurred and by either the law of the state where the resulting injury occurred or the law of the place where the person whose conduct caused the injury was domiciled; or
>
> (2) By the law of the state in which the injury occurred and by the law of the state where the person whose conduct caused the injury was domiciled.

La. Civ. Code art. 3546.

In short, punitive damages may be awarded under article 3546 if such damages are authorized under the law of the state or states with two or more of the following contacts: (a) place of the injurious conduct; (b) place of the resulting injury; and (c) place of the defendant's domicile. Patrick J. Borchers, *Punitive Damages, Forum Shopping, and the Conflict of Laws*, 70 La. L. Rev. 529, 546-47 (2010); *Wooley v. Lucksinger*, 09-571 (La. 4/1/11), 61 So. 3d 507, 567. It is undisputed that the state of the plaintiffs' injury is Louisiana. Therefore, punitive

damages may be awarded if and only if both the state of Citgo's domicile and the state of the "injurious conduct" authorize punitive damages.

Notably, the codal choice of law provisions do not create a legal presumption that Louisiana law should be applied simply because the suit was filed in Louisiana. The court is not called on to apply the law it prefers, or the law it believes is best suited to resolve the dispute. Instead, the Legislature specifically drafted a neutral set of principles directing courts to consider the relative interests of each jurisdiction and the policies at issue in the case.

In any case involving a potential choice of law issue, the court's first task is to determine which jurisdictions have meaningful contacts to the dispute. Here, there are three jurisdictions which may have an interest in having their laws applied to this dispute – Louisiana, Texas, and Oklahoma. Next, a court must determine whether there is any meaningful difference between the substantive laws of the three jurisdictions. If the governing law of each jurisdiction is identical, or so similar that the same result would be reached under either law, there is a "false conflict" and, thus, no need to determine which state's law applies.[3]

Here, application of Louisiana law clearly leads to a different result than application of either Texas or Oklahoma law. However, as between Texas and Oklahoma, there appears to be no conflict. Punitive damages would be proper under either state's law,[4] and the parties do not urge that the result would be

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[3] *See* Eugene F. Scoles, et al., *Conflict of Laws* 28, n.16 (4th ed. 2004)("[f]alse conflicts also include cases in which the laws of the involved states are identical, or different, but produce identical results"); *Zimko v. American Cyanamid*, 03-658 (La. App. 4 Cir. 6/8/05), 905 So. 2d 465, 481, *writ denied*, 05-2102 (La. 3/17/06) 925 So. 2d 538.

[4] Tex. Code Civ. Prac. & Rem. § 41.003(a) provides:

> [E]xemplary damages may be awarded only if the claimant proves by clear and convincing evidence that the harm with respect to which the claimant seeks recovery of exemplary damages results from: (1) fraud; (2) malice; or (3) gross negligence.

different depending on which state's law is applied. Therefore, for the purposes of this analysis, any distinction between Texas law and policy and Oklahoma law and policy is a "false conflict."

A. *Citgo's Place of Domicile*

La. Civ. Code art. 3518 provides that, for the purposes of a choice of law determination, a "juridical person may be treated as a domiciliary of either the state of its formation or the state of its principal place of business, whichever is most pertinent to the particular issue." Citgo is incorporated in Delaware, but has minimal contacts in that state. For the purposes of article 3518, Citgo's domicile is the state of its headquarters and principal place of business. Prior to 2004, Citgo maintained its headquarters and principal place of business in Oklahoma, and was domiciled there. In 2004, Citgo moved its headquarters to Houston, and it is

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Okla. Stat. tit. 23, § 9.1 states, in relevant part:

> In an action for the breach of an obligation not arising from contract, the jury, in addition to actual damages, may, subject to the provisions and limitations in subsections B, C and D of this section, award punitive damages for the sake of example and by way of punishing the defendant based upon the following factors:
>
> 1. The seriousness of the hazard to the public arising from the defendant's misconduct;
>
> 2. The profitability of the misconduct to the defendant;
>
> 3. The duration of the misconduct and any concealment of it;
>
> 4. The degree of the defendant's awareness of the hazard and of its excessiveness;
>
> 5. The attitude and conduct of the defendant upon discovery of the misconduct or hazard;
>
> 6. In the case of a defendant which is a corporation or other entity, the number and level of employees involved in causing or concealing the misconduct; and
>
> 7. The financial condition of the defendant.

currently domiciled in Texas. Therefore, for the purposes of article 3518, Citgo is a domiciliary of Texas and Oklahoma, which supports an award of punitive damages.

However, La. Civ. Code art. 3548 sets forth a possible exception to the domicile rules under article 3518. In delictual cases only, a court may treat a non-Louisiana domiciliary as if it were a Louisiana domiciliary under limited circumstances:

> For the purposes of this Title, and provided it is appropriate under the principles of Article 3542, a juridical person that is domiciled outside this state, but which transacts business in this state and incurs a delictual or quasi-delictual obligation arising from activity within this state, shall be treated as a domiciliary of this state.

We must determine whether treating Citgo as a Louisiana domiciliary is "appropriate under the principles of Article 3542." As noted above, the primary question presented by article 3542 is which state's policies would be "most seriously impaired if its law were not applied to the issue."[5]

There are two principal guiding policies behind punitive damages awards: deterrence and punishment. Notably, both of these policies are directed towards the *tortfeasor*, not the victim. The "domicile of the victim is not a pertinent factor" in determining choice of law in a punitive damages case. La. Civ. Code art. 3546,

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[5] The majority criticizes this analysis because it does not discuss every possible policy listed in article 3542. The statute expressly requires the court to consider only the "*relevant* policies of the involved state," and my analysis (unlike that of the majority) only focuses on the factors which are directly related to the punitive damages claim at the heart of this case. The revision comments to article 3542 make clear that the list of policies and contacts is merely an "illustrative list" which is "neither exhaustive nor hierarchical, and is intended to discourage a mechanistic counting of contacts as a method of selecting the applicable law." La. Civ. Code art. 3542, cmt (a).

The majority errs by taking into account manifestly irrelevant factors such as the domicile of the victims. This is a punitive damages dispute, and this Court should concern itself only with those policies directly related to punitive damages – punishment of wrongdoers, and the deterrence of future wrongful acts.

cmt. (b). The victim is made whole by the award of compensatory damages; punitive damages are intended to go beyond mere compensation and deter wrongful behavior by providing additional punishment to the tortfeasor.[6]

The Texas Supreme Court explained the primary public policies served by punitive damages awards: "In addition to punishment, punitive damages are allowed to deter the same or similar future conduct... punishment and deterrence [are] co-purposes of punitive damages awards."[7] Oklahoma's public policy is much the same: "the essence of an exemplary damage award is punitive in nature and is proper where the defendant has maliciously or wantonly and wilfully invaded the rights of the plaintiff. Its purpose is to restrain the defendant and to deter others from the commission of similar wrongs."[8] In short, both Texas and Oklahoma have a strong interest in insuring that their corporate citizens are punished for gross environmental negligence so as to deter them from future wrongful actions. This policy is especially strong in the oil spill context, as both Texas and Oklahoma are, like Louisiana, heavily involved in energy-related industries.

In contrast, Louisiana's policy in disallowing punitive damages is to protect its domiciliaries from excessive legal liability. As Citgo is not (and never has been) a Louisiana domiciliary, this policy is not impacted in this case. Louisiana's

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[6] La. Civ. Code art. 3546, cmt. (b), "Punitive damages are not intended for the protection of the individual victim who, *ex hypothesi*, has been compensated for his loss through ordinary damages. Instead, punitive damages are for the most part designed to 'punish' the individual tortfeasor, to deter him and other potential tortfeasors in the future."

[7] *Lunsford v. Morris*, 746 S.W.2d 471, 472 (Tex. 1988)(internal citations omitted).

[8] *Timmons v. Royal Globe Ins. Co.*, 653 P. 2d 907, 919 (Okla. 1982); *Estrada v. Port City Properties, Inc.*, 258 P.3d 495, 502 n.21 (Okla. 2011)("Exemplary damages are a tool to deter the wrongdoer and are for society's benefit, not the litigating party's.")

punitive damages law is intended to protect Louisiana tortfeasors, but it has no interest in protecting Texas tortfeasors.

We should also take into account Citgo's interests in operating under the laws of the state where it chooses to make its principal place of business. By maintaining its headquarters in Oklahoma, then in Texas, Citgo implicitly agreed to be bound by the laws of those states. Indeed, Citgo apparently has a strong interest in having the laws of Oklahoma and Texas applied to suits in which it is a party, as its standard Franchise Agreement contains a choice of law provision mandating Oklahoma or Texas law, even when it is contracting with out of state franchisees.[9]

Stated simply, Texas and Oklahoma have strong interests in applying their punitive damages laws to regulate, punish, and deter wrongful conduct committed by corporations headquartered in those states. Louisiana has no countervailing interest in applying its law to actions taken by a corporation not headquartered in this state.[10] Under the balancing test set forth in article 3542, Texas and Oklahoma

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[9] *See Citgo Petroleum Corp. v. Home Service Oil Corp.*, 2009 U.S. Dist. LEXIS 110764, * 19 (N.D. Okla. 2009); *Citgo Petroleum Corp. v. Ranger Enterprises*, 590 F. Supp. 2d 1064, 1068 (W.D. Wisc. 2008); *Citgo Petroleum Corp. v. Bray Terminals, Inc.*, 2005 U.S. Dist. LEXIS 39766, * 6 n.1 (N.D. Okla. 2005); *Pantry, Inc. v. Citgo Petroleum Corp.*, 2009 NCBC 1, 46 (N.C. Super. Ct. 2008); *see also* page 22 of the Citgo "Managed Service Agreement," available at https://www.citgo.com/WebOther/CITGOLightOilsCustomerServiceReferenceManual/files/05cNewPaymentCardPrograms.pdf (requiring application of Texas law).

[10] Professor Symeonides describes this situation as a "false conflict," as only the state of the defendant's domicile has a true interest in applying its policies: "The first state has an interest in applying its punitive-damages law in order to punish the tortfeasor who engaged in egregious conduct in that state, and to deter others similarly situated. In contrast, the state of injury does not have an interest in applying its non-punitive-damages law because that law is designed to protect tortfeasors who are either domiciled in, or act in, that state, neither of which is the case here." Symeon C. Symeonides, *Choice of Law in Cross-Border Torts: Why Plaintiffs Win and Should*, 61 Hastings L.J. 337, 357 (2009).

See also Fanselow v. Rice, 213 F. Supp. 2d 1077, 1085-86 (D. Neb. 2002) ("[D]eterring future wrongdoing by the defendants would most benefit their

are the states whose policies would be most seriously impaired if Citgo were not treated as a domiciliary of those states. It would therefore be improper to treat Citgo as a Louisiana domiciliary under article 3548 for the purposes of the choice of law analysis.

B. *Where the Injurious Conduct Occurred*

The next question is the state of the injurious conduct; that is, the state where Citgo committed the wrongful and negligent acts which caused the oil spill. The trial court found the bulk of the injurious conduct took place in Texas and Oklahoma, at Citgo's headquarters. The majority opinion, giving no deference to the trial court's findings of fact, finds the only injurious conduct in this case was committed by the relatively low-level employees located in Louisiana who negligently failed to conduct routine maintenance of the storage tanks and dikes. I would find, as did the trial court, that Citgo's responsibility for this environmental disaster began further up in the corporate hierarchy, with decisions made by executives in Oklahoma and Texas. Therefore, for the purposes of article 3546, the injurious conduct took place in Oklahoma and/or Texas.

This Court has not had occasion to analyze the proper standard for determining the place of "injurious conduct" under article 3546 where, as here, there are multiple negligent acts which, together, caused the plaintiff's injury. The closest case on point is our recent decision of *Wooley v. Lucksinger*, 09-571 (La. 4/1/11), 61 So. 3d 507,[11] which also involved wrongful actions by corporate

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respective states of residence, while protecting two non-resident defendants against excessive financial liability provides little benefit to Nebraska or its citizens.")

[11] The majority also cites *In re Train Derailment*, 2004 WL 169805 (E.D. La. 2004), an unpublished federal district court decision involving a *factual* finding that the "injurious conduct" leading to a train accident in Louisiana was not caused by decisions made at corporate headquarters in Mississippi, and *Security Title Guarantee Corp. of Baltimore v. United General Title Ins. Co.*, 91 F.3d 137 (5th Cir. 1996)(unpublished), in which the Fifth Circuit expressly declined to address the question of where the "injurious conduct" occurred, as the other two factors

executives located in Texas. In *Wooley* this Court found the "majority" of the injurious conduct took place in Texas and therefore applied Texas punitive damages law:

> This article [3546] points squarely toward the applicability of Texas law: Texas was the state where the majority of the tortious conduct occurred and where most of the damage was inflicted. Here, due to the intertwined nature of the tortious acts alleged, the operative facts relating to Health Net's conduct are common to all of the claims asserted by the three Receivers. We find no error in the district court's determination that all of the victims of the same scheme should share the same remedy, no matter where they reside. Moreover, to hold Health Net responsible for punitive damages does not somehow deny the insurance regulatory agencies in Louisiana and Oklahoma the authority to regulate insurance in their states.
>
> *Id.* at 567

Wooley defines the state of the injurious conduct as the state where a "majority of the tortious conduct occurred." The majority essentially follows the legal standard set forth in *Wooley*, finding out-of-state "management or corporate level decisions must outweigh tortious activity which occurs locally in order for the location of the corporate or management decision to be considered the locale of the injurious conduct." (Op. at 13). While I believe this is the appropriate standard, the majority clearly errs in applying that standard to the facts of this case as found by the trial court and established in the record.

The ultimate question is whether the trial court committed manifest error in finding, as a matter of fact, that the majority of the injurious conduct took place out of state. Under the manifest error standard, we must indulge every presumption in favor of the factual findings of the trial court and cannot substitute our own view of

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(domicile of the defendant and state of injury) mandated application of Louisiana law, rendering the place of injurious conduct irrelevant. These cases are unpublished and carry little or no jurisprudential weight. The Fifth Circuit's own rules state "Unpublished opinions issued on or after January 1, 1996, are not precedent, except under the doctrine of res judicata, collateral estoppel or law of the case." U.S. 5th Cir. R. 47.5.4.

the evidence for that of the trial court.[12] The manifest error standard is especially important where, as here, the district court presided over a lengthy and complex trial and heard testimony from numerous fact and expert witnesses. The "trial judge is in the best position to review the factual circumstances and render an informed judgment as he is intimately involved with the case, the litigants, and the attorneys on a daily basis,"[13] while this Court is constrained to reviewing a cold record. On review, the record evidence fully supports the factual determinations of the trial court, and there are no grounds for a finding of manifest error.

There were two fundamental causes of the oil spill: first, the wastewater tanks were underbuilt, leading to a lack of adequate storage capacity; second, the tanks and dikes were not adequately maintained. From the very beginning, Citgo management made a conscious decision to intentionally underbuild the wastewater treatment units at the Lake Charles refinery. The original construction plans, drafted in 1992, called for three tanks, each holding 10 million gallons. However, Citgo management, then located in Oklahoma, issued cost reduction directives and budgetary constraints which led to cutting, among other things, the third planned tank. This decision was not made for engineering purposes; it was made to save money.

Notably, the Lake Charles refinery requested additional funds for building a third tank as early as 1996, and a third party engineering firm echoed this recommendation in 2002. In the meantime, the storage tanks proved inadequate on

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[12] *Sistler v. Liberty Mutual Ins. Co.*, 558 So. 2d 1106, 1114 (La. 1990); *Rosell v. ESCO*, 549 So. 2d 840, 844 (La. 1989).

Justice Guidry's concurrence suggests a *de novo* review is appropriate. While I agree that the trial court's legal conclusion on a choice of law issue is subject to *de novo* review, the trial court's findings of fact are entitled to a good deal of deference under the manifest error standard.

[13] *Thomas v. Capital Security Services, Inc.*, 836 F.2d 866, 873 (5th Cir. 1988); *State v. Payne*, 01-3196 (La. 12/4/02), 833 So. 2d 927, 933; *Clement v. Frey*, 95-1119 (La. 1/16/96), 666 So. 2d 607, 609-10.

several occasions, as oily wastewater leaked into the surge pond on at least six occasions, and the refinery had accumulated more than 950 days' worth of permit violations since 1994. However, Citgo management deferred budgeting money for construction until May 2004, and the third tank was not completed by the time of the spill. Construction of the third tank was delayed by Citgo's attempt to use a Venezuelan engineering firm in yet another cost-cutting measure. Because of the ongoing construction at the time of the spill, portions of the concrete dike floor had been removed, which allowed the oil and wastewater to escape. If construction had been completed sooner, there would have been no such gaps for the oil to spill through. These facts establish a pattern of Citgo management consistently deciding to place budgetary concerns ahead of engineering and environmental necessities. While some of these decisions were made with the input of employees at the Lake Charles refinery, the ultimate responsibility for refinery construction and operation rests with the corporate management. The final decisions on budgetary matters were unquestionably made in Oklahoma and Texas.

The majority opinion downplays the significance of these decisions by Citgo headquarters; indeed, it barely even acknowledges their existence. Incredibly, the majority finds Citgo's failure to construct a third tank is irrelevant because, in the majority's opinion, a third tank would not have been sufficient to completely prevent the spill. Citgo does not even raise that argument in its briefs before this Court, and the majority does not cite to any record evidence or testimony to support this finding. In any event, even if the majority is correct, that does not excuse Citgo's underbuilding of the refinery. Citgo has a duty to build however many tanks would be necessary to store the slop oil and wastewater created by the refinery. If three tanks would not have been enough, Citgo had a duty to build four. Following the 2006 spill, ENSR International Corp., an environmental regulatory consulting company hired by Citgo, recommended construction of a fourth tank to

ensure no further spills would occur. Yet even after the catastrophic 2006 oil spill, Citgo obstinately refused to build the fourth tank, solely because it wished to keep down costs. As a result, the federal district court was forced to issue an injunction ordering Citgo to construct a fourth tank in order to ensure compliance with the Clean Water Act.[14]

It is an undisputed fact that this spill took place because the Citgo wastewater treatment plant was knowingly and purposefully built without sufficient capacity to safely retain the amount of slop oil and wastewater generated by the refinery. Citgo management was aware of this shortcoming, yet repeatedly refused to budget the necessary funds to build sufficient waste storage capacity. These budgetary decisions were both a cause-in-fact and the legal cause of the eventual environmental disaster, and this alone is sufficient to justify the trial court's finding that the injurious conduct took place at Citgo headquarters, where these budgetary decisions were made.

The majority places great weight on Citgo's failure to adequately maintain the tanks and dikes, including the failure to run the oil "skimmers" designed to minimize the level of oil in the tanks. However, this is at most a secondary consideration. While the lack of routine maintenance may have aggravated the effects of the spill, the spill was primarily caused by the lack of adequate wastewater storage capacity. Citgo engineers and consultants warned management of the inadequate capacity as early as 1995 and repeatedly requested funds for building additional tanks. The engineers obviously believed that, even if the two tank system were properly maintained and the oil skimmers were run, two tanks would simply not provide sufficient storage capacity. Notably, the federal court issued an injunction requiring Citgo *both* to build a fourth tank and to adequately

[14] See Judgment in *U.S. v. Citgo*, case no. 08-cv-0893 (W.D. La. 9/29/11) at p. 12.

maintain those tanks – maintenance alone is not sufficient to prevent future spills. The wastewater and slop oil storage tanks overflowed because there were not enough tanks to contain the amount of byproducrts generated by the Lake Charles refinery. There were not enough storage tanks because Citgo headquarters refused to budget enough money to build those tanks. If Citgo had budgeted for sufficient storage capacity to contain the wastewater and slop oil, the tanks would not have overflowed and the on-site maintenance issues would be irrelevant. The failure to build those tanks is thus the primary and superseding cause of the spill.

Even assuming the negligence in maintaining the tanks is a relevant consideration, the majority errs in finding the negligent failure to properly maintain the facility took place solely in Louisiana. The implied finding is that Citgo, as a corporation, is somehow not responsible for the actions of its employees in Louisiana. This is puzzling, to say the least. It is a fundamental principle of corporate law that a corporation acts only through its officers, employees, and other agents or mandataries.[15] It is ultimately the responsibility of management to ensure that proper safety and environmental protocols are followed at each and every corporate facility. Citgo's own corporate governance documents make this principle clear: "Executive Management of the Corporation establishes policies, approves standards and goals for performance, and reviews HS&E [Health, Safety, and Environmental] compliance for all facilities …. the Corporate HS&E Department will conduct comprehensive reviews and assessment of facility compliance through verification of field practices to established procedures." Citgo executives draft the company's safety and environmental policies, and Citgo's

[15] *Doe v. Parauka*, 97-2434 (La. 7/8/98), 714 So.2d 701, 705 n. 5; *Hammerly Oaks, Inc. v. Edwards*, 958 S.W.2d 387, 391 (Tex. 1997); *Porter v. Norton-Stuart Pontiac-Cadillac of Enid*, 405 P. 2d 109, 114 (Okla. 1965).

headquarters bears the responsibility of ensuring these policies are followed by employees in the field.[16]

While the severity of the spill was exacerbated by the day-to-day negligence of the Louisiana employees, the culpability for that negligence rests equally on the Citgo corporate officers who failed to conduct the safety and environmental inspections necessary to ensure the Lake Charles refinery was following the appropriate protocols. The lack of routine maintenance was apparently an ongoing problem, meaning Citgo executives and supervisors had ample opportunity to remedy the problems at the refinery. They did not do so. From a policy perspective, this corporate negligence is far more troublesome than the negligence of the individual employees because its scope is wider. Citgo's failure to enforce its own Health, Safety, and Environmental regulations at the corporate level potentially affects not just the Lake Charles refinery, but every Citgo facility in the country. Both Texas and Oklahoma have a strong public policy in favor of deterring this kind of lax corporate oversight, if necessary, by imposition of punitive damages.[17]

The Texas Supreme Court discussed corporate liability for punitive damages at length in *Mobil Oil Corp. v. Ellender*, 968 S.W. 2d 917 (Tex. 1998):

> Because a corporation can "act only through agents of some character," this Court has developed tests for distinguishing between acts that are solely attributable to agents or employees and acts that are directly attributable to the

[16] This duty is imposed by federal law, including the Clean Water Act, which Citgo pleaded guilty to violating. *See, e.g., U.S. v. Iverson*, 162 F. 3d 1015, 1022-24 (9th Cir. 1998), which discusses the "responsible corporate officer" doctrine. Under this doctrine, a corporate officer is liable for environmental violations if he "has authority to exercise control over the corporation's activity that is causing the discharges," whether or not he actually exercised that authority. *Id.* at 1025.

[17] This public policy is doubly strong because Texas is both the site of Citgo's headquarters and the site of one of its three U.S. refineries, located in Corpus Christi. Texas has a vested interest in preventing negligent acts by its own corporate citizens which could lead to environmental disaster within its borders.

> corporation. A corporation is liable for punitive damages if it authorizes or ratifies an agent's gross negligence or if it is grossly negligent in hiring an unfit agent.
>
> A corporation is also liable if it commits gross negligence through the actions or inactions of a vice principal. "Vice principal" encompasses: (a) corporate officers; (b) those who have authority to employ, direct, and discharge servants of the master; (c) those engaged in the performance of nondelegable or absolute duties of the master; and (d) those to whom the master has confided the management of the whole or a department or a division of the business.
>
> In determining whether acts are directly attributable to the corporation, the reviewing court does not simply judge individual elements or facts. Instead, the court should review all the surrounding facts and circumstances to determine whether the corporation itself is grossly negligent. Whether the corporation's acts can be attributed to the corporation itself, and thereby constitute corporate gross negligence, is determined by reasonable inferences the factfinder can draw from what the corporation did or failed to do and the facts existing at relevant times that contributed to a plaintiff's alleged damages.

Id. at 921-22 (citations omitted).

The actions of the Citgo corporation, through its officers and other "vice principals," were grossly negligent under Texas law.[18] In *Ellender*, defendant Mobil Oil was taxed with punitive damages because its corporate management failed to establish an adequate corporate safety policy to protect its employees from known dangers. *Id.* at 924. Citgo management in Texas and Oklahoma likewise failed to establish or enforce adequate corporate policies to prevent environmental and public health damages resulting from its refinery operations. The law is clear that an employer's negligent supervision of its employees and

[18] Oklahoma jurisprudence also holds that punitive or exemplary damages may be awarded against the principal for a servant's act under the doctrine of *respondeat superior*. *Jordan v. Cates*, 935 P.2d 289, 292 (Okla. 1997)(citing *McDonald v. Bruhn*, 126 P.2d 986, 988 (Okla. 1942); *Holmes v. Chadwell*, 36 P.2d 499, 500 (Okla. 1934)).

corporate operations is a separate and distinct tortious act.[19] Citgo headquarters committed gross negligence in failing to establish and enforce adequate safety and environmental protection at its refineries. This is an independent "injurious conduct" which occurred solely in Texas and Oklahoma.

I do not understand how, given the evidence in the record, the majority can conclude that the trial court committed *manifest error* in finding that the majority of the injurious conduct took place in Texas and Oklahoma. I fear this opinion tilts the board in favor of applying Louisiana law to out-of-state companies who commit wrongful acts in their home states, as this case evinces. This interferes with the rights of our sister states to apply their own laws to the actions of companies headquartered in those states. While Louisiana does not have a strong policy of deterring environmental misconduct through punitive damages, Texas and Oklahoma do. Those states are just as involved in mineral exploration and refining as Louisiana, and they have authorized strong civil penalties against the kind of conduct which occurred in this case. We have a duty to respect the policy decisions made by the legislatures of our sister states. Instead, the majority effectively overwrites the laws of Oklahoma and Texas in favor of Louisiana law.

It appears the majority reaches its conclusion by applying Louisiana's public policy against imposition of punitive damages in cases under Louisiana law. However, this public policy is limited to cases arising out of Louisiana *substantive* law; Louisiana has no public policy against an award of punitive damages in cases involving Texas substantive law against a Texas domiciliary. In such cases, we are required to follow the law and public policies set forth by the Texas legislature.

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[19] *Bourgeois v. Allstate Ins. Co.*, 02-105 (La. App. 5 Cir. 5/29/02), 820 So. 2d 1132, 1135; *Jackson v. Ferrand*, 94-1254 (La. App. 4 Cir. 12/28/94), 658 So.2d 691, 698, *writ denied*, 95-0264 (La. 3/24/95), 659 So.2d 496.

The same is true in Oklahoma and Texas. *Young v. City of Dimmit*, 787 S.W.2d 50, 51 (Tex. 1990)(*per curiam*); *Mistletoe Express Service, Inc. v. Culp*, 353 P.2d 9, 13-14 (Okla. 1960).

The majority commits a fundamental error of law by using Louisiana's substantive public policy to decide a choice of law issue.

The record establishes that the primary cause of the spill was management and budgeting decisions made by Citgo headquarters in Texas and Oklahoma. These decisions caused the refinery wastewater treatment plant to be woefully underbuilt. Given the admitted lack of capacity of the storage tanks, and the numerous prior incidents in which the tanks overflowed, Citgo management clearly knew of the potential for disaster yet did nothing. The failure to properly maintain the storage tanks and operate the oil skimmers was a secondary cause of the spill, and a portion of that negligence took place in Louisiana. However, the ultimate responsibility for the refinery's safety and environmental compliance rests with Citgo headquarters. Given these factors, I agree with the trial court's determination that the decisions made at corporate headquarters outweighed any decisions made in Louisiana, and the "injurious conduct" ultimately took place in Oklahoma and Texas. As both the state of Citgo's domicile and the state of the injurious conduct permit punitive damages, I would affirm the trial court's judgment in accord with La. Civ. Code art. 3546.

Conclusion

I am very disappointed that my esteemed colleagues have overruled the factual findings in this case contrary to the manifest error doctrine. This decision in turn allows defendants to haphazardly, dangerously pollute the state of Louisiana. It is an inescapable conclusion that Citgo's tortious conduct in Oklahoma and Texas was a direct cause of the oil spill which led to widespread pollution and public health harms in our state. Punitive damages, which would both punish and deter this conduct, are authorized by the laws of the state of the defendant's domicile and the state where the injurious conduct occurred. Under La. Civ. Code art. 3546, the trial court did not err in awarding punitive damages against defendant

Citgo. I therefore respectfully dissent and would affirm the judgment of the lower courts.

03/13/12

SUPREME COURT OF LOUISIANA

No. 2010-C-2605

CRAIG STEVEN ARABIE, ET AL.

VERSUS

CITGO PETROLEUM CORPORATION, ET AL.

ON WRIT OF CERTIORARI TO THE COURT OF APPEAL THIRD CIRCUIT, PARISH OF CALCASIEU

GUIDRY, Justice, concurs in the result and assigns reasons.

I respectfully concur with the majority opinion on the issue of punitive damages. This court granted writs in the instant case primarily to address the choice of law to be applied for the award of damages under the facts.

The proceedings arise out of an oil spill at a Louisiana refinery owned by the defendant, CITGO Petroleum Corporation (CITGO). The accident resulted from the overflow of storage tanks following a heavy rain storm. Plaintiffs urge corporate management's decisions concerning the refinery's storage tank capacity was the principal cause of the toxic spill. CITGO's administrative offices were headquartered in Oklahoma during the initial construction of the refinery's storage tanks. The corporation subsequently moved its headquarters to Houston, Texas, its location at the time of the spill.

Generally, exemplary or punitive damages are not allowable under Louisiana law. *Bellard v. American Cent. Ins. Co.*, 2007-1335, p. 18 (La. 4/18/08), 980 So.2d 654, 667 (citing *Gagnard v. Baldridge*, 612 So.2d 732, 736 (La. 1993)). There are limited statutory exceptions to the general rule. *Id. See, e.g.*, La. C.C. arts. 2315.3, 2315.4, and 2315.7, and La. R.S. 46:440.3(C)(2). However, it is undisputed that none

of the provisions allowing the award of punitive damages under Louisiana law are applicable under the facts.[1] Instead, the plaintiffs seek relief in the Louisiana courts through the application of Texas or Oklahoma law, both of which permit the award of punitive damages.[2]

The court of appeal affirmed the trial court's use of La. C.C. art. 3546 to award punitive damages based on Texas law. The appellate court concluded that Texas was, at the time of the spill, the location of CITGO's domicile and corporate headquarters and, as such, presumably the location where budget and management decisions were made concerning the construction of facilities and operations at the Louisiana refinery. CITGO assigns as error the court of appeal's failure to apply Louisiana law, arguing it should apply since CITGO is a Louisiana domiciliary under La. C.C. art. 3542, and it is the state where the injurious conduct took place and the injuries were sustained.

In addressing the question of choice of law, I believe that *de novo* review is the appropriate standard, not manifest error. *Wooley v. Lucksinger*, 2009-0571, p. 62-63 (La. 4/1/11), 61 So.3d 507, 562-563; *Mihalopoulos v. Westwind Africa Ltd.*, 511 So.2d 771, 775-76 (La. App. 5th Cir. 1987) ("The law is well settled that a determination of choice of law by the trial court is reviewed by the appellate courts 'de novo[,]'" citing *Diaz v. Humboldt*, 722 F.2d 1216 (5th Cir. 1984).)

"La. C.C. art. 3546 provides the standard for determining when the remedy of punitive damages may be imposed." *Wooley*, 2009-0571, p. 69, 61 So.3d at 567. The

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[1]As evidence of Louisiana's general policy prohibiting punitive damages in toxic tort cases, the Louisiana Legislature repealed in 1996 the statutory authority which allowed the award of exemplary damages for improper storage, handling, or transportation of hazardous or toxic substances. *See* former La. C.C. art. 2315.3, repealed by 1996 La. Acts No. 2, §1.

[2]*See* Tex. Code Civ. Prac. & Rem. §41.003 and Okl. Stat. 23, § 9.1.

provision states in full:

> Punitive damages may not be awarded by a court of this state unless authorized:
>
> > (1) By the law of the state where the injurious conduct occurred and by either the law of the state where the resulting injury occurred or the law of the place where the person whose conduct caused the injury was domiciled; or
> >
> > (2) By the law of the state in which the injury occurred and by the law of the state where the person whose conduct caused the injury was domiciled.

The parties do not dispute that Louisiana is the "state where the resulting injury occurred." Therefore, another state's laws regarding punitive damages can be applicable pursuant to La. C.C. art. 3546 if the injurious conduct occurred in that state, and not in Louisiana, and if either one or both of the remaining provisions of Paragraph (1) are established. Stated differently, if the injurious conduct did occur in Louisiana, the application of another state's punitive damages laws would not be allowed, and the analysis should end at that point.[3]

Utilizing de novo review, I find the tortious conduct that took place at CITGO's Louisiana refinery was the "principal cause of injury"[4] of the plaintiffs' toxic exposure and that Louisiana was the state where the injurious conduct occurred. Based on my review of the record, this conduct far outweighed and offset any injury that may have been caused by the administrative actions or inaction of CITGO's Texas and Oklahoma management. CITGO correctly points out that the plaintiffs' own engineering expert testified that the oil spill resulted principally from several contributing factors related to the Louisiana refinery, namely, inoperable oil skimmers

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[3]Paragraph (2) is not applicable because the parties agree that Louisiana is the state "where the resulting injury occurred." Because both provisions of Paragraph (2) must be met, the absence of either defeats the authorization of punitive damages.

[4]Comment (h) to La. Civ. Code art. 3543 provides "[c]ases in which the injurious conduct occurs in more than one state should be approached under the principles of causation of the law of the forum. Ordinarily, these principles will make it possible to determine which particular conduct was, legally speaking, the principal cause of the injury."

that allowed the accumulation of oil in the tanks; the failure to maintain tank water levels; and the installation of an unsealed junction box and an earthen containment dike with the propensity to breach. It is clear that the negligent actions of the refinery's employees more directly precipitated the spill than any budget or management decisions made at CITGO's corporate headquarters regarding tank capacity.

Additionally, I find no merit in the plaintiffs' assertions that CITGO's corporate officers must be held accountable for the negligent acts of its Louisiana employees relative to the day to day operations of the refinery. The plaintiffs have provided no compelling evidence that corporate management was aware of the tortious conduct at the Louisiana refinery and failed to remedy the problem. Nor is there any controlling evidence that corporate officers neglected to provide adequate supervision over operations at the refinery. Under these facts, it would be implausible to extend the theory of vicarious liability or respondeat superior simply for the benefit of allowing the plaintiffs to recover exemplary damages through the application of another jurisdiction's laws. It is a fundamental tenet of Louisiana law that punitive or other penalty damages are not allowable unless expressly authorized by statute. *Ricard v. State*, 390 So.2d 882, 884 (La.1980). Our Legislature has taken concerted effort to bar recovery for punitive damages in toxic tort cases, as evidenced by the repeal of former La. C.C. art. 2315.3. *See supra* note 1. To allow recovery under these facts, would infer a jurisprudential rule that corporations headquartered out-of-state can be held vicariously liable through the application of another forum's laws for its Louisiana employees' tortious acts absent evidence of management's participation, consent or control.

For the above reasons, I concur in the majority's result.