14-3087-cv

United States Court of Appeals
for the
Second Circuit

JAGARNATH SAHU, on behalf of himself and all others similarly situated,
OHMWATI BAI, on behalf of herself and all others similarly situated,
MOHAN LAL SEN, on behalf of himself and all others similarly situated,
(For Continuation of Caption See Next Page)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

PLAINTIFFS-APPELLANTS' PETITION FOR PANEL REHEARING AND REHEARING EN BANC

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Plaintiffs-Appellants,

-v.-

UNION CARBIDE CORPORATION, MADYA PRADESH STATE,

Defendants-Appellees,

WARREN ANDERSON,

Defendant.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES **PAGE(S)**

STATUTES & OTHER AUTHORITIES

I. Introduction

Over one night in December 1984, the people of Bhopal became the victims of the worst industrial disaster in history. Over the following decades, they became the victims of corporate neglect, as the pesticide plant made infamous by the gas disaster leached toxins into their drinking water, while Union Carbide Corporation (UCC) abandoned the country without cleaning up the contaminated site. Over the last few years, they have become the victims of something even less visible.

The people of Bhopal have become victims of judicial inertia. Six times, the district court has dismissed suits seeking remedies for the pollution. A prior opinion by this Court found that UCC was not liable for pollution from the plant. While this panel may be reluctant to rule differently, inertia is not a legal rule: the records are vastly different. The judicial process is a search for the truth. Courts should defer to the law and the facts presented here, not to the result in a prior decision.

The Court's latest Summary Order is one more example of how this case has not been treated like other cases – in which courts wait for motions to dismiss, consider only arguments raised by the parties, apply settled legal standards, and consider the evidence before them. In any other pollution case against a company, the fact that the company's own employee led the construction of the polluting plant would establish its responsibility. In any other case, if qualified experts testified that the company's strategy of storing toxins in ponds above an aquifer – a "high risk" strategy – caused the resulting pollution, courts would allow a jury to consider that

evidence. In any other case, the victims of contamination would not need to prove that the company *knew* pollution would result, only that it was reasonably foreseeable.

This case has not been treated like other cases. It is time for that to change.

II. The court that never wanted this case.

For thirty years, Judge John F. Keenan has been dismissing Bhopal lawsuits.

When lawsuits arising out of the gas disaster were filed in the U.S. in the mid-1980s, even the Indian government argued that its own courts could not handle the complex litigation. But Judge Keenan ruled that it would be an "example of imperialism" for a U.S. court to hear the case."[1] So the case was heard in India – but then Union Carbide fled India, refusing to subject itself to jurisdiction there.

So when, in 1999, Bhopalis discovered that the lingering health effects of the gas disaster were not the only toxic legacy left by Union Carbide, some of them came to the United States to seek redress. Their groundwater was deeply contaminated, and UCC was refusing to take responsibility. They sued, and again found themselves in Judge Keenan's court, beginning a saga that – over seventeen years of litigation – has never resulted in a single deposition, let alone a trial. At every instance, Judge Keenan has sought the most expeditious route to dismissing the Bhopalis' claims – with the minimum process and discovery necessary to that end, and often less than that.

The first dismissal, in the *Bano* case, concluded that the Indian government had made itself the representative of all victims of the gas disaster; the opinion did not

[1] *In re Union Carbide Corp. Gas Plant Disaster*, 634 F. Supp. 842, 867 (S.D.N.Y. 1986).

discuss the water pollution.[2] This Court reversed, allowing the claims for ongoing pollution to proceed.[3] Judge Keenan then dismissed the suit again, ruling – among other things – that the claims were too old, and that to require UCC to clean up the water supply on which thousands of people depend would be "infeasible" and "inappropriate."[4] The judge also opined, incorrectly and without citing any evidence, that UCC "has met its obligations to clean up the contamination in and near the Bhopal plant" – a position that UCC had not argued.[5] Again, this Court reversed, finding that the plaintiffs could continue to challenge damage to their property.[6]

So Judge Keenan got creative. The *Bano* plaintiffs sought to proceed as a class action, and another group, led by the Sahu family, sought to intervene and join the suit. A magistrate judge recommended denying both motions.[7] But in reviewing the magistrate's report, Judge Keenan did not simply deny these motions. Instead, issuing an order that even UCC's own lawyers had not requested, he took it upon himself to dismiss the case.[8] Dismissing a case on a plaintiff's class certification motion is certainly highly unusual, if not entirely unprecedented. Nonetheless, in 2006 this

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[2] *Bano v. Union Carbide Corp. ("UCC")*, No. 99 Civ. 11329, 2000 U.S. Dist. LEXIS 12326, *30-34, 36, 39 (S.D.N.Y. Aug. 28, 2000).
[3] *Bano v. UCC*, 273 F.3d 120, 132-33 (2d. Cir. 2001).
[4] *Bano v. UCC,* No. 99 Civ. 11329, 2003 U.S. Dist. LEXIS 4097, at *24-28 (S.D.N.Y. Mar. 18, 2003).
[5] *Id.* at *27-28.
[6] *Bano v. UCC*, 361 F.3d 696, 712-13, 717 (2d. Cir. 2004).
[7] *Bano v. UCC*, No. 99 Civ. 11329, 2005 U.S. Dist. LEXIS 32595, at *49 (S.D.N.Y. Aug. 12, 2005).
[8] *Bano v. UCC*, No. 99 Civ. 11329, 2005 U.S. Dist. LEXIS 22871, at *11 (Oct. 5, 2005).

Court – moving from published opinions to a summary order – found no error.[9]

Injured Bhopalis were not remotely ready to give up the fight for justice, however. Seven years of litigation in the *Bano* case had yielded no reason to question the severity of the contamination or even any discovery relating to it. Different groups of plaintiffs filed two new suits, *Sahu (I)* and *Sahu (II)*, for personal injury and property damage, again seeking a cleanup of their groundwater.

Judge Keenan still did not believe these cases belonged in his courtroom. Referring to his decision in the original gas disaster case, he suggested that *Sahu I* should also be heard in India, not the U.S., because

> the majority of factors that influenced the Court's reasoning above are also present in this case. For example, claimants, evidence, and witnesses are located in India. . . . India remains a world power whose "courts have the proven capacity to mete out fair and equal justice."[10]

Again Judge Keenan suggested an argument for dismissal that Union Carbide had never made – and *could not* make, because the company has refused to return to India. While Judge Keenan did not dismiss on this basis, instead finding that UCC was not responsible for the Bhopal plant,[11] the discussion highlighted his deep opposition to hearing any case arising out of Bhopal.

Again this Court reversed on appeal, finding that Judge Keenan had improperly

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[9] *Bano v. UCC*, 198 Fed. Appx. 32 (2d. Cir. 2006).
[10] *Sahu v. UCC*, 418 F. Supp. 2d 407, 410 (S.D.N.Y. 2005).
[11] *Id.* at 410, 413–15; *Sahu v. UCC*, No. 04 Civ. 8825, 2006 U.S. Dist. LEXIS 84475 at *1 (S.D.N.Y. Nov. 20, 2006).

relied on evidence outside the complaint without giving the plaintiffs notice,[12] but this only delayed the inevitable dismissal. After the appeal, Judge Keenan allowed very limited discovery on UCC's involvement in the Bhopal plant. Although the plaintiffs sought only four depositions, Judge Keenan found them all to be "unduly burdensome" – chiefly because the testimony would relate to "events that took place between fifteen and thirty-five years ago."[13] Of course witnesses would testify if the case were ever to proceed to trial, but this case has never been treated as if trial were a possibility. So Judge Keenan permitted only "limited document discovery" – not even requests for admission.[14]

In 2012, Judge Keenan granted summary judgment in *Sahu I*, ruling that only the subsidiary Union Carbide India Ltd. (UCIL) – not UCC itself – was responsible for the Bhopal plant.[15] This came in the face of evidence that UCC had provided critical – and flawed – design for the plant that resulted in the faulty waste disposal system. The plaintiffs also believed that the evidence showed that L.J. Couvaras, the project manager for plant construction, was a UCC employee.

But this Court disagreed. It found that the evidence did not show that UCC's "designs for a waste disposal system" caused the pollution, and that UCIL alone

[12] *Sahu v. UCC*, 548 F.3d 59, 70 (2d. Cir. 2008).
[13] *Sahu v. UCC*, 262 F.R.D. 308, 317 (S.D.N.Y. 2009).
[14] *Id.* at 317-18.
[15] *Sahu v. UCC*, No. 04 Civ. 8825, 2012 U.S. Dist. LEXIS 91066 (S.D.N.Y. June 26, 2012). Judge Keenan's characterization, in this decision, of the plaintiffs' discovery requests as an "expedition worthy of Vasco da Gama" referred to what the plaintiffs *sought*, not the limited discovery they had received. *Id.* at *4.

"built the actual waste disposal system," not crediting any role by UCC employees.[16]

So, in *Sahu II* – this case – the plaintiffs redoubled their efforts to prove the truth. Couvaras, the project manager, confirmed in a signed declaration that he *was* a Union Carbide employee. The plaintiffs sought only one deposition – of Couvaras. And two eminent experts analyzed the evidence, submitting declarations that concluded that UCC's waste disposal strategy *had* caused the contamination.

The new evidence responded directly to the deficiencies identified in *Sahu I*, but Judge Keenan's decision was the same. He concluded both that Couvaras was *not* employed by Union Carbide, and that deposing him would add nothing.[17] "Couvaras would be testifying based upon decades-old recollection," Judge Keenan reasoned[18] – despite the rule that the passage of time does not make testimony unreliable.[19] In any other case, the fact that a key witness was aging would be a reason to depose him at the earliest possibility. And although expert testimony is critical in other pollution cases, Judge Keenan disregarded the experts' views and substituted his own conclusions. For the sixth time since the groundwater pollution claims were first filed, he ushered the Bhopalis from his courtroom.[20]

III. The Bhopal plant project was led by a Union Carbide employee.

Companies are responsible for the acts of their employees, a basic principle

[16] *Sahu v. UCC*, 528 Fed. Appx. 96, 102 (2d. Cir. 2013).
[17] SPA23.
[18] SPA24.
[19] *See, e.g.*, *Cleveland v. Bradshaw*, 693 F.3d 626, 641 (6th Cir. 2012).
[20] SPA45-SPA47.

every first-year law student can recite. In any other case, L.J. Couvaras's statement that he was a Union Carbide employee throughout his career would have allowed a trial on UCC's responsibility. Couvaras was undisputedly the Bhopal project manager, responsible for the detail design and construction to implement UCC's basic design.

Even Judge Keenan seemed to accept that if Couvaras were a UCC employee, UCC would be responsible. His ruling focused instead on denying this, describing Couvaras's own declaration about his employment as "wholly unsubstantiated."[21] But ignoring Couvaras's statement was untenable. Of course an individual's own declaration of who employed him is competent evidence of that fact. In any other case, this would have ended the discussion.

This Court took a different approach than Judge Keenan, apparently deciding that, even if Couvaras were employed by Union Carbide, the parent company was in the clear because he was "on loan" to its subsidiary: "Thus, UCC 'lent' Couvaras to UCIL, to manage the project for, and under the supervision of, UCIL."[22] The meaning of this all-important sentence is not entirely clear. If it means that Couvaras was no longer a UCC employee, but was instead employed by UCIL, it is obviously erroneous, because it directly conflicts with Couvaras's own statement. What the Court appears to mean, instead, is that Couvaras may have still been a UCC employee, but lent out to UCIL, and therefore UCC was not liable for him.

[21] *Id.* at *25.
[22] Summ. Order at 5.

The plaintiffs never responded to this argument, because UCC never made it. Union Carbide argued to this Court that "Couvaras became a UCIL employee and reported to UCIL management when he acted as UCIL's project manager."[23]

And the Court's conclusion missed the key step. The Court cited no legal principle that would allow the conclusion that a company is not responsible for an employee "lent" to another company.

New York's highest court has considered several cases of employees who may be "loaned" from a "general employer" to a "special employer." The court *presumes* that employment with the general employer continues, a presumption that is only overcome with a "clear demonstration of surrender of control by the general employer and assumption of control by the special employer."[24] That question is "ordinarily . . . not amenable to resolution on summary judgment."[25] The burden is on the company to prove that it has "has surrendered control completely."[26] This has *not* occurred if the general employer "retain[s] the right to assign" and "terminate."[27]

Last year, the New York Court of Appeals considered the case of a truck driver who was assigned to another company, and "was told where and when to deliver and pick up voting machines."[28] Despite that fact the general employer had "relinquish[ed]

[23] Opp'n Br. 14.
[24] *Thompson v. Grumman Aerospace Corp.*, 78 N.Y.2d 553, 557 (1991).
[25] *Bellamy v Columbia Univ.*, 50 A.D.3d 160, 165 (N.Y. App. Div. 2008).
[26] *Irwin v. Klein*, 271 N.Y. 477, 485 (1936).
[27] *Bellamy*, 50 A.D.3d at 164-65.
[28] *Holmes v. Bus. Relocation Servs., Inc.*, 117 A.D.3d 468, 469 (N.Y. App. Div. 2014), *aff'd*, 2015 N.Y.3d 955.

. . . contact with and direct supervision" with the driver, and "assign[ed] him" to the other company, this was not enough to show that the other company had assumed ""complete and exclusive control"" over the employee's work.[29]

Union Carbide never proved that it surrendered control over Couvaras, or that it gave UCIL the right to re-assign or fire him. Couvaras distinguishes between himself – a "UCC employee assigned to UCIL" – and other project staff, who were "provided" by UCIL.[30] Couvaras stated that he was only "assigned to UCIL" through 1981, suggesting that he was re-assigned – by UCC – afterward.[31]

Far from establishing that UCIL was solely responsible for Couvaras, the evidence supports the notion that he was a "dual servant" of both UCC and UCIL, such that *both* are liable for his actions.[32] As the U.S. Supreme Court has recognized, "[u]nder common-law principles . . . . [an employee] could be deemed to be acting for two masters simultaneously."[33] As long as Couvaras's service to UCIL did not involve "abandonment" of his service to Union Carbide, such that an "intent to serve [UCIL] necessarily excludes an intent to serve [UCC]," both companies are responsible.[34]

We know that Couvaras was "furthering the business" of Union Carbide "by

[29] *Id.* (quoting *Bellamy,* 50 A.D.3d at 165).
[30] Declaration of Lucas John Couvaras ("Couvaras") ¶ 1, A3298.
[31] *Id.*
[32] Restatement (Second) of Agency § 226 (2010).
[33] *Kelley v. Southern Pac. Co.*, 419 U.S. 318, 324 (1974). If there is any doubt about whether New York recognizes this doctrine, the Court should ask the New York Court of Appeals. *See* Pls' Mot. to Certify Questions of State Law to the N.Y. Ct. of Appeals (June 21, 2016).
[34] Restatement (Second) of Agency § 226 & cmt. a (2010).

the service rendered to" UCIL, indicating that he remained a UCC employee.[35] Couvaras was sent to "implement the project," "based on proprietary UCC design."[36] UCC never proved that UCIL had the ability to fire or reassign Couvaras, nor submitted any evidence that he had "abandoned" his service to UCC.

A deposition of Couvaras might have given more answers. This Court found "no indication" that deposing Couvaras would add anything useful regarding UCC's role in the plant.[37] That cannot be reconciled with Court's conclusion that UCC was not responsible for Couvaras even if he was a UCC employee – which depends on a legal doctrine that requires a much deeper exploration of Couvaras's employment.

IV. Union Carbide's waste disposal strategy caused the pollution.

In any other case, UCC could also be held responsible because it mandated the "high risk" waste disposal strategy that failed, including the idea to use solar ponds.

In *Sahu I*, this Court noted that if the "idea to use evaporation ponds" for waste disposal "was a cause of the hazardous conditions," UCC can be held liable.[38] The plaintiffs did not submit expert testimony in *Sahu I*, so the Court concluded that the plaintiffs had not proven that UCC's *idea* for its waste-disposal strategy, centered on the use of ponds, had caused pollution. The new evidence here changes that. New testimony from Dr. von Lindern confirms that "UCC's high-risk . . . [waste] strategy

[35] *Irwin*, 271 N.Y. at 484.
[36] Couvaras ¶ 3, A3298.
[37] Summ. Order at 8-9.
[38] *Sahu,* 528 Fed. App'x at 102.

ultimately resulted in . . . groundwater contamination."[39] Dr. Exner likewise found that aspects of UCC's strategy – including the ponds – contributed to the pollution.[40]

In any other case, that would be sufficient – the testimony directly addresses the gaps in *Sahu I*. But the Court found that the expert testimony was not "new . . . evidence," at all, because the experts had offered "conclusions based on the same evidence that we addressed and found lacking in *Sahu I*."[41] This is factually wrong and flatly inconsistent with the law in this Circuit.

The experts did not merely review the "same evidence" addressed in *Sahu I*. Dr. von Lindern's conclusions relied in part on documentation of the problems at UCC's Institute, West Virginia, plant, including evidence that was not presented in *Sahu I*.[42] Dr. Exner's conclusions were based in part on his experience with hundreds of similar ponds and on two on-site investigations he personally conducted at Bhopal.[43]

If this were any other case, however, the Court would have also concluded that the experts' conclusions were themselves new evidence. Expert testimony must be considered just like other evidence,[44] even if there is conflicting expert testimony –

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[39] Declaration of Ian von Lindern ("von Lindern") ¶¶ 21, 39, 64, 66, A3313-14, A3317-18, A3324-25.
[40] Declaration of Jurgen H. Exner ("Exner") ¶¶ 10-11, A3301-02.
[41] Summ. Order at 7.
[42] von Lindern ¶¶ 26-27, 60-64, A3315, A3323-24.
[43] Exner ¶¶ 2, 11, A3300-02.
[44] Under Fed. R. Evid. 702(a), expert testimony can "help the trier of fact" not just "understand the evidence" but also "determine a fact in issue" – in other words, expert conclusions *are* evidence that the Court must consider; under Rule 703, experts are allowed to draw conclusions based on other evidence in the record.

which UCC never submitted here.[45] In one prior pollution case, the plaintiffs had submitted testimony of a waste disposal expert, but the district court still granted summary judgment. This Court reversed, precisely because the district court "did not place much weight on the affidavit."[46] The Court found that "[e]xpert testimony was essential in this complex environmental litigation"; "there was only one expert opinion before the court, and the court was obliged not to ignore it."[47]

In retrospect, it was not surprising that this Court in *Sahu I* found insufficient evidence that UCC's disposal strategy caused the contamination – no experts testified. It was reasonable to expect that an "untrained layman" would not be "qualified" to determine the issues "without enlightenment from those having a specialized understanding."[48] But that principle works both ways. Judges, too, are untrained laymen. So in pollution cases, courts deny summary judgment based on expert testimony, though they might grant dismissal without such evidence.[49]

Although the Court also suggested that the experts blurred the distinction between UCC and UCIL, the experts in fact rigorously distinguished between each

[45] *See In re Joint E. & S. Dist. Asbestos Litig.*, 52 F.3d 1124, 1133, 1135 (2d Cir. 1995).
[46] *BF Goodrich v. Betkoski*, 99 F.3d 505, 525 (2d Cir. 1996).
[47] *Id.* at 525-27.
[48] *United States v. Locascio*, 6 F.3d 924, 936 (2d Cir. 1993) (internal quotations omitted).
[49] *See e.g., BF Goodrich*, 99 F.3d at 526-27; *United States v. Ala. Power Co.*, 730 F.3d 1278, 1280 (11th Cir. 2013); *Sierra Club v. Ga. Power Co.,* No. 3:02-CV-151, 2007 U.S. Dist. LEXIS 100219, at *13-19 (N.D. Ga. Jan 11, 2007).

entity's role in the waste disposal system design.[50] UCC "selected and mandated the waste treatment strategy," including the use of ponds to store toxins.[51] Although UCIL provided the detail design that implemented UCC's strategy, waste disposal design not done by UCC required UCC's approval.[52] UCC retained the authority to overrule UCIL's proposed changes, and, when UCIL proposed a different type of pond than UCC wanted, UCC shot UCIL down.[53] Thus, UCC had "complete primary or review authority."[54] And the experts concluded that *Union Carbide* caused the harm.

In the past six years, none of Judge Keenan's opinions dismissing the *Sahu* cases, nor this Court's orders, have been published. But even unpublished decisions must follow the law. If the Court really meant to hold that expert testimony based on documents is "not . . . factual evidence," it should publish this novel proposition. If not, it must reconsider and reverse the district court's decision.

V. In other environmental contamination cases, knowledge that contamination will occur is not required.

In any other pollution case, a company could be held responsible if the pollution were reasonably foreseeable – that is the rule adopted by New York's highest court, and applied by this Court in other cases. But here, the Court required evidence "that UCC had knowledge that the Bhopal plant's waste management system

[50] This phrase was copied from Judge Keenan, but he was referring *only* to the methyl isocyanate production process, not UCC's role in the waste disposal strategy. SPA27.
[51] von Lindern ¶¶ 17, 20-21, 28-30, A3313-16; *accord* Exner ¶¶ 3-5, 9, 11, A3300-02.
[52] von Lindern ¶¶ 18, 30-31, 47-48, A3313-16, A3319-20; *accord* Exner ¶ 9, A3301.
[53] von Lindern ¶¶ 18, 22, 30, 48-51, A3313-14, A3316, A3320-21.
[54] von Lindern ¶ 48, A3320; *accord* ¶¶ 18, 22, 30, 47, A3313-14, A3316, A3319.

would leak, [and] that such leaks would lead to local contamination."[55]

Defendants are liable for negligence regardless of whether they *knew* that harm would occur, as long as the "risks of harm" from their conduct were "reasonably foreseeable."[56] According to New York law, requiring knowledge of future harm would "improperly modif[y] the test for foreseeability from what is reasonably to be perceived, to what is actually foreseen, and thus unduly circumscribe[] the standard of care normally due any party: reasonable care under the circumstances."[57]

This Court's most recent application of New York law to pollution, the *MTBE* case, reflects this rule. The Court found liability for negligence applying the familiar "standard of ordinary care," without requiring knowledge.[58] It also found Exxon liable for nuisance, finding only that Exxon knew that it was "likely" that gas would be spilled and pollute others' property.[59] And it is undisputed that the Bhopal plant involved an unreasonably dangerous activity. In such a case, as even Judge Keenan recognized, liability for nuisance requires no fault at all.[60]

In any other case, plaintiffs' evidence would meet these standards. UCC knew its disposal strategy posed serious risks to drinking water. UCC knew that its disposal system for similar wastes at its Institute plant was inadequate, and that its Bhopal

[55] Summ. Order at 8.
[56] *Sanchez v. State*, 99 N.Y.2d 247, 252-55 (2002).
[57] *Id.* at 254.
[58] *In re Methyl Tertiary Butyl Ether Prods. Liab. Litig.,* 725 F.3d 65, 118-19 (2d Cir. 2013).
[59] *Id.* at 121.
[60] SPA15 (citing *State v. Schenectady Chems., Inc.,* 117 Misc. 2d 960, 976-79 (N.Y. Sup. Ct. 1983)).

strategy was *worse*.[61] That strategy involved "high risk."[62] And UCC knew that "a question can be raised as to whether the soil conditions at [Bhopal] lend themselves to constructing ponds economically with completely impervious bottoms that would prevent seepage . . . into the ground waters."[63] More simply put, UCC knew that the ponds were not likely to contain the waste; that a spill was likely. Just like Exxon.

VI. Rehearing, or rehearing en banc, is warranted.

Rehearing is appropriate because the Court "overlooked or misapprehended" these issues.[64] The Court's decisions with respect to Couvaras, the experts, and the legal standard conflict with the facts and the law.

En banc rehearing is rarely granted at all – let alone on an unpublished summary order – but it is warranted here. En banc proceedings are appropriate for questions "of exceptional importance," and to "maintain uniformity."[65]

The legal questions raised here are significant – but put that aside for the moment. Courts should not be blind to the impact of their decisions. What could be more important than the contamination of thousands of families' drinking water?

And if this Court's decisions are to be uniform, it must start treating this case like any other pollution case, in which the evidence presented would be more than enough to allow it to proceed. Justice demands no less.

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[61] *Id.* ¶¶ 25-28, 31, 62-64, A3314-16, A3323-24.
[62] von Lindern ¶¶ 64-66, A3324-25.
[63] A2244.
[64] Fed. R. App. Proc. 40(a)(2).
[65] Fed. R. App. Proc. 35(a)(1)-(2).

Dated: June 21, 2016

Respectfully submitted,

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14-3087-cv
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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 24th day of May, two thousand sixteen.

Present:

PETER W. HALL,
DEBRA ANN LIVINGSTON,
Circuit Judges,
ALVIN K. HELLERSTEIN,
District Judge.[1]

JAGARNATH SAHU, on behalf of themselves and all others similarly situated, OHMWATI BAI, on behalf of themselves and all others similarly situated, MOHAN LAL SEN, on behalf of themselves and all others similarly situated, QAMAR SULTAN, on behalf of themselves and all others similarly situated, MEENU RAWAT, on behalf of themselves and all others similarly situated, MAKSOOD AHMED, on behalf of themselves and all others similarly situated, KRISHNA BAI, on behalf of themselves and all others similarly situated, KANTI DEVI CHAUHAN, on behalf of themselves and all others similarly situated, RAGHUNATH VISHWAKERMA, on behalf of themselves and all others similarly situated, HARCHARAN CHAURASIA, on behalf of themselves and all others similarly situated, MOHAMMAD BAHADUR SHAH, on behalf of themselves and all others similarly situated, SHASHI BHAGEL, on behalf of themselves and all others similarly situated, KAMALA BAI SHRIVASTAV, on behalf of themselves and all others similarly situated, HARISHANKAR TOMAR, on behalf of themselves and all others similarly situated, SHANTI AIHRWAR, on behalf of themselves and all others similarly situated, ASGARI BEE, on behalf of themselves and all others similarly situated, ZAMIL KHAN, on behalf of

[1] Hon. Alvin K. Hellerstein, United States District Court for the Southern District of New York, sitting by designation.

themselves and all others similarly situated,

Plaintiffs-Appellants,

v. No. 14-3087-cv

UNION CARBIDE CORPORATION, MADHYA PRADESH STATE,

Defendant-Appellee.

APPEARING FOR APPELLANT: RICHARD L. HERZ, Earthrights International, Washington, DC (Reena Gambhir, Hausfeld LLP, Washington, DC, H. Rajan Sharma, Sharma & DeYoung LLP, New York, NY, and Curtis V. Trinko, LLP, New York, NY, *on the brief*).

APPEARING FOR APPELLEE: WILLIAM A. KROHLEY (William Charles Heck, *on the brief*) Kelley, Drye & Warren, LLP, New York, NY.

Appeal from a judgment of the United States District Court for the Southern District of New York (John F. Keenan, *J.*).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment entered on July 30, 2014, is **AFFIRMED**.

This case is the latest chapter in years of litigation arising from the operations of a pesticide factory in Bhopal, India. The factory was owned and operated by Union Carbide India Limited ("UCIL"), a corporation incorporated in India in 1934. A majority of UCIL's stock, during the Bhopal plant's operations, from 1969 to 1984, was owned by Union Carbide Corporation ("UCC"), a U.S. corporation.

The history of the Bhopal plant and the previous chapters of this litigation have been described in earlier decisions. *See Bano v. Union Carbide Corp.*, 361 F. 3d 696 (2d Cir. 2004); *Sahu v. Union Carbide Corp.*, 528 F. App'x 96 (2d Cir. 2013) (*Sahu I*). Owners and occupants of land near to the Bhopal plant, in several iterations of lawsuits, have sought relief against UCC

for injuries resulting from hazardous contaminants attributed to the plant's inadequate waste management system. We have already addressed part of this evidentiary record in *Sahu I*, a separate suit filed in 2004 by some of the same plaintiffs to recover for personal injuries.[2] *Sahu I* was dismissed by the District Court (Keenan, J.) and, after remand to allow additional discovery, dismissed again and affirmed on appeal. We noted that even after undertaking "a discovery expedition worthy of Vasco de Gama," 528 F. App'x at 100 (quoting *Sahu v. Union Carbide Corp.*, No. 04 Civ. 8825JFK, 2012 WL 2422757, at *2 (S.D.N.Y. June 26, 2012)), "it is clear from the undisputed facts that UCIL, and not UCC, designed and built the actual waste disposal system," *id.* at 102.

In the present case, the plaintiffs again try to establish UCC's liability.[3] Plaintiffs Jagarnath Sahu and several other similarly situated property-owners (collectively, "Sahu") have brought this separate action to recover for property damage, alleging claims sounding in nuisance, trespass, strict liability, and negligence. Building on the record established in *Sahu I*, Sahu claimed new evidence established UCC's responsibility, and sought leave to take a

[2] The plaintiffs in these actions were absent class members in a 1999 class action brought against UCC and ultimately dismissed. *See Bano v. Union Carbide Corp.*, No. 99-cv-11329 (S.D.N.Y.). The plaintiffs' personal injury claims were barred under New York's three year statute-of-limitations. *Bano v. Union Carbide Corp.*, No. 99 Civ. 11329JFK, 2003 WL 1344884, at *5 (S.D.N.Y. Mar. 18, 2003), *aff'd in part, vacated in part*, 361 F.3d 696 (2d Cir. 2004). Remaining property claims were later dismissed as not viable because the lead plaintiff owned no property. *Bano v. Union Carbide Corp.*, No. 99 Civ. 11329(JFK), 2005 WL 2464589, at *4 (S.D.N.Y. Oct. 5, 2005), *aff'd*, 198 F. App'x 32 (2d Cir. 2006).

[3] As the District Court's opinion describes in detail, the plaintiffs commenced this action while *Sahu I* was before the Second Circuit on appeal. The plaintiffs, some of whom appeared in *Sahu I* and some who did not, sought to toll the statute of limitations on various property damage claims not included in the 2004 action. *See Sahu v. Union Carbide Corp.*, No. 07 Civ. 2156(JFK), 2014 WL 3765556, at *1 (S.D.N.Y. July 30, 2014). The District Court acknowledged that this action involves many of the same parties as *Sahu I* and that collateral estoppel might apply to plaintiffs present in both. However, the District Court addressed the claims of all plaintiffs on the merits, and we shall do the same. *Id.* at *3.

deposition of a former UCC employee, Lucas John Couvaras, to provide additional evidence to oppose summary judgment, *see* Fed. R. Civ. P. 56(d), and to preserve his testimony in light of his advanced age, *see* Fed. R. Civ. P. 26 and 30. The District Court ruled that the evidence was not sufficient, denied the request for a deposition, and dismissed the lawsuit, a decision Sahu appeals. We affirm.

Sahu raises three arguments on appeal: that the District Court disregarded Sahu's new evidence, applied an erroneous legal standard under New York tort law of causation, and erred in disallowing the preservation deposition of an elderly witness.

I. Summary Judgment

"We review *de novo* a district court's grant of summary judgment after construing all evidence, and drawing all reasonable inferences, in favor of the non-moving party." *Sotomayor v. City of New York*, 713 F.3d 163, 164 (2d Cir. 2013). A court shall grant summary judgment only if "there is no genuine dispute as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). However, "[t]he mere existence of a scintilla of evidence in support of the [non-moving party's] position will be insufficient; there must be evidence on which the jury could reasonably find for the [non-moving party]." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986). "Where it is clear that no rational finder of fact 'could find in favor of the nonmoving party because the evidence to support its case is so slight,' summary judgment should be granted." *F.D.I.C. v. Great Am. Ins. Co.*, 607 F.3d 288, 292 (2d Cir. 2010) (quoting *Gallo v. Prudential Residential Servs., Ltd. P'ship*, 22 F.3d 1219, 1224 (2d Cir. 1994)).

A. New Evidence

Sahu's primary argument on appeal is that its new evidence "fills the gaps identified in *Sahu I*." Appellants' Br. 3. Sahu presents a declaration from L.J. Couvaras, a project manager at

UCIL, as to his ongoing employment relationship with UCC. Sahu claims that such evidence proves the missing link in causation: that UCC, through its agent Couvaras, was directly involved in the engineering and construction of the Bhopal plant. We agree with the District Court that Sahu's offer of "new evidence" does not accomplish his intended result.

Couvaras states in his declaration that he "was a UCC employee assigned to UCIL from 1971 to the end of 1981, to manage the engineering and construction of the plant based on proprietary design." J.A. 3298. Couvaras's declaration gives no specifics as to what he did, or as to his role and responsibilities. That information is already in the extensive record. The Definition of Services between UCC and UCIL stated that UCC's Chemicals and Plastics Engineering Department would provide "a project manager on loan to UCIL for the project." *Id.* at 2676. Project management was listed as UCIL's responsibility. Thus, UCC "lent" Couvaras to UCIL, to manage the project for, and under the supervision of, UCIL. In a 1985 affidavit, UCIL-employee Ranjit Dutta described Couvaras's reporting position within UCIL. Dutta identified Couvaras as a UCIL employee, and an employee that he had himself supervised. "As a UCIL employee, [Couvaras] also reported to UCIL management and all of his activities on the project were supervised and directed by UICL's management."[4] *Id.* at 1997. The record also includes copies of Annexures to UCIL's Annual Reports of the Directors, identifying Couvaras as a UCIL employee.

Couvaras's declaration is consistent with this record evidence, that his work was for UCIL, not UCC. He reiterates the division of responsibilities described in the documents, that UCC's role was to furnish the process design reports, which "were prepared by UCC-Technical Center in Charleston, West Virginia," and that "UCIL provided all the other administration and

[4] Sahu asserts that the District Court overlooked impeachment evidence from a later transcribed interview. But Dutta nowhere in that interview contradicted the statement that Couvaras was a UCIL employee who reported to him. J.A. 2937.

engineering staff to execute the project, using local contractors and material suppliers required by the Government of India." *Id*. at 3298. Nor does he dispute that his work was within UCIL's domain and that the "engineering and construction group formed in India to implement the project" "was entirely UCIL employees." *Id.*

Sahu also furnishes a new declaration from plant operator T.R. Chauhan, who asserts that Couvaras worked "[o]n behalf of UCC." *Id.* at 3335. Chauhan does not describe any personal knowledge about Couvaras's status or responsibilities, nor substantiate this assertion. Nothing in his biographical details suggests that Chauhan had any knowledge that Couvaras reported to, or was supervised by, UCC, rather than UCIL. *See* Fed. R. Civ. P. 56(c)(4) ("An affidavit or declaration used to support or oppose a motion must be made on personal knowledge . . . and show that the affiant or declarant is competent to testify on the matters stated."). Sahu argues that "it is credible that someone in [Chauhan's] position would learn these facts," but Sahu's supposition does not create facts. Appellants' Br. 34. Sahu also points to the 1985 affidavit of UCIL employee Edward Munoz, which states that the UCC Group I engineering department "selected the Union Carbide Corporation employee who acted as the Project Manager to oversee the design and construction of [a portion of the Bhopal] plant." J.A. 2899. But Munoz's affidavit only reiterates what we already know from the record and, particularly, the Definition of Services between UCC and UCIL, that UCC's Chemicals and Plastics Engineering Department would provide "a project manager on loan to UCIL for the project," and that UCIL was "responsible for the over-all venture." *Id.* at 2676, 2675.

Sahu's argument does not impeach or rebut the extensive evidence of Couvaras's role, that he was lent by UCC to UCIL and, as project manager for UCIL, was answerable to, and supervised by, UCIL. The District Court rightly determined that "[c]onclusory allegations" arguing for Couvaras's ongoing affiliation with UCC were insufficient to defeat summary

judgment. *Scott v. Coughlin*, 344 F.3d 282, 287 (2d Cir. 2003); *see also Harlen Assocs. v. Inc. Village of Mineola*, 273 F.3d 494, 499 (2d Cir. 2001) ("[M]ere speculation and conjecture is insufficient to preclude the granting of [a summary judgment] motion."). "[N]o rational finder of fact 'could find in favor of the nonmoving party because the evidence to support its case is so slight.'" *F.D.I.C.*, 607 F.3d at 292 (quoting *Gallo*, 22 F.3d at 1224).

Sahu also argues that declarations from two experts, Dr. Jurgen H. Exner and Dr. Ian H. von Lindern, constitute new evidence of UCC's involvement in the plant's waste management system. J.A. 3300, 3309. The District Court found that Sahu, without "evidence of actual tortious conduct by UCC . . . seek[s] instead to lump together all of the steps" that led to the production of certain chemicals at the Bhopal plant. *Sahu*, 2014 WL 3765556, at *11. We agree.

The experts contend that the process engineering and design, furnished by UCC, in fact created the disposal problems at the Bhopal plant. In so doing, these experts only "blur[]" the distinction between UCC and UCIL's respective responsibilities. *Id.* These experts are not offering new factual evidence, but rather, are offering conclusions based on the same evidence that we addressed and found lacking in *Sahu I*. 528 F. App'x at 104 ("Sahu and many others living near the Bhopal plant may well have suffered terrible and lasting injuries from a wholly preventable disaster for which someone is responsible. After nine years of contentious litigation and discovery . . . all that the evidence in this case demonstrates is that UCC is not that entity."). None of the new evidence presented here changes that conclusion.

B. Legal Standard for Causation

Sahu argues, based on our recent decision in *In re Methyl Tertiary Butyl Ether ("MTBE") Products Liability Litigation*, 725 F.3d 65 (2d Cir. 2013), that the District Court misinterpeted

the legal standard for causation and erroneously found that only the party responsible for actual waste disposal could be subject to liability. Sahu misconstrues the District Court's opinion.

Quoting *MTBE*, the District Court correctly ruled that a defendant could be liable when its conduct was a "substantial factor in" bringing about the injury, *MTBE*, 725 F.3d at 116 (quoting *Schneider v. Diallo*, 788 N.Y.S.2d 366, 367 (1st Dep't 2005)), where its conduct "had such an effect in producing the injury that reasonable people would regard it as a cause," *id.* (quoting *Rojas v. City of New York*, 617 N.Y.S.2d 302, 305 (1st Dep't 1994)). The District Court then inquired, consistent with *MTBE*, "whether UCC played a sufficiently direct role in causing the hazardous wastes to seep into the ground to be held liable." *Sahu*, 2014 WL 3765556, at *7 (quoting *Sahu I*, 528 F. App'x at 101-02); *MTBE*, 725 F.3d at 121 ("[T]he City offered testimony that Exxon knew station owners would store this gasoline in underground tanks that leaked, and introduced evidence that Exxon knew specifically that tanks in the New York City area leaked.").

In *MTBE*, the defendant's knowledge of a risk and "substantial[] certain[ty]" about the ultimate injury constituted "tortious conduct" that "sufficed to demonstrate [defendant's] participation in a nuisance and trespass." *Sahu*, 2014 WL 3765556, at *8 (citing *MTBE*, 725 F.3d at 120). But in contrast to the defendant in *MTBE*, there is no indication on this record that UCC had knowledge that the Bhopal plant's waste management system would leak, or that such leaks would lead to local contamination. As the District Court's opinion thoroughly sets forth, no reasonable juror could find that UCC participated in the creation of the injury on any theory of liability.

II. Deposition

Sahu also argues that the District Court erred in declining to allow the deposition of Couvaras. The District Court's denial of a preservation deposition is reviewed for an abuse of

discretion. *Penn Mut. Life Ins. Co. v. United States*, 68 F.3d 1371, 1374 (D.C. Cir. 1995). Sahu argues that Couvaras is uniquely qualified to explain the relationship between UCC and UCIL. But the extensive evidentiary record, accumulated over years of litigation, provides a thorough picture of the relationship between UCC and UCIL as to the Bhopal plant. Sahu speculates that Couvaras's deposition will somehow alter what the ample record demonstrates. However, there is no indication in Couvaras's declaration that Couvaras knows of any new detail to supplement or change the existing evidence. The District Court did not abuse its discretion in rejecting a further deposition.

III. Conclusion

The District Court found that Sahu's offer of new evidence was insufficient to raise an issue of material fact in opposition to UCC's summary judgment motion. For the reasons set forth above, we AFFIRM the judgment of the District Court.

FOR THE COURT:

Catherine O'Hagan Wolfe, Clerk