# 12-2983-cv

## United States Court of Appeals
*for the*
## Second Circuit

JANKI BAI SAHU, on behalf of herself, her family, as guardian of her minor Children, and all others similarly situated, SHANTI BAI, on behalf of herself, her Family, as guardian of her minor children, and all others similarly situated,

(*For Continuation of Caption See Below)*

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

**PLAINTIFFS-APPELLANTS' PETITION FOR PANEL REHEARING**

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*Plaintiffs – Appellants,*

-v.-

UNION CARBIDE CORPORATION, WARREN ANDERSON,

*Defendants-Appellees.*

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## INTRODUCTION AND SUMMARY OF THE ARGUMENT

The June 27, 2013, Summary Order in this case held that no reasonable jury could properly find that defendant UCC participated in the creation of a nuisance—the pollution of Plaintiffs' drinking water. The panel concluded that UCC was not sufficiently involved in the design of the waste disposal system at the Bhopal plant, in particular in the lining of the solar evaporation ponds. Plaintiffs respectfully petition for rehearing because the Order overlooked or misapprehended key facts and points of law.

First, the Summary Order overlooked the fact that UCC had ultimate authority over the design of the waste disposal system, including the liner of the ponds, and the fact that the ponds were not the only source of pollution.

Second, the Order conflicts with New York law. The conclusion that only those ultimately responsible for the liner of the solar evaporation ponds can be held liable cannot be reconciled with the holding of the trial and appeals courts in *State v. Schenectady Chems., Inc.*, that the defendant need not have *any* involvement in the disposal of the wastes. 459 N.Y.S.2d 971 (N.Y. Sup.Ct. 1983), *aff'd as modified*, 479 N.Y.S.2d 1010 (3rd Dep't 1984). Under those decisions, a jury may find UCC liable for its role in creating the toxic waste that leaked into Plaintiffs' water supply even if Plaintiffs had not presented evidence that UCC participated in the design of the ponds.

Although the Order relies on *People ex rel. Spitzer v. Sturm, Ruger & Co., Inc.*, 761 N.Y.S.2d 192 (1st Dep't 2003), suggesting it limits *Schenectady Chemicals*, *Sturm*, *Ruger* explicitly approved *Schenectady Chemicals*, thus affirming that it is exactly the type of case that is actionable.

Third, even assuming that *Sturm*, *Ruger* and *Schenectady Chemicals* conflict, the most appropriate course would be to certify the question to the New York Court of Appeals, to provide it the opportunity to resolve the conflict.

## STANDARD FOR REHEARING

Rehearing is warranted where the Petitioner "show[s] 'point[s] of law or fact that . . . the court has overlooked or misapprehended.'" *Sash v. Zenk*, 439 F.3d 61, 62 (2d Cir. 2006) (quoting Fed. R. App. P. 40(a)(2)).

## ARGUMENT

The Summary Order framed the question at bar as "whether UCC played a sufficiently direct role in causing the hazardous wastes to seep into the ground." Summary Order at 6. The Order held that:

> Neither UCC's approval of the plan to "back-integrate" the plant, nor its transfer of technology for pesticide manufacture, nor its designs for a waste disposal system, nor its limited involvement in remediation amount to participation in the failure of the evaporation ponds to contain the hazardous waste.
>
> We note in particular that it is clear from the undisputed facts that UCIL, and not UCC, designed and built the actual waste disposal system and Sahu points to nothing in the record (or even in the Complaint) that suggests that the mere idea to use evaporation ponds

> as a means to dispose of wastewater was a cause of the hazardous conditions.

*Id.* Thus, the Summary Order is predicated on 1) the factual finding that UCC was not involved in the design of the "actual waste disposal system" and 2) the legal conclusion that a jury may not find a defendant liable for participating in the creation of a water pollution nuisance unless that defendant was ultimately responsible for the specific manner in which the pollutants were handled that failed to protect the water supply.

The panel erred on both points. As detailed below, Plaintiffs respectfully submit that they meet even the standard set forth in the Summary Order, because UCC approved the design of the solar evaporation ponds, but that New York nuisance law is not so narrow. Application of this standard would effectively change the law as applied by the New York appellate courts, and this Court should not do so without first certifying the question to the New York Court of Appeals.

**I. The Summary Order overlooked critical facts from which a jury could have found that UCC approved the design of the actual waste disposal system, including the solar evaporation ponds and their lining, and that there were additional sources of pollution.**

Because, under New York law, causation is a "quintessential jury question[] . . . generally and more suitably entrusted to fact finder adjudication," courts are reluctant to resolve this issue on summary judgment. *See Lombard v. Booz-Allen & Hamilton, Inc.*, 280 F.3d 209, 215-16 (2d Cir. 2002).

The Summary Order correctly recognized that UCC provided "designs for a waste disposal system." Summary Order at 6. But the Order suggested that UCC could not be held liable because only UCIL "designed and built the actual waste disposal system." *Id*. The Summary Order overlooked the facts that UCIL's plans were based on UCC's, Plaintiffs-Appellants' Opening Brief ("PB") 15, 44, and that the final waste disposal design had to be, and was, approved by UCC. *Id.* 15-18; Plaintiffs-Appellants' Reply ("Reply") 13-14.[1] In particular, while the Order focused on the liner of the evaporation ponds, Summary Order at 6, it overlooked the fact that UCC's final approval authority extended to the pond's liner. PB 17, 46; Reply 15. Thus UCC was involved in the design of the actual waste system.[2] Rehearing should be granted to consider whether a jury can find that final approval constitutes a direct causal role; *i.e.* that UCC, the ultimate decision-maker with respect to the design and construction of the waste disposal system, participated.

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[1] UCC sent its *own* employee, John Couvaras, to oversee construction and approve all design. PB 14, 45; A3372. The final report detailing the treatment and disposal of all plant wastes was "approved" by Couvaras. *Id.*; A2879. The Summary Order noted that it was affirming the district court "substantially for the reasons set out" in the district court's opinion. Summary Order at 6. But the district court committed a crucial factual error: it assumed contrary to the evidence that Couvaras was a UCIL employee, and then relied on the fact that he approved the design to find UCC was not involved, PB 46; SPA74, when Couvaras' approval shows the precise opposite.

[2] While UCC therefore did far more than merely provide the "idea to use evaporation ponds," the Order also overlooked evidence that that idea itself was "a cause of the hazardous condition." *See* Summary Order at 6. UCC knew from the outset that there was a question as to whether safe ponds could be built economically. PB 22-23; Reply 14.

Additionally, the Summary Order erred in assuming that the failure of the evaporation ponds' liner was the only means by which pollutants leached into Plaintiffs' drinking water. Summary Order at 6. In fact, pollutants also leached from the plant-site itself. PB 9. And UCC was a cause of that harm; it created and exercised final approval authority over the plant-site waste disposal plan and conducted mandatory supervisory audits of waste-handling practices. PB 18, 44; Reply 14, 16-18. Likewise, UCC was a key participant in the failed rehabilitation of the plant-site and ponds that has left these facilities a continuing source of water pollution. PB 9, 23-26; Reply 20-22. Because the panel overlooked evidence that plant-site wastes and the failed rehabilitation contributed to water pollution, rehearing should be granted.

**II. New York nuisance caselaw firmly establishes that anyone who participates in creating a water pollution nuisance is liable, even without direct participation in the waste disposal process.**

As the Summary Order acknowledges, New York law holds that everyone who participates in the creation of a nuisance is jointly and severally liable. Summary Order at 6, *quoting Schenectady Chems.*, 459 N.Y.S.2d at 976. This standard has long been settled.[3]

[3] *E.g. Penn Cent. Transp. Co. v. Singer Warehouse & Trucking Corp.*, 86 A.D.2d 826, 828 (1st Dep't. 1982); *Hine v. Aird-Don Co.*, 250 N.Y.S. 75, 77 (3rd Dep't. 1931); *Uggla v. Brokaw*, 117 A.D. 586, 595 (1st Dep't. 1907).

The panel erred, however, in its application of this standard. Even if the failure of the ponds' liner were the only mechanism for pollution, the Summary Order's legal conclusion that only the entity ultimately responsible for the liner can be held liable is inconsistent with the holding in *Schenectady Chemicals*, which found nuisance liability proper despite the fact that the defendant had not participated in the improper disposal.

There, the court held that a chemical manufacturer could be held jointly and severally liable for its participation in the creation of a nuisance, even though it merely contracted with a disposal company to dispose of its wastes. The *disposal company* caused groundwater pollution by dumping the wastes indiscriminately on its own land. *Schenectady Chems.*, 459 N.Y.S.2d at 974. Notably, only 18% of the chemicals the disposal company dumped came from the defendant; it had no connection whatsoever with 82% of problem. *Id*. But more importantly, the defendant had *nothing* to do with how the disposal company *handled* the wastes. *Id.* Here, Plaintiffs can show UCC *was* a critical participant in designing the waste disposal system. Section I, *supra*.

The Summary Order does not follow the essential principle of *Schenectady Chemicals*, affirmed by the Appellate Division, 479 N.Y.S.2d at 1013, that those who participate in creating a toxic waste site are responsible for the toxins that ultimately leach into the water, even if they are not involved in the disposal. The

panel acknowledged the role that UCC played in creating the toxic nuisance.[4] But contrary to *Schenectady Chemicals*, it found no liability based solely on UCC's supposed lack of sufficient participation in the disposal process. Summary Order at 6. Rehearing should be granted to address this inconsistency with New York law.

**III. *Sturm, Ruger* approved *Schenectady Chemicals*; it did not purport to adopt a narrower standard.**

The Summary Order noted the *Schenectady Chemicals* standard, and did not suggest that Plaintiffs would not prevail under that case. Summary Order at 6. But it concluded that:

> New York's First Department has cautioned that courts are not to lay aside traditional notions of remoteness, proximate cause, and duty when evaluating public nuisance claims. [*Sturm, Ruger*, 761 N.Y.S.2d at 199, 200-02]; *see also id.* at 198 n.2 (explaining that public nuisance claims generally may proceed where they "involve specific harm directly attributable to defendant or defendant's activity").

*Id.* Thus, the panel suggested that *Sturm, Ruger* limited or conflicted with *Schenectady Chemicals*. Plaintiffs respectfully submit that this misreads that case.

*Sturm, Ruger* approved and distinguished *Schenectady Chemicals*, in applying nuisance law to a completely different context. The First Department

[4] The Summary Order acknowledged that UCC transferred "technology for pesticide manufacture." Summary Order at 6. But that understates UCC's participation. UCC was a cause of the contamination because it provided the primary source of the pollutants in Plaintiffs' water—the MIC process—even though it knew that process presented a "major disposal problem" at Bhopal. PB 20-23. The district court failed to even consider the fact that the MIC process came from UCC. PB 47.

expressly noted that *Schenectady Chemicals is* a case involving "specific harm directly attributable to [the] defendant." *Sturm, Ruger*, 761 N.Y.S.2d at 198, n.2. Thus, far from suggesting that it adopted a more limited standard or that the Third Department erred, *Sturm, Ruger* cited *Schenectady Chemicals* as a case in which "traditional notions of remoteness, proximate cause, and duty" *have been met*.[5]

Since the Order was based on a misapprehension that *Sturm, Ruger* limited or conflicted with *Schenectady Chemicals*, rehearing should be granted.

**IV. If *Sturm, Ruger* purported to adopt a narrower standard than *Schenectady Chemicals*, this Court should allow the New York Court of Appeals to resolve the conflict.**

Even if the First Department's *Sturm, Ruger* decision would bar Plaintiffs' claims, those claims would be actionable under the Third Department's holding in *Schenectady Chemicals*. In that circumstance, the standards laid out by two intermediate appellate courts would conflict. And if conflict exists on this important legal question, then the appropriate course is to afford the New York Court of Appeals the opportunity to resolve the conflict.

[5] *Sturm, Ruger* is about the court's refusal to expand public nuisance into novel areas, not about limiting previously accepted claims. Plaintiffs sought to "widen the range" of nuisance claims to sue gun makers for others' "unlawful use of handguns," *id.* at 194, 196, even though the "intervention of unlawful and frequently violent acts of criminals" attenuates the industry's responsibility, and even though regulating the manufacturing and marketing of handguns is a function courts are ill-suited to perform. *Id.* at 199. Moreover, the court feared that allowing such previously unrecognized liability would open the door to similarly novel suits to address a host of other societal problems. *Id.* at 196, 202-203.

This Court may certify a question of state law to that state's highest court, where state law allows. Local Rule 27.2. This Court has repeatedly certified questions to, and received answers from, the New York Court of Appeals.[6]

New York permits certification from a United States Court of Appeals if "determinative questions of New York law are involved . . . for which no controlling precedent of the Court of Appeals exists." New York Court of Appeals, Rules of Practice, Rule 500.27(a); *see also* N.Y. Const. Art. 6, §3(b)(9).

This Court's tripartite analysis of whether to certify a question subsumes New York's requirements. First, this Court considers "whether the New York Court of Appeals has addressed the issue and, if not, whether the decisions of other New York courts permit [the court] to predict how the Court of Appeals would resolve it." *Osterweil v. Bartlett*, 706 F.3d 139, 142 (2d Cir. 2013). The Court of Appeals has not addressed the question at bar. *Schenectady Chemicals* addressed similar facts and therefore ought to be more predictive than *Sturm, Ruger*. Regardless, where courts have adjudicated a question but reached different conclusions, this Court cannot predict how the Court of Appeals would rule.

[6] *E.g.*, *Jaramillo v. Weyerhaeuser Co.*, 536 F.3d 140 (2d Cir. 2008), certified question accepted, 11 N.Y.3d 744 (2008), and answered, 12 N.Y.3d 181 (2009); *ITC Ltd. v. Punchgini, Inc.*, 482 F.3d 135 (2d Cir. 2007) certified question accepted, 8 N.Y.3d 994 (2007), and answered, 9 N.Y.3d 467 (2007); *Joblon v. Solow*, 135 F.3d 261 (2d Cir. 1998), certified question accepted, 91 N.Y.2d 908 (1998), and answered, 91 N.Y.2d 457 (1998); *W.-Fair Elec. Contractors v. Aetna Cas. & Sur. Co.*, 49 F.3d 48 (2d Cir. 1995), certified question accepted, 85 N.Y.2d 890 (1995), and answered, 87 N.Y.2d 148 (1995).

*Executive Plaza, LLC v. Peerless Ins. Co.*, No. 12-1470-CV, 2013 U.S. App. LEXIS 10394 at *7 (2d Cir. May 23, 2013); *accord Osterweil*, 706 F.3d at 143 (finding prediction must be based on other courts' decisions, "not based on our instinct that the Court of Appeals will find those courts' decisions unconvincing"). If *Sturm, Ruger* requires dismissal, the first factor is met because Plaintiffs' claims would proceed under *Schenectady Chemicals.*

Second, the Court considers whether the question is important to the state and may require value judgments and public policy choices. *Osterweil*, 706 F.3d at 142. The question of whether those who participate in creation of a toxic waste site are responsible for the ultimate disposal of the wastes is undoubtedly important; indeed, *Schenectady Chemicals* was brought *by the State.* 459 N.Y.S.2d at 973.

New York surely has a strong interest in deciding whether its law should exempt from liability those who participate in creating a toxic nuisance if they are not involved in the specific disposal failure that leads to environmental pollution. This question could conceivably arise in any number of water pollution cases, involving chemical or even nuclear wastes. And it inherently involves a value-laden public policy choice between competing considerations. Such a decision is best resolved by the New York Court of Appeals. [7]

[7] It makes no difference that the Summary Order is not precedential; the Order can be cited to this and other courts. FRAP 32.1(a); Local Rule 32.1.1. Indeed, no federal court ruling on state law issues is binding on state courts.

Finally, this Court considers whether the certified question is determinative. *Osterweil*, 706 F.3d at 142. The question here is, because if *Schenectady Chemicals* properly applies New York law, Plaintiffs are entitled to present their claim to a jury.

## CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that this Court grant Plaintiffs' petition for rehearing and reverse the district court's grant of summary judgment or, alternatively, certify to the New York Court of Appeals the question of the level of participation required.

Dated: July 11, 2013

Respectfully submitted,

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*Osterweil*, 706 F.3d at 143. Nonetheless, avoiding the confusion that would result if state courts had to choose between binding state precedents (like *Schenectady Chemicals*) and non-binding federal decisions is "[o]ne of the chief virtues of certification." *Id.* In any event, the relevant issue is not the importance of this *decision*, but rather the importance of the *question*.

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