

01-40474

01-40471

038 UNITED STATES COURT OF APPEALS - FIFTH CIRCUIT
New Orleans, Louisiana

Case No. 01 - 40474

EULUGIO MIRELES, BARTOLO MENDIOLA,
ISRAEL TREVINO and FRANCISCO GONZALES,

SUFFICIENT

Plaintiffs - Appellants;

and

DAVID LYNN HORTON, Appellant;

COPY

Vs.

CELANESE CORP., CELANESE CHEMICAL CO.,

Defendants - Appellees.

Case No. 01 - 40471

OSCAR GUERRA, Plaintiff - Appellant; ^{DAVID LYNN HORTON -}
_{APPELLANT}

Vs. CELANESE CORP. *Et Al.*, Defendants;

CELANESE CORP., CELANESE CHEMICAL CO.,

Defendants - Appellees.

Appeal from the United States District Court
Southern District of Texas - Corpus Christi Division
The Hon. Ricardo Hinojosa, United States District Judge

B R I E F O F A P P E L L A N T S

David Horton
NEEL & HORTON, LLP
Post Office Box 2159
South Padre Island, TX 78597
956.761.6644 Telephone

U.S. COURT OF APPEALS
FILED

OCT 26 2001

CHARLES H. FULDRIDGE III
CLERK

038 UNITED STATES COURT OF APPEALS - FIFTH CIRCUIT
New Orleans, Louisiana

Case No. 01 - 40474

EULUGIO MIRELES, BARTOLO MENDIOLA,
ISRAEL TREVINO and FRANCISCO GONZALES,

Plaintiffs - Appellants;

and

DAVID LYNN HORTON, Appellant;

Vs.

CELANESE CORP., CELANESE CHEMICAL CO.,

Defendants - Appellees.

Case No. 01 - 40471

OSCAR GUERRA, Plaintiff - Appellant;

Vs. CELANESE CORP. *Et Al.*, Defendants;

CELANESE CORP., CELANESE CHEMICAL CO.,

Defendants - Appellees.

Appeal from the United States District Court
Southern District of Texas - Corpus Christi Division
The Hon. Ricardo Hinojosa, United States District Judge

B R I E F O F A P P E L L A N T S

David Horton
NEEL & HORTON, LLP
Post Office Box 2159
South Padre Island, TX 78597
956.761.6644 Telephone

I INTERESTED PARTIES

Case No. 01-40474 and Case No. 01-40471

The undersigned counsel of record certify that the following listed persons have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

- 1) Texas Rural Legal Aid, Inc.
300 South Texas Blvd.
Weslaco, TX 78596

- 2) Mr. David Horton
NEEL & HORTON, LLP
Post Office Box 2159
South Padre Island, TX 78597

ATTORNEYS FOR APPELLANTS

- 3) Celanese Corporation
New York, New York

- 4) Ms. Kathryn Green
THE KLEBERG LAW FIRM
800 North Shoreline Blvd:
Corpus Christi, TX 78401

ATTORNEYS FOR APPELLEES

II

**ATTORNEYS FOR APPELLEES
STATEMENT REGARDING ORAL ARGUMENT
Pursuant to Local Rule 28.2.4**

Appellant requests oral argument in this case pursuant to Local Rule 28.2.4. Oral argument is necessary in this appeal from summary judgment due the complexity of the legal and factual issues involved in this case. Oral argument would allow counsel to simplify matters and provide the Court the opportunity to probe into additional factual and legal issues raised by, or implicit in the written briefs.

III TABLE OF CONTENTS

I.	CERTIFICATE OF INTERESTED PARTIES	1
II.	STATEMENT REGARDING ORAL ARGUMENT	2
III.	TABLE OF CONTENTS	3
IV.	TABLE OF AUTHORITIES	4
V.	STATEMENT OF JURISDICTION	3
VI.	STATEMENT OF ISSUES	4
VII.	STATEMENT OF THE CASE	5-15
VIII.	STATEMENT OF FACTS	16
IX.	SUMMARY OF THE ARGUMENT	18
X.	ARGUMENT	19-35
XI.	CONCLUSION	36
XII.	SIGNATURE OF COUNSEL	37
XIII.	CERTIFICATE OF SERVICE	37
XVI.	CERTIFICATE OF COMPLIANCE	38

IV TABLE OF AUTHORITIES

1. Cases

<i>Allen v. United States Steel Corp.</i> , 665 F.2d 689, 697 (5th Cir. 1982)	28
<i>Cypress-Fairbanks Indep. Sch. Dist. v. Michael F.</i> , 931 F.Supp. 474, 483 (S.D. Tex. 1996)	34
<i>Fogleman v. ARAMCO</i> , 920 F.2d 278 (5th Cir. 1991)	26,27, 32,33
<i>Lipsett v. Blanco</i> , 975 F. 2d 934 (1st Cir. 1992)	35
<i>Perez v. Pasadena Indep. School Dist.</i> , 165 F.3d 368, 374 (5th Cir. 1999)	28,29
<i>Scroggins v. Air Cargo, Inc.</i> , 534 F.2d 1124, 1133 (5th Cir. 1976)	32
<i>Stearns Airport Equip. Co., Inc. v. FMC Corporation</i> , 170 F.3d 518, 536 (5th Cir. 1999)	28,33
<i>Studiengesellschaft Kohle v. Eastman Kodak Co.</i> , 713 F.2d 128, 134 (5th Cir. 1983)	27,28
<i>Trevino v. Celanese Corp.</i> , 701 F.2d 397, 399-402 (5th Cir. 1983).....	35
<i>United States v. Kolesar</i> , 33 F.2d 835 (5th Cir. 1963)	25,26

2. Statutes

28 United States Code § 1920	20,21
------------------------------------	-------

TO THE HONORABLE JUDGES OF
THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT:

Come now Appellants, in appeal from Final Judgment of the United States District Court for the Southern District of Texas, Corpus Christi Division, and submit to this Honorable Court such Brief as follows.

UNITED STATES COURT OF APPEALS - FIFTH CIRCUIT
New Orleans, Louisiana

Case No. 01 - 40474

EULUGIO MIRELES, BARTOLO MENDIOLA,
ISRAEL TREVINO and FRANCISCO GONZALES,

Plaintiffs - Appellants;

and

DAVID LYNN HORTON, Appellant;

Vs.

CELANESE CORP., CELANESE CHEMICAL CO.,

Defendants - Appellees.

Case No. 01 - 40471

OSCAR GUERRA, Plaintiff - Appellant;

Vs. CELANESE CORP. *Et Al.*, Defendants;

CELANESE CORP., CELANESE CHEMICAL CO.,

Defendants - Appellees.

Appeal from the United States District Court
Southern District of Texas - Corpus Christi Division
The Hon. Ricardo Hinojosa, United States District Judge

B R I E F O F A P P E L L A N T S

V STATEMENT OF JURISDICTION

A. District Court

The United States District Court had subject matter jurisdiction of this employment discrimination case pursuant to 42 U.S.C. § 2000e-5(f)(3) for the claims arising under Title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000-e, *et seq.*, and under 28 U.S.C. § 1331 (federal question)).

B. Court of Appeals

The Court of Appeals has the jurisdiction to review the final judgements signed and entered by the District Court on March 31, 2001. The final judgements disposed of all claims before the District Court (R.E.- Tab B). Plaintiffs filed timely appeals on April 25, 2001 (R.E.- Tab C).

VI STATEMENT OF THE ISSUES

1. THE DISTRICT COURT ABUSED ITS DISCRETION IN THIS TITLE VII CASE BY FAILING TO AWARD PLAINTIFFS COSTS FOR PHOTOCOPIES AND DEPOSITIONS.
2. THE DISTRICT COURT ERRED IN THIS TITLE VII CASE BY RULING PLAINTIFFS FAILED TO MAKE THE NECESSARY SHOWING THAT THE REQUESTED COSTS RELATED TO DEPOSITIONS AND PHOTOCOPIES WERE 'NECESSARILY OBTAINED FOR USE IN THE CASE' AS REQUIRED BY TITLE 28 U.S.C. § 1920.

VII STATEMENT OF THE CASE

- A. Course of Proceedings and
- B. Disposition in Court Below

1. Introduction

This is an appeal by plaintiffs of the District Court's award of costs in Title VII cases. The District Court refused to award costs for depositions and photocopies. Plaintiffs requested costs in the amount of \$19,899.45. The court awarded only \$2527.58, approximately 13% of the amount sought. The court disallowed *all* \$9872.43 in deposition costs, *all* \$6999.44 in photocopy costs, and \$500.00 for mediation.

This case consists of three (3) related cases. The original case was filed in 1976, and this litigation has continued for 25 years.

This is the fourth (4th) appeal in this litigation during the past 20 years. There are three (3) records in this consolidated case ("*Mireles-Guerra*"). Upon Appellants' motion in the most recent previous appeal, the Court included the *Trevino* record as a supplement to

the consolidated record. *Trevino* was the lead case after the first remand, and through the second appeal.

References to the Records in this appeal and the previous appeals 1) *Trevino*, 1981-1982, 2) *Mireles-Trevino-Guerra*, 1995 - 1998; and 3) *Mireles-Guerra*: 1999 - 2000), identify each case separately: *Mireles*, "M/R. ____"; *Trevino*, "T/R. ____"; and *Guerra*, "G/R. ____". References to transcripts are, in *Mireles* and *Guerra*, "M&G/Tr. (Hearing date)____", and in *Trevino*, "T/Tr. ____",. References to the Record Excerpts are "R.E.- Tab ____."

Appellants are referred to as "Appellants" or "Plaintiffs," Appellants' counsel by name, and Texas Rural Legal Aid, Inc., "TRLA." The Celanese companies are referred to as "Appellee Celanese," "Defendant Celanese," "CCC," or by name.

2. Current Record on Appeal

The record on appeal consists of the records in *Mireles* and *Guerra*. The record in *Trevino* is the supplemental record. Part of the *Mireles* record appears to be missing. Instruments (notices of depositions) #13, 14, #26, and #27 appear in the docket sheets (R.E.- Tab

A, *Mireles*- pp. 3-5), but counsel can not find notices in the record.

3. Proceedings Prior to First Appeal: 1976-1982

The five *Mireles* plaintiffs filed their class action case October 28, 1976, naming only defendant ABI. Celanese was not named in either the EEOC charge or in the court complaint (M/R. 1904; Appendix, Tab A *Mireles* Docket Sheet, Entry #1, p. 3). About four years later, *Trevino* was filed on April 30, 1980 (*Trevino* Docket Sheet, Entry #1, p. 1). Based on an EEOC charge filed in 1978, Plaintiff Guerra filed suit on August 23, 1980, against ABI and CCC (*Guerra v. Celanese Corporation and Arthur Brothers, Inc.*, C.A.No. C-80-115; USDC SDTX - Corpus Christi) (G/R. 1120). The cases were all based on the same or similar facts, and the liability periods overlapped.

In contested discovery through 1980, plaintiffs obtained evidence indicating substantial involvement by CCC managers and supervisors in decisions directly affecting their employment with ABI, and with their opportunities to compete equally for CCC employment

(T/R. Vol. 6, 827-1309). Based on the discovered evidence regarding the CCC-ABI interrelationship, Plaintiff Trevino filed a second EEOC charge in October 1979, naming CCC and ABI as employers (T/R. 1446 - 1447), and on April 30, 1980 filed suit against CCC and ABI (T/R. 1494) (*Trevino v. Celanese and Arthur Brothers, Inc.*, C.A.No. C-80-049; USDC SDTX - Corpus Christi Division).

Mireles was certified as a class action by Judge Owen Cox in 1979 (M/R. 1596-1597), and decertified by him in 1981 (M/R. 833-835). The District Court also denied class certification in *Trevino* and *Guerra* in 1981 (T/R. 1065-1067; G/R. 958-959), granted summary judgement against plaintiff in *Trevino*, and awarded \$24,541.00 in fees to defendants against plaintiff and TRLA, on grounds that the case was frivolous and an abuse of legal process (T/R. 770-773). Plaintiff Trevino, and TRLA, as movant-appellant, appealed.

4. The District Court Refused to Consolidate

The District Court refused to consolidate the cases, except for some limited purposes of filing specific

documents (T/R- Civil Docket Sheets; #95, p. 11). In contrast, the Court of Appeals has consolidated the cases in this appeal and in the two previous appeals.

Plaintiffs repeatedly sought pre-trial consolidation of all three cases. Such consolidation was resisted by defendants and always denied by the court (M/R. 1080-1086; G/R. 945-953; T/R. 1310-1325). In *Mireles*, plaintiff filed two motions on May 13, 1980 (M/R. 1157-1158), both denied by oral order on July 3, 1980. In *Trevino*, a motion was submitted on July 31, 1980 (T/R. 1081), and denied on August 1, 1980 (T/R. 1080). In *Guerra* and *Mireles* plaintiffs filed motions to consolidate on February 17, 1982 (G/R. 848; M/R. 621). Nine years later, the court denied the motions on October 23, 1991 (G/R. 644; M/R.543). The court also denied similar motions in the last remand proceedings [M-G/Tr. 2: 18-20 (08/20/98)].

**5. The First Appeal: Trevino (1982 - 1983)/
The ABI - Celanese Joint Employer Issue**

Plaintiff Trevino's and TRLA's appeal in 1982 of the summary judgements and the adverse fee awards in *Trevino*

was the first of the four (4) appeals herein ("*Trevino I*"). The *Trevino* record is the supplemental record to the current appeal.

In *Trevino*, this Court reversed the summary judgements, holding that the District Court erred in failing to consider the case under the "joint employer" theory plead by plaintiff, explaining that the District Court had erroneously considered the case as a simple "failure-to-hire" case against Celanese alone, a theory that had not been asserted by plaintiff. *Trevino v. Celanese Corporation*, 701 F.2d 397 (5th Cir. 1983) (T/R. 767).

This Court also vacated the adverse fee awards, the order denying class certification, an order limiting discovery against CCC, and ordered the District Court to reconsider plaintiff's consolidation motion under the correct theory (T/R. 766-767).

6. Proceedings on First Remand: 1983 - 1995

a. Bifurcation of Joint Employer Issue and Limited Consolidation

After remand in *Trevino*, the three cases were assigned to Judge Hayden Head, who recused himself because his former law firm represented Celanese. In turn the cases were assigned to Judge James De Anda, and others to Judge Filemon Vela. Ultimately assigned to Judge Ricardo Hinojosa (McAllen) in 1983 (R.E.- Tab A).

The parties requested an expedited evidentiary hearing on the issue of joint liability. At the defendants's request, the court canceled a pre-trial hearing in 1984, and took no further action in the case for seven years (T/R. 675-676; M/R. Civil Docket Sheet, p. 23 - Aug. 9, 1984; 532).

Finally, on December 16, 1991, the court held a status conference, and granted the motion for bifurcated hearing on the joint employer issue (T/R. 673; G/R. 644; M/R. 543). In March 1992 the court granted a joint motion for limited consolidation of all three cases for pre-hearing procedures and filing, so the joint employer

issues common to all three cases could be considered together (T/R. 391; G/R. 368; M/R. 493).

b. Settlement: Plaintiffs and ABI

In April 1992, ABI and plaintiffs settled all claims in all cases. The settlements included disposition of attorney's fees and costs.

In settlement ABI agreed to pay each plaintiff in each case \$2500.00, a total of \$12,500.00, and ABI agreed to an additional contingent liability of \$2500.00. The agreement is part of the supplemental record in the second appeal. Further, ABI agreed to give plaintiffs information regarding which ABI employees had relatives working for Celanese (T/R. 257-259). This information was probative of the joint employer issue.

**c. Hearing on Joint Employer Issue:
February 23, 1993**

Almost 10 years after the remand in *Trevino*, pursuant to this Court's instructions, on February 25, 1993 an evidentiary hearing was held on the joint employer issue. The missing ring binders contain exhibits admitted into evidence at that hearing.

Judge Hinojosa did not hear the matter. The hearing was held before a visiting judge (The Hon. Wendell Miles, USDC WD MI) (T/R. 217; transcript is in T/R.: Vol. 9). However, the District Court never ruled on the issue.

d. Settlement: Plaintiff Trevino and CCC - 1993

In October 1993, CCC and plaintiff Trevino settled (M/R. 475/12-16; M/R. 8-11). Trevino was the only plaintiff not represented by TRLA at time of settlement. The District Court *sua sponte* dismissed the Trevino case on December 3, 1993 (T/R. 110), even though the settlement between Celanese and Trevino did not dispose of Trevino's claims against ABI. Because of the erroneous dismissal with claims still pending, and ambiguity related to TRLA's status as a party (movant-appellant) in the first appeal, Trevino was included with Mireles and Guerra in the second appeal.

e. Plaintiffs and Celanese - 1994

During 1993, CCC and plaintiffs discussed settlement while awaiting the ruling on the joint employer issue. Finally, beginning in January 1994, CCC and plaintiffs settled plaintiffs' claims, and reserved the issues of

attorney's fees and costs.

**f. Plaintiffs' Claims for Costs and
Attorney's Fees - Phase 1: 1994 - 1995**

Even during phase one of the costs and fees proceedings, the court refused to consolidate *Mireles* and *Guerra* (G/R. 325-326). After mediation efforts failed in 1994, hearing was held on September 28, 1995 (T/R. 5; M/R. 3; G/R. 408). The court ruled that plaintiffs were not "prevailing parties," and denied all claims by orders dated September 29, 1995 (M/R. 3; G/R.4). Plaintiffs appealed.

**7. The Second Appeal: Attorney's Fees/
Mireles-Trevino-Guerra (1995 - 1998)**

The second appeal (1995 - 1998) involved all three cases. The appeal was limited to the "prevailing party" issue. Once again (February 1998) this Court reversed and remanded with instructions (M/G: A/250-239).

**8. Proceedings on Second Remand:
Costs and Attorney's Fees - Phase 2 (1998-1999)**

Four hearings were held during the second remand, the first on April 30, 1998; others on August 20, 1998; January 13, 1999; and the final hearing on March 29, 1999

(R.E.- Tabs A & E). The District Court announced its decision at the last hearing.

The District Court did not conduct an evidentiary hearing on remand, nor did it make findings of fact or conclusions of law. The court awarded as attorney's fees \$9600.00 in *Mireles*, and \$5000.00 in *Guerra*, a total of \$14,600.00.

The court also awarded plaintiffs costs of court. Plaintiffs filed their bill of costs and supporting papers on April 14 and 21, 1999 (R.E.- Tab-A; *Mireles*, pp. 40-41), seeking \$19,899.45. The court entered orders each case on March 31, 2001, awarding \$2324.58 in *Mireles*, and \$203.00 in *Guerra*, a total of \$2527.58. The District Court disallowed all costs for depositions and photocopies, stating that plaintiffs had failed to show such were "necessarily obtained." (R.E.- Tab B).

VIII STATEMENT OF FACTS

A. Settlements, Attorney's Fees, and Costs

This is the appeal of the District Court's awards of costs. Defendants did not appeal the decisions. This litigation has spanned twenty-five years (25). Plaintiffs' claims were settled in 1992, 1993, and 1994. In settlements Plaintiffs obtained \$76,500.00 from CCC; and from ABI, \$12,500.00 cash, and an additional contingent asset of up to \$12,500.00, for a total monetary value of \$101,500.00. Plaintiffs sought approximately \$1,095,913.06 in attorney's fees and costs (G/R: A/27-30), plus interest.

B. Plaintiffs' Claims

The joint employer issue was the central issue of the cases. Plaintiffs worked at the CCC plant in Bishop, Texas (M/R. 1904; T/R. 1494; G/R. 1120), employed by ABI, a company which provided maintenance and operating employees, usually temporary or part-time, to CCC (M/R. 1904; T/R/ 1494; G/R. 1120). Plaintiffs alleged CCC-ABI jointly denied Hispanic employees equal opportunity to compete for the preferred regular jobs at CCC, leaving

them behind at ABI in disproportionate numbers while ABI's Anglo employees were "promoted" to regular employment at CCC.

Plaintiffs also complained that ABI treated its employees who had friends or family at CCC better than ABI employees who did not have the CCC "nexus." Most ABI employees who had such Celanese nexus "were Anglo" (R.E.-Tab E; G/R: A/80-87).

Using the "Stalingrad" tactics, defendants delayed hearing on the central joint employer issue for 18 years. Eight months after the hearing was finally held on February 25, 1993, Celanese began settling plaintiffs' claims.

By the time Celanese agreed to settle, plaintiffs counsel had expended more than 4600 hours of attorney time, incurred \$19,899.45 in costs, and incurred more than \$265,000.00 in expenses. Almost all of the time and expenses were directed at the joint liability issue.

IX SUMMARY OF ARGUMENT

The District Court abused its discretion in refusing to award plaintiffs costs for photocopies and depositions. The District Court erred in ruling plaintiffs failed to show costs related to photocopies and depositions were "necessarily obtained for use in the case" as required by Title 28 U.S.C. §1920.

Regarding depositions, the record identifies all or almost all of the deponents, and the substance of their testimony. This evidence was offered and admitted into evidence at the "joint employer" hearing (1993), and also appears in the *Trevino-Guerra* joint pretrial order (1992). All depositions were necessary to plaintiffs' case.

Regarding photocopies, the record shows two factors related to the large volume of required copies: 1) evidence on the "joint employer" issue required examination of approximately 45,000 documents, and 2) the District Court's failure to consolidate the cases required extra copies be filed. All photocopies were necessary to plaintiffs' case.

X ARGUMENT

A. STATEMENT OF THE ISSUES

1. THE DISTRICT COURT ABUSED ITS DISCRETION IN THIS TITLE VII CASE BY FAILING TO AWARD PLAINTIFFS COSTS FOR PHOTOCOPIES AND DEPOSITIONS.

2. THE DISTRICT COURT ERRED IN THIS TITLE VII CASE BY RULING PLAINTIFFS FAILED TO MAKE THE NECESSARY SHOWING THAT THE REQUESTED COSTS RELATED TO DEPOSITIONS AND PHOTOCOPIES WERE 'NECESSARILY OBTAINED FOR USE IN THE CASE' AS REQUIRED BY TITLE 28 U.S.C. § 1920.

B. STANDARD OF REVIEW

The Court of Appeals reviews a District Court's award of attorney's fees for abuse of discretion, and its supporting factual findings for clear error. *Foreman, et al. v. Dallas County, Texas, et al.*, 193 F.3d. 314, 317 (5th Cir. 1999), citing *Wilson v. Mayor of St. Francisville*, 135 F.3d 996, 998 (5th Cir. 1998). The conclusions of law underlying the award of attorney's fees is subject to *de novo* review. *Foreman, Id.*, citing *Marre v. United States*, 117 F.3d 297, 301 (5th Cir. 1997).

C. ARGUMENT

1. Introduction

The issues before the Court are whether the plaintiffs' photocopies and depositions were "necessarily obtained." The extensive record in these cases shows that the depositions and copies were necessary to the proceeding herein. The District Court did not hold any evidentiary hearings on the issues of costs and attorney's fees. The District Court did not make any findings of fact based upon any of the evidence previously admitted into the record during the prior years of the litigation of this case.

The relevant statute, 28 U.S.C. § 1920, is shown below.

A judge or clerk of any court of the United States may tax as costs the following: (1) Fees of the clerk and marshal; (2) Fees of the court reporter for all or any part of the stenographic transcript necessarily obtained for use in the case; (3) Fees and disbursements for printing and witnesses; (4) Fees for exemplification and copies of papers necessarily obtained for use in the case; (5) Docket fees under section 1923 of this title; (6) Compensation of court appointed experts, compensation of interpreters, and

salaries, fees, expenses, and costs of special interpretation services under section 1828 of this title. A bill of costs shall be filed in the case and, upon allowance, included in the judgment or decree.

28 U.S.C. § 1920

2. Depositions

Plaintiffs sought costs for approximately 30 depositions (M/R- #332; A27 - 30; R.E.- Tab D). The record shows the persons deposed include 1) Herb Andrews, Jr. (M/R: #332;A-31, R.E.- Tab D); 2) Richard Arvey, Ph.D. (M/R: #332;A-32, R.E.- Tab D); 3) Donna Banks (M/R: #332;A-30, R.E.- Tab D); 4) James Barrington, Jr. (M/R: #332;A-30, R.E.- Tab D); 5) Fred Biester (M/R: #332;A-30, R.E.- Tab D); 6) Allen Bryant (M/R: #332;A-31, R.E.- Tab D), 7) Diane Butler (M/R: #332;A-30, R.E.- Tab D); 8) Ira Chorush, Ph. D. (M/R: #332;A-31, R.E.- Tab D); 9) Norman Coulter (M/R: #332;A-30, R.E.- Tab D), 10) E.C. Cude (M/R: #332;A-30, R.E.- Tab D); 11) Nancey Devinney (M/R: #332;A-29,30; R.E.- Tab D); 12) Mario Garcia (T/R- 410); 13) Roy Gilberts, Ph.D. (M/R: #332;A-27, 31; R.E.- Tab D); 14) Angel Gonzalez (M/R: #332;A-31, R.E.- Tab D); 15) Ventura Gonzalez (M/R: #332;A-31, R.E.- Tab D); 16)

Johnny Griffith (M/R: #332;A-30, R.E.- Tab D); 17) Paul Hime (M/R: #332;A- 27); 18) Debbie Martinez (M/R: #332;A-30); 18) Dudley McDaniel (T/R- 411); 19) Dick Mopeley (M/R: #332;A-31, R.E.- Tab D); 20) Margaret Owen (M/R: #332;A- 27,29); 21) John Parra (M/R: #332;A-31, R.E.- Tab D); 22) Robert (Bob) Regan (M/R: #332;A-27); 23) Martin Sanchez (M/R: #332;A-30, R.E.- Tab D); 24) Nelson Sharpe (M/R: #332;A-29); 25) Fred Shaver, Jr. (M/R: #332;A-30, R.E.- Tab D); 26) Larry Smith (M/R: #332;A-29); 27) Aaron Starks (M/R: #332;A-30, R.E.- Tab D); 28) George Swan (M/R: #332;A-30, R.E.- Tab D); 29) R. D. Urban (M/R: #332;A-30, R.E.- Tab D); 30) Donald Van Schuette (T/R- 409-410); 31) Joyce Williams (M/R: #332;A-29,30; R.E.- Tab D)), and 32) Patty Wright (M/R: #332;A-30).

Plaintiffs listed many of the deponents in the *Joint Pretrial Order* filed in *Trevino and Guerra* on February 28, 1992 (R.E.- Tab E). The witnesses listed include 1) Larry Smith (T/R- 407), 2) Richard Moseley (T/R- 407), 3) George Swann (T/R- 407), 4) Patti Wright (T/R- 407), 5) Nancy Devinnay (T/R- 407-408), 6) angel Gonzalez (T/R- 408), 7) Martin Sanchez (T/R- 408), 8) Ellis Cude (T/R-

408), 9) Juan Parra (T/R- 409), 10) Fred Shafer (T/R- 409), 11) Donald Van Schuette (T/R: 409-410), 12) Aaron Starks (T/R- 410), 13) Mario Garcia (T/R- 410), 14) James Barrington (T/R- 410), 15) Deborah Martin (T/R- 411), 16) Dudely McDaniel (T/R- 411), 17) Margaret Owen (T/R- 411), 18) Herbert Andres (T/R- 411), 18) Norman Coulter (T/R- 411-412), and 19) Dr. Bernard Yancey, plaintiff's expert (T/R- 412). Defendant Celanese lists 1) Paul Hime (T/R- 412, and, 2) Robert Regan (T/R- 411412).

In preparation for the evidentiary hearing on the "joint employer" issue, plaintiffs filed *Plaintiffs' Memorandum Regarding Evidence Indicating Joint Employer Status and Supplemental Pre-Hearing Filing* (filed December 7, 1992) (T/R: #115; 260-282, R.E.- Tab E).

In the memo plaintiffs identify refer to testimony of 14 of the deponents, and explain the relevant testimony each offered. These witnesses are 1) Herbert Andrews (ABI administrative employees) (T/R: #115; 271,272 & 276; R.E.- Tab D) 2) Norman Coulter (former owner of Arthur Brothers Inc., and then manager with Celanese), (T/R: #115;263,266,267,273,274,275 & 276; R.E.- Tab D); 3)

Ellis Cude (T/R: #115; 276, ;R.E.- Tab D); 4) Nancey Devinney (T/R: #115; 273 & 275, ;R.E.- Tab D) 5) Angel Gonzalez (T/R: #115; 272; R.E.- Tab D); 6) Ventura "Junior" Gonzalez (Arthur Brothers owner, and General Foreman) (T/R: #115; 263,266,267,269,272,273 & 274, ;R.E.- Tab D); 7) Dudley McDaniel (a Celanese employee) (T/R: #115; 275; R.E.- Tab D); 8) Margaret Owner (ABI office manager) (T/R: #115; 267,268, &272; 9) Richard Moseley (T/R: #115; 267,270,272,273,275 & 276; R.E.- Tab D) R.E.- Tab D; 10) Robert Regan (Celanese manager, retired) (T/R: #115; 263, R.E.- Tab D); 11) Larry Smith (Arthur Brothers owner and official) (T/R: #115; 263,266,267,269,272,273,274 & 276;R.E.- Tab D); 12) George Swan (T/R: #115; 268 & 271; R.E.- Tab D); 13) Donald Van Schuette (T/R: #115; 263,266,267,269,272,273 & 274, ;R.E.- Tab D); and, 14) Bernard Yancey, Ph.D. (Plaintiffs' expert) (T/R: #115; 263,266; R.E.- Tab D).

Regarding the deponents not identified in plaintiffs' memorandum, at least four are identified in the record. Robert Hime is a Celanese manager, Nelson Sharpe is counsel of record for Arthur Brothers Inc., Dr. Ira

Chorush and Dr. Roy Gilberts are ABI's experts, and Dr. Richard Arvey is plaintiff's expert.

One of the most essential witnesses was Norman Coulter, one of the owners of ABI, and subsequent manager with Celanese. At the evidentiary hearing on the "joint employer" issue, plaintiffs' expert, Dr. Bernard Yancey, testified that the information from Norman Coulter's most recent deposition was critical to his analyses of the data showing the interrelationship between ABI and Celanese (T/R- Vol. 9, Tr.: 43-46).

Plaintiffs' identify each of the 14 witnesses and summarize the witness's testimony in the memorandum. All of the testimony was relevant to the "joint employer" issue. The joint employer issue was the central issue of the case. After plaintiffs offered their evidence on the issue at the hearing on joint employer liability, Celanese agreed to settlement.

In the Fifth Circuit, the first case to deal with the issues of costs for depositions, appears to be *United States v. Kolesar*. 33 F.2d 835 (5th Cir. 1963). The Court concluded that it is within the discretion of the

trial court to determine what items are "necessarily obtained" and this determination should be based on an evaluation of the facts. *Id.* at 838-39.

The Court listed "common sense" situations in which a finding of "necessarily obtained" would be appropriate:

1) ready access to the clerk's office -

[i]t is artificial to suggest that it is a mere matter of 'convenience' that a busy lawyer obtains a copy to spare himself a 75 to 150-mile trip [to the clerk's office];

2) practicalities of preparation for trial - pre-trial discovery, and the need for copies of depositions; and,

3) trial preparation - necessity of deposition copies for note-taking and highlighting. *Id.* The court offered these suggestions, not as an exhaustive list, but as examples of when a "necessarily obtained" finding might appropriate.

Several Fifth Circuit cases followed the decision in *Kolesar* with much the same result. The lead Fifth Circuit case on this issue appears to be *Fogleman v. ARAMCO*. 920 F.2d 278 (5th Cir. 1991). This case involved injuries received in the scope of employment.

Id. The primary issue involved was one of choice of law. However, the plaintiffs also appealed the district court's award of costs under 28 U.S.C. § 1920. *Id.* at 285.

The plaintiffs in *Fogleman* asserted that the district court's award of costs was excessive. *Id.* As in this case, at issue were the costs for depositions, expedited transcripts and photocopies.

The court rejected plaintiff's argument, holding

[t]his court has previously held that prevailing parties are entitled to recover the costs of original depositions and copies under 28 U.S.C. § 1920(2) and § 1920(4) respectively, provided they were 'necessarily obtained' for use in the case.

Id. at 285.

Especially relevant is *Studiengesellschaft Kohle v. Eastman Kodak Co.*, 713 F.2d 128, 134 (5th Cir. 1983), which holds that

[u]nder this court's precedents, the cost of original depositions is taxable without any factual finding. . . . cost of copies is taxable only if the copies were necessarily obtained for use in the case.

Not only should depositions have been taxed as costs, but

the record shows they were "necessarily obtained."

The court further noted that for a deposition to be 'necessarily obtained', it need not be introduced into evidence at a trial. *Fogleman*, 920 F.2d at 285. Costs can attach so long as,

1) at the time it was taken, a deposition could reasonably be expected to be used for trial preparation, rather than merely for discovery," or 2) the deposition copy was obtained "for use during trial or trial preparation, rather than for the mere convenience of counsel.

Id. See also *Allen v. United States Steel Corp.*, 665 F.2d 689, 697 (5th Cir. 1982)

In 1999, the court again held that depositions need not be used at trial to be found reasonably necessary. In *Stearns Airport Equip. Co., Inc. v. FMC Corp.* the court held:

[] challenge to the deposition costs is grounded in the fact that certain depositions were not used in FMC's summary judgment filings. It thus claims that they were merely for general discovery and not necessary to the case. But we have indicated that it is not required that a deposition actually be introduced in evidence for it to be necessary for a case- -as long as there is a reasonable expectation that the deposition may be used for trial preparation, it may be included in costs.

170 F.3d 518, 536 (5th Cir. 1999). See also *Perez v. Pasadena Indep. School Dist.*, 165 F.3d 368, 374 (5th Cir.

1999).

3. Photocopies

If there is any humor in the record of these twenty-five years of proceedings, perhaps it is Celanese's objection to, and the District Court's disallowance of, plaintiffs' claims for photocopies. With three separate cases, rather than one, often each document to be filed had to be prepared as three (3) originals, with three (3) copies. Even with limited consolidation, an extra copy had to be filed in the related case(s). If the District Court had permitted consolidation, then only one (1) original, and one (1) copy could have been filed.

Plaintiffs repeatedly during the entire course of these proceedings repeatedly by motion sought to consolidate these cases. Celanese always objected. The District Court always denied the motions. In the "joint employer" memorandum referenced above, once again plaintiffs requested consolidation.

Again, Plaintiff's theme: the three cases are in fact one case. Handling them as separate cases is inefficient and expensive for the court and the parties. The cases should at least be consolidated for the purposes of final pretrial

matters and trial.

(T/R- #115; 278)

The *Joint Pretrial* Order filed in Trevino-Guerra refers to and identifies the thousands and thousands of personnel documents relevant to the "joint employer" issue (T/R: 415-420; Tab E). These documents had to be copied in the course of abstracting data from them, to file with the court, and to serve on counsel for Celanese and ABI.

As stated above, plaintiffs reviewed a large volume of ABI's personnel records. There were approximately "45,000 documents (T/R- Vol. 9; Tr- 24:1). Dr. Yancey and his staff "went through each and every personnel document." (T/R- Vol. 9; Tr- 23:25, 24:1). Dr. Yancey testified:

There is a lot of source data. We've heard about the massive number of documents. What those documents translate into re over, I would say, 150,000 lines, or separate data entries. The major sources for the information, the payroll journal sheets from 1972 through May of 1980, from the [affirmative action] compliance reporting for 1975 through May of 1980 --

(T/R-Tr., Vol.9- 42:6-11).

The review of over 45,000 personnel documents required thousands of copies. Marshaling proof on the "joint employer" issue was a massive paper chase. Witness testimony, the depositions taken, was essential to locate the ABI personnel documents, and identify the Celanese managers whose names and initials appeared on ABI's documents.

The evidentiary hearing in February 1993 was followed by settlement with Celanese, which during the prior 18 years had defended the case vigorously. The information from the depositions taken, and the photocopies made, were offered as evidence at the joint employer hearing.

In *Fogleman*, above, the next issue challenged by the plaintiffs was the cost of photocopying documents. 920 F.2d at 286. The court held that the same standard applies to photocopies as does to depositions: were the copies "necessarily obtained" for use in the case. *Id.* See also *Scroggins v. Air Cargo, Inc.*, 534 F.2d 1124, 1133 (5th Cir. 1976) (holding that "costs were for the copying of various exhibits and documents. Certain of these copies were presented to the trial court pursuant

to the court's orders. The others were likewise prepared for the court's consideration It was well within the court's discretion to conclude that these copies were 'necessarily obtained for use in the case'.")

On this issue the Court of Appeals remanded to the District Court for a proper determination of the necessity of the copy cost claimed by ARAMCO. *Fogleman*, 920 F.2d at 286. While ARAMCO had provided a total amount of copy costs, they did not provide the court with an itemized breakdown of costs incurred, making it impossible for the district court to determine which copies were "necessarily obtained" and which were for the mere "convenience of counsel." *Id.* Specifically, the court said

[w]hile we certainly do not expect a prevailing party to identify every Xerox copy made for use in the course of legal proceedings, we do require some demonstration that reproduction costs necessarily result from that litigation. The [plaintiffs] should be taxed for the cost of reproducing relevant documents and exhibits for use in the case, but should not be held responsible for multiple copies of documents, attorney correspondence, or any of the other multitude of papers that may pass through a firm's Xerox machines.

Id.

The Court of Appeals affirmed the award of costs for originals and copies of the depositions. However, the Court remanded to the District Court for an appropriate determination of copy costs. *Id.* at 287. See also *Stearns Airport Equip. Co., Inc. v. FMC Corporation*, 170 F.3d 518, 536 (5th Cir. 1999) (holding "[w]hile we have indicated that multiple copies of relevant documents may not be charged to an opponent, we have never held that a district court may not award a litigant the cost of preparing a single set of the documents in a case."). *Cypress-Fairbanks Indep. Sch. Dist. v. Michael F.*, 931 F.Supp. 474, 483 (S.D. Tex. 1996) (finding \$.15 per page a reasonable copy cost and allowing as necessary copy costs for three copies of each filing - one for the court, and one each per party).

4. Mediation

The District Court disallowed plaintiffs' claim for \$500.00 for court ordered mediation. This is a minor amount, but perhaps presents a significant policy question. Plaintiffs submit that allowing costs of alternative dispute resolution will encourage settlement efforts.

5. Summary

Plaintiffs' depositions and photocopies are both reasonable and were necessarily obtained. This has been intense litigation. Defendants conducted a staunch defense, and did not concede even minor points (for example, consolidation). Particularly relevant is the conduct of Celanese in resisting discovery of documents indicating a joint employer relationship with Arthur Brothers. See *Trevino v. Celanese Corp.*, 701 F.2d 397, 399-402 (5th Cir. 1983).

Celanese's conduct in this case was akin to the defendant's conduct in *Lipsett v. Blanco*, 975 F. 2d 934 (1st Cir. 1992) wherein the court noted that the number of attorney hours expended was reasonable given the

"bitterly contested" nature of the litigation. The court characterized the defense as a "Stalingrad defense, resisting [the Plaintiff] at every turn and forcing her to win her hard-earned victory from rock to rock and from tree to tree" *Id.* at 939. Similarly, the costs incurred bear direct relationship to the nature of the case and defendants' defense.

The magnitude of those costs flowed directly from Defendants vexatious defense strategy which succeeded in denying Plaintiff access to all Celanese records relevant to the joint employer issue. Considering the long course of this litigation, the costs at issue are reasonable, and should be taxed against Celanese.

XI CONCLUSION

WHEREFORE, for reasons stated Appellants prays the Court grant this appeal and Order such relief as includes the following:

1. ORDER that the and Orders of the District Court be in all respects reversed.

2. ORDER that judgement be rendered herein in favor of the Appellant for the full amount of costs sought in the District Court.

3. ORDER that Appellant be awarded reasonable attorney's fees and costs incurred on this appeal.

4. ORDER that Appellee pay interest as appropriate.

5. Or, in the alternative, ORDER that and Orders of the District Court be reversed in all respects, and that these cases be remanded with appropriate instructions to the District Court for further proceedings.

6. ORDER such other and further relief as it appropriate and just.

XII SIGNATURE OF COUNSEL

Respectfully submitted,



David Horton
NEEL & HORTON, LLP
Post Office Box 2159
South Padre Island, TX 78597
956.761.6644 Telephone
956.761.7424 Telecopier

David Hall
Executive Director
TEXAS RURAL LEGAL AID INC.
300 South Texas Blvd.
Weslaco, TX 78596

XIII CERTIFICATE OF SERVICE

Pursuant to Rule 25 of the Federal Rules of Appellate procedure, I certify service of a copy of this document, and the same in machine readable form stored on diskette, on counsel as follows:

Ms. Kathryn Green
THE KLEBERG LAW FIRM
800 North Shoreline Blvd.
900 North Tower
Corpus Christi, TX 78401
361.693.8500 Telephone
361.693.8600 Telecopier
Attorney for Appellee Celanese Companies,

by means of First Class Mail, on October 23, 2001.



David Horton

XIV CERTIFICATE OF COMPLIANCE

Pursuant to 5th Cir. R. 32.2.7(c), the undersigned certifies this brief complies with the type-volume limitations of 5th Cir. R. 32.2.7 (b).

1. EXCLUSIVE OF THE EXEMPTED PORTIONS IN 5th Cir. R. 32.2.7 (b)(3), THIS BRIEF CONTAINS (Select one.):

A. 6294 (all pages) words, OR

B. _____ lines in text in monospaced typeface.

2. THE BRIEF HAS BEEN PREPARED (Select one.):

A. In proportionally spaced typeface using- Software Name and Version- WordPerfect 6.1, in (typeface name and font size)- Courier New, 14; OR

B. In monospaced (nonproportionally spaced) typeface using- Typeface name and number of characters per inch- _____.

3. IF THE COURT SO REQUESTS, THE UNDERSIGNED WILL PROVIDE AN ELECTRONIC VERSION OF THE BRIEF AND/OR A COPY OF THE WORD OR LINE PRINTOUT.

4. THE UNDERSIGNED UNDERSTANDS A MATERIAL MISREPRESENTATION IN COMPLETING THIS CERTIFICATE, OR CIRCUMVENTION OF THE TYPE-VOLUME LIMITS IN 5th CIR. R. 32.2.7, ANY RESULT IN THE COURT'S STRIKING THE BRIEF AND IMPOSING SANCTIONS AGAINST THE PERSON SIGNING THE BRIEF.



Signature of Filing Party

(PLACE THIS AS LAST DOCUMENT IN BRIEF BEFORE BACK COVER.)