

Not Reported in S.W.3d, 2005 WL 1531827 (Tex.App.-Waco)  
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**MEMORANDUM OPINION**

Court of Appeals of Texas, Waco.  
 In re CENTERPOINT ENERGY, INC.  
 No. 10-05-00244-CV.

June 29, 2005.

Original Proceeding.

R. Paul Yetter and Greg White, for Centerpoint  
 Energy, Inc.  
 Brian D. Melton and Bobby Reed, for H.D. Black  
 and Valence Operating Company.  
 John Anaipakos, Joe B. Cannon and David E.  
 Jackson, for LP Texas Genco.

Before Justice VANCE and Justice REYNA.

**MEMORANDUM OPINION**

FELIPE REYNA, Justice.

\*1 CenterPoint Energy seeks a writ of mandamus directing Respondent, the Honorable H.D. Black, Jr., Judge of the 77th District Court of Freestone County, to vacate an order permitting Valence Operating Company to depose CenterPoint's chief executive officer. We will conditionally grant the requested relief.

A former CenterPoint subsidiary, Texas Genco Holdings, Inc., operated a power plant located on property in Limestone and Freestone Counties and known as the Limestone Electric Generating Station. CenterPoint sold the Limestone Plant and several other power plants to Texas Genco, LLC in December 2004. The sale of the Limestone Plant included a neighboring 392-acre tract of land which is designated as a solid waste facility for the disposal of waste byproducts generated by the plant.

Valence owns significant mineral interests in the disposal site property.

Before the sale, Valence obtained a permit from the Railroad Commission to drill a gas well on the property, entered the land, and prepared a site for the well. Texas Genco filed suit seeking a temporary restraining order and seeking to enjoin Valence from drilling the well. Texas Genco's suit contends that Valence's drilling activities breach Valence's duty to accommodate Texas Genco's rights as the owner of the surface estate because drilling at the contemplated location "would permanently and irreversibly damage [Texas Genco's] long-planned, TCEQ-approved use of the land as a Disposal Site."

Valence contends that its operations will not interfere with Texas Genco's current use of the property because Texas Genco is not presently disposing (and has never disposed) of waste byproducts from the Limestone Plant at the property. Thus, Valence argues that discovery regarding profitability, revenues, and costs for the Limestone Plant and regarding Texas Genco's future plans for the Limestone Plant are "critical" to determine whether the proposed drilling will substantially impair Texas Genco's use of the land.

When Valence sought to depose CenterPoint CEO David McClanahan, CenterPoint responded with a motion for protective order. CenterPoint supported its motion with McClanahan's affidavit, which states in pertinent part:

"I currently serve as President and Chief Executive Officer of CenterPoint Energy, Inc...."

"I have no unique or superior knowledge regarding any aspect of this case. I have no personal knowledge of any aspect of the dispute between Texas Genco, LP and Valence made the basis of this lawsuit. I have never been involved in the day-to-day operations of the Limestone Station and have no personal knowledge of its operations. Prior to CenterPoint Energy's sale of Texas Genco

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Holdings, Inc., the Limestone Station's day to day operations were managed by Texas Genco personnel, and decisions pertaining to the operation of the Limestone Station were delegated to the management and staff of Texas Genco. As a result of the sale, the executive responsible for power plant operations is now employed by Texas Genco, LLC. The president and chief executive officer of Texas Genco Holdings, Inc. during the time it was owned by CenterPoint Energy retired in connection with the sale.”

\*2 At a hearing on CenterPoint's motion for protective order, Valence argued that McClanahan should be deposed because: (1) Centerpoint Energy owned Texas Genco Holdings, Inc. when Texas Genco filed the underlying suit; (2) McClanahan has been with the organization “for a while” and “knows about the operations, the value, [and] the way the Limestone Plant is run from an operations point of view”; and (3) the contemplated deposition is “not overburdensome” or “undue .”

CenterPoint replied that McClanahan should not be ordered to submit to a deposition because Valence did not show that he possesses unique or superior personal knowledge of discoverable information.

Respondent denied CenterPoint's motion for protective order.

CenterPoint contends that the court abused its discretion by permitting Valence to depose McClanahan because Valence did not show that: (1) McClanahan has “any unique or superior personal knowledge of discoverable information”; or (2) less intrusive means of discovery have proven insufficient.

According to the apex deposition doctrine, when a party seeks to depose a high level corporate official, a corporation may seek to shield the official from the deposition by filing a motion for protection supported by the official's affidavit denying knowledge of any relevant facts. *In re Alcatel USA, Inc.*, 11 S.W.3d 173, 175 (Tex.2000) (orig.proceeding). A trial court determines such a motion by first deciding whether “the party seeking the deposition has ‘arguably shown that the official

has any unique or superior personal knowledge of discoverable information.’ “ *Id.* at 175-76 (quoting *Crown C. Petroleum Corp. v. Garcia*, 904 S.W.2d 125, 128 (Tex.1995) (orig.proceeding)).

“If the party seeking the deposition cannot show that the official has any unique or superior personal knowledge of discoverable information, the trial court should” not allow the deposition to go forward without a showing, after a good faith effort to obtain the discovery through less intrusive means, “(1) that there is a reasonable indication that the official's deposition is calculated to lead to the discovery of admissible evidence, and (2) that the less intrusive methods of discovery are unsatisfactory, insufficient or inadequate.”

*Id.* at 176 (quoting *Crown C. Petroleum*, 904 S.W.2d at 128).

Valence cites *In re Columbia Rio Grande Healthcare, L.P.* for the proposition that McClanahan's affidavit did not adequately deny knowledge of relevant facts. 977 S.W.2d 433 (Tex.App.-Corpus Christi 1998, orig. proceeding). CenterPoint relies on a more recent decision of the Fort Worth Court to support its contention that McClanahan's affidavit is sufficient. *See In re Burlington N. & Santa Fe Ry.*, 99 S.W.3d 323 (Tex.App.-Fort Worth 2003, orig. proceeding).

In *Columbia Rio Grande Healthcare*, a negligent credentialing case, Columbia identified its CEO in discovery as “the person most knowledgeable regarding [physician contracts].” 977 S.W.2d at 434 . The plaintiffs sought to depose the CEO, and Columbia filed a motion to quash the deposition notice. The trial court denied this motion. The appellate court denied Columbia's mandamus petition, concluding that, even though the CEO in his affidavit “denied personal knowledge of many aspects of the lawsuit,” he did not deny knowledge of the hospital's physician contracts or of the hospital's credentialing practices, and he did not broadly deny “any knowledge of relevant facts.” *Id.*

\*3 Conversely, in the *Burlington Northern* case, the court concluded that the corporate executive's statements in his affidavit (1) that he had no knowledge of the facts of the suit, (2) that he had “

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no unique or superior knowledge or information regarding any aspect of this case,” and (3) that he had “no personal knowledge of the condition of [the railroad] crossing at the time of the accident made the basis of this suit,” were sufficient to invoke the apex deposition analysis, even though the executive did not generally deny knowledge of any relevant facts. 99 S.W.3d at 326 n. 3.

Here, McClanahan stated in his affidavit that he has “no unique or specialized knowledge regarding any aspect of this case” and that he has “never been involved in the day-to-day operations of the Limestone Station and [has] no personal knowledge of its operations.”

The issue in the underlying lawsuit is whether Valence's proposed well will preclude or impair “an existing use by the surface owner.” *Tarrant County Water Control & Improvement Dist. v. Haupt, Inc.*, 854 S.W.2d 909, 911 (Tex.1993) (quoting *Getty Oil Co. v. Jones*, 470 S.W.2d 618, 622 (Tex.1971)).

McClanahan denied having any specialized or unique knowledge of the day-to-day operations of the Limestone Plant. Thus, he sufficiently denied knowledge of any relevant facts regarding any existing usage of the disposal site to shift the burden to Valence to show otherwise. See *Alcatel USA*, 11 S.W.3d at 175-76; *Burlington N. & Santa Fe Ry.*, 99 S.W.3d at 326.

Valence responded by *arguing* that McClanahan's executive position with CenterPoint and the length of his tenure there establishes that McClanahan “knows about the operations, the value, [and] the way the Limestone Plant is run from an operations point of view.” However, Valence presented no evidence to support this argument. Accordingly, we hold that Valence failed to arguably show that McClanahan “has any unique or superior personal knowledge of discoverable information.” See *Alcatel USA*, 11 S.W.3d at 175.

Nevertheless, Valence also contends that it has been unable to obtain the discovery it seeks by less intrusive means. *Id.* at 176. At the hearing, Valence referred to a May 5 deposition notice it served on CenterPoint under Rule of Civil Procedure

199.2(b)(1) requiring CenterPoint to designate a representative to testify on its behalf. This notice states that the contemplated deposition would be conducted on May 25, two weeks after the hearing on CenterPoint's motion for protective order.

This single deposition notice does not satisfy Valence's burden to show that it has “made a *reasonable* effort” to obtain the information sought through less intrusive means of discovery.<sup>FN1</sup> See *In re Daisy Mfg. Co.*, 17 S.W.3d 654, 658 (Tex.2000) (orig.proceeding) (per curiam). Thus, Respondent abused his discretion by denying CenterPoint's motion for protective order.

FN1. Respondent granted CenterPoint's motion to quash the corporate representative deposition notice. Nevertheless, this does not change the fact that Valence did not even begin to try to obtain discovery from CenterPoint of the information it seeks from McClanahan until less than a week before the hearing on the motion for protective order.

CenterPoint has no adequate remedy at law. *In re El Paso Healthcare Sys.*, 969 S.W.2d 68, 75 (Tex.App.-El Paso 1998, orig. proceeding). Therefore, we conditionally grant the requested writ of mandamus. The writ will issue only if Respondent fails to advise this Court in writing within fourteen days after the date of this opinion that he has vacated the order requiring CenterPoint to produce McClanahan for deposition.

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