

based on the very real concern that permitting this type of telecasting will affect not only the conduct of this trial, but will prejudice BP Products' ability to empanel a fair and impartial jury in the remaining cases currently pending before this Court. *See* U.S. CONST. amend. XIV; TEX. CONST. art. I, § 19. Absent consent from all parties and witnesses, a trial court is without discretion and must deny any request to televise the trial of a case. TEX. R. CIV. P. 18c.

II. DISCUSSION

A. **Unlike Criminal Proceedings, This Court Has No Discretion And Must Deny Any Request To Televise The Trial**

Unlike criminal proceedings — where neither the Texas Legislature nor the Texas courts have promulgated any bright line rules — Texas Rule of Civil Procedure 18c governs the televising, broadcasting, recording, or photographing of civil proceedings:

A trial court may permit broadcasting, televising, recording, or photographing of proceedings in the courtroom *only* in the following circumstances:

(a) in accordance with guidelines promulgated by the Supreme Court for civil cases, or

(b) when broadcasting, televising, recording, or photographing will not unduly distract participants or impair the dignity of the proceedings *and the parties have consented, and consent to being depicted or recorded is obtained from each witness* whose testimony will be broadcast, televised, or photographed, or

(c) the broadcasting, televising, recording, or photographing of investiture, or ceremonial proceedings

TEX. R. CIV. P. 18c. (emphasis supplied); *cf. Graham v. State*, 96 S.W.3d 658, 660 (Tex. App.—Texarkana 2003, pet. ref'd) (trial courts have discretion to allow cameras in the

courtroom during a criminal trial).

The Texas Supreme Court has not promulgated any guidelines that would fall under Rule 18c's purview. Thus a plain reading of the rule dictates that civil proceedings may be broadcast *only* if the parties and each witness consents. TEX. R. CIV. P. 18c. Accordingly, BP Products' failure to consent precludes any media outlet from broadcasting, televising, recording, or photographing the trial of this case. *Id.*¹

B. BP Products May Not Receive A Fair Trial If The Proceedings Are Televised

Significantly, BP Products does not object to the media attending and reporting on the trial of this case. But, allowing the media to televise the proceedings will not only interfere with a fair and impartial presentation of the evidence, it will also prejudice jurors in the cases yet to be tried, necessarily impacting BP Products' due process rights. *See* U.S. CONST. amend. XIV; TEX. CONST. art. I, § 19.

Permitting a widespread audience to view the entire trial (whether on television, on the radio, or over the internet) in effect allows viewers to become surrogate jurors, as they listen to and weigh the evidence. But unlike real jurors, viewers may be allowed to see and hear things the real jury will not. In addition, the viewers will almost certainly make their determinations based on an abbreviated record, without any real understanding of what has been omitted. Given that there are other cases to be tried in Galveston County, many of these viewers may be called upon to act as jurors in future

¹ Significantly, Defendant JE Merit also has objected to any televising or broadcasting of the trial. JE Merit's objection alone is sufficient under Rule 18c to prevent the media from televising the proceedings. TEX. R. CIV. P. 18c.

cases. As recognized by the United States Supreme Court, these jurors will not be able to shed their initial views and attitudes once they are asked to make real determinations. *Estes v. Texas*, 381 U.S. 532, 546-47 (1965) (“new trials plainly would be jeopardized in that potential jurors will often have seen and heard the original trial when it was telecast. Yet viewers may later be called upon to sit in the jury box during the new trial.”).

The participants in this trial will also be affected by the presence of broadcasting and recording equipment in the courtroom. This is confirmed by case law and common sense. Witnesses who believe their testimony may become the topic of discussion on *60 Minutes* or *Dateline* may testify differently — either in terms of giving highly abbreviated answers out of fear and timidity, or exaggerating their testimony in an attempt to gain greater notoriety. *Estes*, 381 U.S. at 547 (“The impact upon a witness of the knowledge that he is being viewed by a vast audience is simply incalculable. Some may be demoralized and frightened, some cocky and given to overstatement; memories may falter, as with anyone speaking publicly, and accuracy of statement may be severely undermined. Embarrassment may impede the search for the truth, as may a natural tendency toward overdramatization.”).

Similarly, it is unrealistic to expect that jurors who believe their time in the spotlight may vary depending on how they vote will remain able to weigh the evidence impartially and render a dispassionate decision. *See id.* at 545 (discussing effect televising may have on jurors and stating that “experience indicates that it is not only possible but highly probable that it will have a direct bearing on [their] vote . . . Where pretrial publicity of all kinds has created intense public feeling which is aggravated by the

telecasting or picturing of the trial the televised jurors cannot help but feel the pressures of knowing that friends and neighbors have their eyes upon them.”). Where, as here, the facts of a case are complicated and nuanced, broadcasting the proceedings interferes with the right to a fair trial by preventing the jury from “clearheaded deliberation unencumbered by passion, prejudice, or a confusion of the issues.” *U.S. v. Williams*, 523 F.2d 1203, 1209 (5th Cir. 1975).

This Court need look no further than the highly-publicized trial of O.J. Simpson for support. As one prominent legal commentator has written, the decision to allow cameras to broadcast that trial had a profoundly adverse effect on the proceedings:

Many journalists and others idealistically believed that televised trials would enhance the quality of justice and increase general knowledge about the courts by providing public oversight not previously available. Unfortunately, this was not the case. Television did not deter lying witnesses; instead, it rendered many truthful ones nervous and inarticulate. Television provided the temptation, and the opportunity, for media-savvy lawyers and a media-conscious judge to sell their respective cases not merely to the jury, but literally to the world.

Pugsley, *The Sound of Silence: Reflections on the Use of the Gag Order*, 17 LOY. L. A. ENT. L.J. 369, 370, 377 (1997) (internal citations omitted). In denying the media’s request to allow cameras in the courtroom for O.J. Simpson’s civil trial, Judge Fujisaki commented that the presence of cameras is “intrusive and distracting,” and concluded that “electronic coverage of the [criminal] trial significantly diverted and distracted the parties. There were displays in the courtroom that contributed to a circus atmosphere.

This detracted from the dignity of the courtroom.” *See, e.g., Judge Bars Cameras from Simpson Trial*, N.Y. TIMES, August 24, 1996 at 7.

The sage observation of Chief Judge Edward R. Becker, Presiding Judge of the Third Circuit, is directly on point:

While judges are accustomed to balancing conflicting interests, balancing the positive effects of media coverage against an external factor such as the degree of impairment of the judicial process that camera coverage would bring is not the kind of thing judges should balance. Rather, our mission is to administer the highest possible quality of justice to each and every litigant. We cannot tolerate even a little bit of unfairness (based on medial coverage), notwithstanding that society as a whole might in some way benefit, for that would be inconsistent with our mission.²

Given that BP Products’ constitutional rights are at issue, it follows that *any* prejudice to BP Products’ right to a fair and impartial trial is sufficient to justify denying any request to televise these proceedings. *See* U.S. CONST. amend. XIV; TEX. CONST. art. I, § 19.

C. The First Amendment Does Not Give The Media The Right To Televise Trials

It has long been established that while the media and the public may have a right to attend public trials, the media has no constitutional right to broadcast a trial. *See, e.g. Nixon v. Warner Comm. Inc.*, 435 U.S. 589, 609-11 (1978) (“there is no constitutional right to have [live witness] testimony recorded and broadcast.”); *Westmoreland v. Columbia Broadcasting Systems, Inc.*, 752 F.2d 16, 24 (2d Cir. 1984) (“the public interest

² Statement of the Chief Judge Edward R. Becker on behalf of the Judicial Conference of the United States to the Senate Judiciary Subcommittee on Administrative Oversight and the Courts,

in television access to the courtroom does not now lie within the First Amendment.”).³

As a result, an order barring the media from broadcasting or recording the trial will not infringe upon their constitutional rights. In fashioning his concurrence in *Estes v. Texas*, Justice Harlan aptly explained:

Once beyond the doors of the courthouse, a news-gathering agency may publicize, within wide limits, what its representatives have heard and seen in the courtroom. But the line is drawn at the courthouse door; and within a reporter’s constitutional rights are no greater than those of any other member of the public.

381 U.S. at 588-89 (“no constitutional provision guarantees a right to televise trials”) (Harlan, J., concurring); *see also United States v. Edwards*, 785 F.2d 1293, 1295 (5th Cir. 1986) (“No case suggests that this right of access includes a right to televise, record, or otherwise broadcast trials.”); *Combined Communications Corp. v. Finesilver*, 672 F.2d 818, 821 (10th Cir. 1982) (“The First Amendment does not guarantee the media a constitutional right to televise inside a courthouse.”).

http://www.uscourts.gov/Press_Releases/press_090600.html (opposing bill S.721 titled “A bill to allow media coverage of court proceedings”) (September 6, 2000).

³ Indeed, television cameras are routinely **banned** from federal courts. *See* FED. R. CRIM. PROC. 53 (prohibiting broadcast equipment in criminal cases); *see also* Michael Kirkland, *No Cameras in Federal Courtrooms*, UPI, Sept. 21, 1994, available in Lexis News Library, UPI File; *see also* Charles Whitebread & Darrell W. Contreras, *Free Press v. Fair Trial: Protecting the Criminal Defendant’s Rights in a Highly Publicized Trial by Applying the Sheppard-Mu’min Remedy*, 69 S. CAL. L. REV. 1587, 1595-96 (1996).

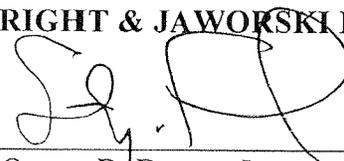
III. CONCLUSION

For the above reasons, BP Products requests that the Court deny any request from the media to televise, broadcast, record, or photograph the trial proceedings in this case. BP Products further requests all other relief to which it may be entitled.

Respectfully submitted,

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CERTIFICATE OF SERVICE

In compliance with Rules 21 and 21a of the Texas Rules of Civil Procedure, this pleading was served upon the following counsel of record on September 19, 2006 by facsimile.

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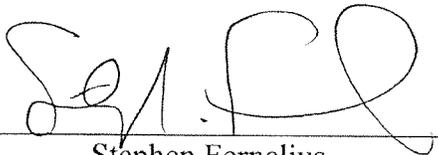
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MIGUEL ARENAZAS AND	§	IN THE DISTRICT COURT OF
ELIZABETH RAMON, ET. AL.	§	
(including Intervenors)	§	
	§	
VS	§	
	§	GALVESTON COUNTY, TEXAS
BP AMOCO CHEMICAL COMPANY,	§	
BP AMOCO POLYMERS, INC., BP	§	
CORPORATION NORTH AMERICA,	§	
INC., DON PARUS, AND JE MERIT	§	
CONTRACTORS, INC.	§	212 TH JUDICIAL DISTRICT

**DECLARATION OF STEPHEN FERNELIUS PURSUANT TO
RULE 18C OF THE TEXAS RULES OF CIVIL PROCEDURE**

I, STEPHEN FERNELIUS, certify as follows:

1. I am an attorney licensed to practice law in the State of Texas and a Partner in the law firm of Fulbright & Jaworski L.L.P., counsel for BP Products North America Inc. (“BP Products”) in this matter. I make this declaration in support of BP Products’ Objection To Any Broadcasting of the Trial Proceedings, which is made pursuant to Texas Rules of Civil Procedure 18c. I am over the age of 18, of sound mind, and have personal knowledge to state that the following is true and accurate.

2. Neither BP Products nor any other defendant has consented to the broadcasting or televising of the court proceedings in *Miguel Arenazas and Elizabeth Ramon v. BP Amoco Chemical Company, et al.*, Cause No. 05CV0337 (Galveston County, Texas).

3. There is no indication that the witnesses who will be testifying, or whose testimony will be referenced during opening and closing statements, have consented to the broadcasting or televising of the court proceedings in *Miguel Arenazas and Elizabeth*

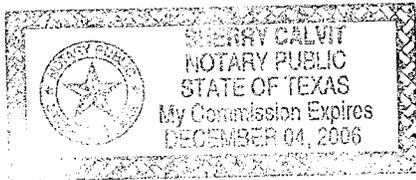
Ramon v. BP Amoco Chemical Company, et al., Cause No. 05CV0337 (Galveston County, Texas).

I declare under penalty of perjury that the foregoing is true and correct.

Executed in Houston, Texas on September 19, 2006.

[Handwritten Signature]

STEPHEN FERNELIUS



[Handwritten Signature]
Notary Public, State of Texas

Sherry Calvit
(Printed or Stamped Name of Notary)

12-4-06
(Commission Expiration Date)

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served in compliance with Texas Rules of Civil Procedure 21 and 21a on September 19, 2006.

[Handwritten Signature]
Stephen Fernelius
DISTRICT CLERK
GALVESTON COUNTY, TX
[Handwritten Signature]
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