

## Newspaper blamed for mistrial in landfill case

Hays judge agrees with companies being sued for toxic cleanup costs

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A state District Court judge in Hays County on Monday declared a mistrial in a 2-week-old civil trial to determine who is responsible for disposing of the lead-tainted waste mistakenly sent to the Texas Disposal Systems landfill in Creedmoor. Judge Gary Steel granted the mistrial motion by Zenith Electronics Corp. and Penske Truck Leasing Co., whose lawyers argued that jurors could have been improperly influenced by an article that appeared Saturday in the Austin American-Statesman.

Texas Disposal Systems is suing the two companies, saying they are legally responsible for paying for the proper disposal of their hazardous waste, sent to the municipal waste landfill after a 1997 truck wreck on Interstate 35.

According to a draft transcript of Monday's proceedings, none of the 12 jurors reported reading the article, though four jurors told the judge they had seen the headline: "Landfill is suing for toxic mistake; top-rated site near Austin stuck with tons of lead-laden waste."

One juror remembered the word "landfill" and another the word "toxic," the transcript says. All the jurors, who had been told to avoid reading media accounts of the trial, told Steel they would remain able to render an impartial verdict.

Steel described the article as opinionated and cited its timing in explaining his decision: "It just came at a time during the evidence that doesn't allow us to go forward, not to mention that I believe four of you had actually seen the headlines, which in and of themselves, in my opinion, could very easily sway a juror's opinion."

Lawyers for Penske and Zenith argued that the article and headlines were one-sided.

"The headlines themselves are a misrepresentation of what we're dealing with here," said Douglas Christian, the lawyer for Penske.

Christian argued that, by speaking to a reporter and allowing a photographer to shoot the 99 containers of waste waiting for legal disposal, Texas Disposal officials "manufactured evidence to support its claim that its reputation was harmed."

"For 6 1/2 years, nobody other than (Texas Disposal) cared at all about this, and here we are two weeks into trial, and they manufacture an article in the newspaper," Christian said.

The article, which outlined events behind the case, included the defendants' arguments and quoted Zenith lawyer Phillip Comella.

The article also examined why, with Penske admitting to state regulators that it created hazardous waste, the Texas Commission on Environmental Quality for the past six years has not enforced state law and required either Penske or Zenith to properly dispose of all the material at a hazardous waste landfill. That estimated cost is \$400,000.

David Donaldson Jr., representing Texas Disposal, argued against the mistrial and said his client had no say in how the article was published.

"I want to make it clear that I believe that my client has a First Amendment right to communicate their concerns about the activities of the state agencies involved in this action and have a right to discuss the events that are going on in the trial," Donaldson said.

The article noted that Steel had tentatively barred the jurors from hearing about the regulations that designate what waste is hazardous and how it must be handled, and the letters in which the companies acknowledge that the wreck created hazardous waste.

Texas Disposal owner Bob Gregory has said Steel's rulings on that evidence, which Gregory's lawyers have argued is based on a misreading of federal laws, seriously hurt his case and could have been grounds for an appeal.

On Oct. 9, 1997, a Penske truck hauling Zenith TV picture tubes to a Mexican assembly factory overturned and split open on I-35 near Buda. The 1,248 tubes, each of which contained 3 1/2 pounds of lead, became hazardous waste once broken. But without a warning in the truck's manifest, state highway officials sent it to the nearby Texas Disposal landfill.

Seven dump-truck loads were emptied into the landfill and mixed in with garbage before Texas Disposal was notified of the mistake and stopped unloading. Today, about 1,600 tons of mixed waste sits in 99 sealed metal containers, waiting for proper disposal.

Declaring a mistrial two weeks into a civil trial is somewhat unusual, particularly based on a single article, several legal experts said. However, they said, the judge may have had access to information -- such as a juror's body language while being interviewed -- that tilted his opinion.

"Someone, whoever lost, would use it as a point of appeal," said Tracy McCormack, a University of Texas Law School lecturer. "The court can't always tell how much these jurors were or were not influenced. The judge probably felt it was the safest thing to do."

The trial has been reset for Sept. 13.

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