

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

\_\_\_\_\_  
No. 18-30139  
\_\_\_\_\_

United States Court of Appeals  
Fifth Circuit

**FILED**

June 28, 2019

Lyle W. Cayce  
Clerk

WASTE MANAGEMENT OF LOUISIANA, L.L.C.,

Plaintiff - Appellant

v.

RIVER BIRCH, INCORPORATED; ALBERT J. WARD, JR.; FREDERICK R.  
HEEBE; HIGHWAY 90, L.L.C.,

Defendants - Appellees

\_\_\_\_\_  
Appeal from the United States District Court  
for the Eastern District of Louisiana  
\_\_\_\_\_

Before DAVIS, COSTA, and OLDHAM, Circuit Judges.

PER CURIAM:

**ON PETITION FOR PANEL AND EN BANC REHEARING**

Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, we note that Defendants did not cite or rely on *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986), in the district court or to the panel. We therefore decline to consider that case now. Both the majority and the dissent agree that the issue in this case is factual, more particularly, what inferences can or will be drawn by the jury from the evidence.

The majority continues to adhere to its view that fact issues are presented that preclude summary judgment. The dissent disagrees and would

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affirm the district court. The petition for panel rehearing is therefore **DENIED**. Accordingly, the judgment of the district court is reversed, and the case is remanded for further proceedings.

No member of the panel nor judge in regular active service of the court<sup>1</sup> having requested that the court be polled on Rehearing En Banc (FED. R. APP. P. and 5<sup>TH</sup> CIR. R. 35), the Petition for Rehearing En Banc is **DENIED**.

ENTERED FOR THE COURT:

*W Eugene Davis*

UNITED STATES CIRCUIT JUDGE

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<sup>1</sup> Judges Stephen A. Higginson and Kurt D. Engelhardt did not participate in the consideration of the rehearing en banc.