STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2012 CA 0620

ALFRED WATTS AND ROSA LEE WATTS

VERSUS

GEORGIA-PACIFIC CORP. (INDIVIDUALLY AND AS SUCCESSOR TO BESTWALL GYPSUM COMPANY); METROPOLITAN LIFE INSURANCE COMPANY; FOSTER WHEELER ENERGY CORPORATION; MINNESOTA MINING AND MANUFACTURING COMPANY (A/K/A "3M"); NORTH AMERICAN REFRACTORIES COMPANY; GENERAL REFRACTORIES COMPANY; HARBISON-WALKER REFRACTORIES COMPANY (FORMERLY A DIVISION OF INDRESCO INC.); UNIROYAL, INC. (SUCCESSOR TO U.S. RUBBER COMPANY); THE MCCARTY CORPORATION; RAPID AMERICAN CORPORATION, ET AL

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Judgment Rendered: SEP 16 2013

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APPEALED FROM THE EIGHTEEN JUDICIAL DISTRICT COURT
NUMBER 55,941, THE PARISH OF IBERVILLE
STATE OF LOUISIANA

THE HONORABLE JAMES J. BEST, JUDGE

* * * * * * *

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* * * * * * * *

BEFORE: KUHN, PETTIGREW, AND McDONALD, JJ.

Disposition: AMENDED AND, AS AMENDED, AFFIRMED.

McDonald, J. dissents and will assign reasons

KUHN, J.

Defendant-appellant, Hebert Brothers Engineers, Inc. (Hebert Brothers)[1] appeals the trial court's judgment awarding to plaintiffs-appellees, Rosa Lee Watts and her children (the Watts),[2] the survival action damages of the decedent, Alfred Watts,[3] after his death from lung cancer contracted as a result of his employment with Hebert Brothers on the Dow Chemical Company (Dow) premises located in Plaquemine, Louisiana. We amend the judgment to reflect Hebert Brothers' virile portion and, as amended, affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Alfred began working as a laborer for Hebert Brothers in 1963 in the cell service unit of the chlorine plant at the Dow premises. In conjunction with the manufacturing process in the chemical plant, Alfred and his coworkers were required to handle asbestos. In 1994, after his voice box was removed as a result of laryngeal cancer, Alfred retired from Hebert Brothers. In the summer of 2001, Alfred was diagnosed with lung cancer from which he died on October 31, 2001.

Although this lawsuit, filed on September 10, 2001, named as defendants numerous entities, including those who had manufactured or distributed asbestos as well as Dow in its capacity as premises owners, Hebert Brothers was not made a

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[1] Although this corporate entity has had several predecessors, Hebert Brothers Engineers, Inc. is the undisputed proper party defendant.

[2] The lawsuit was instituted by Alfred and his wife Rosa Lee. After Alfred's death, the trial court signed an order substituting as party plaintiffs Rosa Lee, in her capacity as Alfred's surviving spouse, as well as Helen Mallion, Gwen Burnstein, Joyce Watts, and Alfreda Watts, who are Alfred's surviving children.

[3] On April 21, 2004, the trial court granted summary judgment and dismissed the Watts' claims of intentional tort, wrongful death, and loss of consortium. Writs were subsequently denied by this court, ***Watts v. Georgia-Pacific Corp.***, 2004-1186 (La. App. 1st Cir. 6/7/04) (unpublished writ action) and the Louisiana Supreme Court, 2004-1705 (La. 10/8/04), 883 So.2d 1018. At the trial on the merits, the Watts conceded that their recovery was limited to Alfred's survival action only. On appeal, the Watts have raised no contentions regarding entitlement to any other type of damages. Accord ***Rando v. Anco Insulations Inc.***, 2008-1163 (La. 5/22/09), 16 So.3d 1065, 1071 (concluding that a worker's tort claim against his employer for asbestos-caused cancer was not barred by the exclusive remedy provision of the Louisiana Workers' Compensation Act under the pre-1975 version of the act).

party to the lawsuit until the Watts filed a supplemental petition on August 29, 2003. Subsequently, the Watts dismissed all the other named defendants from the lawsuit including Dow, which was dismissed by an order signed on September 3, 2003. Thereafter, the matter proceeded to trial against Hebert Brothers.

A seven-day jury trial was held. After the presentation of evidence, the Watts moved for a directed verdict arguing, among other things, that there was no evidence of the fault of any entity other than Hebert Brothers. The trial court denied relief. Hebert Brothers then moved for a directed verdict, urging that because the Watts had not put on any evidence of the fault of anyone other than ostensibly that of Hebert Brothers, the Watts' claims were prescribed. Emphasizing that the jury was impaneled and almost ready to deliberate, the trial court denied Hebert Brothers' motion for a directed verdict, expressly noting that its ruling was not based on the merits of the request. Although the trial court granted leave for Hebert Brothers to seek supervisory writs, the jury was charged and retired.

After deliberations, the jury rendered a verdict finding that Hebert Brothers was negligent and that its negligence was a substantial factor in causing both Alfred's laryngeal and lung cancers. The jury also found that Alfred, despite having been a heavy cigarette smoker who regularly consumed alcohol until the removal of his voice box in 1994, was not contributorily negligent in causing either of his cancers. Damages totaling $3,625,000.00 were awarded to the Watts for Alfred's survival action.

Prior to entry of a final judgment, the trial court granted Hebert Brother's motion to stay the proceedings while the issue of prescription was under supervisory review. This court subsequently issued a ruling, stating:

> **WRIT GRANTED IN PART; DENIED IN PART; REMANDED WITH INSTRUCTIONS.** The documents presented to this Court indicate that, while the [trial] court denied [Hebert Brothers'] motion

> for directed verdict on the basis of prescription (which issue was initially raised in [Hebert Brothers'] answer), it did not consider the merits of that motion. Neither does it appear that the issue of prescription was presented to the jury for its consideration. Under the particular circumstances presented here, the application is hereby granted insofar as the case is remanded to the [trial] court with instructions to consider and rule on the merits of [Hebert Brothers'] assertion that [the Watts'] claims against it have prescribed and then to render a final judgment. Thereafter, the party or parties ultimately aggrieved by the judgment can seek a timely appeal with this Court. In all other respects, the application is hereby denied.

Watts v. Georgia-Pacific Corp., 2005-0933 (La. App. 1st Cir. 6/17/05) (unpublished writ action).

A hearing was held on the remand, after which the trial court concluded that the Watts' claims against Hebert Brothers were not prescribed. A final judgment, incorporating the jury's verdict, was signed on June 2, 2011, and Hebert Brothers timely appealed.

On appeal, Hebert Brothers asserts the trial court erred by: (1) concluding that the Watts' claims were not prescribed; (2) failing to render a judgment that limited Hebert Brothers' liability to its virile share; and (3) awarding an excessive amount of damages for Alfred's survival action in connection with his lung cancer.

PRESCRIPTION[4]

It is undisputed that when Hebert Brothers was made a defendant in the Watts' lawsuit, over a year had elapsed from the date of Alfred's death. Thus, on the face of the pleadings, the Watts' claims were prescribed. But when prescription is interrupted against a solidary obligor, the interruption is effective against all solidary obligors and their successors. See La. C.C. art. 3503; see also

[4] At the hearing held as a result of this court's remand order, the parties argued over whether the matter was before the trial court as a directed verdict or an exception of prescription. The distinction arose because if the trial court treated the issue of whether the Watts' claims were timely asserted as an exception of prescription, additional evidence was admissible under La. C.C.P. art. 931. Although the Watts' additional evidence was admitted by the trial court in an abundance of caution, that evidence is not contained in our record. On appeal, the Watts maintain that the evidence admitted at the trial on the merits established the timeliness of their claims. Thus, on review, it is unnecessary to classify the procedural basis for consideration of the timeliness of the Watts' claims, and we pretermit such a discussion.

La. C.C. art. 1799 (the interruption of prescription against one solidary obligor is effective against all solidary obligors and their heirs); ***Hoefly v. Government Employees Ins. Co.***, 418 So.2d 575, 577-78 (La. 1982) (plaintiff's timely and properly filed suit against tortfeasors interrupted prescription as to his uninsured motorist carrier, who was solidarily liable to him). Hebert Brothers urges that the record is devoid of any evidence that establishes a solidary relationship between it and another timely sued defendant.

An obligation is solidary for the obligors when each obligor is liable for the whole performance. A performance rendered by one of the solidary obligors relieves the others of liability toward the obligee. La. C.C. art. 1794. For purposes of prescription, parties are solidarily liable to the extent that they share coextensive liability to repair certain elements of the same damage. ***Glasgow v. PAR Minerals Corp.***, 2010-2011 (La. 5/10/11), 70 So.3d 765, 772.

Without levying any claims challenging the jury's conclusions that Hebert Brothers was a substantial factor in causing Alfred's laryngeal and lung cancers or that Alfred was not contributorily negligent in causing his cancers, in this appeal, Hebert Brothers asserts that the record fails to establish Dow's liability so as to create the necessary solidary relationship to support the trial court's conclusion that the Watts' claims were timely asserted. Thus, in order to prove the solidary relationship between Hebert Brothers and Dow, the Watts had to prove Dow's liability.

Dow's Liability:

It is undisputed in this case that it was the Dow premises upon which all manufacturing operations occurred and included Alfred's handling of asbestos. With regard to a long-latency occupational disease claim, the law in effect at the time of the exposure applies. See ***Cole v. Celotex Corp.***, 599 So.2d 1058, 1066 (La. 1992). Thus, in our examination of the record to ascertain whether Dow was

liable under a theory of strict liability, see La. C.C. art. 2317, the limitations imposed on strict premises liability set forth in La. C.C. art. 2317.1, added by Louisiana Acts 1996, 1st Ex.Sess., No. 1, §1, are not applicable.

In a typical negligence case against the owner of a thing (such as a manufacturing facility that utilizes asbestos in its process) that is actively involved in the causation of injury, the claimant must prove that something about the thing created an unreasonable risk of injury, which resulted in the damage; that the owner knew or should have known of that risk; and that the owner nevertheless failed to render the thing safe or to take adequate steps to prevent the damage caused by the thing. Under traditional negligence concepts, the knowledge (actual or constructive) gives rise to the duty to take reasonable steps to protect against injurious consequences resulting from the risk, and no responsibility is placed on the owner who acted reasonably but nevertheless failed to discover that the thing presented an unreasonable risk of harm. See ***Kent v. Gulf States Utilities Co.***, 418 So.2d 493, 497 (La. 1982).

In a strict liability case against the same owner, the claimant is relieved only of proving the owner knew or should have known of the risk involved. The claimant must still prove that under the circumstances the thing presented an unreasonable risk of harm, which resulted in the damage (i.e., must prove the thing was defective). The resulting liability is strict in the sense that the owner's duty to protect against injurious consequences resulting from the risk does not depend on actual or constructive knowledge of the risk, the factor which usually gives rise to a duty under negligence concepts. *Under strict liability concepts, the mere fact of the owner's relationship with and responsibility for the damage-causing thing gives rise to an absolute duty to discover the risks presented by the thing in custody.* If the owner breaches that absolute duty to discover, he is presumed to have discovered any risks presented by the thing in custody, and the owner

accordingly will be held liable for failing to take steps to prevent injury resulting because the thing in his custody presented an unreasonable risk of injury to another. ***Kent***, 418 So.2d at 497.

Accordingly, in a strict liability case in which the claimant asserts that the owner's damage-causing thing presented an unreasonable risk of harm, the standard for determining liability is to presume the owner's knowledge of the risk presented by the thing under his control and then to determine the reasonableness (according to traditional notions of blameworthiness) of the owner's conduct, in the light of that presumed knowledge. ***Id.***

The evidence introduced at trial established that Dow was the owner of the asbestos that Hebert Brothers' employees utilized in their day-to-day operations in the cell service unit of the chlorine plant on Dow's premises. Charles Snearl, who worked for Hebert Brothers at the Dow facility from 1972 through 1988, primarily as a foreman, testified that the orders on what day-to-day tasks were undertaken came from Dow, the workers used Dow equipment, and Dow provided the asbestos, which was utilized in the cell service unit. Sirkil Pania worked for Hebert Brothers at Dow from 1957 through 1996. He was assigned to Dow's cell service unit from 1957 through 1972, and worked as a laborer with Alfred from 1963 through 1972. Pania testified that he and Alfred did the same type of tasks on a daily basis. In conformity with Snearl, Pania testified that all the asbestos utilized by Alfred and him was provided by Dow. Omer King Hebert, the present owner and president of Hebert Brothers, stated that no one could get on Dow's premises without Dow's permission, Hebert Brothers' workers did whatever Dow told them to do, and Dow was in charge of everything at the facility. Hebert testified, "[W]e relied on ... Dow ... I mean, it was their [f]acility. They knew what dangers they had and didn't have and ... we always just ... went by their [g]uidelines and directions."

There is really no dispute in this case that asbestos is a substance that creates an unreasonable risk of harm when inhaled. The testimony of nearly every witness who worked on Dow's premises; Dr. Antonio Edwards, Alfred's treating physician who diagnosed the lung cancer; and Dr. Alfredo Suarez, the pathologist who performed the autopsy on Alfred; along with the testimony of Dr. Richard Lemen, an expert in epidemiology and industrial hygiene; Dr. Arnold Brody, Dr. Jerrold Abraham, and Dr. Travis Harrison, experts in pathology; and Dr. Robert Jones, an expert in pulmonary disease, established that asbestos was a substance that created an unreasonable risk of harm. While the views of the expert witnesses reflected differing opinions on whether Alfred's lung cancer was a result of a significant exposure to asbestos, his longtime heavy cigarette smoking, or the synergistic effect of the two factors, none disagreed with the dangerous propensities of asbestos when inhaled, and on appeal, Hebert Brothers does not suggest that asbestos inhalation in significant quantities is anything other than an unreasonable risk of harm.

Thus we turn our attention to the reasonableness of Dow's conduct, in the light of its presumed knowledge of the risk presented by the asbestos which was under its control. Hebert Brothers presented evidence of the safety measures Dow undertook to protect both its own workers and those employed by Hebert Brothers from the dangers presented by the inhalation of significant quantities of asbestos. Both Snearl and Hebert testified about the extensive protocols in place at the Dow facility certainly no later than the 1980s. But Snearl -- who testified that workers had safety equipment (including some sort of respirator) on them the entire time they worked in the asbestos vat -- did not commence his employment at the Dow facility until 1972. And Hebert conceded that during his early part-time employment as an assistant timekeeper in 1972, he was not usually in the cell

service unit of the chlorine plant, just on occasions, and that he would use whatever safety precautions he observed workers in the unit undertaking.

Pania, however, described in detail the significant asbestos exposure that he and Alfred experienced as laborers working for Hebert Brothers at the Dow facility between 1963 and 1972 on a daily basis when no protective gear was provided. According to Pania, in putting cells together in the chlorine plant, a crew would go into a railroad box car and load sacks of raw asbestos off the car and onto a pallet. One worker would bring the pallet out with a forklift and another would begin stacking the individual sacks. Occasionally, a sack would bust open in the railroad car or when it was in transit. Once opened, the vicinity became dusty. Each sack of asbestos weighed approximately 100 pounds. When asbestos was needed in the cell-building process, a laborer (including Pania and Alfred) would get a couple sacks, cut each open with a knife, and dump the raw asbestos into a vat for mixing. A ceiling fan would stir up the asbestos dust that was created upon dumping. Additionally, part of the cell-making process included use of an asbestos rope that created dust when pounded into place. The laborers were also exposed to asbestos dust in the cell breakdown process, which required use of a hatchet to physically remove baked-on asbestos, a process that also created dust; as well as in the clean-up process of the asbestos debris, which included sweeping the displaced asbestos particles into piles.

Pania acknowledged that beginning in 1974, Dow began conducting annual physical exams, had a physician on the premises, and performed chest x-rays. But he stated that between 1963 and 1972, no one ever told him of the dangers of asbestos exposure, there were no posted warning signs, he was not advised either to wear a respirator to protect himself from asbestos fibers or of the heighten danger created by asbestos inhalation and cigarette smoking.

Given Pania's undisputed testimony about the lack of any safety precautions in the Dow facility between 1963 and 1971, we find a reasonable factual basis exists to support the trial court's implicit finding that Dow is liable based on a theory of strict custodial liability under La. C.C. art. 2317 (before Louisiana Acts 1996, 1st Ex.Sess., No. 1, §1). Specifically, Pania's testimony established that as a laborer, between 1963 and 1972, Alfred inhaled significant quantities of asbestos; Dow owned the asbestos, which was unreasonably dangerous, and the inhalation occurred on Dow's premises; and Dow failed to take reasonable steps to prevent his injury. As such, there is no manifest error.[5] See ***Stobart v. State, Dep't of Transp. and Dev.***, 617 So.2d 880, 882-83 (La. 1993).[6]

Hebert Brothers complains about the Watts having moved for a directed verdict averring, after the close of evidence, that there was no evidence of fault of any entity other than Hebert Brothers and then took the exact opposite position after Hebert Brothers moved for a directed verdict on the issue of the timeliness of their claims against it. While we do see the irony of the changed positions the Watts argued before the trial court, arguments of counsel are not evidence. Importantly, the trial court denied the Watts' motion for a directed verdict on that

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[5] In issuing its ruling on remand, the trial court stated that "as fact finder ... [it] finds substantial evidence of Dow's ... [solidary] liability." Hebert Brothers maintains the trial court applied the wrong standard of proof to find that the Watts had proven Dow's solidary liability and suggests that this constituted legal error that interdicted the fact finding process. Proof by a preponderance of the evidence means that taking the evidence as a whole, such proof shows that the fact or cause sought to be proved is more probable than not. ***Connelly v. Connelly***, 94-0527 (La. App. 1st Cir. 10/7/94), 644 So.2d 789, 798. It is axiomatic that proof by substantial evidence is necessarily a heightened standard. While we agree with Hebert Brothers' suggestion that the applicable standard of proof in this case is preponderance of the evidence, we question whether the trial court actually applied a heightened burden of proof. Even so, any such error did not and could not have prejudiced Hebert Brothers. Thus, this assertion is without merit.

[6] We note, moreover, that the record also supports a finding of Dow's liability based on negligence. Because there is an almost universal duty to use reasonable care to avoid injury to another, see ***Rando v. Anco Insulations Inc.***, 2008-1163 (La. 5/22/09), 16 So.3d 1065, 1086-94, Dow's custodial liability falls within the ambit of such a broad duty and this record contains evidence to support findings that Alfred experienced significant exposure to asbestos, he received an injury substantially caused by that exposure, Dow's failure to use reasonable care to avoid injury was a cause-in-fact, i.e., a substantial factor in generating Alfred's harm, and the risk that he would develop laryngeal and lung cancers was one within the scope of Dow's duty.

basis, implicitly finding that evidence of other entities' fault existed. Moreover, we point out by analogy that alternative assertions are frequently advanced in the legal context. Indeed, our system of pleading permits parties to assert alternative theories of liability. See La. C.C.P. art. 892 (a petition may set forth two or more causes of action in the alternative, even though the legal or factual bases thereof may be inconsistent or mutually exclusive). There is no prejudice shown by Hebert Brothers and the legal effect of the Watts' inconsistent arguments are of no moment in our appellate review.

Accordingly, there is no error in the trial court's determination that Dow's liability was proven by the evidence admitted a trial. Thus, a solidary relationship existed between Hebert Brothers and Dow, a timely sued defendant, and the trial court correctly concluded that the Watts' claims were timely.[7]

VIRILE SHARE

The trial court incorporated the jury's verdict awarding damages to the Watts without reducing the percentage of fault attributable to Dow that it found, after the jury's verdict on remand from this court, was a proven co-obligor of Hebert Brothers. Because the record establishes, without dispute, that Alfred inhaled significant quantities of asbestos between 1963 and 1971, prior to the enactment of Louisiana Comparative Fault Law,[8] the case is governed by prior law, and virile share principles apply. See ***Cole v. Celotex Corp.***, 599 So.2d at 1072-74.

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[7] We find no merit in Hebert Brothers' contention that the Watts failed to sufficiently plead a solidary relationship between it and Dow since Dow was no longer a defendant at the time the Watts filed the supplemental petition that added Hebert Brothers; the supplemental allegations did not include any averred liability on Dow's part; and, therefore, the Watts' "blanket allegations" of the solidary relationship of all the defendants could not have included Dow. Un-objected to evidence of issues not contained in the pleadings that is admitted at trial serves to enlarge the pleadings. Such evidence is "treated in all respects as if [it] had been raised by the pleading[s]." ***Hopkins v. American Cyanamid Co.***, 95-1088 (La. 1/16/96), 666 So.2d 615, 623-24 (citing La. C.C.P. art. 1154). Because the record contains evidence that supports a solidary relationship between Hebert Brothers and Dow, which was admitted without objection, we find no merit in this contention.

[8] See La. Acts 1979, No. 431.

On appeal, the Watts suggest that because the jury was not asked to determine whether Dow bore any fault, Hebert Brothers waived entitlement to a reduction for Dow's virile share. But neither the Watts nor Hebert Brothers requested that Dow's fault be presented to the jury. Thus, both Hebert Brothers and the Watts waived their rights to have the jury resolve the issue. See La. C.C.P. art. 1812A (if the court omits any issue of fact raised by the pleadings or by the evidence, each party waives his right to a trial by jury of the issue). Some issues may be tried by a jury while others in the same trial may be decided by the judge. See ***Champagne v. American Southern Ins.Co.***, 295 So.2d 437 (La. 1974). Under the particular facts of this case, we find no error in the resolution of Dow's liability by the trial judge.

A plaintiff's release of a joint tortfeasor reduces the amount recoverable against the remaining tortfeasors by the amount of the virile share (pro rata share) of the one released. ***Raley v. Carter***, 412 So.2d 1045, 1046 (La. 1982). Nonetheless, the remaining tortfeasor is only entitled to a reduction of the award if the parties released are proven to be joint tortfeasors. Thus, a pre-trial settlement shifts the burden of proving liability on the part of the released tortfeasors from the plaintiff to the remaining defendant or defendants. ***Raley***, 412 So.2d at 1047.

At the commencement of trial, the Watts read into the record the names of thirteen defendants, including Dow, who had settled with them. Because the respective liability of the settling defendants was not established on the record, the judgment cannot be reduced to reflect their respective pro rata shares. But we have found no manifest error in the trial court's determination that Dow was at fault in causing Alfred's injuries. Since the record reflects Dow's fault, the trial court erred in failing to attribute one-half the damages to Dow and reduce the total damages awarded to the Watts against Hebert Brothers by one-half. Accordingly,

we amend the judgment to award to the Watts one-half their total damages, reflecting Hebert Brothers' virile share.

QUANTUM

In its final challenge of the trial court's judgment, Hebert Brothers maintains that the general damages award for Alfred's lung cancer is beyond what a reasonable trier of fact could assess and suggests the amount should be reduced. Thus, without challenging the awards made by the jury for Alfred's laryngeal cancer, Hebert Brothers urges that jury's award of $2,750,000.00 (consisting of $750,000.00 for physical pain and suffering, $1,000,000.00 for mental anguish, and $1,000,000.00 for loss of enjoyment of life) for the lung cancer from which Alfred died was excessive. In its appellate brief, Hebert Brothers provides us with a series of reported cases that it contends are most similar to the Watts' and asserts that $2,000,000.00 is the maximum amount the jury could have awarded without abusing its discretion.

The trial court's determination of the amount of an award of damages is a finding of fact. The Civil Code provides that "[i]n the assessment of damages in cases of offenses, quasi offenses, and quasi contracts, much discretion must be left to the judge or jury." La. C.C. art. 2324.1. Under the manifest error standard, in order to reverse a trial court's determination of a fact, an appellate court must review the record in its entirety and (1) find that a reasonable factual basis does not exist for the finding, and (2) further determine that the record establishes that the fact finder is clearly wrong or manifestly erroneous. On review, an appellate court must be cautious not to re-weigh the evidence or to substitute its own factual findings just because it would have decided the case differently. Moreover, the initial inquiry must always be directed at whether the trier court's award for the particular injuries and their effects upon this particular injured person is a clear abuse of the trier of fact's great discretion. It is only after articulated analysis of

the facts discloses an abuse of discretion that the award may on appellate review, for articulated reason, be considered excessive. Only after such determination of abuse has been reached is a resort to prior awards appropriate for purposes of then determining what would be an appropriate award for the present case. However, absent an initial determination the trial court's very great discretion in the award of general damages has been abused under the facts of this case, the reviewing court should not disturb the trier's award. ***Rando v. Anco Insulations Inc.***, 2008-1163 (La. 5/22/09), 16 So.3d 1065, 1093-94.

Our review of the record shows no abuse of the jury's vast discretion. Alfred was 69 years old when he was diagnosed with lung cancer in July 2001. Although he had suffered from laryngeal cancer and could no longer speak after the removal of his voice box, Alfred recovered fairly well from the surgery and regained his animated personality. To communicate, he wrote things down, read lips, used hand gestures, and clapped. Once he was diagnosed with lung cancer, Alfred was in denial. He could no longer walk, stand, eat, or do anything for himself. Alfred's grown daughters had to put diapers on him and feed him with a syringe. Someone had to turn him over every two hours. To see his doctor, he could no longer stay upright in a wheelchair, so he had to be transported by ambulance.

According to Dr. Edwards, Alfred's treating physician beginning in 2000, when he met Alfred, he was a bright-eyed person who communicated with others through clapping. He described, "[W]hen you would say something and [Alfred] agreed with it, he clapped ... as though he was excited." Dr. Edwards explained to the jury that during Alfred's last three weeks of life, he stopped engaging in life. He went from an excited person to one who was nonresponsive to his environment.

Gwen, Alfred's second oldest daughter, testified that her father was a proud man who never asked anyone for anything. She explained that her father became

so depressed as a result of his condition that on his birthday in September 2001, he refused to take pictures with his children or grandchildren because he knew he would not be around much longer. When his family convinced him to take a picture, Alfred was confused and did not understand what was going on around him. In his final days, according to Gwen, Alfred was like a baby with no life in his body.

Helen, Alfred's youngest daughter, told the jury that she watched her father go from a man to a baby after the onset of the lung cancer. She recalled that her father, a man not apt to show his emotions, cried when the doctor told him he had lung cancer. Describing her father as "a very proud man," Helen told the jury of the indignity Alfred felt as he watched his own child put diapers on him, bathe him, and feed him through a tube. Helen stated that "his whole manhood was taken away from him" and that he could not do a thing about it. Helen testified that she could see the pain in his eyes and that, in the last three weeks of his life, his pain was constant and severe. Her testimony about Alfred's final days was in conformity to that of Gwen. Helen reminded the jury that without a voice box, Alfred could not speak. He had communicated his feelings to his family through hugs and claps. Once he became too weak, he lost his only means of communication and so was unable to fully express his feelings in his final days.

Although the duration of his suffering from lung cancer was but a short period, it is clear from the record that the evidence proved Alfred suffered intense and severe changes in his life after the lung cancer diagnosis. Those members of his family who testified at trial established that Alfred was an old-fashioned man who took pride in being with and providing for his family. Alfred said little but demonstrated much. When he lost his ability to speak, he did not quit communicating, adapting a nonverbal articulation that those who interacted with him readily understood. But with the lung cancer, Alfred watched in constant

physical and emotional pain as all his means of communication vanished and life left him. In light of the testimony of his family and treating physician, we cannot say this jury abused its vast discretion in awarding the Watts the amounts of $750,000.00 for Alfred's physical pain and suffering, $1,000,000.00 for mental anguish, and $1,000,000.00 for loss of enjoyment of life.

DECREE

For these reasons, the trial court's judgment is amended to reduce to one-half, i.e., Hebert Brothers' virile share, the amounts of damages awarded to the Watts. In all other respects, the judgment is affirmed. Appeal costs are assessed to Hebert Brothers Engineering, Inc.

AMENDED AND, AS AMENDED, AFFIRMED.

ALFRED WATTS AND ROSA LEE WATTS

VERSUS

GEORGIA-PACIFIC CORP. ET AL.

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

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McDONALD, J., Agreeing in part and dissenting in part:

NOV 22 2013

I must respectfully dissent from the majority opinion in several respects. First, on the issue of solidary obligors and the finding of liability on Dow; secondly, on affirming the trial court's refusal to grant a directed verdict on behalf of the defendants; and thirdly, applying the wrong standard of review to the jury's award of general damages. However, having made the determination that Dow and Hebert Brothers were both liable, I believe the majority is correct in finding the quantum award should be reduced as Hebert Brothers is only liable for its virile share.

The defendants point out that there seemed to be some confusion in this case. That seems to be an understatement. No one seemed to know whether comparative law principles applied, what solidary obligors meant, or what the law on virile share entails. The trial court even enlisted the assistance of a law professor to explain some of these principles.

For whatever reason, the plaintiffs set out from the start to prove that the only defendant with any liability was Hebert Brothers. I believe, as did the defendants, that they succeeded. The testimony and questioning of witnesses should be understood in that context.

Liability of Dow

The majority discusses the theory of strict liability in connection with fault on the part of Dow. However, at the charge conference between the trial court and the attorneys, the plaintiffs insisted that this was **not** a strict liability case, but rather a negligence case based on a failure to provide a safe place to work. They

had requested a jury charge on strict liability but withdrew it. Thus, I believe the majority should not have gone down a road that the plaintiffs chose not to travel. If the plaintiffs did not believe strict liability was applicable, then I do not believe we should have considered it either.

Nevertheless, since the majority considered this issue, I will also do so. In examining this issue, I find that the testimony of the various experts demonstrated the increasing knowledge of the dangers of exposure to asbestosis, but none attributed any liability to Dow. Whether Dow had any liability is open to speculation and conjecture. This is easily understood considering the plaintiffs were determined and had an objective to prove none; their goal was to prove all liability on the part of Hebert Brothers.

Charles Snearl, a co-worker of Mr. Watts during much of the time that he worked at Dow, testified as follows:

> Q: Okay. Did you have written procedures that you had to follow that **Hebert Brothers** gave you regarding the use of respirators and working asbestos?
> A: Did I have written—
> Q: From **Hebert Brothers**?
> A: No.
> Q: Did you ever have a Safety Manual from **Hebert Brothers** or any information about this is what you do when you're working around asbestos?
> A: No.
> Q: Were you ever—did—did—were you ever trained from **Hebert Brothers** about how to properly fit the respirator on—
> A: No.
> Q: --or a mask on?
> A: No.
>
> . . . .
>
> Q: All right, and so Dow—did **Hebert Brothers** ever provide you with any escape respirator?
> A: No.
> Q: Did **Hebert Brothers** ever provide you with a dust mask?
> A: No.
> Q: Did **Hebert Brothers** ever provide you with Comfo Two?
> A: No.
> Q: Did **Hebert Brothers** ever provide you with anything in regards to safety?
> A: No.

Q: Okay. So if we took what **Hebert Brothers** did when it came to safety, you would have no protection at all; would you?
A: (No audible response).
Q: Is that true?
A: I mean, Dow supplied us with—with the safety, but you know, **Hebert Brothers** didn't give it to us, if you're going to say it like that.
Q: And if you're going to have to get it from **Hebert Brothers**, if they were going to provide you with a safe place to work, you would have gotten nothing; right?
A: (No audible response).
Q: Is that correct?
A: Yeah; I guess.
(Emphasis added.)

The majority suggests Mr. Snearl's testimony is less important, because he did not begin to work at Dow until 1972 some nine years after Mr. Watts began working there. The majority relies heavily on the testimony of Sirkil Pania who worked there from 1957 until 1972. However, Mr. Pania's testimony was almost the same as that of Mr. Snearl; he stated:

Q: Let's be right up front. Did anybody every instruct you from **Hebert Brothers** to put on respiratory protection when you were around that slurry, when they were dumping those bags in, and the asbestos was flying up, and the fans was pushing it down, out into the building? Anybody ever tell you to wear respiratory protection?
A: No. No.
Q: Okay. In fact, sir, the only respiratory protection you were ever given by **Hebert Brothers** was a little escape thing; wasn't it?
A: Right. Right.

. . . .

Q: All right. In any of your time, or I should say, did you ever have any safety meetings while you worked for **Hebert Brothers**?
A: About once a month.
Q: All right.
A: That's in chlorine.
Q: In chlorine.
A: That's right.
Q: Okay. Okay, and we can talk about the other side in a moment, but for—for purposes of—of right now, we want to talk about what you were doing with Mr. Watts. So, in the Chlorine Unit, you have a safety meeting about once a month?
A: About once a month.
Q: Okay. Was there ever, ever any time between 1963 and 1972 when you were working in the Chlorine Unit that anybody at any of those safety meetings ever discussed the dangers of asbestos?
A: No.
Q: Okay. We talked for a moment earlier about the escape respirator, excuse me.
A: Right.

Q: Did anybody for **Hebert Brothers** ever tell you to wear a dust mask when you worked around asbestos?
A: No.
Q: Anybody [for **Hebert Brothers**] ever tell you to wear a respirator when you worked around –
A: No.
Q: --asbestos?

. . . .

Q: Okay, and we've already established that nobody at **Hebert Brothers** ever told you about the dangers of asbestos?
A: Right.
(Emphasis added.)

Again, the questions all were concerned with the failure of Hebert Brothers to provide adequate protection for Mr. Watts or other employees. But, these questions must be considered in the context of an attempt by the plaintiffs' attorneys to prove all the responsibility was on Hebert Brothers. None of the witnesses were asked what Dow did or did not provide or did or did not tell the employees. These questions were only asked about Hebert Brothers. In spite of the lack of evidence on the issue, the majority makes a huge leap and concludes that Dow failed to take reasonable steps to prevent the injuries to Mr. Watts. There is ample evidence that Hebert Brothers failed to prevent Mr. Watts' injuries; there is no such evidence that Dow failed to do so.

The vast majority of testimonial evidence regarding Dow's practices was about the safety measures it instituted. Dow placed air monitors on Hebert Brothers' employees, and provided them with safety equipment, including respirators. Dow's plant doctor performed annual physical examinations on Hebert Brothers' employees including chest x-rays and breathing tests, and Dow conducted safety orientations and weekly safety meetings. There is testimony that Dow supervised Hebert's employees to the extent that Dow could cause an employee to be fired for not wearing a respirator, and that Dow employees told Hebert Brothers what work was to be done. But there was absolutely no evidence elicited by the plaintiffs that indicated an intention to establish that Dow and

Hebert Brothers were solidarily liable. In fact, they argued vigorously that Hebert Brothers was the only party at fault.

Dow did provide the asbestos to Hebert Brothers for distribution to their employees so they could perform the tasks that Dow required. Also, there was testimony that a Dow employee was on the premises, in a supervisory capacity, when Hebert Brothers were working. However, we cannot say that Dow failed to take reasonable measures to protect persons on its premises from unreasonable risks of harm. In fact, the evidence adduced at trial established that Dow did make reasonable efforts to protect persons on its premises from harm. The plaintiffs failed to prove that these efforts were inadequate or unreasonable.

Directed Verdict/Judicial Estoppel

The plaintiffs moved for a directed verdict, arguing that it had been conclusively proven that: (1) Watts was not contributorily negligent; (2) Hebert Brothers was at fault; and (3) no party other than Hebert Brothers was at fault. This indicates that the plaintiffs did not have any intention of proving fault on the part of Dow, and they did not believe any proof of liability by Dow had been established. They vigorously maintained this position throughout the trial. Plaintiffs' counsel avoided presenting any evidence of the fault of any entity other than Hebert, then advised the court that it had presented no such evidence. While I recognize that this argument is not evidence, it is certainly the plaintiffs' opinion of the evidence.

The majority suggests this complete shift in positions is analogous to a party pleading alternative theories of liability or causes of action. The majority suggests there is no prejudice shown by Hebert Brothers and the legal effect of the plaintiffs' inconsistent arguments is of no moment to its appellate review. This position completely ignores the facts. First, the plaintiffs' petition made no allegations of fault on the part of Dow and alleged that Hebert Brothers was solely

responsible for their damages. An alternative plea provides notice to the defendant of the various theories that may be raised and argued. The defendant knows what to expect and, more importantly, what he must defend against, even if it is in the nature of an alternative claim. No notice equates to prejudice to the defendant.

Secondly, this is not a case analogous to alternative pleading. Rather, it is a case where judicial estoppel should apply. The doctrine of judicial estoppel prohibits parties from deliberately changing positions according to the exigencies of the moment. The doctrine is intended to prevent the perversion of the judicial process and prevents playing fast and loose with the courts. *Lowman v. Merrick*, 2006-0921 (La. App. 1st Cir. 3/23/07), 960 So.2d 84, 92.

Plaintiffs' counsel argued strenuously as follows in describing the evidence (or lack of evidence as to any fault by Dow):

> There's no evidence ... of fault of any other party, other than the employer, Hebert Brothers, in this case. I know there has been some talk about what goes on the verdict, but just for the record, we move [for] Directed Verdict on the issue of any other fault, other than the employer on [sic] this case. And in conjunction with that, we move for a Directed Verdict, because the only evidence uncontradicted, is the employer is at fault in this case ... .
>
> In fact, the only evidence in this case, that could be—viewing in the light most favorable, is that Dow provided certain things. Dow did this, Dow did that. It's unclear when Dow did all those things, prior to 1976, that's the employers' duty to provide a safe place to work. There's no evidence that there's any evidence that that happened. In fact, the evidence is totally opposite. If anybody did anything, it was Dow, who is not even in this case, who I have already moved for a Directed Verdict on that issue. Anyone else's fault, any other causation, I have moved for a directed verdict on both issues, that there is ... no evidence on causation from asbestos exposure, other than Hebert Brothers, I move for that, and no evidence of fault of any other party.
>
> The only evidence presented, from the stand, is that the plaintiffs have put evidence, through their witnesses ... that the employer failed to provide a safe place to work. Who cares what Dow did or didn't do? [W]e move for a Directed Verdict, since there is uncontroverted evidence that asbestos if is [sic] a cause, it was caused only because of the fault and the exposure, due to the employer. That's the only evidence in this case.

Having advanced this argument throughout the trial, the plaintiffs should not be allowed to advance an inconsistent and different argument when the initial one

no longer suits their needs. Indeed, the theory of judicial estoppel is designed to prevent this exact type of gamesmanship. *Hotard v. State Farm Fire & Cas. Co.*, 286 F.3d 814, 818 (5th Cir. 2002), *citing Showboat Star P'ship v. Slaughter*, 2000-1227 (La. 4/3/01), 789 So.2d 554, 561.

Quantum

I also disagree with the majority's decision on quantum. I do not believe the jury's determination of the amount of an award of general damages is a finding of fact as maintained by the majority. The majority cites La. C.C. art. 2424.1, which provides that the judge or jury has much "discretion" in the assessment of damages. Further, the majority suggests that its "review of the record shows no abuse of the jury's vast discretion." I think both statements correctly state the law that a general damage award is subject to a review for an abuse of discretion. In contrast, a special damage award is a factual determination and subject to review under the manifest error standard.

Special damages are those which refer to specific expenses that may be quantified and which arose out of the consequences of the defendant's behavior. See *Pirtle v. Allstate Ins. Co.*, 11-1063 (La. App. 1st Cir. 5/4/12), 92 So.3d 1064, 1067, writ denied, 12-1268 (La. 9/28/12), 98 So.3d 839. The standard of review for special damages was set forth by the Louisiana Supreme Court in *Kaiser v. Hardin*, 06-2092 (La. 4/11/07), 953 So.2d 802, 810, as follows:

> Special damages are those which have a "ready market value," such that the amount of the damages theoretically may be determined with relative certainty, including medical expenses and lost wages. In reviewing a jury's factual conclusions with regard to special damages, an appellate court must satisfy a two-step process based on the record as a whole: [In order to reverse,] [t]here must be no reasonable factual basis for the trial court's conclusions, and the finding must be clearly wrong. (Citations omitted).

Thus, special damages would include past lost wages, future loss of income or earning capacity, and past and future medical expenses.

On the other hand, general damages involve mental or physical pain or suffering, inconvenience, loss of gratification or intellectual or physical enjoyment, or other losses of lifestyle that cannot be measured definitively in terms of money. *Boudreaux v. Farmer,* 604 So.2d 641, 654 (La. App. 1st Cir.), writs denied, 605 So.2d 1373 and 1374 (La. 1992). The factors to be considered in assessing quantum of damages for pain and suffering are severity and duration. *Jenkins v. State ex rel. Dep't of Transp. and Dev.,* 06-1804 (La. App. 1st Cir. 8/19/08), 993 So.2d 749, 767, writ denied, 08-2471 (La. 12/19/08), 996 So.2d 1133. Much discretion is left to the judge or jury in the assessment of general damages. La. C.C. art. 2324.1. In reviewing a general damage award, a court does not review a particular item in isolation; rather, the entire damage award is reviewed for an abuse of discretion. *Smith v. Goetzman*, 97-0968 (La. App. 1st Cir. 9/25/98), 720 So.2d 39, 48.

It is only when the general damage award is, in either direction, beyond that which a reasonable trier of fact could assess for the effects of the particular injury to the particular plaintiff under the particular circumstances, that the appellate court should increase or reduce the award. *Youn v. Maritime Overseas Corp.*, 623 So.2d 1257, 1261 (La. 1993), cert. denied, 510 U.S. 1114, 114 S.Ct. 1059, 127 L.Ed.2d 379 (1994). Only after it is determined that there has been an abuse of discretion is a resort to prior awards appropriate, and then only to determine the highest or lowest point of an award within that discretion. *Coco v. Winston Indus., Inc.*, 341 So.2d 332, 335 (La. 1976); *Turner v. Ostrowe*, 01-1935 (La. App. 1st Cir. 9/27/02), 828 So.2d 1212, 1216-17, writ denied, 02-2940 (La. 2/7/03), 836 So.2d 107.

Therefore, I believe the majority is incorrect in its assertion that the amount of an award of general damages is a finding of fact and subject to the manifest error standard of review. This appeal only involves the general damage award for

the plaintiffs' survival action claims. I believe a general damage award is subject to the abuse of discretion standard of review. The jury gave a general damage award of $875,000.00 for Mr. Watts' laryngeal cancer. This was diagnosed in 1994 and resulted in the removal of his larynx and he had to live mute until his death in 2001, over seven years. The jury gave a general damage award of $2,750,000.00 for his lung cancer. It was diagnosed in the summer of 2001 and Mr. Watts died only a few months later on October 31, 2001. It is only the amount of this latter award that is being appealed, as the award for the laryngeal cancer was not appealed. The majority concludes that this award for Mr. Watts' lung cancer was not an abuse of discretion; however, I disagree and think this amount is indeed an abuse of discretion, particularly when the amount is compared to the much lesser award for the laryngeal cancer, from which Mr. Watts suffered for a much longer time.

For these reasons, I respectfully dissent from the majority opinion. I would reverse the finding that any liability on the part of Dow was proven and, under the principle of judicial estoppel, would have prevented the plaintiffs from making that argument. Further, I would review the general damage award under an abuse of discretion standard and reduce it accordingly.