NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2013 CA 2177

MARIA ELENA LUNA, CARMEL L. BASS, JUSTIN M. LUNA, AND MARIA THERESA GABRIELLA ALPHONSE, INDIVIDUALLY AND ON BEHALF OF THE LATE RAFAEL MEDARDO LUNA

VERSUS

A.W. CHESTERTON COMPANY, ET AL

DATE OF JUDGMENT: SEP 19 2014

ON APPEAL FROM THE NINETEENTH JUDICIAL DISTRICT COURT
NUMBER C604391, SEC. 22, PARISH OF EAST BATON ROUGE
STATE OF LOUISIANA

HONORABLE ROBERT J. BURNS, JUDGE AD HOC

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BEFORE: KUHN, PETTIGREW, AND WELCH, JJ.

Disposition: PEREMPTORY EXCEPTION OVERRULED; TRIAL COURT JUDGMENT AFFIRMED IN PART AND REVERSED IN PART.

KUHN, J.

Defendant-appellant, Louisiana State University Board of Supervisors (Charity Hospital), appeals the trial court's judgment awarding survival action damages to plaintiffs-appellees, Maria Elena Luna, Carmel L. Bass, Justin M. Luna, and Maria Theresa Gabriella Alphonse, the siblings and surviving heirs of decedent, Rafael Medardo Luna.[1] Charity Hospital subsequently filed with this court a peremptory exception raising the objection of prescription. We overrule the exception; the judgment is affirmed in part and reversed in part.

BACKGROUND

The Luna siblings filed this survival action on August 17, 2011, shortly after their brother, Rafael, died from mesothelioma as a result of asbestos exposure over a period of more than thirty years while working as a plumber at Charity Hospital.[2] The petition averred that Charity Hospital was liable as Mr. Luna's employer and additionally named numerous manufacturers and suppliers who, they alleged, provided asbestos related products to the Charity Hospital campus. All defendants except Charity Hospital were subsequently dismissed, with and without prejudice, from the lawsuit.

After a three-day trial on the merits, on July 31, 2013, the trial court issued a judgment finding Charity Hospital solely liable. The trial court awarded the Luna siblings $2,314,208.00 that, according to its written reasons for judgment, compensated the Lunas for medical expenses of $114,208.00 and general damages

[1] Although the petition named Louisiana State University Health Sciences Center as an employer defendant also liable to the Luna siblings for survival action damages, the judgment casts only Louisiana State University Board of Supervisors. Louisiana State University Board of Supervisors, who oversees Charity Hospital as part of Louisiana State University Health Sciences Center, was the only party who appealed. The Luna siblings have not answered the appeal. For reader ease, since all the tortious events occurred at the Charity Hospital facility, we refer to the appellant as "Charity Hospital" although technically it is the Louisiana State University Board of Supervisors who is the proper party appellant.

[2] By stipulation, the Luna siblings voluntarily dismissed their wrongful death claims against Charity Hospital.

of $2,200,000.00. Charity Hospital was also cast with court costs. Charity Hospital appealed.

On appeal, Charity Hospital does not challenge the trial court's finding that it is liable as Mr. Luna's former employer for having caused his death by exposing him to asbestos. Instead, Charity Hospital suggests that other defendants should have been held solidarily liable; the amount of the award of general damages is excessive; and it should not have been cast with court costs. During the pendency of the appeal, Charity Hospital filed a peremptory exception of prescription averring that the Luna siblings' claim is untimely and, therefore, should be dismissed.

PRESCRIPTION

Generally, prescription statutes are strictly construed against prescription and in favor of the claim sought to be extinguished by it. ***Bailey v. Khoury***, 2004-0620 (La. 1/20/05), 891 So.2d 1268, 1275. An asbestos related action is subject to a liberative prescription of one year, which commences to run from the day injury or damage is sustained. La. C.C. art. 3492. Damage is considered to have been sustained, within the meaning of the article, only when it has manifested itself with sufficient certainty to support accrual of a cause of action. ***Cole v. Celotex Corp.***, 620 So.2d 1154, 1156 (La. 1993). However, where the cause of action is not known or reasonably knowable by the plaintiff, courts have used the doctrine of *contra non valentem* to prevent the running of prescription. It is often difficult to identify a precise point in time at which the claimant becomes aware of sufficient facts to begin the running of prescription. ***Id.***, 620 So.2d at 1156-57.

Prescription will not begin to run at the earliest possible indication that a plaintiff may have suffered some wrong. Prescription should not be used to force a person who believes he may have been damaged in some way to rush to file suit against all parties who might have caused that damage. On the other hand, a

plaintiff will be responsible to seek out those whom he believes may be responsible for a specific injury. When prescription begins to run depends on the reasonableness of a plaintiff's action or inaction. ***Id.***, 620 So.2d at 1157 (citing ***Jordan v. Employee Transfer Corp.***, 509 So.2d 420, 423 (La.1987)); see also ***Bailey***, 891 So.2d at 1275-76 (liberative prescription of one year generally begins to run when the victim knows or should know of the damage, the delict and the relationship between them; the ultimate issue of whether a plaintiff knew or should have known of his claim is the reasonableness of his action or inaction, in light of his education, intelligence, the severity of the symptoms, and the nature of the defendant's conduct).

The party urging a peremptory exception raising the objection of prescription bears the burden of proof. Only if prescription is evident from the face of the pleadings will the plaintiff bear the burden of showing an action has not prescribed. ***Onstott v. Certified Capital Corp.***, 2005-2548 (La. App. 1st Cir. 11/3/06), 950 So.2d 744, 747. Nothing in the petition sets forth facts sufficient to establish the date Mr. Luna or his siblings acquired, or should have acquired, knowledge of the damage caused by Mr. Luna's exposure to asbestos while he worked at Charity Hospital. Therefore, Charity Hospital, as the party raising the objection, bears the burden of proof. See ***Naquin v. Bollinger Shipyards, Inc.***, 2011-1217 (La. App. 1st Cir. 9/7/12), 102 So.3d 875, 880, writs denied, 2012-2676 (La. 2/8/13), 108 So.3d 87 and 2012-2754 (La. 2/8/13), 108 So.3d 93.

Pointing to Mr. Luna's medical record, Charity Hospital asks this court to conclude that a note in a record at Touro Infirmary on October 7, 2010, stating that Mr. Luna reported having worked at Charity Hospital where he was exposed to asbestos, demonstrates he had actual knowledge of the relationship between exposure and his ultimate diagnosis of mesothelioma. This we find insufficient to have alerted Mr. Luna to file suit against Charity Hospital.

Charity Hospital next maintains that Mr. Luna's medical record demonstrates that he had constructive knowledge of his claim such that his failure to file suit before August 17, 2011 was unreasonable. Dr. Richard Kradin, an expert in pulmonary medicine, described the sequence of events leading to a diagnosis of mesothelioma, testifying the patient usually presents complaining of shortness of breath, a cough, and unexplained weight loss, which leads to a physical exam and a chest x-ray, where fluid around the lining of the lung is detected. Charity Hospital urges that Mr. Luna's indications to his healthcare providers when he was examined in October 2010 show that he unreasonably delayed filing suit against his former employer. Specifically, Mr. Luna stated to a Touro Infirmary physician that he suffered from shortness of breath beginning, as interpreted by the healthcare provider, as early as November 2009; and that he admitted to having had a dry cough and a ten-pound weight loss between October 2009 and October 2010.

It is undisputed that Mr. Luna was not diagnosed with mesothelioma until November 2010. The record also establishes that he suffered from hypertension, high cholesterol, vascular disease, and had been cured of prostate cancer. His medical record shows that although in October 2010 he complained of shortness of breath and admitted to a cough and weight loss, Mr. Luna's chief complaint was stomach pain, constipation, and frequent gas.

Based on our review of the record, we find November 18, 2010, when Mr. Luna was diagnosed with mesothelioma, was when prescription commenced on his claim; and that the Luna siblings' suit for survival action damages, filed on August 17, 2011, was, therefore, timely. We expressly find Mr. Luna's inaction in filing suit was reasonable in light of the myriad of physical symptoms from which he suffered and the lack of evidence that he had actual knowledge of the connexity between his exposure to asbestos and that the symptoms of shortness of breath, a

cough, and unexplained weight loss were the classic symptoms that lead to a mesothelioma diagnosis. This is particularly so where nothing in this extensive record establishes that Charity Hospital ever advised its long-time employee (or any of its employees) of the dangers of asbestos and potential of contracting asbestos-related diseases despite evidence that by the 1970's, with the promulgation of the federal Occupational Safety and Health Act, the dangers of asbestos were widely known throughout the United States and were being addressed by industry. Safety precautions Charity Hospital apparently took at some time in the 1980's were mentioned but not delineated with specificity with the exception that some warnings were posted. We find this limited evidence insufficient to support an inference that Mr. Luna was aware of his heightened risk of developing an asbestos-related disease and, therefore, on notice to monitor his lungs. Accordingly, having failed its burden of proof, the peremptory exception raising the objection of prescription filed by Charity Hospital is overruled.

VIRILE SHARE

It is undisputed that Mr. Luna inhaled significant quantities of asbestos prior to the enactment of Louisiana Comparative Fault Law.[3] Thus, the case is governed by prior law, and virile share principles apply. See ***Cole v. Celotex Corp.***, 599 So.2d at 1072-74. On appeal, Charity Hospital contends the trial court erred in failing to reduce the amount of damages awarded to the Luna siblings by the virile shares of defendants, Eagle, Inc. (Eagle), Reilly-Benton Company, Inc. (Reilly-Benton), and Taylor-Seidenbach, Inc. (Taylor-Seidenbach), characterized in the Luna siblings' petition as manufacturers of asbestos.

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).

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

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. ***Id.***, 412 So.2d at 1047.

In this case, there were no pretrial settlements with any of the manufacturer-defendants. Thus, Charity Hospital bore the burden of proving that Eagle, Reilly-Benton, and Taylor-Seidenbach were joint tortfeasors in causing Mr. Luna's death.

To prevail, Charity Hospital must show that Mr. Luna was exposed to asbestos from the manufacturer defendants' products and that he received an injury that was substantially caused by that exposure. Louisiana courts employ a "substantial factor" test to determine whether exposure to a particular asbestos-containing product was a cause-in-fact of a plaintiff's asbestos-related disease. Thus, Charity Hospital must show that Mr. Luna had a significant exposure to the product complained of to the extent that it was a substantial factor in bringing about the injury. See ***Robertson v. Doug Ashy Bldg. Materials, Inc.***, 2010-1547 (La. App. 1st Cir. 10/4/11), 77 So.3d 323, 333, writ denied, 2011-2468 (La. 1/13/12), 77 So.3d 972.

Because of the lengthy latency period between exposure to asbestos and manifestation of the disease, cause-in-fact is noted as the "premier hurdle" faced in asbestos litigation. Notwithstanding the difficulty of proof involved, to prove the liability of the manufacturer defendants, Charity Hospital's burden in this long latency case is not relaxed or reduced because of the degree of difficulty that might ensue in proving the contribution of each defendant's product to Mr. Luna's injury. When multiple causes of injury are present, a defendant's conduct is a cause-in-fact if it is a substantial factor generating plaintiff's harm. ***Id.***, 77 So.3d at 334. Evidence of the mere physical presence of asbestos-containing material is insufficient to find a manufacturer liable to a plaintiff. ***Roberts v. Owens-Corning***

Fiberglas Corp., 2003-0248 (La. App. 1st Cir. 4/2/04), 878 So.2d 631, 642, writ denied, 2004-1834 (La. 12/17/04), 888 So.2d 863. Whether a defendant's conduct was a substantial factor in causing plaintiff's harm is a question of fact subject to the manifest error standard of review. ***Id.***, 77 So.3d at 333.

Charity Hospital relies on the testimony of two of Mr. Luna's co-workers to assert that the trial court erred in concluding the evidence was insufficient to find that Eagle, Reilly-Benton, and Taylor-Seidenbach were liable so as to support a virile share reduction in damages. Thomas Lowell Thomas, Sr., who worked as a tradesman on the main campus from 1975 through 2005, indicated that he had ordered asbestos products from Eagle, Reilly-Benton, and Taylor-Seidenbach. These products included pipe covering, fiberglass, duct wraps, mastics, glues, and rubber items. Thomas recalled having seen trucks from each of these companies delivering insulation materials. And deposition testimony of Mr. Luna's coworker, Charles Cline, established that he had also ordered products containing asbestos from Eagle beginning in 1959 though the 1980s.

Initially, we note that until around 1975, Thomas did not order any asbestos products. Significantly, Mr. Luna's exposure to asbestos commenced in 1963, twelve years before Thomas placed any orders for Charity Hospital. And while Cline testified that he ordered products from Eagle prior to 1975, there is no evidence in the record demonstrating the specific dates of those orders or what products were ordered from Eagle. On this record where there is a dearth of evidence establishing which products were present during specific time periods, we cannot say the trial court was manifestly erroneous in finding that Charity Hospital failed its burden of proving any products from Eagle, Reilly-Benton, and Taylor-Seidenbach were the cause-in-fact of Mr. Luna's harm. Accordingly, we find no error in the trial court's conclusion that Charity Hospital was solely liable for the damages caused to the Lunas.

QUANTUM

Without challenging the award of $114,208.00 in medical expenses, Charity Hospital contends that the trial court's award of $2,200,00.00 in general damages was beyond what a reasonable trier of fact could assess and suggests the amount should be reduced. Charity Hospital maintains that because an in-patient hospice facility's record indicated in 45 of 64 entries between December 9, 2010 and February 28, 2011 that Mr. Luna was not experiencing pain, the general damages in his survival action should be based on awards in cases where the victim experiences less pain than victims of mesothelioma. And in support of this contention, in its appellate brief, Charity Hospital provides us with reported cases in which survival action general damage awards of $100,000.00 and $150,000.00 were made, urging that these are more appropriate under the facts of this case.

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 trial 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.

There is no abuse of discretion. While Charity Hospital has correctly pointed out the notations from the in-patient hospice facility indicating Mr. Luna was not in pain, it is overwhelming evident that he was placed in the hospice facility for palliative care. Throughout his final days, which were in that in-patient facility, Mr. Luna was given pain medication "as needed," which Dr. Kradin explained meant it was administered when Mr. Luna wanted it rather than on scheduled intervals. The pain medication consisted of strong narcotics including morphine, Oxycodone, and Percocet. Dr. Kradin testified that the high dosages given to Mr. Luna indicated that Mr. Luna's pain was intense on a pain scale. He also pointed out that the notes did not reflect Mr. Luna's state of consciousness at the time each had been recorded, so there was the possibility that he was asleep when hospice staff reported he was not in pain.

Dr. Kradin stated pain in mesothelioma cases is "substantial" due in part to the tumor's invasion into the patient's nerves that lined the rib cage and in part to the progressive compression on the chest that makes it more and more difficult to breathe. Aside from the pain directly related to mesothelioma, Mr. Luna endured significant invasive medical treatments. He was hospitalized on three separate occasions between October and December 2010. Fluid was removed from his lungs on several occasions and a biopsy of his lung was surgically removed, which ultimately resulted in the November 18, 2010 diagnosis of Stage 4 cancer.

Because of the underlying mesothelioma, Mr. Luna suffered seizures that Dr. Kradin attributed to the treatment of metabolic abnormalities. Mr. Luna's medical record also contained evidence of frequent falls and resulting injuries. The reason for the falls according to Dr. Kradin was the substantial pain medication Mr. Luna was taking for pain.

While Charity Hospital complains that the trial court erred in relying on the testimony of Dr. Kradin, an expert in pulmonary medicine who did not actually treat Mr. Luna, there is no error. There are no documents or any objective evidence that contradicts Dr. Kradin's testimony; and we cannot say that his testimony is internally inconsistent or implausible on its face. Thus, the trial court did not err in crediting this witness's testimony. See ***Stobart v. State***, 617 So.2d 880, 882.

Mr. Luna was 74 years old at the time he was diagnosed with mesothelioma. He was an old-fashioned man who found his self worth in working and maintained a self-sufficient lifestyle even after his retirement from Charity Hospital after over thirty years of service. The last three-and-a-half months of his life were in stark contrast to how he lived before the mesothelioma overwhelmingly took over his body. According to his siblings, despite his official retirement, Mr. Luna continued to work hard, most often in his garden or in the yard. He also performed every aspect of home repair despite his advancing years. Mr. Luna had lived in the same residence with his younger sister, Maria, for her entire life and in close proximity to his younger brother, Justin. The three visited frequently and maintained a close relationship engaging in social activities. Maria did the cooking and cleaning of the house they owned together; Mr. Luna maintained the outside and kept all the systems of the house working. Maria said that she and Mr. Luna attended church every week and occasionally enjoyed visiting the casino. But once mesothelioma took over Mr. Luna's life, he experienced drastic personality

changes. After many years of a well functioning relationship, Maria stated that she became nervous living with him. He was mean. He hollered at her and accused her of not having fed him and trying to drug him. Because he lost his sense of taste, Mr. Luna had become a picky eater. Maria also testified that Mr. Luna started to hallucinate, insisting, for example, that she had chained him to the bed. When the mood swings took their toll, Maria and Justin knew Mr. Luna had to go into an in-patient facility. Mr. Luna became irate at his brother for making him leave his home and forcing him to be admitted into the in-patient facility. He also expressed anger toward Maria, stating that she had failed to call when in fact when she had called, he was asleep. According to Maria, he expected daily calls from her and when he missed a call, he would berate her, telling her to stop calling.

It is evident from this record that Mr. Luna, in addition to the enormous pain and suffering from mesothelioma, experienced an indignity at the end of his life that left him angry and in a state of mental confusion after having lived a life of self-sufficiency and close relationships with his family. There is no abuse of discretion in the trial court's award of $2,200,000.00 to the Luna siblings for the survival action general damages.

COSTS

At the time of the delictual conduct, La. R.S. 46:759 stated in relevant part, "In any suit, either by or against the Charity Hospital of Louisiana at New Orleans, the hospital shall never be required to pay costs of court except when collected against defendants." That statute was subsequently repealed by La. Acts 1997, No. 3, § 8, eff. July 1, 1997. The Luna siblings do not dispute Charity Hospital's assignment of error maintaining that under La. R.S. 46:759, it cannot be required to pay costs of court. Thus, by agreement of the parties, we amend the judgment to delete the trial court's order casting Charity Hospital with costs.

DECREE

For these reasons, and in accordance with the parties' agreement, that portion of the trial court's judgment casting Charity Hospital with court costs is reversed. In all other respects, the judgment awarding survival action damages to plaintiffs-appellees, Maria Elena Luna, Carmel L. Bass, Justin M. Luna, and Maria Theresa Gabriella Alphonse, is affirmed. Appeal costs in the amount of $12,124.00 are assessed against defendant-appellant, Louisiana State University Board of Supervisors.[4]

PEREMPTORY EXCEPTION OF PRESCRIPTION OVERRULED; TRIAL COURT JUDGMENT AFFIRMED IN PART AND REVERSED IN PART.

[4] Although in its assignment of error Charity Hospital asserted that the enactment of La. R.S. 13:5112 by La. Acts 1978, No. 467, § 1 was substantive and could not be applied retroactively to the court costs incurred in the Luna siblings' survival action, we reversed on the basis that the Luna siblings conceded Charity Hospital could not be so cast. Thus, we pretermitted a discussion of the propriety of Charity Hospital's assertion. This appeal taken by Charity Hospital on September 10, 2013, arose subsequent to the enactment of La. R.S. 13:5112 and, thus, we conclude its provisions are correctly applied to the imposition of appeal costs.