NOT DESIGNATED FOR PUBLICATION

ANTHONY DINAPOLIS, JR. AND JEANNETTE DINAPOLIS	*	**NO. 2001-CA-0583**
	*	**COURT OF APPEAL**
VERSUS	*	**FOURTH CIRCUIT**
GAF CORPORATION, ET AL.	*	**STATE OF LOUISIANA**
	*	
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APPEAL FROM
CIVIL DISTRICT COURT, ORLEANS PARISH
NO. 98-15270, DIVISION "AD-HOC-G"
Honorable Walter E. Kollin, JudgeAd Hoc
* * * * * *
Judge Dennis R. Bagneris, Sr.
* * * * * *

(Court composed of Chief Judge William H. Byrnes, III, Judge Miriam G. Waltzer, and Judge Dennis R. Bagneris, Sr.)

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COUNSEL FOR DEFENDANT/APPELLEE **AFFIRMED**

On August 31, 1998, the plaintiff Anthony Dinapolis, Jr. filed this suit against General Electric Company ("General Electric") and several manufacturers and distributors of asbestos (hereinafter, the "appellees") alleging asbestos-related injuries while working at the General Electric facility. In May of 1999, Mr. Dinapolis's wife and two children (hereinafter, the "appellants") were substituted in Mr. Dinapolis's survival action, and they also asserted wrongful death claims on their own behalf. The appellees filed exceptions of prescription, alleging that the appellants' survival action was prescribed because the original suit was not filed within one year of the initial diagnosis of malignant mesothelioma. The trial court maintained the exceptions of prescription on November 3, 2000. The appellants filed a devolutive appeal from this final judgment. We affirm.

From 1969 to 1983, Mr. Dinapolis was employed as a turbine mechanic and machinist at General Electric's New Orleans facility. On March 12, 1993, Mr. Dinapolis visited the Ochsner Clinic with complaints of "the flu or something." At that time, chest x-rays were taken, and Mr.

Dinapolis was admitted to the hospital because he had "some fluid in his chest." Mr. Dinapolis then had several fluid removals and a thoracoscopic biopsy performed, that the pathologist tentatively diagnosed as mesothelioma. Mr. Dinapolis was discharged from the Ochsner Clinic on March 23, 1993 with a diagnosis of "probable mesothelioma."

On March 31, 1993, Mr. Dinapolis sought a follow-up visit with Dr. John Cole, an oncologist, who confirmed that Mr. Dinapolis had contracted malignant mesothelioma. Dr. Cole treated Mr. Dinapolis on a regular basis from 1993 to 1998; however, during this period, Mr. Dinapolis was asymptomatic. This period of dormancy ended in February of 1998 when the cancer spread, enveloping his lungs. Mr. Dinapolis died as a result of the lung cancer in March of 1999.

The sole issue before this Court is when the one year period of liberative prescription applicable to tort actions under La. Civ.Code Art. 3492 commenced to run. The appellants contend that Mr. Dinapolis was unaware that he suffered from an asbestos-related disease until February of 1998, and prescription would commence to run at that time. The appellees contend that Mr. Dinapolis had actual notice that he had an asbestos-related condition in March of 1993, and Mr. Dinapolis suit filed on August 31, 1998 was untimely.

An asbestos-related action is subject to a liberative prescription of one year. La. Civ.Code art. 3492. This prescription commences to run from the day the injury or damage is sustained. *Id.* As stated in *Cole v. Celotex Corp*., "[d]amage 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." 620 So.2d 1154, 1156 (La. 1993).

The doctrine *contra non valentem agere nulla currit praescriptio* is a judicially-created exception to the general rule of prescription. *Fontenot v. ABC Ins. Co*., 95-1707, p.4 (La.06/07/96), 674 So.2d 960, 963. The Louisiana Supreme Court has held that the doctrine of *contra non valentem* "prevents the running of prescription where the cause of action is not known or reasonably knowable by the plaintiff." *Cole*, 620 So.2d at 1156. Thus, the question is whether, in light of Mr. Dinapolis's own information and the diagnoses he received, he was reasonable to delay the filing of his survival suit. *Id.* at 1157.

The appellants cite to *Cole v. Celotex Corp*. in support of their argument that, despite the unequivocal diagnosis of cancer in 1993, Mr. Dinapolis was nevertheless reasonable in delaying any action because he was told nothing about a relationship between asbestos and his lung disease. However, the facts in *Cole* are quite different than the facts in this case. In

Cole, the plaintiff was initially diagnosed with pleurisy or early pneumonia in 1955. Again, in 1979, the physician told him that "something showed up on his chest x-ray" and that it was "pleurisy or pneumonia or something like." *Id.* at 1155. The doctors then requested that the plaintiff continue to be monitored on a yearly basis, although he did not have any ill effects or symptoms. *Id*. The plaintiff was not diagnosed with asbestosis until late 1985 or early 1986. *Id.* After plaintiff was diagnosed with asbestosis, he filed suit within the one-year prescriptive period. The Louisiana Supreme Court found that plaintiff's delay in filing suit until October of 1986 was reasonable, and the action had not prescribed because, prior to 1985, he had been told that the x-ray findings of plaque on his lungs could be the result of several causes besides asbestosis.

In this case, Mr. Dinapolis testified in his deposition that Dr. Cole told him in 1993 that he had some cancerous cells in his chest. He testified that, when questioned about his exposure to asbestos in 1993, he told the doctors about his employment at General Electric and that he had worked with asbestos insulation products. Nonetheless, Mr. Dinapolis testified that he was unaware of the link between his cancer and his asbestos exposure until February of 1998.

Mrs. Jeanette Dinapolis testified in her deposition that she and her

husband had heard about asbestos in the media in the late 1970's. At that time, Mrs. Dinapolis testified that she understood that asbestos could cause respiratory problems. Further, Mrs. Dinapolis testified that she became more aware of the word "mesothelioma" while working for a law firm as a bookkeeper in 1996-1997. Mrs. Dinapolis testified that it was her understanding that Mr. Dinapolis was diagnosed with mesothelioma in 1998, and that prior to that time, he was receiving follow-up treatment for pneumonia.

Dr. John Cole testified in his deposition that, during an oncology consultation with Dr. Ranpp on March 22, 1993, Mr. Dinapolis gave a history of working with asbestos. Dr. Cole confirmed Mr. Dinapolis's diagnosis of mesothelioma and testified that he discussed Mr. Dinapolis's options with him in March of 1993. Specifically, Dr. Cole testified:

> Q. Doctor, at some point in your care of Mr. Dinapolis, did you have a consult with him to confirm the diagnosis of mesothelioma?
>
> A. Yes. He was discharged from the hospital and returned to see me in clinic, and my clinic note from March 31 says, "special stains confirm diagnosis of mesothelioma."
>
> And at that point I discussed the options with the patient. I had previously discussed our concerns for the diagnosis with him during my initial hospital consultation. And then with the confirmation of that, I discussed that with him and then, that was done on the 31st of March, 1993.
>
> Q. What, if anything would you have told him about the disease, mesothelioma?

> A. I would have told him that it was not curable, that in the absence of there being a surgical option, which there rarely is and there was not in his case a surgical option, that the available treatment options were limited, that systemic therapy in the form of chemotherapy has a low chance of benefit, typically less than 20 percent of causing a shrinkage of the cancer with no real risk, no real chance of cure with chemotherapy, and to that end, I discussed with him no therapy at that time.

Dr. Cole also testified that there would have been no reason why he would not have told Mr. Dinapolis that his cancer was possibly caused by asbestos exposure at the time of his diagnosis in 1993.

Under the facts of this case, we find that Mr. Dinapolis had knowledge, or should have known, of his cause of action against appellees in March of 1993, when he was diagnosed with mesothelioma. Based on our review of the record, we find Mr. Dinapolis's delay in filing his survival suit until August of 1998 was unreasonable and thus, we find his suit has prescribed. Because we find Mr. Dinapolis's survival claim commenced after his diagnosis in 1993, we find no merit to appellants' argument that prescription was interrupted by a timely workers compensation claim filed on December 9, 1998, by Mr. Dinapolis against his employer, General Electric.

Accordingly, the trial court's decision to maintain the exception of prescription is affirmed.

AFFIRMED