WARREN LESTER, ET AL

VERSUS

EXXON MOBIL CORPORATION, INTRACOASTAL TUBULAR SERVICES, INC., ET AL

NO. 10-CA-743

FIFTH CIRCUIT

COURT OF APPEAL

STATE OF LOUISIANA

ON APPEAL FROM THE TWENTY-FOURTH JUDICIAL DISTRICT COURT
PARISH OF JEFFERSON, STATE OF LOUISIANA
NO. 630-402, DIVISION "G"
HONORABLE JOHN L. PEYTAVIN, JUDGE PRESIDING

MAY 31, 2012

JUDGE SUSAN M. CHEHARDY

Panel composed of Judges Susan M. Chehardy,
Jude G. Gravois, and Marc E. Johnson

JOHNSON, J., DISSENTS WITH REASONS

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AFFIRMED

This appeal involves sixteen plaintiffs[1] who sued various defendants seeking recovery of damages for personal injuries allegedly suffered as a result of exposure to naturally occurring radioactive material ("NORM")[2] while cleaning pipe and tubing belonging to Exxon Mobil Corp. (Exxon Mobil) at the Intracoastal Tubular Services, Inc. (ITCO) pipe yard in Harvey, Louisiana. Plaintiffs and one defendant, Exxon Mobil, appeal the jury verdict, as well as other trial court rulings. For the reasons that follow, we affirm the trial court's judgment in favor of plaintiffs and against defendant, Exxon Mobil.

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[1] The sixteen plaintiffs are John A. Booth, Jr.; Richard Meerman, Sr.; Vi Nguyen; John M. Oleszkowicz; Leo Pollard, Jr.; Clarence D. Ross; Jack Roy; Tanner Darrensburg, Sr.; John T. Hendrix, Jr.; Bruce Ingram; Jeffery G. Lang; Leo Mediamolle, Jr.; David L. Perry; Raymond C. Schaffer; Cedric D. Watts, Sr.; and Ernesto A. Soto.

[2] At the site in question, the radioactive scale removed from the pipes consists of radium–226, radium–228, and their daughter products. To the extent that radium is found on sites such as this one, it is naturally occurring and may be technologically enhanced. It is sometimes referred to as Technologically Enhanced Naturally Occurring Radioactive Material ("TENORM"), which is defined as "natural sources of radiation which would not normally appear without some technological activity not expressly designed to produce radiation." See, *Grefer v. Alpha Technical*, 02-1237 (La. App. 4 Cir. 3/31/05), 901 So. 2d 1117, 1128, *writ denied*, 05-1590 (La. 3/31/06), 925 So. 2d 1248 and *writ denied*, 05-1259 (La. 3/31/06), 925 So. 2d 1248 and *cert. granted, judgment vacated sub nom. Exxon Mobil Corp. v. Grefer*, 549 U.S. 1249, 127 S. Ct. 1371, 167 L. Ed. 2d 156 (2007).

FACTS AND PROCEDURAL HISTORY

The inception of the current litigation has a protracted history beginning on May 22, 2001 when the multi-million dollar verdict in *Grefer v. Alpha Technical*,[3] involving NORM contamination at the former ITCO pipe yard, was reported in the local press. The next day, May 23, 2001, the first lawsuit for personal injury damages caused by exposure to NORM at or near various pipe yards was filed by Leo Pollard, Jr. and others against several defendants, including Exxon Mobil and ITCO, in Civil District Court for the Parish of Orleans, bearing docket number 01-8707, Division D ("Pollard CDC"). Several similar lawsuits followed.

On May 10, 2002 *In re: Harvey TERM,*[4] a separate class action suit, bearing docket number 01-8708, Division D, in Civil District Court for the Parish of Orleans was filed. In response to the filing of the class action suit, on December 20, 2002, five of the original *Pollard CDC* plaintiffs and Warren Lester, individually and on behalf of hundreds of other similarly situated plaintiffs, filed another lawsuit against Exxon Mobil, ITCO and others in Civil District Court for the Parish of Orleans bearing docket number 02-19657, ("Lester CDC"), for personal injury damages caused by exposure to NORM, and other hazardous, toxic and carcinogenic radioactive materials, including technologically enhanced radioactive material ("TERM").[5]

As the litigation progressed without a determination of class status the Judge of Division D in Civil District Court for the Parish of Orleans determined that the individual plaintiffs would be tried in "flights" according to pipe yard location. On March 23, 2006, the Orleans Parish Judge maintained defendants' exception of venue with respect to the flight of 24 plaintiffs whose sole source of exposure

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[3] *See Grefer v. Alpha Technical*, 02-1237 (La. App. 4 Cir. 3/31/05), 901 So.2d 1117, *jdgmt vacated by Exxon Mobil Corp. v. Grefer*, 549 U.S. 1249, 127 S.Ct. 1371, 167 L.Ed.2d 156 (2007), *on remand*, 02-1237 (La. App. 4 Cir. 8/8/07), 965 So.2d 511, *writ denied*, 07-1800 (La. 11/16/07), 967 So.2d 523, *cert. denied*, 553 U.S. 1014, 128 S.Ct. 2054, 170 L.Ed.2d 810 (2008). The plaintiffs in the *Grefer* lawsuit filed suit as landowners in August 1997 against Exxon Mobil and ITCO to recover damages for the contamination of a 33-acre tract of land with radioactive material. This land was where ITCO operated its pipeyard where plaintiffs in the present case worked. After a five-week trial, the jury returned a verdict in favor of the Grefers and awarded them damages in the amount of $56,145,000.00, which included $145,000.00 in general damages and $56,000,000.00 in restoration costs, as well as punitive damages in the amount of one billion dollars. The award was initially affirmed by the Fourth Circuit, but later vacated by the United States Supreme Court. On remand, the Fourth Circuit amended the award to reduce the $1 billion award for punitive damages to $112,290,000.00

[4] *In re: Harvey TERM litigation*, 04-0005 (La. App. 4 Cir. 4/7/04), 872 So.2d 1214, *writ denied*, 04-1151 (La. 6/25/04), 876 So.2d 846 includes, *In re: Harvey TERM*, No. 01-8708 and consolidated cases: *Leo Pollard, Jr., et al. v. Alpha Technical Services, Inc., et al.*, No. 01–8707; *Glenda Bailey, et al. v. Exxon Mobil Corporation, et al.*, No. 01–8926; *James A. Williams, et al. v. Exxon Mobil Corporation, et al.*, No. 01–8959; *Odile Gordon, et al. v. Exxon Mobil Corporation, et al.*, No, 01–14101; *Jo Ann B. Grigsby, et al. v. Joseph Grefer, et al.*, No. 01–16364; *Willie Williams, et al. v. Exxon Mobil Corporation, et al.*, No. 01–18230; *Ida Rose Wilson, et al. v. Exxon Mobil Corporation, et al.*, No. 01–19533; *John H. Cotton, et al. v. Exxon Mobil Corporation, et al.*, No. 01–19938; and *Phil Burras, et al. v. Exxon Mobil corporation, et al.*, No. 02–644.

[5] See, *Bailey ex rel. Brown v. Exxon Mobil Corp.*, 11-0177 (La. App. 4 Cir. 8/31/11), 76 So. 3d 53, 54, *writ denied*, 11-2131 (La. 11/18/11), 75 So.3d 468.

allegedly occurred at the ITCO pipe yard in Harvey, and transferred the instant case to the 24th Judicial District Court for Jefferson Parish. On January 11, 2010, sixteen of those plaintiffs, appellants herein, proceeded to trial against the only remaining defendants, Exxon Mobil and ITCO.

After 34 days of trial, the jury returned a verdict in favor of all sixteen plaintiffs solely against Exxon Mobil, and awarded damages to each plaintiff for increased risk of contracting cancer in amounts ranging from $10,000.00 to $175,000.00, with the award totaling $1,195,000.00. The jury did not find that plaintiffs were entitled to any additional damages for medical monitoring. The jury further determined that Exxon Mobil did not engage in wanton or reckless conduct in the storage, handling or transportation of hazardous or toxic substance and, thus, did not award punitive damages. The jury also found no fault on behalf of ITCO. This appeal follows.

LAW AND ANALYSIS

EXXON MOBIL'S APPEAL

Exxon Mobil assigns two issues for review by this Court: first, the trial court erred in denying its exception of prescription as to all sixteen plaintiffs and, second, the jury erred in awarding damages for increased risk of contracting cancer when plaintiffs have no present injury, no need for medical monitoring, and their right to sue for cancer, if they develop it in the future, was reserved.

Prescription

With respect to its first assignment of error, Exxon Mobil divides plaintiffs into three groups and contends that all 16 plaintiffs' claims are prescribed. The three groups are: (1) the *Pollard CDC* plaintiffs,[6] who were named in the *Pollard CDC* litigation filed on May 23, 2001; (2) the non-*Pollard CDC* plaintiffs,[7] who first filed suit on December 20, 2002 in the *Lester CDC* petition; and (3) Ernesto Soto, who joined the litigation via an amended and supplemental petition filed on October 24, 2003.

As to the *Pollard CDC* plaintiffs, Exxon Mobil contends these five plaintiffs had constructive knowledge of their possible exposure to NORM as early as 1987, which triggered the running of prescription years before they filed suit in May

[6] The *Pollard CDC* plaintiffs include Leo Pollard, Jr., Jack Roy, Clarence Ross, Richard Meerman, and John Hendrix.

[7] The non-*Pollard CDC* plaintiffs include John A. Booth, Jr.; Vi Nguyen; John M. Oleszkowicz; Tanner Darrensburg, Sr.; Bruce Ingram; Jeffery G. Lang; Leo Mediamolle, Jr.; David L. Perry; Raymond C. Schaffer; and, Cedric D. Watts, Sr.

2001. Exxon Mobil contends that the doctrine of *contra non valentem* should not be invoked to extend the prescriptive period more than a decade to make these claims timely.

As to the ten non-*Pollard CDC* plaintiffs, Exxon Mobil asserts that prescription began to run once plaintiffs knew or should have known of their exposure to NORM, which the trial court determined was May 22, 2001, the date that the verdict in the *Grefer* lawsuit was reported in the media. Although Exxon Mobil disagrees with this factual determination by the trial court, it maintains that even under these facts, the claims of the non-*Pollard CDC* plaintiffs prescribed on May 23, 2002, seven months before they filed suit on December 20, 2002. Exxon Mobil further contends that the doctrine of *contra non valentem* would not apply to prevent the running of prescription as to the non-*Pollard CDC* plaintiffs because Exxon Mobil did nothing to prevent these plaintiffs from timely filing suit.

Exxon Mobil further contends that this Court's decision in *Lester v. Exxon Mobil Corp.* ("*Lester I*"),[8] makes it clear that the *Pollard CDC* suit filed on May 23, 2001 did not interrupt prescription for the *Lester CDC* plaintiffs because the *Lester CDC* plaintiffs, by express language in that petition opted out of the class action suit, *In re: Harvey TERM.*[9]

As to Mr. Soto, Exxon Mobil asserts the amending petition, filed on October 24, 2003, adding Mr. Soto as a plaintiff to *Lester CDC*, did not relate back to the filing of the original petition and, thus, for the same reasons applicable to the non-*Pollard CDC* plaintiffs, Mr. Soto's claims are prescribed.

Prior to trial, Exxon Mobil filed an exception of prescription asserting that plaintiffs' petition in *Lester CDC* was prescribed on its face. Exxon Mobil argued that plaintiffs alleged exposure to NORM while working at the ITCO pipe yard had occurred no later than 1992, almost a decade before plaintiffs filed suit in December of 2002. Exxon Mobil maintained that the doctrine of *contra non valentem* did not apply to prevent prescription from running, because all plaintiffs had constructive knowledge by the early 1990s, and five of the plaintiffs had actual knowledge in 1987 of their potential exposure to NORM. Exxon Mobil further maintained that it did nothing to prevent plaintiffs from timely filing suit.

In a peremptory exception of prescription, the mover bears the burden of proof. However, if the petition is prescribed on its face, the burden shifts to the

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[8] 09-1105 (La. App. 5 Cir. 6/29/10), 42 So.3d 1071, *writ denied*, 10-2244 (La. 12/17/10), 51 So.3d 14.

[9] The class action suit, *In re: Harvey TERM*, was filed after *Pollard CDC* but before *Lester CDC*.

plaintiff to negate the presumption by establishing prescription has been suspended or interrupted. *Taranto v. Louisiana Citizens Property Insurance Corp.*, 10-105 (La. 3/15/11), 62 So.3d 721, 726. A trial court's findings of fact on the issue of prescription are subject to the manifest error standard of review. *Id.*

At the three-day hearing on the exception of prescription, which concluded on November 18, 2009, plaintiffs presented testimony from four witnesses. The parties then agreed to forego further testimony, and submit the remaining issues to the trial judge via exhibits. On December 10, 2009, after reviewing 37 exhibits offered by the plaintiffs and 106 exhibits offered by the defendants, the trial court rendered a judgment denying Exxon Mobil's exception of prescription.

The trial court's decision and extensive reasons for judgment indicated that *Pollard CDC,* the first petition filed on May 23, 2001, was prescribed on its face because the ITCO pipe yard, where all of the current plaintiffs admittedly suffered exposure to radioactive material, closed in 1992. The court then correctly determined that the burden shifted to plaintiffs to prove that the suits for personal injury damages filed almost a decade later were not prescribed.

The trial court's initial determination was that Exxon Mobil had actively engaged in conduct that effectively prevented the *Pollard CDC* plaintiffs from availing themselves of their cause of action by misrepresenting to plaintiffs the risk of the harm to them associated with exposure from these classes of radioactive material. In applying the doctrine of *contra non valentem*, in accordance with *Carter v. Haygood*, 04–0646 (La. 1/19/05), 892 So.2d 1261, 1267, the trial judge found that the actions of Exxon Mobil had interrupted prescription, and rendered the plaintiffs' petition in *Pollard CDC*, filed May 23, 2001, timely. In its reasons for judgment, the trial court described the most telling indicator of Exxon Mobil's continued attempts to conceal the risk of harm from exposure to radioactive NORM as alleged in *Pollard CDC*:

> By far, the most revealing exhibit was EM 1, the video entitled Natural Occurring Low Level Radiation in Oil and Gas Production. It began with a man standing in a cluster of trees explaining that naturally occurring radiation is all around us. It comes from garden variety trees, the earth's crust, the sun, artificial sources such as the T.V., X-rays, airline travel, watch dials. In short he explained low level radiation as an everyday part of our lives. He added that it is measured in milligrams and individuals receive a dose simply from living. He indicated that residents of Louisiana and Texas receive 40 milligrams per

> year simply from living, and the U.S. average is 100 milligrams per year.
>
> He then stated that small amounts of NORM results from gas processing and deposits scale in tubing flow lines and inside piping. He described Exxon Mobil as revealing low levels in all cases, emitting less than 2 milligrams per hour. He estimated that tests were unlikely to reveal excessive doses or more than OHSA allowed.
>
> He next suggested that some accidental exposure could happen and that ingesting a small amount would not cause harm. He speculated that *it would be very unlikely for a worker to inhale or ingest a harmful amount.*
>
> Finally, he suggested wearing gloves, don't eat, drink, smoke, or chew around suspected NORM. He concluded by saying that "the risk in our operators is very small but we will continue to monitor." (Emphasis added).

The trial court then went on to conclude:

> Given the low key nature of EM 1 it is small wonder that Mr. John Hooper, the owner of ITCO came away with the following impression after viewing the video:
>
> Q. All right. So you were not -- you were not concerned with external exposure to the material?
>
> A. We were given to believe it was a natural phenomenon; it's coming from the sun, the sheetrock, the wood paneling. We, ourselves, radiating out radiation, NORM, naturally occurring radiation.

The trial court also determined that the *Lester CDC* plaintiffs presented adequate evidence at the hearing that they did not learn of the cause of action for personal injuries that resulted from the risk of harm from NORM exposure until the *Grefer* jury verdict was reported on May 22, 2001.

After reviewing the trial judge's extensive reasons for judgment, we find that the trial court did not commit manifest error in its findings of fact on the issue of prescription, or in applying the doctrine of *contra non valentem,* in holding that Exxon Mobil's actions had interrupted prescription and rendered plaintiff's petition in *Pollard CDC* filed May 23, 2001, timely.

Next, the trial court addressed the timeliness of the *Lester CDC* suit as related to the filing of *Pollard CDC.* Exxon argued that, under the law, once the

original *Pollard CDC* action was voluntarily dismissed by plaintiffs in December 2004, it was as if prescription had never been interrupted. The trial court, however, relying on *Levy v. Stelly*,[10] and former La. C.C. art. 3519,[11] held that the timely-filed *Pollard CDC* suit interrupted prescription for all *Lester CDC* plaintiffs so the *Lester CDC* petition filed on December 20, 2002 by the instant plaintiffs was not prescribed on its face.

In *Levy*, our brethren on the Fourth Circuit held:

> [I]n the case where a second suit is filed prior to abandonment, voluntary dismissal or failure to prosecute the original demand, the interruption provided by the first suit is still viable at the time of the filing of the second suit, and the interruption remains viable after the dismissal because of the pendency of the second suit.

Levy, 277 So.2d at 196.

We find no error in the trial court's reliance on *Levy* in determining that the instant *Lester CDC* petition was filed timely.

Additionally, Exxon Mobil contends that this Court's previous opinion in *Lester I, supra* addresses the timeliness of the original *Lester CDC* petition. However, Exxon Mobil's interpretation of *Lester I* is mistaken.

Lester I presented this Court with the question of prescription of claims as it related to a "Clarifying and Amending Petition" (hereinafter referred to as "Amending Petition") filed on May 5, 2009, almost seven years after the original *Lester CDC* petition was filed. The Amending Petition sought to add a new cause of action for wrongful death and survivor benefits, and new classes of plaintiffs, surviving spouses and children (hereinafter the "New Plaintiffs"). In *Lester I*, the New Plaintiffs argued that the Amending Petition should enjoy the same interruption of prescription afforded the original *Lester CDC* petition, through the *Pollard CDC* suit, as in *Levy*, or in the alternative, that the Amending Petition should be allowed to "relate back" to the original *Lester CDC* petition in accordance with La. C.C.P. art 1153.

In *Lester I*, the trial court granted Exxon Mobil's exception of prescription, finding that the Amending Petition was, in fact, a supplemental petition. The trial court further held that *Pollard CDC* did not interrupt prescription for the Amending Petition because it had been dismissed on December 10, 2004, three years before the Amending Petition was filed. The trial court, following *Katz v.*

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[10] 277 So.2d 194 (La. App. 4th Cir. 1973), *writ denied,* 279 So.2d 203(La. 1973).

[11] Acts 1982, No. 187, §1, repealed C.C. art. 3519 and reenacted its substance as La. C.C. art. 3463.

Allstate, 04-1133 (La. App. 4 Cir. 2/2/05), 917 So.2d 443, determined that the only suspension of prescription available for the New Plaintiffs in the Amending Petition were if they could have been considered putative class members in the pending class action suit, *In re: Harvey TERM.*

The trial court reasoned, and this Court agreed in *Lester I*, that the New Plaintiffs in the Amending Petition could not avail themselves of the suspension of prescription afforded putative class members under La. C.C.P. art. 569(3).[12] The petition in *Lester CDC*, the suit to which the New Plaintiffs sought to be added, had a specific provision to "opt-out" of the pending class action matter *In re: Harvey TERM.* That provision excluded them from availing themselves of the suspension of prescription allowed in class action matters in accordance with La. C.C.P. art. 569(3). The trial court also ruled, and this Court affirmed, that the Amending Petition could not relate back to *Lester CDC* under La. C.C.P. art. 1153 for reasons that are not pertinent to the instant case.

The case before us is distinguishable from *Lester I*, particularly when considering where on the timeline of this lengthy matter the original petition in *Lester CDC* falls.[13] The trial court made a factual finding that *Pollard CDC* was not prescribed under the doctrine of *contra non valentem,* despite the closure of the pipe yard where the exposure occurred almost a decade before the initial suit was filed in May of 2001. As explained previously in this opinion, *Pollard CDC* remained a viable cause of action on December 20, 2002, and acted to interrupt prescription for the plaintiffs in the original *Lester CDC* suit in accordance with *Levy, supra.* In *Lester I,* this Court determined, as did the trial court, that Pollard

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[12] La. C.C.P. art. 596 provides: Liberative prescription on the claims arising out of the transactions or occurrences described in a petition brought on behalf of a class is suspended on the filing of the petition as to all members of the class as defined or described therein. Prescription which has been suspended as provided herein, begins to run again:

(1) As to any person electing to be excluded from the class, from the submission of that person's election form;

(2) As to any person excluded from the class pursuant to Article 592, thirty days after mailing or other delivery or publication of a notice to such person that the class has been restricted or otherwise redefined so
as to exclude him; or

(3) As to all members, thirty days after mailing or other delivery or publication of a notice to the class that the action has been dismissed, that the demand for class relief has been stricken pursuant to Article 592, or that the court has denied a motion to certify the class or has vacated a previous order certifying the class.

[13] The critical distinction between the petition in *Lester CDC* and the Amended Petition in *Lester I* is, when the Amending Petition was filed, *Pollard CDC* was no longer a viable cause of action and could not act to interrupt prescription for these plaintiffs. *Lester CDC,* likewise, could not interrupt prescription because, without *Pollard CDC*, it was filed after the original tolling of prescription on May 23, 2002. Therefore, the only suit available to interrupt or suspend prescription for the plaintiffs in the Amended Petition would have been *In re Harvey TERM.* However, in *Lester CDC,* as analyzed in light of the holding in *Katz, supra,* the plaintiffs specifically opted-out of any class action so the Amending Petition did not enjoy the suspension of prescription afforded to putative class members under La. C.C.P. art. 596(3).

CDC could not interrupt prescription for the Amending Petition because it had been dismissed on December 10, 2004, three years before the Amending Petition in *Lester I* was filed.

With respect to Exxon Mobil's assignment of error regarding prescription, the final issue is whether Ernesto Soto's amending petition filed on October 24, 2003 is prescribed. La. C.C.P. art. 1153 provides that, "When the action or defense asserted in the amended petition or answer arises out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of filing the original petition." La. C.C.P. art. 1155 states, "The court, on motion of a party, upon reasonable notice and upon such terms as are just, may permit mover to file a supplemental petition or answers setting forth items of damage, causes of action or defenses which have become eligible since the date of filing the original petition or answer, and which are related to or connected with the causes of action or defenses asserted therein."

New defendants and new plaintiffs may be added by supplemental and amended pleadings if the applicable criteria are met. In some instances, even new causes of action may be asserted in supplemental and amended pleadings. *Gaines v. Bruscato*, 30,340, (La. App. 2 Cir. 4/8/98); 712 So.2d 552, 557-558, *writ denied*, 98-1272 (La. 6/26/98); 719 So.2d 1059.

In *Giroir v. South Louisiana Medical Center, Div. of Hospitals*, 475 So.2d 1040, 1044 (La. 1985), the court held that:

> an amendment adding or substituting a plaintiff should be allowed to relate back if (1) the amended claim arises out of the same conduct, transaction, or occurrence set forth in the original pleading; (2) the defendant either knew or should have known of the existence and involvement of the new plaintiff; (3) the new and the old plaintiffs are sufficiently related so that the added or substituted party is not wholly new or unrelated; (4) the defendant will not be prejudiced in preparing and conducting his defense.

The action filed by Mr. Soto arose from the same conduct, transaction, or occurrence by Exxon Mobil as set forth in the original pleading in both *Pollard CDC* and *Lester CDC*. Further, the defendants knew of or should have known of the existence of Mr. Soto and other workers like him. Additionally, Mr. Soto's amending petition was filed only 10 months after the original petition in *Lester CDC,* and prior to the time that *Pollard CDC* was dismissed, distinguishing this filing from the amended petition in *Lester I.*

For the reasons stated above, we find no error in the trial court's denial of Exxon Mobil's exception of prescription. The trial court determined that no proof was offered that any plaintiff from *Pollard CDC* or *Lester CDC* became aware of the existence of their cause of action for injuries sustained from exposure to NORM or TERM until the *Grefer* verdict was reported on May 22, 2001. As a result of that finding, the timely filing of the *Pollard CDC* suit on May 23, 2001 interrupted prescription for all the plaintiffs in *Lester CDC* filed on December 20, 2002, and the supplemental petition filed by Mr. Soto on October 24, 2003.

Damages

In its next assignment of error, Exxon Mobil, relying on *Bonnette v. Conoco, Inc.*,[14] argues that the jury erred in awarding damages for "increased risk of cancer" where plaintiffs have no present injury.

Here, sixteen plaintiffs proceeded to trial against Exxon Mobil seeking damages for fear of cancer, increased risk of developing cancer, and medical monitoring because of their exposure to NORM. Seven of those sixteen plaintiffs also had claims for punitive damages against Exxon Mobil for exposure to NORM, under La. C.C. art. 2315.3.[15]

On February 18, 2010, the trial judge granted Exxon Mobil's motion for directed verdict regarding punitive damages for plaintiffs' fear of cancer claims. As a consequence, plaintiffs' "fear of cancer" claims were not presented to the jury. On March 5, 2010, after two weeks of deliberations, the jury awarded damages to all sixteen plaintiffs for their "increased risk of cancer" as a result of their exposure to NORM by Exxon Mobil.

The jury's determination of the amount, if any, of an award of damages is a finding of fact. *Ryan v. Zurich Am. Ins. Co.*, 07-2312 (La. 7/1/08), 988 So. 2d 214, 219. Our law 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.

It is well-settled that a reviewing court may not disturb the factual findings of the trier of fact in the absence of manifest error. *Rosell v. ESCO,* 549 So.2d

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[14] 01-2767 (La. 1/28/03), 837 So.2d 1219, 1230-31.

[15] Effective July 9, 1999, Acts 1999, No. 989, the Louisiana Legislature amended La. C.C. art. 2315 to provide that "[d]amages do not include costs for future medical treatment, services, surveillance, or procedures of any kind unless such treatment, services, surveillance, or procedures are directly related to a manifest physical or mental injury or disease." Thus, the amendment effectively eliminated medical monitoring as a compensable item of damage in the absence of a manifest physical or mental injury or disease. The provisions of the Act were made "applicable to all claims existing or actions pending on its effective date and all claims arising or actions filed on and after its effective date." *Bonnette v. Conoco, Inc., supra.*

840, 844 (La.1989); *Arceneaux v. Domingue,* 365 So.2d 1330, 1333 (La.1979). In *Arceneaux,* the supreme court set forth a two-part test for the appellate review of facts: (1) the appellate court must find from the record that there is a reasonable factual basis for the finding of the trial court, and (2) the appellate court must further determine that the record establishes the finding is not clearly wrong or manifestly erroneous. *Arceneaux,* 365 So.2d at 1333; *see also Mart v. Hill,* 505 So.2d 1120, 1127 (La.1987).

If the trial court's findings are reasonable in light of the record reviewed in its entirety, the appellate court may not reverse. *Sistler v. Liberty Mutual Ins. Co.,* 558 So.2d 1106, 1112 (La.1990). Consequently, when there are two permissible views of the evidence, the factfinder's choice between them cannot be manifestly erroneous. *Stobart v. State, Through Department of Transportation and Development,* 617 So.2d 880, 883 (La.1993); *Sistler,* 558 So.2d at 1112.

Here, each plaintiff testified to a fear of contracting cancer in the future as a result of his exposure to NORM for a period of years. Recently, in *Arabie v. Citgo Petroleum Corp.*,[16] the Louisiana Supreme Court affirmed the lower court's award for future injury relying on *Anderson v. Welding Testing Laboratory, Inc.*, 304 So.2d 351 (La. 1974). "While to a scientist in his ivory tower the possibility of cancerous growth may be so minimal as to be untroubling, we are not prepared to hold that the trier of fact erred in finding compensable this real possibility to th[ese] worrying workmen." *Id.* (quoting *Anderson*, 304 So.2d at 353). We agree. The jury did not err in awarding plaintiffs' damages for increased risk of future injury. On that basis, the jury's award is affirmed.

PLAINTIFFS' APPEAL

Plaintiffs present three assignments of error on appeal. Each of those assignments of error challenge the award of damages: first, the district court erred in failing to award punitive damages; second, the district court erred in failing to award damages for medical monitoring; and third, the district court erred in awarding general damages that are abusively low.

Additionally, although not listed as assignments of error, plaintiffs also challenge, in their brief, numerous evidentiary rulings and the denial of their *Batson/Edmondson* claim.

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[16] 10-2605 (La. 3/13/12), ___ So.3d ____, *reh'g denied,* ___ So.3d ____.

Damages

In their first assignment of error, plaintiffs contend that the district court erred in failing to award punitive damages. We disagree. Former La. C.C. art. 2315.3, effective September 3, 1984 and repealed April 16, 1996, provided for punitive damages "if it [were] proved that plaintiff's injuries were caused by the defendant's wanton or reckless disregard for public safety in the storage, handling, or transportation of hazardous or toxic substances."

Here, the trial court granted defendant's directed verdict on the issue of punitive damages with respect to seven plaintiffs' increased risk of cancer claim. Here, although plaintiffs do have an increased risk of cancer because of Exxon Mobil's actions, plaintiffs did not prove actual injury as required by former La. C.C. art. 2315.3. There was no error in the trial court's grant of defendant's motion for directed verdict on plaintiffs' claim for punitive damages.

In their second assignment of error, plaintiffs argue that the district court erred in failing to award damages for medical monitoring.[17] Special damages are those which generally refer to specific expenses which may be quantified arising out of the consequences of the defendant's behavior. *Coxe v. Property Management and Leasing v. Woods*, 09–1729 p. 4 (La.App. 4 Cir. 8/11/10), 46 So.3d 258, 260. 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:

> 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. *McGee v. A C and S, Inc.*, 05–1036 (La. 7/10/06), 933 So.2d 770. 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: There must be no reasonable factual basis for the trial court's conclusions, and the finding must be clearly wrong. *Guillory v. Ins. Co. v. North America*, 96–1084 (La. 4/8/97), 692 So.2d 1029.

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[17] In *Bourgeois v. A.P. Green Ind., Inc.*, 97-3188 (La. 7/8/98), 716 So. 2d 355, 358 n. 12, the Louisiana Supreme Court noted that

> [A] claim for recovery of medical monitoring expenses is separate and distinct from a claim for the enhanced risk of contracting a serious illness due to exposure. The enhanced risk claim seeks a damage award, not because of any expenditure of funds, but because a plaintiff contends that the unquantified injury to his or her health and life expectancy should be presently compensable, even though no evidence of disease is manifest. While this type of claim is inherently speculative, forcing courts to anticipate the probability of future illness or disease, a medical monitoring claim is much less so, the only issue for the factfinder being whether or not the plaintiff needs medical surveillance given the circumstances of his or her exposure. The risk of speculation in a medical monitoring claim is further reduced because recovery is based upon the specific dollar costs of reasonable and necessary periodic examinations. (Citations omitted).

Here, plaintiffs failed to prove that there was no reasonable basis for the jury's award or that its finding was clearly wrong. We will not disturb the jury's finding on appeal.

In their third assignment of error, plaintiffs argue that the district court's general damages award was abusively low. We disagree.

The discretion vested in the trier of fact is great and even vast, such that an appellate court should rarely disturb an award of general damages. Reasonable persons frequently disagree about the measure of general damages in a particular case. It is only when the 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 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).

Although plaintiffs argue that the jury's award of general damages was low considering the wealth of the defendant, from our review of the record, it is obvious that the jury concluded that the plaintiffs deserved compensation for their risk of developing cancer for each year that each plaintiff was exposed to radioactive waste by Exxon Mobil. We will not disturb the jury's award of damages.

Other challenges

Additionally, although not listed as assignments of error, plaintiffs also argue, in brief, that the trial judge erred in numerous evidentiary rulings and the denial of their *Batson/Edmondson* claim. In an abundance of caution, we address those arguments here.

Evidentiary rulings

Plaintiffs contend that the trial court made numerous erroneous rulings excluding evidence of Exxon Mobil's reprehensibility, expert medical and scientific testimony, and deposition testimony from John Hooper, CEO of co-defendant ITCO.

La. C.E. art. 103(A) deems that an error may not be predicated upon a ruling that admits or excludes evidence unless a substantial right of the party is affected. Thus, the proper inquiry for determining whether a party was prejudiced by a court's alleged erroneous ruling is whether the alleged error, when compared to the entire record, had a substantial effect on the outcome of the case. *Arabie Bros.*

Trucking Co. v. Gautreaux, 03–0120, p. 13 (La.App. 1 Cir. 8/4/04), 880 So.2d 932, 942. The party alleging prejudice by the evidentiary ruling of the court bears the burden of so proving. *Emery v. Owens–Corp.*, 00–2144, p. 7 (La.App. 1 Cir. 11/9/01), 813 So.2d 441, 449.

Here, plaintiffs fail to provide support that the alleged error had a substantial effect on the outcome of this case. Their argument lacks merit.

Batson/Edmondson challenge

Plaintiffs allege that the trial judge erred in denying its claim that Exxon Mobil systematically struck minority jurors from the jury that heard this trial in violation of *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986), and *Edmonson v. Leesville Concrete Co., Inc.*, 500 U.S. 614, 111 S.Ct. 2077, 114 L.Ed.2d 660 (1991). Plaintiffs specifically contend that Exxon Mobil, with discriminatory intent, struck four African-American potential jurors – Anton Batiste, Elise Jones, Christopher Hayes-Bougere, and Edna Leboyd – from the jury that tried this case.

A private litigant in a civil case may not use peremptory challenges to exclude jurors on the account of race. To do so is a violation of the Equal Protection Clause. *Richard v. St. Paul Fire and Marine Ins. Co.*, 94-2112 (La.App. 1 Cir. 6/23/95), 657 So.2d 1087 (citing *Edmonson v. Leesville Concrete Company, Inc.*, *supra*). First, the challenging party must make a *prima facie* showing that the opposing party exercised a peremptory challenge on the basis of race. The burden then shifts to the opposing party to articulate a race-neutral explanation for striking the jurors in question, which is related to the case to be tried. *Batson*, 476 U.S. at 96-98, 106 S.Ct. at 1723-1724. This second step of the process does not demand an explanation that is persuasive, or even plausible. *Purkett v. Elem*, 514 U.S. 765, 115 S.Ct. 1769, 1771, 131 L.Ed.2d 834 (1995).

In the final step of the analysis, the trial court must determine whether the party raising the *Batson/Edmonson* challenge has carried his burden of proving purposeful discrimination. At this stage, the trial court must consider the persuasiveness of the explanations. It is at this stage that implausible or fantastic justifications may be found to be pretexts for purposeful discrimination. *Purkett*, 514 U.S. at [768], 115 S.Ct. at 1771.

In this case, *voir dire* of the jury panels took place over four days. On the second day of *voir dire*, after the trial judge denied its challenge of prospective

juror Elise Jones for cause, Exxon Mobil used a peremptory challenge to strike Ms. Jones. Plaintiffs' counsel objected stating:

> She is an African American, and that is the second African-American being struck for preemptory[sic] challenge. I'm preserving that for the record. There is now only one other black person in our jury. Jefferson Parish certainly has a 20, 30, to 40 percent base of African-Americans. I think they are being selective at this point.

After a short aside, the trial judge responded, "[Y]ou have to pass the threshold first and then you have to do more – get beyond doing two challenges on an African-American. I realize there's not that many on the jury venire at this time, but note that's a challenge at this time." Here, the trial judge apparently did not find that plaintiffs made a sufficient *prima facie* showing that the defense had challenged Ms. Jones on the basis of her race.

The next day, after the trial judge denied its challenge of prospective juror Christopher Hayes-Bougere for cause, Exxon Mobil used a peremptory challenge to strike Mr. Hayes-Bougere. Plaintiffs' counsel did not object at that time so any challenge was waived. *See, Nunnery v. City of Kenner*, 08-1298 (La. App. 5 Cir. 5/12/09), 17 So.3d 411, 415; La. C.C.P. art. 1635.[18]

On the final day of *voir dire*, Exxon Mobil used its final peremptory challenge to strike prospective juror Ms. Edna Leboyd. Plaintiffs again objected on the basis that Exxon Mobil exhibited discriminatory intent by its pattern of striking minorities, specifically four African-Americans, from the jury.

In response, defense counsel stated that Exxon Mobil peremptorily challenged Mr. Batiste only after its challenge for cause was denied. Defense counsel stated Exxon Mobil challenged Mr. Batiste on the basis that he "specifically stated that he could not be impartial" about the harmful effects of radiation, not because of his race.

Next, with respect to Ms. Jones, defense counsel stated that he was not aware that Ms. Jones was African-American when he back-struck her. Defense counsel stated Exxon Mobil challenged Ms. Jones for cause because she was biased against the chemical company because she stated that there exists "no safe level of exposure." However, defense counsel stated that once the trial court denied Exxon Mobil's cause challenge of Ms. Jones, they used a peremptory

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[18] La. C.C.P. art. 1635 reads, in pertinent part:
For all purposes it is sufficient that a party, at the time the ruling ... of the court is made ..., makes known to the court ... his objection to the action of the court and his grounds therefore; and, if a party has no opportunity to object to a ruling or order at the time it is made, the absence of an objection does not thereafter prejudice him.

challenge to remove her from the jury, not because of her race but because of her bias.

Plaintiffs' counsel stated that Exxon Mobil "said [Ms. Leboyd] did admit to bias." After listening to both parties regarding *Batson/Edmonson* challenge, the trial judge found that counsel for Exxon Mobil "gave legitimate reasons why you did each one race neutral" and denied plaintiffs' *Batson/Edmonson* challenge.

A reviewing court owes the district judge's evaluations of discriminatory intent great deference and should not reverse them unless they are clearly erroneous. *Purkett, supra* (citing *Hernandez v. New York*, 500 U.S. 352, 364, 111 S.Ct. 1859, 1868-69, 114 L.Ed.2d 395 (1991)). Our review of the *voir dire* transcript reveals that Exxon Mobil presented plausible, if not persuasive, reasons for using its peremptory challenges against the challenged prospective jurors. We find no merit in plaintiffs' argument.

CONCLUSION

For the foregoing reasons, we find no error in the trial court's denial of Exxon Mobil's exception of prescription with respect to the claims of these sixteen plaintiffs. Moreover, we find that the damages awarded by the jury did not constitute an abuse of discretion, and, therefore, decline to disturb the jury's award.

In all respects, the judgment of the trial court is affirmed. Costs of this appeal are assessed solely against Exxon Mobil.

AFFIRMED

WARREN LESTER, ET AL	NO. 10-CA-743
VERSUS	FIFTH CIRCUIT
EXXON MOBIL CORPORATION, CHEVRON USA, INC., INTRACOASTAL TUBULAR SERVICES, INC., ALPHA TECHNICAL SERVICES, INC., OFS, INC., ET AL	COURT OF APPEAL STATE OF LOUISIANA

JOHNSON, J., DISSENTS WITH REASONS

I respectfully disagree with the majority opinion and find that plaintiffs' case is prescribed.

As properly stated by the majority, the mover bears the burden of proof on an exception of prescription. If the petition is prescribed on its face, the burden shifts to the plaintiff to negate the presumption by establishing prescription has been suspended or interrupted. *Taranto v. Louisiana Citizens Property Insurance Corp.*, 10-105, p. 5 (La. 3/15/11), 62 So.3d 721, 726.

Contrary to the majority's conclusion that the trial court found plaintiffs' petition was prescribed on its face and, thus, the trial court properly shifted the burden to plaintiffs to prove their suit was not prescribed, the record shows that prior to the hearing on the exception of prescription, the trial court actually determined that plaintiffs' lawsuit was not prescribed on its face. The law is clear that if the petition is not prescribed on its face, the mover, or Exxon Mobil, bears the burden of proving prescription. Thus, the trial court once it concluded plaintiffs' petition was not prescribed on its face, the trial court improperly shifted the burden to plaintiffs to prove the interruption or suspension of prescription or the application of *contra non valentem*. Because this is legal error, this

Court's review of the prescription issue should be *de novo*.[1] Upon conducting a *de novo* review, I find plaintiffs' lawsuit is prescribed.

Delictual actions are subject to a liberative prescription of one year from the date of injury or damage. La. C.C. art. 3492. Prescription runs against all persons unless excepted by legislation. La. C.C. art. 3467. The jurisprudential doctrine of *contra non valentem* is an exception to this statutory rule. *Marin v. Exxon Mobil Corp.*, 09-2368, p. 11 (La. 10/19/10), 48 So.3d 234, 245.

Contra non valentem applies in four factual situations to prevent the running of prescription: (1) where there was some legal cause which prevented the courts or their officers from taking cognizance of or acting on the plaintiff's action; (2) where there was some condition coupled with the contract or connected with the proceedings which prevented the creditor from suing or acting; (3) where the debtor himself has done some act effectually to prevent the creditor from availing himself of his cause of action; and (4) where the cause of action is not known or reasonably knowable by the plaintiff, even though this ignorance is not induced by the defendant. *Id.* at 12, 48 So.3d at 245.

The fourth category, also known as the discovery rule, "prevents the running of liberative prescription where the cause of action is not known or reasonably knowable by the plaintiff." *Cole v. Celotex Corp.*, 620 So.2d 1154, 1156 (La. 1993). Under this category of *contra non valentem*, prescription begins to run when a plaintiff obtains actual or constructive knowledge of facts indicating to a reasonable person that he is the victim of

[1] When a trial court incorrectly applies a principle of law that materially affects the outcome and deprives a party of substantial rights, it commits legal error. *Evans v. Lungrin*, 97-541, p. 2 (La. 2/6/98), 708 So.2d 731, 735. Applying the wrong burden of proof is inherently prejudicial because it casts a more onerous standard than the law requires on one of the parties. *Leger v. Leger*, 03-419 (La. App. 3 Cir. 7/2/03), 854 So.2d 955, 957. When a trial court commits prejudicial legal error, the appellate court is not bound by the manifest error standard but rather must conduct a *de novo* review of the record if it is complete. *Evans*, 708 So.2d at 735.

a tort. *Campo v. Correa*, 01-2707, pp. 11-12 (La. 6/21/02), 828 So.2d 502, 510. Constructive knowledge is "whatever notice is enough to excite attention and put the injured party on guard and call for inquiry." *Id.*, 01-2707 at 12, 828 So.2d at 510-11. "Prescription will not begin to run at the earliest indication that a plaintiff may have suffered some wrong." *Cole*, 620 So.2d at 1157. Mere apprehension by a plaintiff that something is wrong is insufficient to commence the running of prescription "unless the plaintiff knew or should have known through the exercise of reasonable diligence that his problem may have been caused by acts [of the defendant.]" *Campo*, 01-2707 at 12, 828 So.2d at 511.

The Louisiana Supreme Court has observed the difficulty in identifying the precise point in time at which a claimant becomes aware of sufficient facts to begin the running of prescription, and has explained that when prescription begins to run depends on the reasonableness of a plaintiff's action or inaction. *Cole*, 620 So.2d at 1157. The reasonableness of a plaintiff's action or inaction is considered in light of his education, intelligence, severity of the injury, and the nature of the defendant's conduct. *Campo*, 01-2707 at 12, 828 So.2d at 511. *Contra non valentem* will not apply to exempt a plaintiff's claim from the running of prescription "if his ignorance is attributable to his own willfulness or neglect; that is, a plaintiff will be deemed to know what he could by reasonable diligence have learned." *Marin,* 09-2368 at 13, 48 So.3d at 246.

Regarding the *Pollard* plaintiffs, Exxon Mobil contends these five plaintiffs had constructive knowledge of their possible exposure, which sufficiently triggered the running of prescription, several years before they filed suit in May 2001. As for the ten non-*Pollard* plaintiffs, Exxon Mobil contends the doctrine of *contra non valentem* did not apply to prevent the

running of prescription because it did nothing to prevent plaintiffs from filing suit. Exxon Mobil further asserts that prescription began to run once plaintiffs knew or should have known of their exposure to NORM, which the trial court determined was when the verdict in the *Grefer* lawsuit was reported in the media on May 23, 2001. Although Exxon Mobil disagrees with this factual determination of the trial court, it maintains that even under these facts, the claims of the non-*Pollard* plaintiffs prescribed on May 23, 2002, seven months before they filed suit on December 20, 2002. Exxon Mobil further contends that this Court's decision in *Lester v. Exxon Mobil Corp.*, 09-1105 (La. App. 5 Cir. 6/29/10), 42 So.3d 1071, *writ denied*, 10-2244 (La. 12/17/10), 51 So.3d 14, makes it clear that the *Pollard* suit filed on May 23, 2001 did not suspended prescription for the present plaintiffs because they expressly opted out of the class action suit when they filed a separate lawsuit in December 20, 2002. Exxon Mobil further asserts the amending petition, filed on October 24, 2003, adding Ernesto Soto as a plaintiff did not relate back to the filing of the original petition and, thus, for the same reasons applicable to the non-*Pollard* plaintiffs, Mr. Soto's claims are prescribed.

Plaintiffs respond that they did not have sufficient opportunity for reasonable inquiry to initiate the running of prescription more than one year before suit was filed in December 2002. They maintain prescription did not begin to run at the earliest possible indication that they suffered a wrong. Plaintiffs further contend that this Court's decision in *Lester*, *supra*, is contrary to *Pitts v. Louisiana Citizens Property Ins. Corp.*, 08-1024 (La. App. 4 Cir. 1/7/09), 4 So.3d 107, *writ denied*, 09-286 (La. 4/3/09), 6 So.3d 772, and *Taranto v. Louisiana Citizens Property Ins. Corp.*, 09-413 (La. App. 4 Cir. 12/16/09), 28 So.3d 543, wherein the Fourth Circuit held that

pendency of a cause of action suspends prescription for any class member who later files his own lawsuit.[2]

I first observe that plaintiffs' petition is prescribed on its face. While careful not to list any dates, plaintiffs nonetheless alleged in paragraph XXXI of their petition that Exxon Mobil's conduct occurred during the period of the effective dates of former La. C.C. art. 2315.3, which provided for punitive damages for injuries caused by the wanton or reckless disregard of public safety in the storage, handling, or transportation of hazardous or toxic substances. Article 2315.3 was repealed by Acts 1996, 1st Ex. Sess., No. 2, § 1, effective on April 16, 1996. Thus, by plaintiffs' own allegation, their claims arose sometime before 1996, more than six years prior to suit being filed. As such, plaintiffs' petition was prescribed on its face.[3]

Since plaintiffs' petition was prescribed on its face, plaintiffs had the burden of proving suspension or interruption of prescription. After reviewing the record *de novo*, I agree with the trial court that under the doctrine of *contra non valentem*, prescription did not begin to run against plaintiffs until the *Grefer* verdict in May 2001, which was when their cause of action was known or knowable. The record shows plaintiffs worked at the ITCO pipe yard for various periods between 1981 and 1992. Plaintiffs

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[2] After plaintiffs filed their appellee brief, the Louisiana Supreme Court affirmed *Taranto* in *Taranto v. Louisiana Citizens Property Ins. Corp.*, 10-105 (La. 3/15/11), 62 So.3d 721.

[3] Contrary to the majority, I believe the trial court's reliance on *Levy v. Stelly*, 277 So.2d 194 (La. App. 4th Cir. 1973) as a basis for concluding plaintiffs' petition was not prescribed on its face was misplaced. In *Levy*, the Fourth Circuit found that where a second suit was filed prior to abandonment, voluntary dismissal or failure to prosecute an original demand, the interruption of prescription provided by the first suit is still viable at the time of the filing of the second suit. In *Levy*, the plaintiff first filed suit in state court within one year of the accident. Thereafter, more than one year from the date of the accident, plaintiff filed a second suit in federal court. He chose to proceed in federal court and the state court dismissed his first suit. Because the first suit was still pending at the time the federal court suit was filed, the court held the federal suit was not prescribed under La. C.C. art. 3519, now article 3463, despite the subsequent dismissal of the first suit. Article 3463 provides that prescription is interrupted by the filing of a suit in a competent court in the proper venue. The interruption continues as long as the suit is pending. However, interruption is considered as never having occurred if the plaintiff abandons, voluntarily dismisses the action, or fails to prosecute it at trial.

I find *Levy* distinguishable because it did not involve a class action, which is governed by the more specific articles of La. C.C.P. arts. 591, *et seq.* Additionally, although plaintiffs' petition in the instant case referenced pending class action lawsuits, the petition never stated the date the class action suits were filed so as to purportedly overcome prescription on the face of their petition under the *Levy* rationale as relied upon by the trial court.

submitted evidence in the form of partial depositions and affidavits showing they first learned about radiation at the ITCO pipe yard from the *Grefer* verdict or by word of mouth shortly after the *Grefer* verdict was rendered.

Plaintiffs argue that the *Grefer* verdict was insufficient to start the running of prescription, but rather it only indicated something might be wrong. I disagree. I find the *Grefer* verdict reported in the media in May 2001 provided sufficient facts to alert a reasonable person that he was a victim of a tort. The record shows plaintiffs learned from the verdict and related news reports that the grounds at the ITCO pipe yard were contaminated with radiation. Upon learning of the verdict, many plaintiffs began talking to coworkers with whom they worked at ITCO. Within weeks of the verdict, many plaintiffs had contacted a lawyer. Many plaintiffs stated they were concerned about their possible exposure after learning of the *Grefer* verdict in late May or early June 2001. I find by plaintiffs' own statements that they were alerted to potential problems by the *Grefer* verdict, which was sufficient to excite inquiry and begin the running of prescription.

Having found prescription began running in May 2001, plaintiffs had until May 2002 to file suit but did not file until December 2002. Plaintiffs contend prescription was suspended by the *Pollard* lawsuit filed in May 2001, of which they were members of the purported class. Under La. C.C.P. art. 596, prescription is suspended on the filing of a class action petition as to all members of the purported class. Prescription begins to run again as to any person electing to be excluded from the class, thirty days from the submission of that person's election form, or 30 days from the mailing of notice that the court has denied class certification.[4] La. C.C.P. art. 596(A).

[4] In this case, class certification of *In Re Harvey TERM,* into which *Pollard* was consolidated, was denied by the Civil District Court for the Parish of Orleans on April 14, 2008.

In *Lester v. Exxon Mobil Corp.*, 09-1105, p. 9 (La. App. 5 Cir. 6/29/10), 42 So.3d 1071, 1076, *writ denied*, 10-2244 (La. 12/17/10), 51 So.3d 14, ("*Lester I*"), of which I was a panel member, this Court clearly held that the *Lester CDC* plaintiffs opted out of the class action lawsuit, *In re Harvey TERM*, when they filed their petition prior to class certification and, thus, were denied the benefit of tolling under La. C.C.P. art. 596.[5] Because the plaintiffs in *Lester I* filed their individual lawsuit prior to a ruling on class certification, *Lester I* is distinguishable from *Pitts* and *Taranto*, where the plaintiffs filed their individual lawsuits after the trial court ruled on the issue of class certification.

Contrary to the majority, I do not find *Lester I* distinguishable from the present case ("*Lester II*"). I believe our ruling in *Lester I* is controlling in the present case: "the plaintiffs, [b]y filing the *Warren Lester* case prior to a ruling on class certification, in the *In Re Harvey Term Litigation* opted out of the class action suit, and therefore the pendency of that suit did not serve to suspend prescription." *Lester I*, 42 So.3d at 1076. As we explained in *Lester I*, a plaintiff, who chooses to file an independent lawsuit without waiting for the determination of class certification and while the issue of class certification is still open, cannot benefit from the tolling of prescription created by the class action. *Id.* at 1075-76. This is the basic tenet of law espoused in *Lester I*.

Other jurisprudence likewise holds that when a plaintiff files an individual lawsuit prior to a ruling on class certification, he may not rely on

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[5] *Lester I* involved the wrongful death claims of the spouses of Murphy Gauthreaux and Leonardus Meerman, who were two of the 26 plaintiffs transferred from the *In re Harvey Term* litigation in Civil District Court for the Parish of Orleans to the 24th Judicial District Court. Mr. Meerman's children also asserted a wrongful death claim for their father. The trial court found that the wrongful death claims were prescribed. The issue in *Lester I* was whether the amending petition wherein the spouses and children asserted a wrongful death claim related back to either *In re Harvey TERM* or to *Lester CDC*. This Court found that the plaintiffs in *Lester CDC* opted out of *In Re Harvey TERM* by filing *Lester CDC* prior to a ruling on class certification and, therefore, the class action suit did not serve to suspend prescription. As such, the plaintiffs' wrongful death claims could not relate back to *In Re Harvey TERM*. This Court further determined the plaintiffs' wrongful death claims did not relate back to *Lester CDC*.

the class action to suspend prescription. *See Duckworth v. Louisiana Farm Bureau Mut. Ins. Co.*, 11-837 (La. App. 4 Cir. 11/23/11), 78 So.3d 835, 837;[6] *Dixey v. Allstate Ins. Co.*, 09-4443, --- F.Supp. --- (E.D. La. 9/21/11) [2011 WL 4403988]; and *Wilkienson v. La. Farm Bureau Mutual Ins. Co.*, 11-1421 (La. App. 1 Cir. 3/23/12), --- So.3d --- [2012 WL 996539] (unpublished opinion).[7]

Although not expressly noted in *Lester I*, I point out that not only did the *Lester I and II* plaintiffs file their individual lawsuit prior to a ruling on class certification, but they also explicitly opted out of the class action in their separate lawsuit. Specifically, in paragraph XXIV of their petition, plaintiffs state:

> Class actions have been filed on behalf of various named plaintiffs in the *Leo Pollard* case, the *George Bowie* case and the *Camille Todaro* case. Even if those cases become certified and a certification judgment is affirmed on appeal, the petitioners herein do not desire to have their claims heard as a part of or in the context of those class actions.

Additionally, in paragraph XXV, plaintiffs state:

> In the event that those cases become certified and affirmed on appeal, petitioners would nevertheless opt out with notices to class counsel and with the Court.

Plaintiffs made it abundantly clear that they would not and never intended to participate in the other class action lawsuits. Therefore, they should not benefit from the tolling of prescription provided by the class action, in which they had no desire or intent to participate. Plaintiffs cannot pick and choose those portions of the class action they wish to apply to their separate lawsuit. Plaintiffs would like all the benefits of a class action without any of the disadvantages. The law does not so provide.

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[6] The Louisiana Supreme Court has granted writs in this case, but has yet to render a decision. *Duckworth v. Louisiana Farm Bureau Mut. Ins. Co.*, 11-2835 (La. 3/30/12), --- So.3d --- [2012 WL 1215266].

[7] La. C.C.P. art. 2168 provides that unpublished opinions of a court of appeal shall be posted by such courts on the courts' Internet websites and that those posted opinions may be cited as authority. *Wilkienson* is posted on the Louisiana First Circuit Court of Appeal's website.

Accordingly, based on the holding in *Lester I*, I find plaintiffs, who by specific language in their petition expressly opted out of *Pollard* and any other class action, could not rely on *In re Harvey TERM*, or *Pollard* which was consolidated into *In re Harvey TERM*, to suspend prescription. I do not find the *Lester II* plaintiffs present any distinguishing facts that would preclude the application of the basic tenet of law we espoused in *Lester I*.

Plaintiffs' claims in *Lester CDC* were filed more than one year after prescription began running and nothing interrupted or suspended prescription; therefore, I believe their claims are prescribed and all other issues raised by the parties in their appeals are moot.

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NOTICE OF JUDGMENT AND CERTIFICATE OF MAILING

I CERTIFY THAT A COPY OF THE OPINION IN THE BELOW-NUMBERED MATTER HAS BEEN MAILED ON OR DELIVERED THIS DAY **MAY 31, 2012** TO THE TRIAL JUDGE, COUNSEL OF RECORD AND ALL PARTIES NOT REPRESENTED BY COUNSEL, AS LISTED BELOW:

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