

JAKE PALERMO

*

NO. 2004-CA-1804

VERSUS

*

COURT OF APPEAL

**THE PORT OF NEW
ORLEANS, ET AL.**

*

FOURTH CIRCUIT

*

STATE OF LOUISIANA

*

*

ON REHEARING

**CONSOLIDATED WITH:
WITH:**

CONSOLIDATED

**ABRAHAM VEAL AND
SHEILA ROCHELLE VEAL**

NO. 2004-CA-1805

VERSUS

**THE PORT OF NEW
ORLEANS, ET AL.**

TOBIAS, J. CONCURS AND ASSIGNS REASONS.

I respectfully concur.

I readily understand the frustration of the plaintiffs and their counsel in having their multi-million dollar judgment reversed to zero by this court.

Part of the problem is that the plaintiffs take the position that the four

remaining defendants are liable to them because they may have come into

contact with asbestos as a result of one or more of the defendants' operations or ownership of a thing.

In order for a defendant to be liable to these plaintiffs, the plaintiffs are obligated to prove by a preponderance of the evidence that a defendant's product, operation, ownership, et cetera, was a *substantial* cause or factor of the injury sustained.

It does not appear to me to be beyond dispute that one fiber of asbestos can be a cause of an asbestos-related disease such as mesothelioma or cancer. Ultimately, the question becomes whose asbestos fiber(s) caused the plaintiff's injury. Therefore, I recognize that some read the word "substantial" in the context of an asbestos-related disease case to mean "any;" I find that the trial court so read and interpreted the word "substantial" to mean "any" in these consolidated asbestos-related injury cases. But our jurisprudence does not support that interpretation. In order for a plaintiff to prevail, he or she must establish that it is more likely than not that a defendant's asbestos caused or was a substantial factor in the asbestos-related injury. In this case, one might read the record to mean that the plaintiffs came into contact with a defendant's asbestos, but the record does *not* support a finding that such contact was a *substantial* cause or factor of the plaintiff's asbestos-related disease. *Faulkner v. The McCarty Corp.*,

02-1337 (La. App. 4 Cir. 6/11/03), 853 So. 2d 24; *Vodanovich v. A.P. Green Industries, Inc.*, 03-1079 (La. App. 4 Cir. 3/3/04), 869 So. 2d 930; *Cole v. Celotex Corp.*, 599 So.2d 1058 (La. 1992). All that the substantial factor rule does is prevent a plaintiff from wresting money from someone whose asbestos is very unlikely to be a major factor in causing the plaintiff's disease; the plaintiff has the right to obtain a full recovery from the defendants who are primarily responsible for his or her injury.

We are mandated by the jurisprudence to only overturn a trial court's (or jury's) decision if it is manifestly erroneous or clearly wrong. *Stobart v. State of Louisiana, through Dep't of Transp. & Dev.*, 617 So.2d 880, 882. In my view, without going through a detailed analysis of the jurisprudence, such rule does not mean that we must affirm a trial court's decision if "any" evidence supports what the trial court concluded. By the literal language of the Louisiana Constitution, an appellate court has appellate review of *both* law and facts. La. Const. art. V, § 10(B). As the debates of the 1973 Constitutional Convention reveal (which debates preceded the jurisprudentially created doctrine of manifest error/ clearly wrong), the delegates struck a balance between a trial court's decision and the appellate court's right of review. The delegates mandated the courts of appeal to give deference to the findings of the trial judge or jury by requiring that if the

decision of the trial court was to be reversed by the court of appeal and one judge dissented, then the case had to be reviewed or reargued before a panel of not less than five appellate judges. La. Const. art. V, § 8(B). A majority of the five-judge panel was required to render judgment for either side.

Obviously, a trial court's or jury's finding of fact should be afforded appropriate deference; but the trial judge's decision or jury's finding is not entitled to blind affirmation lest there be no reason to have appellate courts (courts of appeal or supreme court).