

JAKE PALERMO

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NO. 2004-CA-1804

VERSUS

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COURT OF APPEAL

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

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FOURTH CIRCUIT

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STATE OF LOUISIANA

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MCKAY, J., DISSENTS WITH REASONS

While I agree with the majority that the provision of the trial court's judgment which states that the survival awards are to be reduced by "a virile share for the liability with whom plaintiffs settled prior to trial" is ambiguous, I do not agree with the majority's solution to this problem.

When a non-settling defendant in an occupational asbestos exposure case fails to establish every element of the settling defendants' liability at trial, virile shares of liability cannot be assessed against such settling defendants.

Abram v. EPEC Oil Co., 2005-0626 (La.App. 4 Cir. 6/28/06), 2006 WL 2088397. A review of the record in this case indicates that the liability of the settling defendants was never proven. As such, I must disagree with the majority's interpretation of the trial court's judgment. I would settle this ambiguity by reversing this portion of the trial court's judgment because a

virile share of liability cannot be assigned to any of the settling defendants in the instant case.

I also disagree with the majority's interpretation of the trial court's judgment as providing for one award of \$500,000.00 to the plaintiff, Jake Palermo, in the "survival action." Based on the trial court language dealing with "per plaintiff" and the total amounts of its awards, it seems logical that these are wrongful death damages and the trial court meant to award \$500,000.00 to each of Mr. Palermo's surviving children.

Regarding the majority's decision to reverse the trial court's finding of liability on the part of the Dock Board, I must also disagree. In reaching its decision, the majority employs a complete *de novo* review. That, however, is incorrect. The determination of the existence of a duty and the scope of the risk involve policy determinations and are legal questions to be decided by the court. Breach of duty and causation are to be determined by the trier of fact. Meany v. Meany, 639 So.2d 229 (La. 1994). In the instant case, the majority concedes that the Dock Board owed a duty to the plaintiff if the wharf facilities were defective and the Dock Board knew or should have known of that condition but failed to remedy it within a reasonable time. In its reasons for judgment, the trial court found that this duty was breached. Therefore, we have both a duty and a breach of duty. I do not

believe that this finding was clearly wrong or manifestly erroneous.

Accordingly, I believe that the trial court is owed the proper deference on this factual determination.

Finally, I must disagree with the majority's conclusion that the trial court committed manifest error by finding Dixie, Buck Kreihs and Eagle liable to the plaintiffs. A court of appeal may not set aside a trial court's or a jury's finding of fact in absence of "manifest error" or unless it is "clearly wrong." Rosell v. ESCO, 549 So.2d 840 (La. 1989); Stobart v. State, Through DOTD, 617 So.2d 880 (La. 1993). The appellate court must determine not whether the trier of fact was right or wrong, but whether the factfinder's conclusion was a reasonable one, after reviewing the record in its entirety. Mart v. Hill, 505 So.2d 1120 (La. 1987); Even though an appellate court may feel its own evaluations and inferences are more reasonable than the factfinder's, reasonable evaluations of credibility and reasonable inferences of fact should not be disturbed upon review where conflict exists in the testimony. Rosell, 549 So.2d 840; Arceneaux v. Domingue, 365 So.2d 1330 (La. 1978); Stobart, 617 So.2d 880. In the instant case, the fact that Mr. Veal and Mr. Palermo frequently and regularly worked in close proximity to Dixie and Buck Kreihs was confirmed by numerous witnesses that actually worked on the New Orleans riverfront in

the 1960s and 1970s. The uncontested evidence in this case is that actual work performed by the ship repairers generated significant concentrations of airborne asbestos and that the ship repairers work directly resulted in Mr. Veal and Mr. Palermo being exposed to hazardous levels of asbestos while they went about their own duties. Furthermore, Dr. Hammar testified that the ship repair work done by Dixie and Buck Kreihs as specifically described by Anthony Rabito would have generated such high concentrations of asbestos that being in that vicinity for even a single day would result in enough exposure to cause both Mr. Veal's mesothelioma and Mr. Palermo's adenocarcinoma. Accordingly, I believe that the trial court's findings of liability on the parts of Dixie, Buck Kreihs and Eagle were reasonable.

For the foregoing reasons, I respectfully dissent.