

DONALD PONSETI, INDIVIDUALLY AND AS ADMINISTRATOR AND SUCCESSION REPRESENTATIVE OF THE SUCCESSION OF MARVIN PONSETI AND THEODORE PONSETI, ET AL	*	NO. 2018-CA-0109
	*	COURT OF APPEAL
	*	FOURTH CIRCUIT
	*	STATE OF LOUISIANA
	*	
VERSUS	*	
	*	
TOURO INFIRMARY, GHI INSURANCE COMPANY, NURSE JANE DOE, DOCTOR JOHN DOE AND XYZ INSURANCE COMPANY		*****

BARTHOLOMEW-WOODS, J. DISSENTS, IN PART, WITH REASONS.

I respectfully agree with the majority's opinion to affirm the trial court's judgment in favor of Plaintiffs-Appellees. Presently, the trial court did award damages. However, Plaintiffs-Appellees argue that the trial court's award of \$50,000.00 is too low; I agree. I would increase the amount of survival damages awarded to Plaintiffs-Appellees. The majority believes that the trial court did not abuse its discretion when it awarded such a minimal amount of damages; I disagree.

The Louisiana Supreme Court has reasoned,

Survival damages may be awarded for the pre-death mental and physical pain and suffering of the deceased. *Temple v. Liberty Mut. Ins. Co.*, 330 So.2d 891 (La. 1976). A jury may award damages for pain and suffering in a survival action where there is the smallest amount of evidence of pain, however brief, on the part of the deceased, based on his actions or otherwise. *Leary v. State Farm Mut. Auto. Ins. Co.*, 07-1184 (La. App. 3 Cir. 3/5/08), 978 So.2d 1094, 1098, *writ denied*, 08-0727 (La. 5/30/08), 983 So.2d 900; *Etcher v. Neumann*, 00-2282 (La. App. 1 Cir. 12/28/01), 806 So.2d 826, 840, *writ denied*, 02-0905 (La. 5/31/02), 817 So.2d 105; *Patrick v. Employers Mut. Cas. Co.*, 99-94 (La. App. 3 Cir. 8/11/99), 745 So.2d 641, 652, *writ denied*, 99-2661 (La. 11/24/99), 750 So.2d 987.

Thompson v. Crawford, 2017-1400, pp. 1-2 (La. 11/13/17), 229 So.3d 451, 452.

Plaintiffs-Appellees argue that the trial court relied on *Juanita James v. Emanuel Jackson*, 2004-0912 (La. 4 Cir. 3/2/05) 898 So.2d 596, in determining survival damages. In *Juanita James*, the decedent passed away within an hour of the time he began to experience symptoms and the court awarded \$60,000.00. By contrast, Mr. Ponseti endured the hostile and oppressive conditions at Touro from August 29, 2005 at 3:00 a.m. until the afternoon of August 31, 2005. The majority opinion points out that both Nurse Oriol and Nurse Caceres testified that, in the hours after Touro lost electricity, the heat was oppressive and hot air stagnant; in addition, Touro also lost water pressure.

Dr. Samantha Huber, who performed an autopsy on Mr. Ponseti, testified that his death was caused by cardiac arrhythmia, which was triggered by the increasing heat, lack of water, and stress associated with Hurricane Katrina. In his affidavit, Dr. Jim C. Hirschman, an internal medicine physician with a cardiology specialty, stated that “sweltering heat, lack of ventilation, lack of electricity” and “conditions and hostile environment at Touro during Hurricane Katrina made it impossible for Mr. Ponseti to fight infection” and “caused and contributed to Mr. Ponseti’s ultimate demise.”

From the testimony provided in the record, we know (1) that conditions at Touro during Hurricane Katrina caused Mr. Ponseti’s death and (2) the duration of time that Mr. Ponseti experienced and suffered in those conditions. Although the trial court is granted vast discretion, I find that the trial court abused its discretion by relying on *Juanita James*, a case factually inapposite to this matter.¹ Therefore,

¹ In its oral reasons for judgment, the trial court explained its reliance on *Juanita James*. The Louisiana Supreme Court explained that trial court’s reasons for judgment, while it does not

the amount of the survival damages awarded by the trial court was woefully insufficient, and should be increased. In *Robinette v. Lafon Nursing Facility of the Holy Family*, 2015-1363 (La. App. 4 Cir. 6/22/17), 223 So.3d 68, this Court affirmed, in pertinent part, that evidence was sufficient to establish that the decedent, who experienced Hurricane Katrina and its immediate aftermath as a resident of Lafon nursing home, died as a result of heat stroke and dehydration caused by exposure to extreme heat; and that wrongful death and survival damages in the amount of \$1 million was not excessive. Like Mr. Ponseti, the decedent experienced Hurricane Katrina and the resulting lack of electricity and running water and extreme heat; both deaths were caused by these conditions.²

Further, Plaintiffs-Appellees assert, and I agree, that the following cases are more in line with the pain and suffering endured by Mr. Ponseti:

In *Ruttley v. Lee*, 9[19]9-1130 (La. App. 5th Cir. 5/17/00), 761 So.2d 777, a witness saw a young woman breathe only lightly and noted that she had a faint pulse after an automobile accident. The young woman then died at the scene. Her family was awarded \$150,000.00 in survival damages.

In *Estate of Hickerson v. Zimmerman*, 2002-1195 (La. App. 4th Cir. 7/16/03), 853 So.2d 55, a pedestrian, killed by an automobile lived only so briefly that the autopsy report had to be used to determine that he had survived for some period of time after the accident, was awarded \$400,000.00 in general damages.

In *Strawder v. Zapata Haynie Corp.*, [19]94-453(La. App. 3rd Cir. 11/2/94), 649 So.2d 554, two (2) seamen who drowned only twenty to thirty minutes after an explosion were awarded \$500,000.00 each in survival damages.

In *Wingfield v. State*, DOTD, 2001-2668 (La. App. 1st Cir. 11/8/02), 835 So.2d 785, a sixty (60) year old

form part of the judgment, serves as “an explication of the trial court’s determinations.” *Wooley v. Lucksinger*, 2009-0571, p. 77 (La. 4/1/11), 61 So.3d 507, 572.

² The decedent in *Robinette* died on Thursday, September 1, 2005.

man who was in an automobile accident suffered three hours before he died. The jury awarded him \$800,000.00 in survival damage. The trial court granted a JNOV reducing the survival damages to \$500,000.00. However, the First Circuit reinstated the \$800,000.00 survival damage award.

For the aforementioned reasons, I dissent, in part, with the majority's opinion, and would increase the survival damages award.