DONALD JOHNSON	*	**NO. 2018-CA-0162**
VERSUS	*	**COURT OF APPEAL**
MOTIVA ENTERPRISES, LLC, ET AL.	*	**FOURTH CIRCUIT**
	*	**STATE OF LOUISIANA**

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APPEAL FROM
CIVIL DISTRICT COURT, ORLEANS PARISH
NO. 2003-05123 C\W 2003-06746, DIVISION "L-6"
Honorable Kern A. Reese, Judge

* * * * * *

JUDGE SANDRA CABRINA JENKINS

* * * * * *

(Court composed of Chief Judge James F. McKay, III,
Judge Sandra Cabrina Jenkins, Judge Dale N. Atkins)

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AFFIRMED

FEBRUARY 6, 2019

This appeal arises from a 2003 lawsuit brought by two former employees of the Camellia Grill restaurant in New Orleans, who alleged that they suffered adverse health effects from exposure to gasoline vapors originating from a nearby Shell gasoline station. Defendant Motiva Enterprises, LLC ("Motiva"), appeals the trial court's December 7, 2017 judgment, rendered after a five-day bench trial, awarding $230,592.00 in general and special damages to plaintiff Donald Johnson, and $39,962.00 in general and special damages to plaintiff Stephen Gopaul (collectively, "Plaintiffs"). For the reasons that follow, we affirm the trial court's judgment.

FACTUAL AND PROCEDURAL BACKGROUND

On April 4, 2003, Mr. Johnson, who was a waiter at the Camellia Grill, and numerous other plaintiffs filed suit against Motiva; Equilon Enterprises, LLC; Riverbend Shell, Inc.; and Diane Williams.[1] The Petition alleged that underground gasoline storage tanks at the Shell station near the Camellia Grill released massive quantities of gasoline into the soil under the tank beds, which saturated the ground soil, and penetrated through the sanitary sewer system, grease traps, and drain

[1] Defendants Equilon Enterprises, LLC and Diane Williams were dismissed from this suit, with prejudice, on October 6, 2003.

lines, thereby exposing Mr. Johnson and others to concentrated levels of gasoline vapors. On November 7, 2003, Stephen Gopaul, who was a former manager at the Camellia Grill, was added as a plaintiff. Plaintiffs asserted theories of strict liability and negligence, and alleged that their constant exposure to the gasoline vapors caused various ailments, such as severe and permanent headaches, dizziness, nausea, sleep disorders, sexual dysfunction, pulmonary dysfunction, and cognitive dysfunction, in addition to general anxiety, mental anguish, and fear of cancer.

On November 7, 2016, Motiva filed a Motion for Summary Judgment, seeking a dismissal of Mr. Gopaul's claims on the grounds of prescription. After the bench trial, Motiva filed a Motion for Involuntary Dismissal of Stephen Gopaul on the grounds of prescription.[2]

The court conducted a five-day bench trial on February 11-15, 2017. On December 7, 2017, the trial court rendered a judgment finding Motiva 100% at fault, as the leaking gasoline tanks were owned and/or in the physical custody and control of Motiva, and presented an unreasonable risk of harm under La. C.C. arts. 2315 and 2317. The trial court found that Mr. Johnson had been exposed to gasoline vapors for three and one-half years, and Mr. Gopaul had been exposed for 10 months. The trial court awarded Mr. Johnson $200,000.00 in general damages, including physical and mental pain and suffering, and fear of cancer; $5,592.00 in past medical specials; and $25,000.00 in future medical specials. The trial court awarded Mr. Gopaul $20,000.00 in general damages, including physical and

[2] The record does not contain a judgment on either the Motion for Summary Judgment or the Motion for Involuntary Dismissal.

mental pain and suffering, and fear of cancer; $9,962.00 in past medical specials; and $10,000.00 in future medical specials.

Motiva timely appealed.

DISCUSSION

Motiva lists two assignments of error.

First, Motiva contends that the trial court erred by: (1) failing to find Mr. Gopaul's claims prescribed when he was aware of his claimed injuries and their alleged cause more than a year prior to filing suit; and (2) awarding Mr. Gopaul damages when his exposure preceded the earliest date that Motiva could be held liable for damages.

Second, Motiva argues that the trial court's general damages awards to Mr. Johnson and Mr. Gopaul exceed the amount that a reasonable trier of fact could award for the minor and transient health effects experienced by Plaintiffs.

Assignment of Error No. 1: Prescription/Knowledge of Defects

Motiva asserts that, when Mr. Gopaul left his job as manager of the Camellia Grill in July 2002, he had actual and constructive knowledge of his legal claims, yet he did not join this lawsuit until November 2003, more than one year later. Mr. Gopaul contends that under the continuing tort doctrine, the date for commencing the accrual of prescription is the date of Mr. Gopaul's last wrongful exposure to the gasoline vapors. Mr. Gopaul argues that, after leaving the restaurant in July 2002, he returned in December 2002 to do tax work for the owner of the restaurant, and finally left in March 2003, less than one year before filing suit.

"Although typically asserted through the procedural vehicle of the peremptory exception, the defense of prescription may also be raised by motion for summary judgment." *Hogg v. Chevron USA, Inc.*, 09-2632, p. 6 (La. 7/6/10), 45

So.3d 991, 997. "When prescription is raised by motion for summary judgment, review is *de novo*, using the same criteria used by the district court in determining whether summary judgment is appropriate." *Id*.

The prescriptive period for delictual actions is one year, which commences to run from the day injury or damage is sustained. La. C.C. art. 3492. "One of the exceptions to this rule is the jurisprudentially recognized doctrine of continuing tort." *Risin v. D.N.C. Invest., L.L.C.*, 05-0415, p. 4 (La. App. 4 Cir. 12/7/05), 921 So.2d 133, 136. "The continuing tort exception only applies when continuous conduct causes continuing damages." *Id*. (citing *Bustamento v. Tucker*, 607 So.2d 532. 542 (La. 1992)). "Where the cause of the injury is a continuous one giving rise to successive damages, prescription does not begin to run until the conduct causing the damage is abated." *Id*. (citing *S. Cent. Bell Tel. Co. v. Texaco Inc.*, 418 So.2d 531, 533 (La. 1982)).

Under the continuing tort doctrine, the time when a plaintiff acquires knowledge of the damages has no relevance. *Risin*, 05-0415, p. 7, 921 So.2d at 138. Thus, regardless of the plaintiff's knowledge of his possible injuries or the possible cause, the alleged tortious conduct is continuous and gives rise to damages from day to day. Furthermore, the defendant's continuous "conduct" may not necessarily be action, but rather the failure to act by one who has a duty to do so. *Risin*, 05-0415, p. 8, 921 So.2d at 138.

Louisiana jurisprudence has applied the continuing tort doctrine in the context of workplace exposure to toxic substances. In *South Central Bell*, a nearby gas station was leaking gasoline onto underground telephone lines. The Supreme Court ruled that prescription began to run when the leaky gas tanks were replaced, not when the plaintiff discovered the damage. 418 So.2d at 533.

In *Wilson v. Hartzman*, 373 So.2d 204 (La. App. 4th Cir. 1979), the plaintiff, a shipyard employee, was diagnosed in 1968 with silicosis resulting from his inhalation of toxic particles at his job. Seven years later, his health had deteriorated so badly that he had to quit his job. A few months after quitting, he filed suit against the executive officers of his former employer. The defendants filed exceptions of prescription, arguing that the prescriptive period began to run as soon as the plaintiff was informed of his illness. The trial court maintained the exceptions. This Court reversed, holding that the plaintiff's exposure to toxic silica dust was a continuing tort, and thus prescription did not begin to run until the last day of the plaintiff's employment. *Id*. at 207.

Finally, in *Risin*, a tenant filed suit, on behalf of herself and her minor child, against a landlord alleging that they contracted lead poisoning from exposure to lead paint. This Court applied the continuing tort doctrine, finding that the defendant's fault – failing to abate the lead exposure – was not a one-time event which the plaintiffs learned of on October 14, 2002, when they were diagnosed. Rather, the defendant's fault continued until the plaintiffs' exposure to lead paint ended when the plaintiffs moved out in April 2004. *Risin*, 05-0415, p. 8, 921 So.2d at 138.

In this case, we find that Motiva's tortious conduct was continuous. At trial, Mr. Gopaul testified that he began working at the Camellia Grill as a manager in December 2000. He stated that he started smelling gasoline in the restaurant as soon as he started working, and that the gasoline odor began to get stronger in March 2001. Mr. Gopaul said he had smelled gasoline the entire time he was working at the restaurant. Mr. Gopaul testified that when he stopped working as a manager at the Camellia Grill in August 2002, there was still a "high gasoline

odor." He said that in December 2002, he returned to work for the owner of the Camellia Grill doing tax work in the restaurant's office, leaving permanently in March 2003. At this time, Mr. Gopaul testified that he still smelled gasoline vapors.

Mr. Gopaul's testimony was corroborated by the testimony of Dawn Zweifel, who worked as a shift manager at the Camellia Grill from August 2001 to August 2005. Ms. Zweifel testified that throughout this four-year time period, she smelled gasoline in the restaurant two to three times a week. She also stated that when Motiva installed a recovery trench in March 2003, it did not lessen the severity of the smell at all.

Regardless of Mr. Gopaul's knowledge of his injuries, we find that Motiva's tortious conduct was continuous and gave rise to damages from day to day. Therefore, prescription did not begin to run until the cause of the damages was abated, or the last day of Mr. Gopaul's employment in March 2003, which was the last day he was exposed to the harmful gasoline vapors. Mr. Gopaul filed suit on November 7, 2003 and thus, under the continuing tort doctrine, his claims are not prescribed.[3]

In assignment of error number 1, Motiva also contends that the trial court erred in awarding Plaintiffs damages for exposure that occurred before Motiva knew or should have known of the defects in the underground storage tanks. According to Motiva, the earliest date that its conduct fell below the standard of care was December 2002, when Motiva learned that the gasoline had migrated into the soil.

[3] Motiva did not remove the leaking gasoline tanks until January 23, 2008.

A plaintiff asserting a cause of action in either negligence or strict liability against a premises owner for injury caused by a premises defect or vice must prove: (1) that the defendant knew or should have known of the vice or defect; (2) that the damage could have been prevented by the exercise of reasonable care; and (3) that the defendant failed to exercise reasonable care. *See* La. C.C. art. 2317.1.

Plaintiffs' hydrogeological expert, Gregory Miller, testified that he examined fuel inventory records showing that as early as May 2000 there was a significant discrepancy between the fuel that had been delivered to the gas station, and fuel that had been sold, suggesting that gasoline was leaking from the underground fiberglass tanks.[4] The Louisiana Department of Environmental Quality's ("DEQ") investigator/emergency response coordinator, Forest Davis, testified that in April and May 2002, there was a "significant variation in a flow through analysis" revealing a "loss of product through the tanks or lines." Thus, from May 2000 through May 2002, Motiva knew or, in the exercise of reasonable care, should have known that the underground tanks were leaking gasoline.

This assignment of error is without merit.

Assignment of Error No. 2: Quantum of Damages

Motiva contends that the evidence as to the duration, frequency, and level of Plaintiffs' exposure to the gasoline vapors shows that the general damages awards of $200,000 to Mr. Johnson, and $20,000 to Mr. Gopaul, are excessive and unreasonable, and should be reduced.

"In 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.

[4] The DEQ also reviewed these inventory records showing that there was a significant loss of gasoline inventory for several consecutive months in 2000, which the DEQ "flagged as failed."

Our Court described the standard of review as follows:

> The assessment of "quantum," or the appropriate amount of damages, by a trial judge or jury is a determination of fact, one entitled to great deference on review. As such, "the role of an appellate court in reviewing general damages is not to decide what it considers to be an appropriate award, but rather to review the exercise of discretion by the trier of fact." *Youn v. Maritime Overseas Corp.*, 623 So.2d 1257, 1260 (La. 1993). Moreover, "before a Court of Appeal can disturb an award made by a [fact finder,] the record must clearly reveal that the trier of fact abused its discretion in making its award. Only after making the finding that the record supports that the [trier of fact] abused its much discretion can the appellate court disturb the award, and then only to the extent of lowering it (or raising it) to the highest (or lowest) point which is reasonably within the discretion of that court."

Robinette v. Lafon Nursing Facility of the Holy Family, 15-1363, p. 24 (La. App. 4 Cir. 6/22/17), 223 So.3d 68, 84 (quoting *Wainwright v. Fontenot*, 00-0492, p. 6 (La. 10/17/00), 774 So.2d 70, 74).

With respect to the duration of the exposure, Motiva contends that the trial court's award of general damages based on Mr. Johnson's exposure for three and one-half years, and Mr. Gopaul's exposure for 10 months, is "grossly overstated." Motiva relies on the trial testimony of Ronald Jeager, the general manager of the restaurant; Mr. Johnson's ex-wife Stacy Lamar; and Tom Foutz, a regular customer who ate breakfast at the restaurant three or four times a week from 2001 through August 2005, when Hurricane Katrina struck. These witnesses testified that the gasoline odor was present for only 18 months, up through March 2003, when Motiva installed a catch trench to try to stop the leaking.

Other witnesses, however, testified that they smelled gasoline up through the time that Hurricane Katrina struck in 2005. Mr. Johnson testified that he smelled gasoline up until Katrina. Dawn Zweifel, another Camellia Grill

manager/employee, stated that she also smelled gasoline up through Hurricane Katrina.

Motiva also asserts that the scientific evidence – actual readings which tested for the gasoline vapors – demonstrated that the vapors "diminished" after the catch trench was installed in March 2003. This evidence is contradicted by boring samples taken in December 2007, at the request of the DEQ, showing that the levels of benzene[5] in the soil were higher in December 2007 than they were in December 2002.

With respect to the frequency of the exposure, Motiva contends that Plaintiffs' exposure to gasoline vapors was only intermittent, and not continuous. Mr. Jeager testified that on some days there was no odor, other days it was very faint, and only on occasion was the odor strong, when it rained heavily. Plaintiffs testified that they encountered a gasoline odor every day they worked in the restaurant, especially when it rained.[6] Plaintiffs' expert hydrogeologist, Mr. Miller, testified that the soil samples taken in 2007 showed that the catch trench had no effect on decreasing contamination concentrations in the soil. When the fiberglass and steel tanks were removed in January 2008, a witness smelled a strong gasoline odor and observed a "sheen/face cover of gasoline product consistent with a leak." This witness also saw three or four holes in one of the fiberglass tanks, with "liquid running out."[7] Based on this evidence, the trial court could reasonably conclude that the tank was continuing to leak, which continued to

[5] Benzene, a carcinogen, is a constituent of gasoline.

[6] Mr. Johnson's ex-wife testified that he would come home from work with his clothes smelling like gasoline. She said that the gasoline odor was so strong that she asked him to undress in the garage.

[7] Mr. Miller explained that changes in atmospheric pressure as well as the use of vent hoods or fans created negative pressure allowing gasoline and benzene to be drawn from the sewer line through the connecting drains into the restaurant building.

contribute to benzene contamination on the subsurface soil and groundwater, thereby setting up a "steady state condition of contaminating the property."

With respect to the level of Plaintiffs' exposure to gasoline vapors, Motiva contends that the levels of benzene, as a component of gasoline, found in the restaurant would produce only mild, transient, and fully reversible symptoms. Motiva's toxicology expert, Dr. Gary Krieger, testified that reliance on pure benzene studies is improper in a gasoline exposure case because benzene is metabolized at a much lower rate when it is a component of gasoline vapor than it is in its pure state.

Dr. Patricia Williams, Plaintiffs' expert in toxicology, testified that at 140 ppm or less of exposure to gasoline vapor, she would expect to see nausea and vomiting, symptoms experienced by Mr. Johnson. She stated that she reviewed two direct testings by Mr. Davis that were conducted on the same day at the same hour at the clean-out line on the floor in the Camellia Grill dishwashing room. Dr. Williams then looked at the scientific literature to see if the exposure level was sufficient to cause adverse health effects. She testified that the 5 to 10 ppm of vapor coming into the restaurant was more than 3,000 times what is known to cause biological damage.

Dr. Susan Andrews, Plaintiffs' neuropsychological expert, administered testing to Mr. Johnson and Mr. Gopaul. Dr. Andrews diagnosed Mr. Johnson with a cognitive disorder, and noted that his test results were consistent with someone who had sustained an organic brain disorder. Dr. Andrews stated that inhalation of benzene even at lower concentrations over a long period of time can produce chronic poisoning affecting the blood and bone marrow, and resulting in anemia, leukopenia, and thrombocytic leukemia. She said that solvents in gasoline, which

can be absorbed through the lungs, skin, and GI tract, can cause chronic encephalopathy, which consists of headaches, fatigue, mood disturbances, and sleep disorders. Dr. Andrews also opined that solvents accumulate in the brain and the nerve membranes, causing neuropsychological dysfunctions. According to Dr. Andrews, solvents also can cause mutations and can cause cell death because they strip the myelin sheath of the cell membrane. Mr. Johnson's treating neurologist, Dr. Morteza Schamsnia, testified that his left lateral ventricle was slightly larger than the right, which is the "effect of toxins on the white matter." Dr. Schamsnia confirmed that Mr. Johnson's cognitive dysfunction is known to occur in patients who are exposed to this kind of chemical.

Likewise, Dr. Andrews opined that the totality of Mr. Gopaul's exposure to benzene and solvents in gasoline produced hemotoxic and neurological effects, as evidenced by his blood and neurological tests. She testified that Mr. Gopaul's difficulty with working memory and attention met the definition of "cognitive disorder" or organic brain injury. Dr. Shamsnia confirmed that Mr. Gopaul's issues with memory and cognition were related to his exposure to these chemicals. Both Mr. Johnson and Mr. Gopaul will have to be followed by a neurologist and primary care physician for the remainder of their lives.

This appeal largely turns on the trial court's assessment of the weight and credibility of the lay and expert witnesses. Both sides presented conflicting experts, voluminous exhibits, and diverse fact witnesses who testified about their memory of smells they experienced more than 15 years earlier. The trial court found Plaintiffs' witnesses more credible. "Where there is conflict in the testimony, reasonable evaluations of credibility and reasonable inferences of fact should not be disturbed on review." *Gardner Realtors, LLC v. Iteld*, 16-0415, p. 8

(La. App. 4 Cir. 3/22/17), 214 So.3d 146, 152. "'[T]he trial court sitting as a trier of fact is in the best position to evaluate the demeanor of the witnesses, and its credibility determinations will not be disturbed on appeal absent manifest error.'" *Alfonso v. Cooper*, 14-0145, p. 14 (La. App. 4 Cir. 7/16/14), 146 So.3d 796, 805 (quoting *Ruiz v. Ruiz*, 05-175, p. 4 (La. App. 5 Cir.), 910 So.2d 443, 445). Likewise, the trier of fact's acceptance, or rejection, of part or all of an expert's testimony is within its discretion in fact finding. *Gardner*, 16-0415, p. 10, 214 So.3d at 153.

"Because reasonable persons frequently disagree about the measure of general damages, such an award may be disturbed on appeal 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 under the particular circumstances." *Urquhart v. Spencer*, 17–0069, 17–0202, 17–0203, p. 14 (La. App. 4 Cir. 7/27/17), 224 So.3d 1022, 1032 (quoting *Youn*, 623 So.2d at 1261).

In light of the evidence presented at trial, we cannot say the amount of general damages for Mr. Johnson's and Mr. Gopaul's physical and mental pain and suffering, and fear of cancer, as determined by the trial court, is beyond that which a reasonable trier of fact could assess for the effects of these particular injuries to these particular Plaintiffs under these particular circumstances. *See Youn*, 623 So.2d at 1261. Accordingly, we find no abuse of discretion in the trial court's award of $200,000.00 in general damages to Mr. Johnson, and $20,000.00 in general damages to Mr. Gopaul.

Finally, Motiva contends that the trial court's award of general damages to Plaintiffs must be reduced to comport with lower awards in prior chemical exposure cases. "Consideration of prior awards to determine whether a judgment

is . . . excessively high is only appropriate after the appellate court has determined that an abuse of discretion has occurred." *Urquhart*, 17-0069, p. 14, 224 So.3d at 1032. Based on our finding of no abuse of discretion by the trier of fact, we need not resort to an examination of prior awards.

This assignment of error is without merit.

CONCLUSION

For the foregoing reasons, we affirm the trial court's judgment in favor of Mr. Johnson and Mr. Gopaul and against Motiva.

AFFIRMED