

19TH JUDICIAL DISTRICT COURT FOR THE PARISH OF EAST BATON ROUGE

STATE OF LOUISIANA

NO. 604,391

SECTION: 22

MARIA LUNA, ET AL

VESUS

A.W. CHESTERTON COMPANY, ET AL

JUDGMENT

This cause came on for a bench trial on May 8, 14 and 15, 2013.

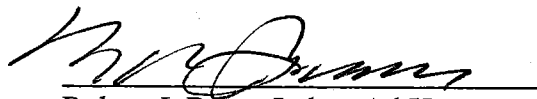
Present:

Plaintiffs and their attorneys, Cameron Waddell and Jody Anderman
Defendants, Louisiana State University Board of Supervisors and
Louisiana State University Health Science Center through its attorneys,
Mary Ann White, Caroline T. Bond and Carrie LeBlanc Jones.

The case was submitted for judgment on May 31, 2013 with the filing of post-trial
briefs. After considering the entire record, evidence produced at trial and for the written
reasons assigned,

IT IS ORDERED, ADJUDGED AND DECREED that there be judgment in
favor of Maria Elena Luna, Justin Luna, Maria Theresa Gabrielle Alphonse, and Carmel
Basse and against the Louisiana State University Board of Supervisors in the full and true
sum of Two Million Three Hundred and Fourteen Thousand Two Hundred Eight Dollars
(\$2,314,208.00) together with legal interest from date of judgment demand and all cost of
these proceedings.

Judgment rendered and signed this 31st day of July 2013 in Baton Rouge, Louisiana.



Robert J. Burns Judge, Ad Hoc
19th Judicial District Court

FILED

JUL 31 2013


DY. CLERK OF COURT

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STATE OF LOUISIANA

NO. 604,391

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REASONS FOR JUDGMENT

Raphael Medardo Luna was employed as a plumber and a pipefitter at Charity Hospital in New Orleans, Louisiana from 1962 until 2003. He was exposed to asbestos from 1962 until his retirement in 2003. He was diagnosed with mesothelioma on November 18, 2010 and he died on March 1, 2011. This lawsuit was filed by Luna's siblings, Maria Elena Luna, Justin Luna, Maria Theresa Gabrielle Alphonse, and Carmel Basse to recover survival damages on behalf of their brother.

The survival action is governed by the law in effect on the date that the cause of action arises. *Cole v. Celotex Corp.*, 599 So. 2d 1058 (La. 1992). In a long-latency, occupational disease case, such as the present case, the survival action arises upon significant exposure to asbestos. *Id.* In other words, the survival action accrues "when the exposures are "significant and such exposures later result in the manifestation of damages." *Austin v. Abney Mills, Inc.*, 01-1598 (La. 9/4/02); 824 So. 2d 1137, 1154 citing *Cole*, 599 So. 2d at 1066. Thus, the law applicable to the present case will be the law in effect at the time that the decedent was significantly exposed to asbestos, giving rise to the survival action.

Plaintiffs presented expert testimony from Richard Lemen, Ph. D. and Richard Kradin, M.D. Dr. Lemen is an expert in occupational health, epidemiology, industrial hygiene, toxicology and public health. Dr. Lemen offered testimony regarding causation of asbestos disease and state of art issues. Dr. Kradin is a pulmonologist and pathologist who practices at Massachusetts General Hospital and teaches at Harvard University. He testified as to general medical issues concerning asbestos as well as the development,

cause, and the diagnosis of mesothelioma. Dr. Kradin testified regarding Luna's medical condition, including the cause of Luna's disease, treatment, medication and his death.

The undisputed testimony of Luna's co-workers, Thomas L. Thomas, Allen Brady and Charles Cline, proves that Mr. Luna had significant exposure early in his career at Charity and throughout the relevant period, which for purposes of this litigation, extended from November of 1963 to September 1, 1975.

The testimony of the experts, Dr. Richard Kradin and Dr. Richard Lemen, is also undisputed. With regard to general causation, Dr. Lemen opined that each of the exposures during the relevant time period was significant and increased Mr. Luna's risk of disease. With regard to specific causation, Dr. Kradin opined that each of the exposures during the relevant time period was significant and was a substantial contributing factor in causing Mr. Luna's mesothelioma and ultimate death. Therefore, the evidence proves that Mr. Luna's pre-1980 exposures were significant tortuous exposures under *Cole* and *Austin* and that pre-comparative fault law controls this case. Further, the evidence presented proves that Charity is liable in negligence for Mr. Luna's injuries and death.

This Court granted motions for dismissal, with and without prejudice, of all defendants, except Charity. Plaintiffs have not entered into any settlements. Since Mr. Luna's heirs have not settled with any other parties, and because the evidence was insufficient to find other defendants liable, there can be no virile share reductions.

Mr. Luna's exposure to asbestos while working for Charity was a substantial contributing factor in bringing about his mesothelioma and death. Dr. Kradin explained that asbestos causes injury soon after inhaling asbestos fibers such that the disease process begins shortly after inhalation. Thus, the asbestos fibers Mr. Luna breathed started the disease process shortly after his first exposure to asbestos in the early 1960's. Since mesothelioma is a latent disease, it was not unusual for his disease to develop decades later.

Charity is liable to Mr. Luna's family in negligence because it knew or should have known of the dangers of asbestos, yet failed to take any action whatsoever to protect Mr. Luna. Charity had a positive duty to prevent dangers and take precautions. *See* La. C.C. art. 2315. "The breach [of defendants' duty] occurs when the defendant has failed to

discharge the obligation with the degree of care required by ordinary prudence... including when the failure results from not acting upon actual knowledge of the risk to others as well as from a lack of ordinary care in discovering and avoiding such risk of harm which has resulted from the breach of the duty.” *Canter v. Koehring Co.*, 283 So 2d 716, 721 (La. 1973).

Charity owed a duty to Mr. Luna as his employer. An employer has the duty to furnish employment that is reasonably safe for its employees. They shall furnish and use safety devices and safety guards, shall adopt and use methods and processes reasonably adequate to render such employment and the place of employment safe in accordance with the accepted and approved practice in such or similar industry or places of employment considering the normal hazard of such employment, and shall do every other thing reasonably necessary to protect the life, health, safety and welfare of such employees. La. Rev. Stat. § 23:13.

The evidence shows that Charity failed in its duty of ordinary prudence, and failed in its duty as Mr. Luna’s employer to provide a safe place to work. Coworkers Thomas, Brady and Cline testified that, prior to September of 1975:

- Charity provided no warnings concerning the dangers of asbestos;
- Charity never discussed asbestos at its safety meetings;
- Charity never warned Mr. Luna or the other Charity workers that exposure to asbestos could be hazardous and could cause cancer;
- Charity never instructed Mr. Luna or the other Charity workers to wear a mask or avoid inhaling asbestos dust;
- and Charity never implemented or utilized safety methods and procedures known and recommended for decades prior to Mr. Luna’s work that would have eliminated or reduced his exposure to asbestos.

Dr. Richard Lemen is a former Deputy Director of the National Institute for Occupational Safety and Health and Assistant Surgeon General of the United States. Dr. Lemen testified that in 1930 a landmark study confirming that asbestos causes asbestosis was published that recommended reducing asbestos exposure by suppressing dust, using exhaust ventilation, using wet methods, wearing respirators, and warning workers about the risks of asbestos. See **Ex. 15** in evidence, E.R.A. Merewether & C.W. Price, Inst.

Occu. & Env't'l. Health, *Report on Effects of Asbestos Dust on the Lungs & Dust Suppression in the Asbestos Industry* (1930). The Merewether report was excerpted in the United States Journal of the American Medical Association ("JAMA"), and "by 1930 the disease asbestosis was well recognized as an occupational condition" and was known to be fatal. By 1952, asbestosis was so widely recognized as an occupational disease that the Louisiana legislature provided for coverage for that disease under the Worker's Compensation Act. See Louisiana Workers' Compensation Act (1952).

Plaintiffs introduced into evidence studies regarding exposure to asbestos and lung cancer dating back to 1949. See Ex. 16 in evidence, *Asbestos & Cancer of the Lung*, JAMA (Aug. 13, 1949). In the 1960's, it was established that mesothelioma was also attributable to asbestos exposure. See Ex. 17 in evidence, *Wagner, et al., Diffuse Pleural Mesothelioma & Asbestos Exposure in the N.W. Cape Province*, 17 BRIT J. INDUSTR. MED. 260 (1960); & Ex. 4 in evidence, *Irving J. Selikoff, et al., Asbestos Exposure & Neoplasia*, JAMA (Apr. 6, 1964).

Thus, the evidence established that, although Charity knew or should have known about the risks posed by asbestos at its facilities and knew or should have known how to reduce those risks, Charity failed to warn its workers or otherwise implement safety measures and/or procedures to protect its employees from the dangers of asbestos. Therefore, Charity is liable to the Luna family in negligence for causing Mr. Luna's mesothelioma and death.

In July 2010, Mr. Luna began experiencing shortness of breath, pain in his abdomen, and a persistent cough. In October 2011, Mr. Luna's doctors discovered a large, left pleural effusion. Over the course of the next two months, Mr. Luna's doctors drained fluid from his lung several times, and performed multiple surgeries that eventually lead them to diagnose Mr. Luna with pleural mesothelioma, a painful and incurable cancer in the lining of the lung that is caused by asbestos exposure. The pain associated with mesothelioma is severe and increases as the cancer grows through the nerves that line the rib cage. In addition, as the cancer spreads, the chest is progressively compressed and it becomes more and more difficult to breath.

When diagnosed, Mr. Luna's asbestos cancer had progressed to stage four. The doctors were unable to offer any treatments to Mr. Luna and ordered him into hospice

care for the remainder of his life. Despite the pain medication and oxygen the doctors gave him, Mr. Luna's pain and shortness of breath gradually worsened over the last months of his life. His mental state was severely altered. He became increasingly confused and agitated, and urinated on himself. Many times during his last months, he fell and suffered lacerations and bruising.

The evidence indicates Mr. Luna was in good health, very active and was living his retirement days to their fullest. He enjoyed many things such as attending church on a regular basis, working in his yard, gardening, and spending time with his sister at the Council on Aging, where they played bingo and socialized. They also liked to visit the local casinos. All of these social activities ceased when Mr. Luna was diagnosed with mesothelioma. In fact, Mr. Luna was unable to continue living in his home because his health and mental status abruptly changed and he needed to be given 24-hour care in an assisted living facility. Medical expenses in this case total \$114,208.00.

This court must set a survival award for the general damages incurred by Mr. Luna. Maria and Justin Luna described their brother's pain, suffering and loss of enjoyment of life. A survival action compensates the survivors for the decedent's pre-death pain and suffering- not the survivors loses. It is always difficult to place a dollar value on the type of pain and suffering endured by someone like Raphael Luna. However, I have the benefit of mesothelioma cases decided by various appellate courts. I will set the general damage award at Two Million Two Hundred Thousand (2,200,000) Dollars which includes Mr. Luna's pain and suffering, mental anguish and loss of enjoyment of life.

Signed in Baton Rouge, Louisiana this 31st day of July 2013.



Robert J. Burns Judge, Ad Hoc
19th Judicial District Court

FILED

JUL 31 2013


DY. CLERK OF COURT

19TH JUDICIAL DISTRICT COURT
PARISH OF EAST BATON ROUGE
STATE OF LOUISIANA
GOVERNMENTAL BUILDING
222 ST. LOUIS STREET

BATON ROUGE, LA., 07/31/2013

TO: JODY ANDERMAN ON BEHALF OF MARIA LUNA, ET AL
8706 JEFFERSON HWY
SUITE B
BATON ROUGE, LA 70809

CASE NAME: MARIA LUNA, ET AL VS. A.W. CHESTERTON CO., ETAL (22)

CASE NUMBER: 604391

CIVIL DOCKET: "X"

JUDGE: ROBERT J. BURNS

ROOM: 000

YOU ARE HEREBY NOTIFIED OF THE FOLLOWING ACTION FOR THE AFOREMENTIONED CASE

ON: 07/31/2013 AT: 00:00 AM FOR: SEE COMMENTS

JUDGMENT AND REASONS FOR JUDGMENT. SEE ENCLOSURE.

YOURS VERY TRULY,

CHARISE PATTERSON
DEPUTY CLERK OF COURT FOR
DOUG WELBORN, CLERK OF COURT

NOTIFIED:

JODY ANDERMAN ON BEHALF OF MARIA LUNA, ET AL
CAROLINE TOMENY ON BEHALF OF LSU

