Supreme Court of Louisiana

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FROM: CLERK OF SUPREME COURT OF LOUISIANA

The Opinions handed down on the **29th day of January, 2020** are as follows:

BY Weimer, J.:

2018-CC-02061 GISTARVE JOSEPH, SR., ET AL. VS. HUNTINGTON INGALLS INCORPORATED, ET AL. (Parish of Orleans Civil)

We granted certiorari to determine the preclusive effect of a written compromise agreement. This agreement was executed by a tort victim in settlement of an action for damages resulting from occupational exposure to toxic materials. At issue is the effect of the compromise on a subsequent survival action brought by the La. C.C. art. 2315.1 beneficiaries of the tort victim, who contracted mesothelioma and died after entering into the compromise. Finding the intent of the parties to the compromise to be clear, unambiguous and unequivocal, and the elements of the res judicata plea satisfied, we conclude that the compromise should have been accorded preclusive effect. Accordingly, we reverse the judgment of the district court, declining to give res judicata effect to the compromise, and sustain the exception of res judicata with respect to the survival action.

REVERSED, EXCEPTION SUSTAINED, REMANDED.

Retired Judge James H. Boddie, Jr., appointed Justice ad hoc, sitting for Justice Marcus R. Clark.

Johnson, C.J., dissents and assigns reasons.
Hughes, J., dissents for the reasons assigned by Johnson, C.J.

01/29/20

SUPREME COURT OF LOUISIANA

NO. 2018-CC-02061

GISTARVE JOSEPH, SR., ET AL.

VERSUS

HUNTINGTON INGALLS INCORPORATED, ET AL.

On Supervisory Writs to the Civil District Court for the Parish of Orleans

WEIMER, Justice[*]

We granted certiorari to determine the preclusive effect of a written compromise agreement. This agreement was executed by a tort victim in settlement of an action for damages resulting from occupational exposure to toxic materials. At issue is the effect of the compromise on a subsequent survival action brought by the La. C.C. art. 2315.1 beneficiaries of the tort victim, who contracted mesothelioma and died after entering into the compromise. Finding the intent of the parties to the compromise to be clear, unambiguous and unequivocal, and the elements of the *res judicata* plea satisfied, we conclude that the compromise should have been accorded preclusive effect. Accordingly, we reverse the district court judgment that declined to give *res judicata* effect to the compromise and sustain the exception of *res judicata* with respect to the survival action.

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[*] Retired Judge James Boddie Jr., appointed Justice *ad hoc*, sitting for Justice Marcus R. Clark.

FACTS AND PROCEDURAL HISTORY

In 1982, Gistarve Joseph, Sr. filed suit against Avondale Industries, Inc., its executive officers, and their insurers seeking damages for occupational exposure to toxic fibers, asbestos, silica dust, and other dangerous materials and irritants during the course and scope of his employment with Avondale between 1969 and 1982, which resulted in his contraction of pneumoconiosis. In November 1985, Mr. Joseph settled his claims against Avondale and its executive officers, executing a "Restrictive Release and Discharge with Indemnification Agreement" (hereinafter "Release"), which released Avondale, its executive officers, and their insurers "from any and all liability, claims, demands, liens, remedies, debts, rights, actions and causes of action of whatever kind or nature which he now has or may hereafter acquire for any damages whatsoever, ... directly or indirectly sustained or suffered by Claimant on account of, or in any way growing out of occupational lung diseases of any and every kind and description, ... and any and all other personal injury claims arising out of Claimant's employment at Avondale ...."

More than three decades later, in June 2016, Mr. Joseph filed the instant lawsuit against Huntington Ingalls Inc. (formerly Avondale) and its executive officers, alleging he contracted mesothelioma as a result of occupational exposure to "dangerously high levels of toxic substances, including asbestos, and asbestos-containing products" between 1970 and 1982. Mr. Joseph died on July 27, 2016. Thereafter, his adult children filed a supplemental and amending petition, substituting themselves as plaintiffs and asserting wrongful death and survival actions.

In response, Huntington and its insurer, Lamorak Insurance Co. (hereinafter "Huntington"), filed an exception of *res judicata*, arguing the 1985 Release barred plaintiffs' survival action. The district court denied the exception, and the court of

appeal denied Huntington's application for supervisory writs. **Joseph v. Huntington Ingalls Incorporated**, 18-0778 (La.App. 4 Cir. 11/19/18) (unpubl. writ action). On Huntington's application, the court granted writs to examine the preclusive effect of the 1985 Release. **Joseph v. Huntington Ingalls Incorporated**, 18-02061 (La. 10/15/19), 280 So.3d 596.

LAW AND ANALYSIS

Reduced to its simplest terms, the issue presented in this case is whether, pursuant to the doctrine of *res judicata*, the Release executed by Mr. Joseph in 1985 in settlement of all future claims for occupational lung disease bars plaintiffs' survival action, which is based on the Mr. Joseph's subsequent contraction of mesothelioma.

Louisiana's Civil Code addresses the consequences of resolving legal disputes based on a settlement. A compromise has the legal efficacy of the thing adjudged and, pursuant to La. C.C. art. 3080, "precludes the parties from bringing a subsequent action based upon the matter that was compromised." We note, as a preliminary matter, that the peremptory exception of *res judicata* is a proper procedural mechanism for asserting the defense of compromise and settlement. See **Ortego v. State, Dept. of Transp. and Development**, 96-1322, p. 7 (La. 2/25/97), 689 So.2d 1358, 1364. While ordinarily premised on a final judgment, the doctrine of *res judicata* also applies where there is a compromise or settlement of a disputed claim or matter that has been entered into between the parties. ***Id.***, 96-1322 at 7, 689 So.2d at 1363.

Louisiana's *res judicata* statute appears at La. R.S. 13:4231. In 1990, the legislature made substantial changes to the civilian concept of *res judicata* that had previously existed, introducing a "transaction or compromise" model to assess the preclusive effect of an initial action. See 1990 La. Acts 521, § 1; **Ortego**, 96-1322 at

5, 689 So.2d at 1362. Section 5 of Act 521 expressly provides an effective date of January 1, 1991, for the revised statute and further states: "The preclusive effect and authority of a judgment rendered in an action filed before the effective date of this Act shall be determined by the law in effect prior to January 1, 1991." 1990 La. Acts 521, § 5.

Mr. Joseph filed his petition in the compromised suit in 1982. Therefore, the preclusive effect of the 1985 Release is governed by pre-revision *res judicata* law. Pre-revision, La. R.S. 13:4231 provided:

> The authority of the thing adjudged takes place only with respect to what was the object of the judgment. The thing demanded must be the same; the thing demanded must be founded on the same cause of action; the demand must be between the same parties, and formed by them against each other in the same quality.

Pursuant to this statute, three elements must be satisfied to sustain a plea of *res judicata*. There must exist: (1) an identity of parties, (2) an identity of "cause," and (3) an identity of the thing demanded. **Ortego**, 96-1322 at 6, 689 So.2d at 1363. The absence of any of these identities is fatal to the plea. **Welch v. Crown Zellerbach Corp.**, 359 So.2d 154, 156 (La. 1978).

Before this court, plaintiffs posit that the first element of *res judicata*–identity of the parties–cannot be established because Mr. Joseph was the plaintiff in the first suit and the plaintiffs in the instant suit are his beneficiaries under La. C.C. art. 2315.1–different individuals–who were not parties to and did not sign the Release.

The jurisprudence is clear that the identity of parties necessary to sustain a plea of *res judicata* is not the physical "identity of persons," but an "identity of capacity or quality." See **Burguieres v. Pollingue**, 02-1385, p. 9 (La. 2/25/03), 843 So.2d 1049, 1054 (quoting 2 PLANIOL, *TRAITÉ ÉLMÉNTAIRE DE DROIT CIVIL*, No. 54A(4), 36 n.30

(Louisiana State Law Institute trans., 11th ed. 1939)).[1] For purposes of *res judicata*, there exists an identity of parties whenever the same parties, their successors, or others appear so long as they share the same "quality" as parties, *i.e.*, so long as they are the same in the legal sense of the word. **Welch**, 359 So.2d at 156; **Ditch v. Finkelstein**, 399 So.2d 1216, 1222 (La. App. 1 Cir. 1981). The legal requirement of identity of parties is met where successors or privies of the original parties assert rights derived therefrom. See **Scurlock Oil Co. v. Getty Oil Co.**, 294 So.2d 810, 815 (La. 1974); **Quinette v. Delhommer**, 176 So.2d 399, 405 (La. 1965) ("Under the civil law doctrine, the Ayant[] cause,[2] or successors, of the parties of record are considered parties to the demand when they acquire title after the institution of the original suit in which judgment is rendered.").

There being no physical identity, in order to determine whether plaintiffs in the instant proceeding are the same parties as Mr. Joseph for *res judicata* purposes, it is necessary to examine the nature of the claim that is at issue. Through their supplemental and amending petition, plaintiffs alleged that they are the children of Mr. Joseph, who wish to be substituted as plaintiffs in order to assert "any and all rights and claims for survival damages currently existing."[3]

The survival action, which is codified as La. C.C. art. 2315.1, is special legislation providing for the survival of a right of action in favor of named classes of

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[1] While **Burguieres** addressed identity of parties under the revised *res judicata* law, the discussion therein traces the history of this requirement and concludes that identity of parties has the same meaning under both the old and the revised versions of La. R.S. 13:4231. See ***id.***, 02-1385 at 10, 843 So.2d at 1054.

[2] An "ayant cause" is a "[p]erson who has acquired a right or incurred an obligation from another person called his principal." Gérard Cornu, DICTIONARY OF THE CIVIL CODE 69 (Alain Levasseur and Marie-Eugènie Laporte-Legeais trans., 2014).

[3] Plaintiffs additionally assert a wrongful death claim, but that claim is not currently at issue.

survivors of a deceased tort victim.[4] **Levy v. State Through Charity Hosp. of Louisiana at New Orleans Board of Administrators**, 216 So.2d 818, 819 (La. 1968). Separate and distinct from the wrongful death action, which compensates designated survivors for their own damages suffered as a result of a tort victim's wrongful death,[5] the survival action has been described as follows:

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[4] La. C.C. art. 2315.1 provides:

> A. If a person who has been injured by an offense or quasi offense dies, the right to recover all damages for injury to that person, his property or otherwise, caused by the offense or quasi offense, shall survive for a period of one year from the death of the deceased in favor of:
>
> (1) The surviving spouse and child or children of the deceased, or either the spouse or the child or children.
>
> (2) The surviving father and mother of the deceased, or either of them if he left no spouse or child surviving.
>
> (3) The surviving brothers and sisters of the deceased, or any of them, if he left no spouse, child, or parent surviving.
>
> (4) The surviving grandfathers and grandmothers of the deceased, or any of them, if he left no spouse, child, parent, or sibling surviving.
>
> B. In addition, the right to recover all damages for injury to the deceased, his property or otherwise, caused by the offense or quasi offense, may be urged by the deceased's succession representative in the absence of any class of beneficiary set out in Paragraph A.
>
> C. The right of action granted under this Article is heritable, but the inheritance of it neither interrupts nor prolongs the prescriptive period defined in this Article.
>
> D. As used in this Article, the words "child", "brother", "sister", "father", "mother", "grandfather", and "grandmother" include a child, brother, sister, father, mother, grandfather, and grandmother by adoption, respectively.
>
> E. For purposes of this Article, a father or mother who has abandoned the deceased during his minority is deemed not to have survived him.

[5] The wrongful death action is codified as La. C.C. art. 2315.2 and provides, in pertinent part:

> A. If a person dies due to the fault of another, suit may be brought by the following persons to recover damages which they sustained as a result of the death:
>
> (1) The surviving spouse and child or children of the deceased, or either the spouse or the child or children.
>
> (2) The surviving father and mother of the deceased, or either of them if he left no spouse or child surviving.

> [B]eneficiaries are given the right to recover the damages which the victim suffered and would have been entitled to recover from the tort feasor, if the victim had lived. This is commonly referred to as the "survival action" which, by the express terms of the Article, survives the death of the injured party and passes to the beneficiaries ....

Guidry v. Theriot, 377 So.2d 319, 322 (La. 1979).[6] In a survival action (which comes into existence simultaneously with the commission of the tort and is transmitted to the beneficiaries upon the victim's death), the beneficiaries are limited to recovery of the damages sustained by the direct victim of the tort from the time of injury until death. ***Id.***; **Watkins v. Exxon Mobil Corp.**, 13-1545, p. 7 (La. 5/7/14), 145 So.3d 237, 241. In other words, upon the tort victim's demise, the beneficiaries step into the shoes of the tort victim to recover the damages sustained by the decedent. Because the only rights transmitted to the beneficiaries in a survival action are those of the decedent, it follows that the beneficiaries are the ayant cause, or legal successors, of the direct tort victim, a status confirmed by the Louisiana Code of Civil Procedure and by the procedural posture of this case.

As noted above, the direct tort victim, Mr. Joseph, instituted the 2016 action and died during its pendency. Shortly thereafter, plaintiffs substituted themselves as plaintiffs for purposes of asserting survival and wrongful death actions. Insofar as the survival action is concerned, plaintiffs were required only to substitute themselves as party plaintiffs in accordance with La. C.C.P. art. 801, which provides:

> (3) The surviving brothers and sisters of the deceased, or any of them, if he left no spouse, child, or parent surviving.
>
> (4) The surviving grandfathers and grandmothers of the deceased, or any of them, if he left no spouse, child, parent, or sibling surviving.
>
> B. The right of action granted by this Article prescribe one year from the death of the deceased.

[6] Repudiated on other grounds by **Louviere v. Shell Oil Co.**, 440 So.2d 93, 97 (La. 1983).

> When a party dies during the pendency of an action which is not extinguished by his death, his legal successor may have himself substituted for the deceased party, on ex parte written motion supported by proof of his quality.

See **Guidry**, 377 So.2d at 325. Significantly, the same procedural article goes on to define a "legal successor" as follows:

> As used in Articles 801 through 804, "legal successor" means:
>
> (1) The survivors designated in Article 2315.1 of the Civil Code, if the action survives in their favor ....

La. C.C.P. art. 801. Clearly, then, with respect to their survival action, plaintiffs are the legal successors of Mr. Joseph within the intent of the law, and there exists an identity of parties for purposes of *res judicata*. The first necessary element of *res judicata* is met.

The remaining two *res judicata* elements are identity of "cause" and identity of the thing demanded. In **Preis v. Standard Coffee Service Co.**, 545 So.2d 1010 (La. 1989), the court defined the civilian concept of "cause of action" under La. R.S. 13:4231 as follows:

> It is well-settled that the term "cause of action" as used in La. R.S. 13:4231 is a mistranslation from the French and really refers to the civil law concept of cause. Cause in this context has been defined as "the juridical or material fact which is the basis of the right claimed, or the defense pleaded." It is the "legal obligation upon which the cause of action is founded."

Preis, 545 So.2d at 1013 (citations omitted). In **Ryan v. Grandison Trust**, 504 So.2d 844 (La. 1987), the court defined the "thing demanded" as "the kind of relief sought." ***Id.***, 504 So.2d at 849 (citing **Quarles v. Lewis**, 226 La. 76, 75 So.2d 14 (1954), overruled on other grounds, **Ugulano v. Allstate Insurance Co.**, 367 So.2d 6, 7 (La. 1978)).

To determine whether these two elements of *res judicata* are established in this case, the 1985 Release must be examined. Preliminary to doing so however, the following principles governing compromise, derived from the Civil Code, are considered.

The Civil Code defines a compromise as "a contract whereby the parties, through concessions made by one or more of them, settle a dispute or an uncertainty concerning an obligation or other legal relationship." La. C.C. art. 3071. As a contract, a compromise is governed by the same general rules of construction applicable to contracts. **Ortego**, 96-1322 at 7, 689 So.2d at 1363. And, as with a contract, a compromise must be interpreted according to "the common intent of the parties." La. C.C. art. 2045; **Brown v. Drillers, Inc.**, 93-1019 (La. 1/14/94), 630 So.2d 741, 748. The general rules of construction dictate that "[w]hen the words of a contract are clear and explicit and lead to no absurd consequences, no further interpretation may be made in search of the parties' intent." La. C.C. art. 2046. However, a supplementary rule of construction applies to compromises. **Brown**, 630 So.2d at 748. Pursuant to La. C.C. art. 3076, "[a] compromise settles only those differences that the parties clearly intended to settle, including the necessary consequences of what they express." In applying this rule of construction, "courts are guided by the general principle 'that the contract must be construed as a whole and in light of attending events and circumstances.'" **Brown**, 630 So.2d at 748 (quoting **Succession of Teddlie**, 385 So.2d 902, 904 (La.App. 2 Cir. 1980)).

In the instant case, as an exceptor urging *res judicata* on the basis of a compromise, Huntington has the burden of establishing the requisites for a valid compromise, including the parties' intent to settle the differences asserted in the present litigation. See **Brown**, 630 So.2d at 747. To meet that burden of proof,

Huntington relies solely on the language of the Release, which it claims clearly and unambiguously includes within its scope the survival claims asserted by plaintiffs in this litigation. For their part, plaintiffs also rely solely on the language of the Release, which they maintain does not expressly and unequivocally state that claims for cancer and mesothelioma were intended to be included therein. Thus, the resolution of the case turns strictly on an interpretation of the parties' intent as reflected in the four corners of the Release. See La. C.C. art. 2046; **Brown**, 630 So.2d at 749 ("[A]bsent some substantiating evidence of mistaken intent, no reason exists to look beyond the four corners of the instrument to ascertain intent.").

The 1985 Release recites, in pertinent part:

> That for and in consideration of the payment by and/or on behalf of the parties released of $25,000.00 Claimant [Gistarve Joseph, Sr.] does hereby **release and forever discharge** [Avondale, its predecessors or successors in interest, its executive officers, and the respective insurers of these parties] **from any and all liability, claims, demands**, liens, remedies, debts, rights, **actions and causes of action of whatever kind or nature which he now has or may hereafter acquire for any damages whatsoever**, whether compensatory or punitive, in tort, contract or otherwise, for workers' compensation under state law or under the Longshore & Harbor Workers' Compensation Act (33 U.S.C. § 901, et. seq.), **for damages**, pain and suffering, medical expenses, court costs, attorney's fees, penalties, interest, expenses and loss or damages **of any and every kind whatsoever, whether or not of the kind enumerated, including without limitation those arising under and federal or state law** (including but not limited to Articles 2315 and 2316 of the Louisiana Civil Code and LA-R.S. 22:655 and LA-R.S. 23:1032), in Admiralty, including but not limited to the General Maritime Law, unseaworthiness, Jones Act, maintenance and cure, **directly or indirectly sustained or suffered by Claimant on account of, or in any way growing out of occupational lung diseases of any and every kind and description**, hearing loss or impairment, workmen[s'] compensation **and any and all other personal injury claims arising out of Claimant's employment at Avondale**, as well as the loss or impairment of any legal right to which Claimant is or was entitled, including specifically and without limitation all rights from any action or cause of action, of any and every nature whatsoever, which arises out of any individual instance of employment discrimination and/or continuing pattern and practice of employment discrimination by Avondale and/or the executive officers and/or other employees against Claimant and/or

> any class or group of which Claimant may be a member, ... **which may have resulted or may in the future result from any circumstances or situation from the beginning of the World to the date of this document including without limitation, Claimant's employment by Avondale and/or his presence on or about the premises of Avondale and/or from any act or omission of any party herein released, including without limitation all claims and demands made by Claimant in the suit described above and/or other suit filed by Claimant or on his behalf naming as defendants any and/or all persons or parties hereby released**. [Emphasis added.]

Huntington argues that the Release, while broad, clearly and expressly states that Mr. Joseph agreed to release all present and future claims, of any kind or nature, in any way growing out of occupational lung diseases (of any and every kind and description), and all other personal injury claims arising out of his employment at Avondale, and that this language fully encompasses and includes plaintiffs' survival action based on Mr. Joseph's contraction of mesothelioma as a result of his exposure to "dangerously high levels of toxic substances, including asbestos, and asbestos-containing products" while employed at Avondale. Plaintiffs counter that there is no mention of cancer or mesothelioma in the Release, and that the Release could not have affected the survival action based on Mr. Joseph's contraction of mesothelioma because that claim had not yet arisen.

As to this latter contention, it is clear that the Civil Code articles on compromise permit parties to a compromise to settle any difference they may have in the present or in the future that is the subject of a lawsuit or that could result in litigation. La. C.C. arts. 3071, 3076, 3082. Further, the jurisprudence on this point is settled. See **Daigle v. Clemco Indus.**, 613 So.2d 619, 622-23 (La. 1993). In **Daigle**, the court was asked to determine whether the Article 2315.1 beneficiaries of a tort victim may, during his lifetime, validly compromise their potential wrongful death claims against

the alleged tortfeasor, and whether such a compromise may be accorded *res judicata* effect. In answering this inquiry in the affirmative, this court explained:

> The ... Civil Code articles on transaction and compromise indicate that persons, by such a contract, may settle any difference they may have in the present or in the future that is the subject of a lawsuit or that could result in litigation. *See 1 S. Litvinoff, Obligations, Louisiana Civil Law Treatise, §§ 374, 392 (1962) and cases cited therein.* That learned commentator further notes that "As a matter of interpretation, the jurisprudence has asserted that the existence of litigation should be recognized from the moment a controversy arises between the parties. Moreover, the mere belief of the parties that litigation will arise suffices as the basis for a transaction and compromise." *Id. at 637.* This interpretation is confirmed by reading these articles in reference to another article on the same subject. *See La. Civ.C. art. 13.* Civil Code article 2004 provides that any contractual clause is null that, in advance, excludes or limits the liability of one party for intentional or gross fault that causes damage to the other; or that, in advance, excludes or limits the liability of one party for causing physical injury to the other party. The clear implication of these provisions, when considered *in pari materia*, is that **a compromise or contractual clause is not null because it excludes or limits liability in advance except when a party to the contract relinquishes future rights of action arising from his or her physical injury or from the intentional or gross fault of another party**. *See Ramirez v. Fair Grounds Corp., 575 So.2d 811 (La. 1991).*

Daigle, 13 So.2d at 622-23 (emphasis added).[7]

Acknowledging that **Daigle** recognizes that future things may be the subject of a compromise, plaintiffs alternatively argue that **Daigle**'s broad language was subsequently qualified in **Brown**, wherein the court stated: "Refining **Daigle**'s holding

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[7] While **Daigle**'s conclusion that liability can be waived in advance arose in the context of a wrongful death claim in which the beneficiaries under La. C.C. art. 2315.2 were parties to the release, the fact that plaintiffs did not sign the Release in this case does not affect its validity. When a tort victim compromises his personal injury claim, a release of any survival claim is a "necessary consequence" of that compromise. See La. C.C. art. 3076. Such a conclusion obtains from the nature of the survival action, which, as noted, comes into existence simultaneously with the existence of the tort, is transmitted to the beneficiaries upon the victim's death and permits recovery only for the damages suffered by the victim from the time of injury to the moment of death. **Guidry**, 377 So.2d at 322; **Taylor v. Giddens**, 618 So.2d 834, 840 (La. 1993). Although it does not derive from succession law, the survival action "is in the nature of a succession right." **Taylor**, 618 So.2d at 840. The genesis of the survival action is the tort victim's injury, and the damages recoverable are those of the tort victim. While Article 2315.1 beneficiaries are accorded a right to recover those damages upon the tort victim's demise, as legal successors of the tort victim, they are bound by the compromise of the tort victim. See discussion at pp. 4-8, *supra*.

that ... a pre-death release is permissible, we add a requirement that the release instrument unequivocally reflect, while not necessarily by direct reference, that the parties clearly contemplated a compromise of future wrongful death claims." **Brown**, 630 So.2d at 744. Plaintiffs seize on this language to argue that the Release executed by Mr. Joseph in this case does not "unequivocally reflect" that the parties contemplated a release of future mesothelioma claims. In support of this contention, they point out that the Release does not mention either cancer or mesothelioma, whereas it does specifically mention claims for workers' compensation, hearing loss, and employment discrimination, in addition to those for occupational lung disease. Thus, plaintiffs reason, because the Release expressly lists the claims the parties intended to compromise, the omission of mesothelioma from the list indicates that this disease was not expressly contemplated by the compromise. Plaintiffs cite **Breaux v. Mine Safety Appliances Co.**, 98-133, p. 6 (La.App. 5 Cir. 8/25/98), 717 So.2d 1255, 1257, for the proposition that if the compromise was intended to include mesothelioma, Mr. Joseph "would surely have included it in the listed diseases."[8] In effect, plaintiffs argue that for a release to "unequivocally reflect" an intent to resolve a claim for future disease or injury, it must expressly identify that disease or injury. Such is not the law.

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[8] **Breaux** should not be read for the proposition that the failure to specifically name cancer, mesothelioma, or any other disease in a release is in and of itself indicative of an intent to exclude that condition from the release, as the law clearly permits releases to be worded in general terms. Moreover, **Breaux** is factually distinguishable from the instant case. The plaintiff in **Breaux**, who had not been diagnosed with any asbestos related disease, settled his claim for the nominal sum of $500. ***Id.*** 98-133 at 6, 717 So.2d at 1257. In light of the small sum of money paid and the fact that the plaintiff had been told by his physician that he did not have asbestosis, the court concluded that the settlement was a nuisance settlement, signed by the plaintiff precisely because his did not have any asbestos related disease at the time. See ***id.*** That is a far different situation from the present case, in which Mr. Joseph, who had been diagnosed with pneumoconiosis, settled for a significantly greater amount ($25,000) and, in the Release, reserved his rights against seven other defendants, leaving him an avenue for additional recovery.

Indeed, the very decision on which plaintiffs' rely, **Brown**, itself acknowledges there is no necessity for direct reference to a particular injury, as long as the intent of the parties is clear. **Brown**, 630 So.2d at 757 ("[O]ur holding here, together with our holding in **Daigle**, permits defendants to conclusively compromise potential wrongful death claims, provided the intent to do so is unequivocally reflected, *while not necessarily by express mention of such claims*, in the language employed in the release instrument.") (Emphasis added.) The Civil Code permits a compromise to be "worded in general terms," as the 1985 Release clearly is. See La. C.C. art. 2051. It further specifies that "[w]hen the parties intend a contract of general scope but, to eliminate doubt, include a provision that describes a specific situation, interpretation must not restrict the scope of the contact to that situation alone." La. C.C. art. 2052. Thus, plaintiffs' attempt to limit the scope of the Release to the specific situations described therein, in the face of the otherwise broad language referencing "any and all other personal injury claims" is not sanctioned by the Civil Code.

Turning now to examine the four corners of the Release, mindful of the obligation to construe it as a whole, in light of attending events and circumstances,[9] this court finds that the intent of the parties thereto is clear, unambiguous, and unequivocal. In fact, that intent is expressly set forth in the Release:

> **It is specifically understood and agreed that the aforementioned provisions are intended to release the parties hereto only from liability on account of or in any way growing out of occupational lung diseases of any and every kind and description**, hearing loss or impairment, workmen[s'] compensation **and any and all other personal injury claims arising out of Claimant's employment at Avondale** .... [Emphasis added.]

The plain language of the Release reflects that Mr. Joseph intended to release his present and future claims for "occupational lung disease of any and every kind and

[9] See La. C.C. art. 2050.

description" and "any and all other personal injury claims arising out of [his] employment at Avondale." Plaintiffs do not dispute that mesothelioma is a disease of the lungs, commonly associated with exposure to asbestos in the workplace, *i.e.*, an "occupational lung disease."[10]

While it is certainly true that Mr. Joseph had not been diagnosed with mesothelioma at the time he executed the Release, the recitations in the instrument reflect that he signed the Release understanding that his future was indefinite and uncertain:

> Claimant specifically warrants that he has discussed his physical and mental condition with several physicians of his own choice and that he is fully aware of his medical condition and understands that the alleged injuries, illnesses, and/or diseases, and their results and consequences, and the damages allegedly sustained by him, whether mental or physical, may be permanent and progressive and that recovery therefrom may be uncertain and indefinite; and Claimant understands and agrees that in executing this Settlement Agreement and in giving this receipt and final complete discharge and release, he has had the benefit of advice and counsel of his own attorney and is relying wholly upon his own judgment, belief and knowledge as to the nature, extent and duration of said alleged injuries and damages, information obtained from physicians, and the advice of his own attorney, and he acknowledges that he has not been influenced in any manner in executing this Settlement Agreement and giving this release and indemnity agreement by any representations or statements whosoever made by the persons or parties hereby released, or by anyone representing them or any of them.

Ultimately, the fact that Mr. Joseph was diagnosed with mesothelioma decades after signing the Release, while tragic, is not grounds to have it set aside. See **Hymel v. Eagle, Inc.**, 08-1287, p. 10 (La.App. 4 Cir 3/18/09), 7 So.3d 1249, 1256 ("The subsequent discovery by a claimant that an injury was more serious than initially believed does not entitle the claimant to rescind the settlement and release agreement." (Citing **Robbert v. Carroll**, 97-0854 (La.App. 4 Cir. 9/10/97), 699 So.2d 1103, 1104-

[10] Mesothelioma is defined as "[a] malignant tumour of the pleura, the membrane lining the chest cavity." BLACK'S MEDICAL DICTIONARY 399 (40th ed. 2004).

05.)). It is not the province of the court to relieve a party of a bad bargain, no matter how harsh. **Hymel**, 08-1287 at 5, 7 So.3d at 1253.

Moreover, as noted in its recitals, the Release was executed with the advice and in the presence of Mr. Joseph's attorneys, who are known as having extensive experience in asbestos litigation. No error, fraud, duress, or undue influence in the confection and execution of this Release has been alleged by plaintiffs. See La. C.C. art. 3082. Rather, plaintiffs argue only that the Release is unenforceable to the extent it can be interpreted to extend to injuries (such as the contraction of mesothelioma) that manifested themselves subsequent to the execution of the agreement because such a result violates La. C.C. art. 2004, which provides:

> Any clause is null that, in advance, excludes or limits the liability of one party for intentional or gross fault that causes damage to the other party.
>
> Any clause is null that, in advance, exclude or limits the liability of one party for causing physical injury to the other party.

In **Hymel**, *supra*, the court explained that Article 2004 applies to prohibit settlements for injuries arising out of *future tortious conduct*, but does not prohibit settlement of past and future damages arising out of *tortious conduct that has already occurred*:

> It is obvious that the purpose of this article is to express the principle that it is against public policy to permit a party to obtain a license for the commission of future bad acts, i.e., if a party, in effect, were to receive in advance forgiveness for the commission of a future bad act, then it would act as an invitation, as it were, to commit the bad act. Society does not wish parties to do acts that cause injury to each other. Therefore, it is against public policy to enforce contracts that would allow parties to [do] so. ... However, where the bad act has already been committed the public policy is not the same. It is then too late to prevent the bad act. It is then time for another public policy to govern, the policy that favors settlement and compromise.

Hymel, 08-1287 at 9, 7 So.3d at 1255.

In this case, the physical injury to Mr. Joseph occurred when he was exposed to asbestos and other toxic materials during his employment at Avondale from 1969 to 1982, years before the 1985 Release was executed. The clear intent of the parties in executing the Release was not to prospectively exclude or limit Avondale's liability for the injury, in violation of the public policy expressed in Article 2004, but rather to compensate Mr. Joseph for both past and future damages stemming from that past injury–precisely the type of settlement sanctioned by the Civil Code and this court's decision in **Daigle**. The provisions of Article 2004 do not apply to prohibit enforcement of the 1985 Release.

Given the clear and unambiguous recitals in the Release (that Mr. Joseph hereby releases and forever discharges Avondale "from any and all liability, claims, demands, liens, remedies, debts, rights, actions and causes of action of whatever kind or nature which he now has or may hereafter acquire for any damages whatsoever, ... directly or indirectly sustained or suffered by Claimant on account of, or in any way growing out of occupational lung diseases of any and every kind and description, ... and any and all other personal injury claims arising out of Claimant's employment at Avondale"), considered in light of the attending events and circumstances (including but not limited to the fact that the amount of the settlement was not a nominal sum, Mr. Joseph had the advice and counsel of his own physicians and of experienced attorneys, and he expressly reserved his rights against seven other defendants, permitting him additional avenues of recovery), we find–logically, legally, and factually–that plaintiffs' survival claims based on Mr. Joseph's contraction of mesothelioma as a result of exposure to asbestos and asbestos-containing products during his employment by Avondale fall squarely within the terms of the 1985 Release.

Returning to the necessary elements for a plea of *res judicata*, it is clear that plaintiffs' survival action stems from the same juridical or material facts as Mr. Joseph's first lawsuit. In his 1982 lawsuit, Mr. Joseph sought damages for personal injuries sustained as a result of his exposure to toxic substances during the course and scope of his employment at Avondale. Through the 1985 Release, Mr. Joseph compromised all of his claims–past and future–for injury arising out of that exposure. In the current action, plaintiffs seek damages for personal injuries sustained by Mr. Joseph as a result of his exposure to toxic substances while employed at Avondale. In both the 1982 and 2016 actions, there is but one underlying legal obligation–the duty of Avondale to provide Mr. Joseph with a safe place to work. Clearly, the "cause" in both actions is the same, as is the "thing demanded."

Since all three elements of the *res judicata* plea are satisfied, the 1985 Release is entitled to preclusive effect. The district court erred in denying Huntington's exception of *res judicata*.

CONCLUSION

The jurisprudence of Louisiana has a long-stated, strong public policy favoring compromises:

> The law in its wisdom, and out of solicitude to end or avert threatened litigation, encourages settlement of disputes by compromise, and does not sanction the solemn acts of contending parties settling their disagreements being lightly brushed aside, unless there be present evidence of bad faith, error, fraud, etc. If such were not the law, there would be little incentive to any one to part with anything of value in the desire to escape the harassments of litigation. A compromise agreement, when freely entered into, is intended to have the binding effect of the thing adjudged. The law has ordained that such transactions have the dignity and force of a definitive judgment, in so far as definitely and irrevocably fixing the rights and liabilities of the parties thereto, as relates to the subject-matter dealt with. It is simply the act of the parties determining their own liabilities and obligations, instead of the court.

Beck v. Continental Cas. Co., 145 So. 810, 811 (La.App. 2 Cir. 1933). In this case, Mr. Joseph filed suit against Avondale, its executive officers, and their insurers seeking damages for his exposure to toxic materials while employed at Avondale. In 1985, the parties agreed to resolve the 1982 litigation and entered into a written compromise agreement. In the Release, in exchange for a sum of money, Mr. Joseph clearly and unambiguously released Avondale and its successors from liability for all present and future occupational lung disease and personal injury claims arising out of his employment at Avondale. The survival action asserted by plaintiffs in the instant case, seeking damages for Mr. Joseph's contraction of mesothelioma as a result of his exposure to toxic materials while employed at Avondale, falls squarely within the scope of that Release. The Release is entitled to preclusive effect. The judgment of the district court is reversed, and the exception of *res judicata* is sustained with respect to plaintiffs' survival action. The case is remanded to the district court for further proceedings.

REVERSED, EXCEPTION SUSTAINED, REMANDED.

01/29/20

SUPREME COURT OF LOUISIANA

No. 18-CC-02061

GISTARVE JOSEPH, SR., ET AL.

VS.

HUNTINGTON INGALLS INCORPORATED, ET AL.

ON SUPERVISORY WRITS TO THE CIVIL DISTRICT COURT, PARISH OF ORLEANS

JOHNSON, Chief Justice, dissents and assigns reasons.

In 1982, Mr. Joseph filed suit seeking damages for pneumoconiosis arising out of his exposure to toxic fibers, asbestos and silica dusts during his employment with Avondale between 1969 and 1982. Mr. Joseph settled that claim for $25,000 in 1985. Decades later, Mr. Joseph was diagnosed with mesothelioma and he filed a second suit in 2016 seeking damages as a result of this fatal disease. Following his death in 2016, plaintiffs' children filed a supplemental and amending petition substituting themselves as plaintiffs to "assert any and all rights and claims to which they are entitled as a result of the injuries and death of Gistarve Joseph, Sr. as well as to assert any and all survival and wrongful death claims to which they are entitled." The majority finds that the release signed by Mr. Joseph in 1985 encompassed a compromise of any future claim for contraction of mesothelioma, thereby precluding plaintiffs' survival action. I find the elements of res judicata are not satisfied in this case because the release does not indicate the parties intended to settle a future claim for mesothelioma. Therefore, I must respectfully dissent.

Based on the facts of this case, I do not find the parties intended the $25,000

settlement in 1985 to include a future claim for mesothelioma. The initial lawsuit alleged Mr. Joseph contracted pneumoconiosis. Unquestionably, pneumoconiosis and mesothelioma are two separate diseases. Mesothelioma was not mentioned in the 1985 release signed by Mr. Joseph. In fact, Mr. Joseph was not diagnosed with mesothelioma until decades after he settled his initial claim against Avondale. Notably, Mr. Joseph would not have been entitled to bring a claim related to mesothelioma when he filed suit in 1982 because he had not yet been diagnosed with the disease and any such lawsuit would have been premature. *See Cichirillo v. Avondale Indus., Inc*., 04-2894 (La. 11/29/05), 917 So. 2d 424, 430-32. It is undisputed that mesothelioma is an extremely rare disease, with only about 1% of those exposed to asbestos and other toxic fibers developing the disease. While medical experts were aware of mesothelioma in 1985, the rate of diagnosis and existence of mesothelioma claims were undoubtedly minuscule compared to today's environment due to the long latency of the disease. Additionally, a mesothelioma diagnosis is effectively a death sentence and claims today typically result in judgments exceeding a million dollars. Considering the settlement in this case totaled only $25,000, and the release documents failed to specifically include mesothelioma, I find the majority errs in finding plaintiffs' claims barred by res judicata.[1]

While our law does allow parties to settle future claims, this is not unequivocal. The release signed by Mr. Joseph was admittedly broad, but I find it too ambiguous to hold Mr. Joseph intended to release a future claim for cancer/mesothelioma. Notably, the release specifies that Mr. Joseph "has discussed his physical and mental condition with several physicians" and that "he is fully aware of his medical condition

[1] Compare this case to *Hymel v. Eagle, Inc*., 08-1287 (La. App. 4 Cir. 3/18/09), 7 So. 3d 1249, 1251, *writ denied*, 09-0873 (La. 5/15/09), 8 So. 3d 590, wherein the settlement and release specifically included release of any and all future asbestos related mesothelioma and cancer claims, even though the claimant had not yet been diagnosed with mesothelioma at the time of settlement.

and understands that the alleged injuries, illnesses and/or diseases, and their results and consequences, and the damages allegedly sustained by him...may be permanent and progressive and that recovery therefrom may be uncertain and indefinite....” Mesothelioma is a form of cancer and a completely separate disease from pneumoconiosis or asbestosis. Mesothelioma is not a progression or worsening of these other occupational lung diseases. Thus, although Mr. Joseph may have fully understood that his then-diagnosed medical condition could worsen over time, there is nothing in the release to sufficiently demonstrate Mr. Joseph was aware that he could develop mesothelioma as a result of the same exposure and that he was specifically including that future claim in the 1985 settlement.

As noted by the majority, a compromise settles only those differences the parties clearly intended to settle. This court has generally recognized that “[e]ven when valid, releases of future actions are narrowly construed to assure that the parties fully understand the rights released and the resulting consequences. As a result, if the release instrument leaves any doubt as to whether a particular future action is covered by the compromise, it should be construed not to cover such future action.” *Brown v. Drillers, Inc*., 630 So. 2d 741, 753 (La. 1994). Avondale was certainly aware of mesothelioma long before it agreed to a settlement of Mr. Joseph’s claim. Avondale could have insisted that language be added to the release to specifically include any future mesothelioma claim. Here, the failure of the release to include language that would have clearly provided for a waiver of a future claim for mesothelioma evidences a lack of intent to compromise such future action. *See id*. at 754. For these reasons, I respectfully dissent.

01/29/20

SUPREME COURT OF LOUISIANA

No. 2018-CC-02061

GISTARVE JOSEPH, SR., ET AL.

VS.

HUNTINGTON INGALLS INCORPORATED, ET AL.

On Supervisory Writ to the Civil District Court,
Parish of Orleans

Hughes, J., dissents for the reasons assigned by Chief Justice Johnson.