

# SUPREME COURT OF LOUISIANA

*No. 98-CC-0455*

JUDY WALLS ET AL.

Versus

AMERICAN OPTICAL CORPORATION ET AL.

ON WRIT OF CERTIORARI TO THE COURT OF APPEAL,  
FIFTH CIRCUIT, PARISH OF JEFFERSON

LEMMON, J., Dissenting

The significant issue of law in this case is whether a wrongful death cause of action, which arises out of a long-latency occupational disease, is governed by the law in effect on the date of death (1995) or by the law in effect at the time of the wrongful conduct that eventually caused that death (1964-1970). My major point of disagreement with the majority is my conclusion that a wrongful death action, like a survival action, involves a derivative claim.

The majority, relying on Burmaster v. Gravity Drainage Dist. No. 2, 366 So. 2d 1381 (La. 1978), concludes that the Legislature could abolish a cause of action against executive officers for wrongful death during the interval between the wrongful conduct and the date of death, because the injury had not yet occurred and the cause of action had not yet vested. However, the Burmaster decision involved a traditional tort, while the present case involves a long-latency occupational disease allegedly caused by negligent and significant tortious exposures. In Burmaster, both the accident that injured the direct tort victim and his ultimate drowning death occurred simultaneously, and those events both occurred after the effective date of the intervening legislative act. In the present case, the significant tortious exposures that injured Walls (and

ultimately resulted in his death) occurred and the disease was diagnosed before the effective date of the 1976 amendment, although his death occurred years later in 1995. Because of this factual distinction, the general tort principles of accrual and vesting of rights articulated in Burmester are inapplicable in this context. As noted in Cole v. Celotex Corp., 599 So. 2d 1058 (La. 1992), these principles are “inept” for addressing the unique problems presented by long-latency occupational diseases.

Of equal significance, the statement in Burmester that a wrongful death remedy is purely a statutory creation subject to legislative repeal is based on the antiquated common law notion that, in the absence of a statute, no cause of action existed for a tort-caused death, a notion this court erroneously borrowed from common law in the often criticized decision in Hubgh v. New Orleans & C.R. Co., 6 La. Ann. 495 (1851).<sup>1</sup>

On several occasions, this court has recognized that the holding in Hubgh expressed a mistaken view of the nature of wrongful death actions in Louisiana. Nathan v. Touro Infirmary, 512 So. 2d 352, 355-56 (La. 1987)(noting that “our article

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<sup>1</sup>Other state and federal courts have retreated on the original common law theory that there is no remedy for wrongful death in the absence of special legislation. The Court in Morange v. State Marine Lines, Inc., 398 U.S. 375 (1970), recognized that a wrongful death action existed in general maritime law, reasoning:

[T]here is no present public policy against allowing recovery for wrongful death. The [wrongful death] statutes evidence a wide rejection by the legislatures of whatever justifications may once have existed for a general refusal to allow such recovery. This legislative establishment of policy carries significance beyond the particular scope of each of the statutes involved. The policy thus established has become itself a part of our law, to be given its appropriate weight not only in matters of statutory construction but also in those of decisional law.

398 U.S. at 390-91. See also David W. Robertson et al., Cases and Materials on Torts 331 (1989)(noting that the court in Gaudette v. Webb, 362 Mass. 60, 284 N.E.2d 222 (1972) followed Morange to recognize a wrongful death action under common law independent of statute); Jonathan S. Massey and Ned Miltenberg, Wrong Ideas About Wrongful Death Statutes, 33 Trial 24 (Jan. 1997)(noting that several jurisdictions have recognized common law attributes of wrongful death action after Morange).

2315 was drawn directly from French law and was misinterpreted in Hubgh"); Callais v. Allstate Ins. Co., 334 So. 2d 692 (La. 1975); King v. Cancienne, 316 So. 2d 366 (La. 1975). See also Ferdinand F. Stone, 12 Louisiana Civil Law Treatise: Tort Doctrine §74 (1977)(characterizing Hubgh as wrongly decided and as "spawn[ing] . . . unsound doctrine"). Nevertheless, "even though the Hubgh result was subsequently discredited by the courts and the commentators, the effects of Hubgh remain today." Thomas J. Andre', Louisiana Wrongful Death and Survival Actions §1-2 (2d ed. 1993). One such lingering effect is the mistaken notion that wrongful death actions are simply statutory creations subject to legislative repeal without due process protection.

The Louisiana survival and wrongful death actions spring from the fountainhead of Louisiana tort law, Civil Code Article 2315, and the subsequently enacted Articles 2315.1 and 2315.2 (specifically pertaining to survival and wrongful death actions) simply limit those actions to specific beneficiaries and to specific prescriptive periods.<sup>2</sup> A wrongful death action, like a survival action, is a right derived from an underlying injury sustained by the direct tort victim.<sup>3</sup> Moreover, each action is derivative in that

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<sup>2</sup>The wrongful death action "really springs from the first sentence of article 2315," and "the amendments [Articles 2315.1 and 2315.2] merely regulate the exercise of the right of action but do not create it." Stone, supra at §75. Under French doctrine, "this [wrongful death] damage is necessarily suffered by the victim before his death. No matter how rapidly the death follows the blows, in that instant, however brief it was, where the victim already wounded has not yet died, when the patrimoine still existed, the obligation to indemnify arises. Stone at §75 n. 58.

<sup>3</sup>In In re Hawaii Federal Asbestos Cases v. Allied Signal, Inc., 854 F.Supp. 702, 712 (D. Hawaii 1994), the court explained:

The foregoing authorities demonstrate that a spouses's wrongful death action is derivative of the decedent's injury and dependent for its viability upon the nature of the harm suffered by the decedent. If the harm suffered by the decedent was not actionable, because the tortfeasor was immune from suit, or because the tortfeasor owed no duty to the decedent, then the wrongful death action for damages derived from that harm must necessarily fail.

However, the wrongful death action is a separate and independent action in the sense that it seeks different,

there would be no wrongful death action or survival action for the beneficiaries but for the tortious conduct to the direct tort victim. Wrongful death and survival actions are separate causes of action, but both derive from the same injury. When death follows the injury to the direct tort victim, a new set of claimants (beneficiaries) comes into being, but there remains only one tort victim and one injury.

The direct tort victim's own action for pre-amendment tortious exposures, as well as the beneficiary's survival action, clearly are not barred by the 1976 amendment. One federal court has held that if the survival action is governed by the pre-amendment law, then the same law should govern the wrongful death action arising out of the same underlying tortious conduct to the same tort victim. Coates v.A.C. and S., Inc., 844 F.Supp. 1126, 1131 (E.D. La. 1994). The court in Coates, which was an action against manufacturers, extended the rationale of Cole to the wrongful death context, reasoning that "the trigger for the applicable law is 'exposure' to the injury producing harm, whether the case is a survival or a wrongful death action." In so extending Cole, the court relied upon the derivative nature of wrongful death actions and analogized them to contribution actions, stating that both contribution and wrongful death actions "are essentially derivative claims which each add to the negligence cause of action formula simply another event and another party." 844 F.Supp. at 1131. Stressing that it is not simply a "death" action, but rather a "wrongful death" action, the court stated:

[T]he beneficiaries' right to those damages originates with the wrongful

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if derivative damages, accrues at the time of death rather than at the time of injury, and is subject to a different statute of limitations. Assuming that the underlying injury or harm was actionable at the time it was sustained by the decedent, the derivative wrongful death action is entitled to go forward subject to the separate procedures and defenses specifically denominated in the wrongful death statute. (emphasis added).

Significantly, Hawaii is the only state that has never adopted the common law rule rejecting a non-statutory action for wrongful death. Stuart M. Speiser, et al, 1 Recovery for Wrongful Death and Injury §1:3 (3d ed. 1997).

act of the tortfeasor which causes injury and subsequent death. The claim at issue is not simply a death action but a wrongful death action. It merely adds to the article 2315 formula another party and another event, i.e., in addition to the tortfeasor's fault, and the victim's injury, in the event that the victim dies on account of the injury, his survivors may recover from the tortfeasor for the damage they sustain as a result of the victim's death.

844 F.Supp. at 1129-30.

As the court in Coates reasoned, the fact that "the victim may eventually die as a result of long-term disease resulting from continuous pre-Act exposure is simply the beginning of the end point of prescription of the long-term damage/death claim." 844 F.Supp. at 1130. Hence, death marks the point at which prescription begins to accrue, but the wrongful death cause of action nevertheless relates back to the injury to the tort victim. Significantly, wrongful death beneficiaries have been allowed to compromise their cause of action prior to the tort victim's death. Brown v. Drillers, Inc., 93-1019 (La. 1/14/94), 630 So. 2d 741. Indeed, wrongful death actions have been recognized by this court to be relational in nature.<sup>4</sup> Callais v. Allstate Ins. Co., 334 So. 2d 692 (La. 1975)(on reh'g).

In summary, I conclude that a wrongful death cause of action is derivative of the injury incurred by the direct tort victim, subject to the specific limitations in the Civil Code, and that a cause of action from wrongful death vests at the time of the injury to the direct tort victim, although prescription does not begin to run until the death of the tort victim. In the case of a long-latency occupational disease, as opposed to a traditional tort, I would extend our decision in Cole and hold that the law applicable to

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<sup>4</sup>This court in Callais recognized the relational nature of a wrongful death action, stating:

"[W]rongful death is a relational concept. It embraces conduct that causes the death of another. It is bilateral in the sense that two parties are involved: the actor, who causes the death, and the victim, whose death gives rise to the cause of action."

334 So. 2d at 700 (emphasis in original).

the wrongful death action is the law as it existed at the time of the significant tortious exposure that caused the disease (or at least the time of diagnosis of the disease, as in this case).

To hold that the direct tort victim and the survival action beneficiaries have a cause of action in the context of a long-latency occupational disease against the tort victim's employer's executive officers, while the wrongful death beneficiaries do not, is an arbitrary result that is not required by the fact that a wrongful death cause of action does not begin to accrue for prescription purposes until the death. Indeed, to avoid a similar arbitrary result, we recognized a wrongful death cause of action in favor of the parents of an unborn child in Danos v. St. Pierre, 402 So. 2d 633 (La. 1981)(on reh'g). There, we reasoned it would be illogical and arbitrary to hinge the existence of a wrongful death cause of action on whether the child lived outside the womb for a few minutes. Likewise, it is arbitrary to allow a wrongful death cause of action against executive officers if a quick death resulted before the effective date of the 1976 amendment, but to disallow such a cause of action when the death results from a lingering disease caused by the same pre-1976 tortious conduct.

When, as in the instant case, all of the direct victim's tortious exposures occurred before the 1976 amendment, application of that amendment to bar the tort victim's beneficiaries' wrongful death cause of action violates the rules involving retroactive application of laws. Like the direct tort victim's own cause of action, the wrongful death beneficiaries' cause of action is also entitled to due process protection, and the 1976 amendment should not be applied retroactively to bar such claims arising prior to the amendment from long-latency occupational disease caused by significant tortious exposure.