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## McCarthy v. Entergy Gulf States

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**LEND ME AN EAR: GRADUAL OCCUPATIONAL HEARING  
LOSS AND RECOVERY UNDER THE THEORY OF *CONTRA  
NON VALENTEM* IN *MCCARTHY V. ENERGY GULF  
STATES, INC.***

Leigh Hill\*

The recent Louisiana Third Circuit Court of Appeal case, *McCarthy v. Entergy Gulf States, Inc.*, addresses several issues involved in situations where plaintiffs are injured in the course of their employment, but are unaware of this injury and its accumulation until many years, if not decades, later.<sup>1</sup> The Third Circuit first addresses the issue of *contra non valentem* and how it applies to this injury, gradual in nature. The third circuit further discusses, though not in as great a detail, the questions of contributory negligence and exclusivity of a remedy in Workers' Compensation, both of which are found not to apply to this case.

I. BACKGROUND

While this litigation began with three original plaintiffs, only two plaintiffs took part in this appeal: Alexander Valerie, Jr. and Milton Pharr.<sup>2</sup> Valerie and Pharr were employed at the Nelson Station Facility of Entergy/Gulf States (EGS) and undisputedly suffered hearing loss between the time of their employment and their respective retirements from EGS.<sup>3</sup> Their hearing loss was found to be caused by the noise levels generated at this facility and

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1. *McCarthy v. Entergy Gulf States, Inc.*, 2011-600 (La. App. 3 Cir. 12/7/11), 82 So. 3d 336, *writ denied*, 84 So. 3d 553 (La. 2012).

2. *Id.* at 339; *see* Original Brief of Appellees Milton Pharr and Alexander Valerie, *McCarthy v. Entergy Gulf States, Inc.*, 82 So. 3d 336 (La. App. 3 Cir.), No. 11-00600-LA, 2011 WL 2700135.

3. *McCarthy v. Entergy Gulf States, Inc.*, 82 So. 3d at 342.

EGS's failure to provide adequate protection and information to Valerie and Pharr.<sup>4</sup>

Both men spent over three decades working at this facility. Valerie's employment with EGS lasted 34 years, from 1952 to 1986.<sup>5</sup> Pharr worked in these conditions for 36 years, from 1959 to 1995.<sup>6</sup> While EGS was aware of the relationship between industrial noise levels and the possibility of hearing loss at the time that the plaintiffs began working at the facility, evidence showed that EGS failed to acknowledge this problem until the 1970s, almost twenty years after Valerie and Pharr had already been exposed to dangerous levels of noise.<sup>7</sup> But, even with EGS's acknowledgement of this danger, the use of hearing protection did not become mandatory in the facility until about 1980.<sup>8</sup> This mandatory policy was effectively useless, however, as it was never enforced, nor were employees instructed on when, where, and how protection should be used or why the protection was necessary.<sup>9</sup>

EGS had Valerie and Pharr undergo multiple audiograms, which revealed that both employees suffered significant hearing loss. Valerie testified to having received a letter with this information stating that EGS would address the issue to the Corporate Occupational Health and Safety Group (COHS).<sup>10</sup> However, Valerie never heard anything from COHS.<sup>11</sup> It was not until April 1999, when Mr. Valerie's attorney arranged for him to have an audiogram that Mr. Valerie actually became aware this damage to his hearing.<sup>12</sup> Pharr testified to retaining copies of his

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4. *Id.*

5. *Id.* at 344.

6. *Id.* at 345.

7. *Id.* at 341.

8. *Id.* at 344.

9. *Id.* at 344, 346.

10. *Id.* at 345.

11. *Id.*

12. *Id.* at 344.

tests, but he did not think, nor was he told that, his hearing loss was related to the noise generated at the facility.<sup>13</sup>

Judge Clayton Davis of the Fourteenth Judicial District Court (JDC) of Calcasieu Parish entered a judgment for plaintiffs, Mr. Valerie and Mr. Pharr, on the grounds that prescription had effectively been halted by the doctrine of *contra non valentem*; there was no evidence that either plaintiff was contributorily negligent for the hearing loss he suffered. Also, the court ruled that the Workers' Compensation Act did not bar recovery from the employer in this case.

## II. DECISION OF THE COURT

The Court of Appeal of Louisiana, Third Circuit, in an opinion authored by Judge Peters, affirmed the decision of the Fourteenth Judicial District Court. The Third Circuit found that plaintiffs' evidence sufficiently showed that damages had resulted from noise levels generated in the Nelson Station Facility and that the Fourteenth JDC had not abused its discretion in its findings or in the award of general damages. The Third Circuit further affirmed that neither employee was barred any recovery through contributory negligence or by the Workers' Compensation Act exclusivity remedy.<sup>14</sup> Moreover, the doctrine of *contra non valentem* suspended the running of prescription and plaintiffs' claims were preserved and afforded remedy.

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13. *Id.* at 346.

14. Generally, unintentional acts causing injury to an employee while in the workplace is the basis for an employee's exclusive remedy provided under the Worker's Compensation Act. Because of the nature of plaintiffs' injuries, the Workers' Compensation Act exclusivity did not bar plaintiffs from suing their employer for damages that would also be covered or partially covered under the Workers' Compensation Act.

## III. COMMENTARY

As with all lawsuits, the rules of prescription must be adhered to and enforced so as not to prejudice a defendant and to further judicial efficiency. Prescription begins to run once a potential plaintiff knows or should have been aware of the wrongful conduct, the damage this conduct caused, and the causation between the damage and conduct.<sup>15</sup> The necessity of awareness of a connection between the damage and conduct is the crux of occupational disease cases. The question in these cases, specifically those cases in which damage caused by certain characteristics of a job site is gradual and diagnosis is likely to be made years after a plaintiff's first exposure, is when should a plaintiff become aware that the exposure during employment caused him damage? When a plaintiff becomes aware of damages caused during employment, prescription begins to run.<sup>16</sup>

In *Broussard v. Union Pacific*, the Louisiana Second Circuit Court of Appeal analyzed a test laid out by the Supreme Court of the United States that provides great assistance with the issue of prescription in occupational disease cases involving long-term hearing loss.<sup>17</sup> This analysis states:

A hearing loss not specifically related to an incident or trauma has no identifiable moment of occurrence. Thus, no cause of action can accrue with respect to a hearing loss that develops over a substantial period of time until the injury is fully evolved and an employee knows or should have know of the conditions and its cause. The time limitation for filing a cause of action for an occupational disease does not start until the harmful consequences of the employer's negligence manifest themselves to the employee to the extent that a diagnosis is possible of the

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15. Original Brief of Appellees, *supra* note 2, at 3.

16. *Id.* at 5. (The Louisiana Second Circuit Court of Appeal found that the running of prescription did not commence until the victim's disease had been diagnosed and the victim had realized the relationship between his diagnosis and his working condition. See *Broussard v. Union Pacific*, 700 So. 2d 542 (La. App. 2 Cir. 1997)).

17. 700 So. 2d 542, 544.

injury and its causal connection to the work environment.<sup>18</sup>

Using this test developed by the Supreme Court, it seems clear that the Third Circuit Court of Appeal in deciding *McCarthy*, diligently applied the principles of prescription and respected the delicate nature these rules have when applied to cases involving occupational disease. In *McCarthy*, plaintiffs Pharr and Valerie were exposed to damaging amount of noise during a span of approximately thirty-five years. During this time, each man's hearing was affected so gradually, albeit harmfully. Therefore, he had no reason to believe that his hearing was deteriorating and did not know the cause of this deterioration until it was diagnosed by a physician.<sup>19</sup>

That fact that a relationship between damage that has been diagnosed or realized and the conduct that caused the damage requires that the doctrine of *contra non valentem non currit praescriptio (contra non valentem)* be applied in the *McCarthy* case. This doctrine halts the running of prescription against a tort victim who has not yet been able to bring a suit for reasons beyond his personal will.<sup>20</sup> *Contra non valentem* should be used to suspend prescription in the following circumstances:

- (1) where there was some legal cause which prevented courts or their officers from taking cognizance of or acting on plaintiff's actions, (2) where there was some condition with a contract with the proceedings which prevented the

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18. *Id.*, citing *Urie v. Thompson*, 337 U.S. 163 (1949). See Original Brief of Appellees, *supra* note 2, at 5.

19. Original Brief By Appellees, *supra* note 2, at 7. (Mr. Pharr testified that during his time with GSU he received no explanation of the importance of wearing hearing protection. While Mr. Pharr did receive periodic hearing tests, the results of these tests were not explained to him by a GSU physician, nor was he told to seek the assistance of a specialist. Mr. Valerie, who had a very limited education, had also never been instructed on using hearing protection, nor had he been informed of the harm associated with noise exposure. Further, Mr. Valerie and his wife testified to having never received the results of his hearing tests at their home).

20. LA. PRAC. CIV. PRETRIAL § 6:98 (2012 – 2013 ed.). See also Benjamin West Janke & François-Xavier Licari, *Contra Non Valentem in France and Louisiana: Revealing the Parenthood, Breaking a Myth*, 71 LA. L. REV. 503 (2011).

creditor from suing or acting, (3) where defendant himself has done some act effectually to prevent plaintiff from availing himself or his cause of action, and (4) where some cause of action is not known or reasonably knowable by plaintiff, even though his ignorance is not induced by defendant.<sup>21</sup>

Mr. Valerie and Mr. Pharr did not have knowledge and, specifically as nonmedical professionals and because of EGS's failure to provide adequate information to their employees, had no reason to know of the connection between the hazardous noise conditions of the Nelson Station Facility and their diagnosis, which took place decades after they began their careers at EGS.<sup>22</sup> The Third Circuit points out prescription starts running "when plaintiff has reasonable basis to pursue claim against specific defendant."<sup>23</sup> This Court further explains that it is sufficient for the inaction to be reasonable in order to have the benefit of *contra non valentem*.<sup>24</sup> Until Mr. Valerie and Mr. Pharr had reasonable knowledge that the damage they were suffering was connected to their employment conditions, they had no reasonable knowledge or claim to bring in court. While it may be difficult to understand that plaintiffs had no knowledge of their hearing loss, as one would presumably recognize that his hearing is deteriorating, the appellate court emphasizes the fact that both plaintiffs are nonmedical professionals who were continuously exposed to noise that very gradually and very negatively affected each man's hearing. The trial court record supports this.<sup>25</sup>

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21. *Id.* at § 6:100.

22. *See* McCarthy v. Entergy Gulf States, Inc., 82 So. 2d at 343.

23. *Id.* at 344, citing Jordan v. Employee Transfer Corp., 509 So. 2d 420, 424 (La. 1987).

24. *Id.*

25. Original Brief of Appellees, *supra* note 2, at 7. ("Moreover, [Mr. Valerie] did not even know he had a hearing loss until shortly before he filed a lawsuit.").

## IV. CONCLUSION

Occupational disease cases can present particularly complex issues of prescription. When an injury has accrued almost seamlessly throughout a span of years, determining a date of injury can be next to impossible. To protect victims in these instances the doctrine of *contra non valentem* acts to keep their claims alive so that they will not be prohibited from seeking recovery when their claims would have otherwise prescribed due to no fault of their own. This is exactly the way the doctrine worked for Messrs. Pharr and Valerie. The Louisiana Third Circuit Court of Appeal determined that, because the evidence showed Pharr and Valerie had no conclusive personal or medical knowledge of their hearing loss until decades after their first exposure to dangerous levels of noise, their claims were preserved by this doctrine. Prescription on their claims would thus not begin until they obtained this knowledge and understood the connection between their loss of hearing and their work at the EGS facility.