

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2011 CA 0166

**JOEL WILLEBY, INDIVIDUALLY AND AS NATURAL TUTOR
OF HIS MINOR DAUGHTER, DAWN WILLEBY**

VERSUS

**JE MERIT CONSTRUCTORS, INC., TRENT THIBODAUX,
WILLE B. HURST, JAMES SCOTT BISSETTE, PAUL GENTILE,
DARRYL ROBINSON, DAVID RUMFOLA, AND RANDY P.
FARRIEL**



Judgment Rendered: February 10, 2012

On Appeal from the 21st Judicial District Court
In and for the Parish of St. Helena
Docket No. 17,937

Honorable Bruce C. Bennett, Judge Presiding

D. Blayne Honeycutt
Denham Springs, LA

Counsel for Plaintiff/Appellee
Joel Willeby

and

Connie M. Aucoin
Destrehan, LA

Martin A. Stern
Raymond P. Ward
Christine S. Fortunato
William E. Wright, Jr.
John Jerry Glas
Beverly A. DeLaune
New Orleans, LA

Counsel for Defendant/Appellant
Exxon Mobil Corporation

*Egs - Gaidry, J. concurs with reasons
Trudy, J. dissents.
McDoherty, J. dissents and assigns reasons.*

André G Bourgeois
Brent J. Bourgeois
Baton Rouge, LA

Counsel for Defendant/Appellee
JE Merit Constructors, Inc.

**BEFORE: WHIPPLE, GUIDRY, GAIDRY, McDONALD,
AND HUGHES, JJ.**

HUGHES, J.

This is an appeal from a judgment imposing liability under an indemnity agreement. This case arose following a January 13, 2002 accident at Exxon Mobil Corporation's ("ExxonMobil") Baton Rouge refinery, which caused injuries to Joel Willeby. At the time of the accident, employees of ExxonMobil's contractor, JE Merit Constructors, Inc. ("JE Merit") had opened a flange on a butylene pipeline, which ignited and caused severe burns to Mr. Willeby, who was acting in the course and scope of his employer, ExxonMobil, at the time.

On September 17, 2002 Mr. Willeby filed suit, individually and on behalf of his minor daughter, Dawn Willeby, against JE Merit and its employees, Trent Thibodaux, Wille B. Hurst, James Scott Bissette, Paul Gentile, Darryl Robinson, David Rumfola, and Randy P. Farriel. Along with its answer, denying any fault, JE Merit asserted a third party claim against ExxonMobil, citing an indemnity agreement (contained in the parties' "Continuing Services Agreement") previously signed by these two parties. ExxonMobil filed an answer to the third party demand, denying any negligence on its part and further asserting that any liability it might have would extend only to its own negligence and that no indemnity was owed to JE Merit for JE Merit's negligence; Exxon also urged exceptions of prematurity and no cause of action.

After extensive litigation,¹ Mr. Willeby and JE Merit entered into a

¹ In conjunction with pre-trial litigation in this case, the supervisory review of this court was sought on several issues not affecting the disposition of this appeal. See **Willeby v. JE Merit Constructors, Inc.**, 2003 CW 0211 (La. App. 1 Cir. 2/6/03) (unpublished), writ denied, 2003-1839 (La. 10/17/03) (supervisory review denied by this court of the trial court's refusal to grant a *forum non conveniens* venue transfer); **Willeby v. JE Merit Constructors, Inc.**, 2004-2421 (La. App. 1 Cir. 6/10/05), 917 So.2d 21 (wherein this court held that JE Merit, who posted a jury trial deposit within ten days after the failure of the plaintiff (who had requested a jury trial) to timely post the jury bond, pursuant to statutory authority, was entitled to a jury trial); **Willeby v. JE Merit Constructors, Inc.**, 2005 CW 1824 (La. App. 1 Cir. 10/17/06) (unpublished), writ denied, 2005-2461 (La. 3/24/06), 925 So.2d 1239 (refusal to grant supervisory review of the trial court's denial of ExxonMobil's motion for summary judgment, in which it contended that the indemnity agreement did not require ExxonMobil's indemnity of JE Merit's negligence); **Willeby v. JE Merit Constructors, Inc.**, 2009 CW 1411 (La. App. 1 Cir. 3/16/10) (unpublished) (denial of ExxonMobil's application for supervisory review of the trial court's grant of a motion to substitute Mr. Willeby for JE Merit, as cross-claimant on JE Merit's indemnity claim against ExxonMobil); **Willeby v. JE Merit Constructors, Inc.**, 2009 CW 2085 (La. App. 1 Cir. 3/16/10) (unpublished), writ denied, 2010-0859 (La. 6/10/10), 38 So.3d 339 (supervisory review denied by this

settlement agreement on March 17, 2006, wherein JE Merit agreed “to pay” to Mr. Willeby and his daughter a total of \$3,000,000 (\$2,950,000 to Mr. Willeby and \$50,000 to Dawn Willeby), which was to be paid as follows: (1) \$1,150,000 in cash, with \$600,000 to be paid within thirty days of the execution of the settlement and \$550,000 to be paid by June 15, 2006; (2) \$177,000 to be paid in settlement of the workers’ compensation carrier’s lien; and (3) by JE Merit’s transfer and assignment of all of its rights and interests to Joel Willeby of its claim to recover indemnity from third party defendant, ExxonMobil, “arising out of the claim for damages and [JE] Merit’s settlement thereof,” and expressly including JE Merit’s rights and interests under the “Continuing Service Agreement” with ExxonMobil (formerly Exxon Corporation), which “provides for indemnity to [JE] Merit based on ExxonMobil’s allocable fault in contributing to the injuries suffered by the Willebys from the January 13, 2002 accident.” On June 16, 2006 Mr. Willeby and JE Merit filed a joint motion seeking to have Mr. Willeby substituted as the cross-claimant having the right to pursue the indemnity claim against Exxon. Over ExxonMobil’s objection, the trial court granted the motion to substitute on May 21, 2009. This court denied supervisory review of the May 21, 2009 order of the trial court. See Willeby v. JE Merit Constructors, Inc., 2009 CW 1411 (La. App. 1 Cir. 3/16/10) (unpublished).

Thereafter, in lieu of a trial on the indemnity claim, Mr. Willeby and ExxonMobil filed written “Joint Trial Stipulations” on August 2, 2010, along with attachments thereto,² and submitted the matter to the trial court for decision on the

court of the trial court’s refusal to grant ExxonMobil’s exception of no cause of action as to indemnity claim, wherein ExxonMobil contended the assignment of the claim by JE Merit to Mr. Willeby was violative of the Louisiana Workers’ Compensation Act).

² The attachments to the written joint stipulations included: Mr. Willeby’s petition; JE Merit’s answer and cross-claim; ExxonMobil’s exceptions and answer to the cross-claim; the “Continuing Services Agreement” between ExxonMobil and JE Merit (containing the indemnity agreement); the “Settlement and Assignment of Rights” signed by JE Merit and Mr. Willeby; and evidence of payment by JE Merit of \$177,000 to Petroleum Casualty Company (ExxonMobil’s workers’ compensation carrier) on April 25, 2006, \$600,000 to Mr. Willeby on April 25, 2006, and \$550,000 to Mr. Willeby on June 22, 2006.

indemnity claim, to be decided on the record and the written stipulations. The written stipulations of the parties included the following: (1) on January 13, 2002 Mr. Willeby, an employee of ExxonMobil, was severely burned in a fire during a turn-around at the ExxonMobil refinery's Alkylation Unit; (2) Mr. Willeby suffered second and third degree burns over two-thirds of his body, including his legs, back, neck, and mouth; (3) Mr. Willeby filed suit against JE Merit on September 17, 2002, contending that he sustained injuries as a result of JE Merit's acts of negligence and the acts of negligence of JE Merit employees; (4) JE Merit filed an answer to the petition on October 22, 2003; (5) at the time of Mr. Willeby's injuries, JE Merit was performing services in ExxonMobil's refinery pursuant to the terms of a "Continuing Services Agreement," dated April 5, 1999; (6) JE Merit filed a cross-claim against ExxonMobil, on October 6, 2005, seeking indemnity from ExxonMobil pursuant to the terms of the April 1999 "Continuing Services Agreement;" (7) ExxonMobil filed exceptions and an answer to the cross-claim on May 6, 2005; (8) Mr. Willeby and JE Merit entered into a "Settlement and Assignment of Rights" on March 17, 2006, whereby JE Merit agreed to pay the sum of \$1,327,000, with \$1,150,000 to be paid in cash to Mr. Willeby and \$177,000 to be paid to satisfy the workers' compensation lien; the agreement further provided that JE Merit assigned and transferred to Mr. Willeby its claim for indemnity under the "Continuing Services Agreement" as related to Mr. Willeby's claim for damages; (9) payment of sums under the settlement agreement were made as follows: \$177,000 to the workers' compensation carrier on April 25, 2006; \$600,000 to Mr. Willeby on April 25, 2006; and \$550,000 to Mr. Willeby on June 22, 2006; (10) JE Merit's agreement to pay the sum of \$1,327,000 in cash for Mr. Willeby's alleged damages was reasonable; (11) JE Merit had both potential and actual liability to Mr. Willeby as a result of JE Merit's negligence; (12) Mr. Willeby now seeks indemnity from ExxonMobil for ExxonMobil's alleged

allocable share of the \$1,327,000 paid by JE Merit; (13) the degree or percentage of fault of ExxonMobil in causing the injuries suffered by Mr. Willeby from the January 13, 2002 accident is forty (40%) percent; (14) the degree or percentage of fault of JE Merit in causing the injuries suffered by Mr. Willeby from the January 13, 2002 accident is sixty (60%) percent; (15) the parties will not offer, file, or introduce into evidence any additional exhibits during the trial of this matter; (16) the parties have not stipulated to a judgment in any amount against ExxonMobil, and the trial court will decide all issues of law regarding the "Settlement and Assignment of Rights" and the "Continuing Services Agreement;"³ (17) the parties agree that legal interest on any judgment in favor of Mr. Willeby will commence to run on May 15, 2006; and (18) the parties reserve their rights to appeal the trial court's determination of any issue agreed to in the stipulation

The consent of both Mr. Willeby and ExxonMobil to the August 2, 2010 stipulations was evidenced by the written signatures of their respective counsel on the "Joint Trial Stipulations" and counsel's verbal statements to that effect in open court. Following this submission, the trial court rendered judgment in favor of Mr. Willeby, on November 19, 2010, and against ExxonMobil in the amount of \$530,800, along with legal interest and all costs. The trial court's written reasons for judgment indicated that the judgment amount represented 40% of \$1,327,000 (the amount paid by JE Merit to Mr. Willeby pursuant to their settlement agreement). ExxonMobil has appealed the judgment.

³ The legal issues enumerated in the joint trial stipulations for resolution by the trial court included the following: whether the indemnification clause in the "Continuing Services Agreement" should be interpreted to require ExxonMobil to indemnify JE Merit; whether ExxonMobil owed a duty to indemnify JE Merit; whether JE Merit could legally assign any right to indemnification against ExxonMobil to an ExxonMobil employee; whether JE Merit breached the terms of the "Continuing Services Agreement" by assigning its action for indemnity to Mr. Willeby; and whether ExxonMobil's immunity from claims asserted by employees includes JE Merit's assigned claim for indemnification. We note that ExxonMobil did not assert all of these arguments on appeal, urging, rather, that "[t]he only question is whether this [c]ourt should interpret the indemnity provision so that each party indemnifies the other for its own negligence or whether, instead, it should interpret the provision so as to require ExxonMobil to indemnify Merit for Merit's negligence."

In this appeal, ExxonMobil contends that it was improperly cast in judgment under an erroneous interpretation of its April 1999 indemnity agreement with JE Merit, asserting the trial court wrongly required it to indemnify JE Merit for the consequences of JE Merit's own fault.

After a thorough review of the record presented on appeal, we conclude the trial court did not err in the judgment rendered. Of particular importance in our affirmance of the trial court's award of a 40% indemnity against ExxonMobil, calculated on the \$1,327,000 cash amount paid, is the fact that ExxonMobil stipulated that JE Merit's payment of \$1,327,000 for Mr. Willeby's damages was "reasonable." If ExxonMobil had wished to qualify that statement by indicating that the \$1,327,000 payment included no amount representing their proportional share of fault, they certainly could have made such a qualification in their stipulation, but they chose not to do so. Therefore, we can find no error in the trial court's conclusion that the \$1,327,000 cash amount paid by JE Merit to Mr. Willeby represented Mr. Willeby's total damages, for which ExxonMobil was 40% liable.

Accordingly, we affirm the trial court judgment in accordance with Uniform Rules - Courts of Appeal, Rule 2-16.2(A), and assess all appellate costs to appellant Exxon Mobil Corporation.

AFFIRMED.

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 **GAIDRY, J., concurs and assigns reasons.**

I concur with the majority to specifically note that I find this holding to be limited to the unique facts of this case, the indemnity agreement and the stipulations of the parties involved. Clearly, had Mr. Willeby taken his action for damages to trial against J.E. Merit rather than settling, the trier of fact would have been required to allocate fault between J.E. Merit and ExxonMobil and to determine the total damages suffered by Mr. Willeby. In that case, the amount of damages that J.E. Merit would have been responsible for would have been limited to its percentage of fault, and J.E. Merit's third-party demand against ExxonMobil based upon the indemnity agreement would have resulted in no judgment against

ExxonMobil, as J.E. Merit would have been cast in judgment only for its assigned share of the fault and none of ExxonMobil's. La. C.C. 2324.

Mr. Willeby had no direct claim against ExxonMobil because of the provisions of the Louisiana Workers' Compensation Act and the immunity from tort liability it provides to ExxonMobil as Mr. Willeby's employer.

Had the parties elected to proceed to trial on the third-party demand after the settlement between Mr. Willeby and J.E. Merit without stipulating to the amount of Mr. Willeby's damages, the trier of fact would have had to determine the total amount of Mr. Willeby's damages. In that case (assuming the allocation of fault was still sixty percent to J.E. Merit and forty percent to ExxonMobil), if the damages as determined by the trial court were less than the settlement amount, ExxonMobil could have been found liable under the indemnity agreement for no more than forty-percent of the trial court-determined damages. Likewise, if the trial court determined the total damages to be more than the settlement amount, ExxonMobil could have been cast in judgment for an amount which was more than forty percent of the settlement amount. Thus, we have a unique stipulation and holding in this matter.

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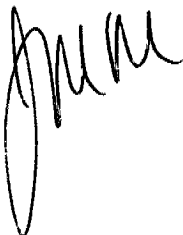
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McDonald, J., Dissenting.

With all due respect to the majority, I must disagree and respectfully dissent. The indemnity agreement provides for ExxonMobil to reimburse Merit for damages incurred by Merit that were caused by the negligence of ExxonMobil. Willeby's injuries were caused by the negligence of both Merit and ExxonMobil. However, ExxonMobil's exclusive liability is in workmen's compensation as they are his employer. Merit's liability is found in Louisiana's comparative fault law. Merit's liability was found to be for 60% of Willeby's damages. Merit was not liable for any amount for any portion of the damages attributable to ExxonMobil. Since Merit was only required to pay for that portion of Willeby's damages that they caused and not for any portion of the damages caused by ExxonMobil, ExxonMobil does not owe any indemnity to Merit. For these reasons I respectfully dissent.