



MONMOUTH COUNTY

PREMISES LIABILITY

Fire — Code Violations — Wrongful Death

Hard-wired smoke detectors would've prevented death

VERDICT \$7,255,000
ACTUAL \$3,500,000

CASE Adelaida Ortiz on behalf of the estate of Jasmine Rashid, Maria Cruz v. John D. Pittenger Builder, Inc., No. MON-L-196-03
COURT Monmouth County Superior Court, NJ
JUDGE Louis Locascio
DATE 10/21/2005

PLAINTIFF ATTORNEY(S) Anthony Malanga, Jr. (lead), Gaccione, Pomaco & Malanga, P.C., Belleville, NJ (Adelaida Ortiz, Estate of Jasmine Rashid)
 Charles J. Uliano (lead), Chamlin, Rosen, Uliano & Witherington, West Long Branch, NJ (Maria Cruz)
 David Levine (co-lead), Chamlin, Rosen, Uliano & Witherington, Edison, NJ (Maria Cruz)

DEFENSE ATTORNEY(S) Martin R. McGowan, Jr. (lead), Methfessel & Werbel, Edison, NJ

FACTS & ALLEGATIONS On January 31, 2001, the plaintiff's decedent, Jasmine Rashid, age 5, was sleeping in the downstairs bedroom with her grandmother, Maria Cruz, and her infant nephew in their Section 8 apartment in Neptune, located at 2102 Harding Ave. and owned by John D. Pittenger Builder Inc. of Neptune. After Cruz was awakened from the heat of a fire in their apartment, she and Jasmine's mother, Adelaida Ortiz, rescued the infant and helped two older children escape but could not find Jasmine, who ran for cover after being frightened by an exploding window. Jasmine perished in the fire and Cruz suffered severe burns while looking for her.

Ortiz sued John D. Pittenger Builder Inc. for wrongful death, premises liability and negligent infliction of emotional distress, claiming that the failed smoke detectors led to her daughter's

death and her mother's injuries.

Ortiz's counsel claimed that the defendant violated New Jersey construction code by failing to install hard-wired interconnected smoke detectors in the hallways and in the four bedrooms after converting the space from a day-care back to a single-family residence in 1994. Plaintiff's counsel argued that interconnected smoke detectors, which are hard-wired into a home's electrical system rather than battery-operated, simultaneously set off all of the home's alarms, which could have prevented death and damages. Cruz's counsel also claimed that the lack of interconnected smoke detectors violated the fire code and made Pittenger liable for the death and damages.

Plaintiff's counsel also claimed that Pittenger was liable for negligent infliction of emotional distress because Ortiz and Cruz both suffered trauma during and following the moment that they realized Jasmine was still inside the burning building.

Defense counsel argued that Pittenger had complied with all fire codes, had been inspected on three different occasions by the city and had received certifications of code compliance.

Defense counsel also sought to dismiss the negligent infliction of emotional distress claim, because Ortiz had not observed Jasmine's death, which is one of the four requirements for such a claim.

Plaintiff's counsel countered that the fact that Ortiz was aware that her daughter was trapped in the building was an adequate form of observation, which would cause emotional distress. Plaintiff counsel argued that the law should be expanded to include "sensory perception" as a form of observation.

The defense also impleaded Cruz as a third-party defendant, claiming that her negligence started the fire after she left a candle burning, and failed to maintain the battery-operated smoke detectors, which were inoperable at the time of the fire.

Plaintiff's counsel for Cruz countered that there was no official determination regarding the fire's causation, claiming that investigations on behalf of the township of Neptune and Monmouth County Prosecutor's office could not determine if the fire was caused by the candle, electrical malfunctions or other possibilities.

INJURIES/DAMAGES *death; emotional distress; scar and/or disfigurement; second-degree burns; third-degree burns*

Jasmine was pronounced dead at the scene.

Cruz was taken via ambulance to the hospital where she spent six weeks in a coma. Cruz suffered third-degree burns on 40% of her body, including parts of her head and both of her hands. She received painful daily wound care that included dressing changes, hydrotherapy and debridement to prevent infections. She underwent skin graft surgery and wore airplane splints and pressure garments to reduce scarring. She takes painkillers and will most likely have more surgical operations in the future, but received no psychological counseling. She sought an award for past and future medical bills of \$435,000 and an unspecified amount for past and future pain and suffering, disfigurement and emotional distress.

Ortiz did not suffer any physical damages and did not receive psychological counseling, but sought an unspecified amount for past and future emotional distress arising from the wrongful death of Jasmine and the serious burn injuries of her mother.

Ortiz also sought an unspecified amount for Jasmine's pain and suffering prior to her death and for a loss of financial support to mother.

The defense did not dispute Cruz's burns but challenged the plaintiffs' emotional distress claims, noting that they did not receive any psychological treatment, which would seem likely for someone suffering emotionally.

Plaintiff counsel argued that Ortiz was too occupied nursing her mother to receive psychological counseling, and Cruz was too injured.

RESULT During trial, counsels made a high-low agreement with no appeals, with a low of \$250,000 and a high of \$3.5 million.

The jury rendered two plaintiff verdicts, attributing 60% of liability to Pittenger for failing to install hard-wired interconnected smoke detectors, and attributed 40% liability to Cruz for starting the blaze with her unattended candle and her failure to maintain the smoke detectors.

The jury awarded Ortiz \$3,255,000, which was a lump sum award for emotional distress associated with the wrongful death. The award was reduced by 7% because Ortiz did not receive psychological counseling, and the high-low agreement further reduced the award to \$2,143,000.

Most significantly, Judge Louis Locascio, expanded the scope of the proofs necessary to establish a claim for negligent infliction of emotional distress law, first established in *Portee v. Jaffe*, 84 N.J. 88, 101 (1980). In December 2004, Judge Locascio ruled that a *Portee* claim, "is viable even without psychological counseling and without actually seeing a relative ablaze, so long as the bystander is sensorially aware of the relative burning to death."

The jury also awarded Cruz \$2 million for her physical damages and \$2 million for her psychological and emotional damages.

However, her award for psychological and emotional damages was reduced by 50% because she did not receive psychological counseling, and her gross award was reduced by 40%, due to her comparative negligence. The high-low agreement further reduced the award to \$1,357,000, which broke down as \$435,000 for past and future medical bills and \$922,000 for past and future pain and suffering.

No award was given for Jasmine's pain and suffering prior to death or the economic loss to her mother, Ortiz.

Pittenger's carrier, Andover Insurance Co., will cover \$1 million of the award, and Fireman Fund Insurance will cover the rest.

MARIA CRUZ \$435,000 past and future medical bills
\$771,000 past and future pain and suffering
\$1,206,000

ADELAIDA ORTIZ \$2,294,000 past and future suffering
\$2,294,000

DEMAND OFFER Low: \$250,000; High: \$3.5 million
Low: \$250,000; High: \$3.5 million

INSURER(S) **Andover Insurance Co.** for John Pittenger Builder Inc.
Fireman Fund Insurance for John Pittenger Builder Inc.

TRIAL DETAILS Trial Length: 8 days
Trial Deliberations: 3.5 hours
Jury Vote: 7-0 on both questions regarding Ortiz's negligence; 6-1 on every other question
Jury Composition: 2 male, 5 female

PLAINTIFF EXPERT(S) **Gary Lewis**, flammability codes & standards, Summit, NJ
Lawrence Eisenstein, M.D., psychiatry, Middletown, NJ
Donald R. Jason, forensic pathology, Winston Salem, NC
Frank D. Tinari, Ph.D., economics, Livingston, NJ

DEFENSE EXPERT(S) None reported

EDITOR'S NOTE Elements of Lisa Brennan's ALM article were used for this report.

—Gregg Kaysen