CIVIL DISTRICT COURT FOR THE PARISH OF ORLEANS

STATE OF LOUISIANA

NO. 93-14333
c/w: 94-5446
c/w: 94-12996
c/w 95-13271
ALL CASES

DIVISION "J"

SECTION 13

JOHN JOHNSON, ET AL

VERSUS

ORLEANS PARISH SCHOOL BOARD, ET AL

FILED ______________________ ______________________
DEPUTY CLERK

REASONS FOR JUDGMENT

Pursuant to its authority and duty under articles 1631-1637 of the Louisiana Code of Civil Procedure, this Court held a non-jury trial beginning on January 7, 2005, and ending on March 11, 2005, of all of the Plaintiffs' claims on behalf of the Certified Class and against the following Defendants: The City of New Orleans, The Housing Authority of New Orleans ("HANO"), The Orleans Parish School Board, Republic Insurance Company, National Union Fire Insurance Company of Pittsburgh, PA, U.S. Fire Insurance Company, and the Louisiana Insurance Guaranty Association ("LIGA") for Southern American Insurance Company, in Liquidation.

The Court, having considered the applicable law, and the evidence and testimony in the Record, entered Judgment this date in favor of the Plaintiffs on behalf of the Certified Class and against all of the Defendants. The Court's findings of fact and conclusions of law on which its Judgment are based are as follows:

FINDINGS OF FACT – GENERAL

1. From the early 1900s until approximately 1958, the City leased more than one hundred acres of land in the Ninth Ward for the operation of a municipal landfill and garbage dump. It was known as the Agriculture Street Landfill ("ASL").

2. The Agriculture Street Landfill was located on the property bordered by

Almonaster Boulevard on the West, Higgins Boulevard on the North, Louisa Street on the East, and the Peoples Avenue Canal and railroad tracks on the South. The ASL was used to dispose of ash from the City of New Orleans incinerators. The landfill was closed in 1958.

3. In 1965, the City re-opened the ASL site for the disposal of massive quantities of debris created by Hurricane Betsy. Up to three hundred truckloads per day of trash material was burned for nine months. No specific closure plan was followed.

4. In 1967, the City of New Orleans and HANO entered into a cooperative agreement for the development of residential properties in the Desire area of the City.

5. Between 1969 and 1971, Drexel Development Corporation constructed the Press Park town homes and apartments for HANO.

6. There was no remediation or special site preparation work done before Press Park was constructed.

7. HANO supervised and monitored the construction of Press Park.

8. HANO was required to obtain City approval through the City Planning Commission for the Press Park scattered-site development.

9. In 1971, HANO purchased the completed Press Park project from Drexel, containing 257 units.

10. Since 1971, HANO has owned and managed Press Park.

11. Some Press Park tenants participated in a "turn key" program, whereby a portion of their monthly rent was placed in an escrow account and applied toward the purchase of their town home unit. When their escrow account reached the amount needed for purchase of the unit, HANO transferred title of the unit to the owner.

12. HANO did not advise prospective Press Park tenants or "turn key" home buyers that the site had once been a part of the City's landfill.

13. Children from around the ASL neighborhood played on the Press Park playground, located behind the Shirley Jefferson Community Center, at

the corner of Press and Benefit Streets.

14. Children from around the ASL neighborhood played at the Bertha Magruer Playground, owned and operated by the City (NORD), located at the corner of Feliciana and Industry Streets.

15. In 1975, the School Board purchased a tract of land along Abundance Street in the ASL neighborhood, with the intent to build an elementary school.

16. In the late 1970s, the City performed soil testing in the Gordon Plaza area of the ASL neighborhood, in anticipation of the construction of the Gordon Plaza single-family homes.

17. As a result of the soil testing, the City required the developer of Gordon Plaza to add topsoil before constructing the homes.

18. The City has never produced a copy of the Gordon Plaza area soil testing and has not explained why the report was never produced.

19. In 1980, sixty-seven single-family homes were built comprising Gordon Plaza.

20. The Gordon Plaza home buyers were not told that their homes were located on what had once been a part of the City's landfill.

21. The School Board purchased land on the ASL site in the mid-1970's. In 1984, the School Board began plans for construction of the Moton Elementary School on the ASL site.

22. Because the School Board knew when it purchased the property that the Moton School site had once been a part of the City's landfill, the School Board hired engineering firms to conduct an environmental evaluation of the School Board's property.

23. Environmental testing on the School site identified the presence of numerous toxic and hazardous materials, including lead, arsenic, mercury, and polycyclic aromatic hydrocarbons (PAHs).

24. Because of the presence of the toxic and hazardous materials, the School Board hired several environmental consultants to advise the School Board

on how the School site could be remediated to eliminate the danger of harmful exposures created by the presence of the hazardous materials.

25. The environmental consultants noted that the School Board did not ask them to report on whether the site was appropriate for a school, rather the School Board asked them to advise on how the site could be remediated. The environmental consultants recommended that the entire site be excavated to a depth of three feet, with the top three feet of contaminated soil removed and replaced with two feet of clean topsoil. Between the clean topsoil and the hazardous materials, the consultants recommended that a layer of six inch to one foot of impermeable clay be placed over the entire site.

26. In addition to the remediation plan they recommended for the School site, the environmental consultants also advised the School Board that it must not conduct any activities on the site to cause a breach or penetration of the clay barrier.

27. The environmental consultants also advised the School Board to implement a plan for the routine, periodic testing and monitoring of the School property to ensure that the contaminants are not migrating to the surface.

28. The environmental consultants noted that younger people are more susceptible to absorbing toxic materials and storing it in their systems for many years.

29. At a School Board meeting on February 25, 1985, the environmental consultants advised that the site may pose an unacceptable risk of exposure to hazardous materials to construction crews, school children and staff, and potentially to neighbors via ground and surface water.

30. After construction of the School was underway, the construction plans were changed, eliminating the impermeable clay barrier. No other impermeable material was substituted for the clay barrier.

31. Before construction began on the School site, there was no fence or

barrier around the School Board's property. Neighborhood children played on the School board's undeveloped land.

32. The residents of the adjacent area- streets between Montegut and Feliciana Streets and the West side of Louisa Street were exposed to dust from the contaminated ASL soil as a result of the various construction activities on the ASL site (Press Park, Gordon Plaza, and Moton School).

33. The Environmental Protection Agency ("EPA") tested the soil in parts of the ASL neighborhood in 1986 to determine whether the ASL site was contaminated.

34. The residents were not given the results of the EPA's 1986 soil tests.

35. After the 1986 tests, the residents were not told that their property was contaminated, nor were they given any special instructions to follow or precautions to take to protect themselves from exposures to the soil.

36. Between 1985 and 1986, the Louisiana Department of Health and the Agency for Toxic Substance Disease Registry ("ATSDR") conducted a public health screening of children in the ASL neighborhood to determine whether there was an increased incidence of elevated blood lead levels.

37. After the 1985-86 health screening, the residents were not told that their children had been exposed to excess levels of lead, nor were they given any special instructions to follow or precautions to take to protect their children from exposures to the soil.

38. In 1986-87, Moton School opened for kindergarten through sixth grade. There were approximately nine hundred children enrolled in the School.

39. The School Board did not tell its employees or the parents of the Moton students that the School had been built on a part of the City's former landfill or that environmental testing had identified the presence of toxic materials on the School site.

40. Between 1991 and 1992, there were plumbing problems at Moton School caused by a construction defect, which required under-slab construction and repairs.

41. The plumbing repairs at the School were conducted while the School was in session.

42. The construction trench around the School was deep enough for an adult to stand erect, indicating that the three-foot layer of clean topsoil had been breached.

43. In 1993, the EPA came back to the ASL site and conducted more soil tests throughout the neighborhood.

44. After the 1993 tests, the EPA told the ASL residents that their soil was contaminated with more than one hundred and forty toxic and hazardous materials, more than forty of which are known to cause cancer in humans.

45. After the 1993 tests, the EPA told the ASL residents to take special precautions to protect themselves from any exposure to the soil. As a part of the effort to prevent further exposures to the contaminated soil, the children's playground equipment at the Press Park playground was removed.

46. After the 1993 tests, the EPA fenced the undeveloped land along Almonaster Boulevard to restrict access to it.

47. In 1994, the EPA placed a portion of the ASL neighborhood on the National Priorities List ("NPL"). Later in 1994, the EPA declared the ASL site sufficiently contaminated to warrant declaring it a Superfund, one of the most toxic and hazardous sites in the United States.

48. In 1994, a HANO official recommended that HANO stop placing new tenants in Press Park and should offer to move Press Park tenants into off-site housing. HANO did not enact this policy.

49. In 1994, the ASL residents formed the Concerned Citizens of the Agriculture Street Landfill, Inc. to qualify for federal grant funding to pay for the services of an environmental Technical Advisor.

50. In response to the public outcry following the announcement of the Superfund designation of a portion of the ASL neighborhood, the School Board closed the Moton School campus. For the next six school years the

School Board rented a closed Catholic school in the Broadmoor area and bussed the Moton elementary students across town every day for school.

51. In the mid-1990s, the EPA proposed a remediation plan for the ASL site that would remove and replace the top two feet of soil, where possible, with a semi-permeable barrier between the clean topsoil and the contaminated soil. The soil under buildings and the streets would not be disturbed.

52. The ASL residents and the Mayor of the City of New Orleans opposed the EPA's plan as being inadequate to remediate the site. The ASL residents and the Mayor supported an alternate voluntary relocation/buy-out plan.

53. The EPA rejected the requests of the ASL residents and the Mayor. From 2000-2001, the EPA financed a $20 million remediation of approximately ten percent of the contaminated soil at the ASL site, which left ninety percent of the hazardous and toxic materials on the ASL site as a permanent condition of the site. The ten percent measurement is based on the fact that the ASL site measures almost ninety-five acres, no soil was removed from under buildings, houses, or streets, and the EPA measured the toxic contamination throughout the ninety-five-acre ASL site to reach a depth of approximately twenty feet.

54. In the remediation process, approximately two feet of soil was removed from around houses and buildings where possible. Due to underground utilities, water lines, etc., only one foot of soil was removed in some areas.

55. After the EPA completed the remediation work, the ASL residents were given a certificate of completion confirming that their property had been partially remediated.

56. Along with the certificate of completion, the EPA gave the ASL residents a list of permanent restrictions on their use of their property and advised the ASL residents that they were responsible for maintaining the integrity of the clean layer of topsoil and the felt-like material that comprises the semi-permeable barrier.

57. The City of New Orleans did not challenge the EPA's findings regarding the nature or extent of the contamination on the ASL site or offer any alternative findings.

58. HANO did not challenge the EPA's findings regarding the nature or extent of the contamination on the ASL Site or offer any alternative findings.

59. Other than the soil testing in the Gordon Plaza area in the late 1970s, for which no report has ever been produced, the City of New Orleans has never conducted any environmental testing anywhere in the ASL neighborhood.

60. HANO has never conducted environmental testing anywhere in the ASL neighborhood.

61. The City of New Orleans has never offered to assist any of the ASL residents in moving away from the ASL site.

62. HANO has never offered to move any of the Press Park tenants into other HANO-managed properties.

63. Marlin Gusman, who served as the City's Minority Business Counselor from 1981 to 1983, Directory of Property Management from 1984 to 1986, and Chief Administrative Officer from 1994 to 2000, testified that even though the Mayor opposed the remediation in favor of relocation, the City did not set aside funding within its annual budget to address the environmental concerns of the ASL residents. The City did not undertake efforts to determine whether there was any real estate that the City owned that it could use to relocate the residents. The City did not provide any protective gear to the residents during the remediation.

64. As a result of the contaminated condition of the soil at the ASL site, the residents were exposed on a daily basis to more than 140 toxic and hazardous materials from 1972 though 2001.

65. The environmental problems at the ASL site have caused the ASL residents to suffer an extraordinary amount of stress since 1993, when they were first told about the contaminated condition of their soil.

66. The residents' stress has been caused by their knowledge that from 1972 though 2001 they were living on one of the most contaminated sites in the United States, and that they and their children were exposed on a daily basis to the more than 140 toxic and hazardous materials in their soil.

67. The contaminated condition of the soil on the ASL site is an incurable defect in the properties, because the Class Members are not economically or physically able to cure the problem through their own efforts.

68. There is no scientific evidence that the contamination two feet beneath the surface of the ASL soil will not migrate to the surface and re-expose the ASL residents.

69. For an indefinite time into the future, the EPA will visit the ASL site every five years and re-test the soil to measure whether the contaminants are migrating to the surface.

70. If future testing reveals the recurrence of contamination at the surface, then the EPA will recommend additional remediation of the ASL site.

71. The ASL residents have been told that as result of the EPA remediation they are now at a ***reduced risk*** of exposure, and the ***immediate health risk*** that existed on the ASL site has been eliminated.

72. No one has told the ASL residents that they are now at ***no risk*** of exposure to contamination at the ASL site.

73. Because of the ongoing nature of the environmental investigations of the ASL site, the ASL residents can never be assured that their property will be safe.

FINDINGS OF FACT – PLAINTIFF-SPECIFIC

1. Phyllis Smith owns and lives in a town home located at 3001 Press Street, in the Press Park area of the ASL neighborhood. She has lived there since 1972.

2. Ms. Smith's town home is within the EPA's 1994 Superfund site boundaries.

3. Ms. Smith decided to move to Press Park following various meetings with

HANO representatives. Before she moved to Press Park, she did not know that the site had once been part of a City landfill.

4. The first time Ms. Smith was told that there was an environmental problem with her property was in the late part of 1993.

5. After some testing in 1994, the EPA notified Ms. Smith that her property was contaminated and that she would have to begin taking extraordinary measures to protect herself from harmful exposures.

6. Nothing was done to reduce Ms. Smith's exposures to the hazardous materials until 2000-2001, when the EPA completed a partial remediation of a portion of her property.

7. The contamination on Ms. Smith's property is an incurable defect, rendering her property unmerchantable and worthless. But for the contamination, her property would have had a fair market value at the time of trial of $22,000.00.

8. As a direct result of living and owning property on a Superfund site for more than 20 years, Mrs. Smith has suffered severe emotional distress.

9. Don Lewis owns and lives in a single-family home at 2885 Abundance Street in the Gordon Plaza area of the ASL neighborhood. He has lived there since 1981.

10. Mr. Lewis's house is within the EPA's 1994 Superfund boundaries.

11. Before he bought his house in Gordon Plaza, Mr. Lewis lived at 3007 Press Street in Press Park from 1972 to 1981. Although he knew that there had once been a City garbage dump somewhere in the Desire area, he did not know that his Press Park house or his Gordon Plaza house were built on the former City landfill site.

12. Mr. Lewis attended a neighborhood meeting in 1985, at which there was a discussion of shoddy construction of the Gordon Plaza homes. There was no discussion at this meeting of possible soil contamination in the ASL neighborhood.

13. The first time Mr. Lewis was told that there might be an environmental

problem with his property was in 1986 when the EPA tested his soil. After the testing, the EPA did not tell him that his property was contaminated, nor did the EPA give him any special instructions to follow or precautions to take. He, therefore, believed his property was safe.

14. The first time that Mr. Lewis was told that there was an environmental problem with his property was in the late part of 1993.

15. After some testing in 1994, the EPA notified Mr. Lewis that his property was contaminated and that he would have to begin taking extraordinary measures to protect himself from harmful exposures.

16. Nothing was done to reduce Mr. Lewis's exposures to the hazardous materials until 2000-2001, when the EPA completed a partial remediation of a portion of his property.

17. The contamination on Mr. Lewis's property is an incurable defect, rendering his property unmerchantable and worthless. But for the contamination, his property would have had a fair market value at the time of trial of $105,000.00.

18. As a direct result of living and owning property on a Superfund site for more than twenty years, Mr. Lewis has suffered severe emotional distress.

19. Nathan Parker owns and lives in a single-family home at 10 Gordon Plaza Drive in the Gordon Plaza area of the ASL neighborhood. He has lived there since 1981.

20. Mr. Parker's house is within the EPA's 1994 Superfund site boundaries.

21. Before he moved to Gordon Plaza, Mr. Parker did not know that the site had once been part of a City landfill.

22. The first time Mr. Parker was told that there was an environmental problem with his property was in the late part of 1993.

23. After some testing in 1994, the EPA notified Mr. Parker that his property was contaminated and that he would have to begin taking extraordinary measures to protect himself from harmful exposures.

24. Nothing was done to reduce Mr. Parker's exposures to the hazardous

materials until 2000-2001, when the EPA completed a partial remediation of a portion of his property.

25. The contamination on Mr. Parker's property is an incurable defect, rendering his property unmerchantable and worthless. But for the contamination, his property would have had a fair market value at the time of trial of $95,000.00.

26. As a direct result of living and owning property on a Superfund site for more than twenty years, Mr. Parker has suffered severe emotional distress.

27. Viola Allen owns and lives in a single-family home at 2897 Abundance Street in the Gordon Plaza area of the ASL neighborhood. She has lived there since 1981.

28. Mrs. Allen's house is within the EPA's 1994 Superfund site boundaries.

29. Before she moved to Gordon Plaza, Mrs. Allen did not know that the site had once been a part of a City landfill.

30. The first time Mrs. Allen was told that there was an environmental problem with her property was in the late part of 1993.

31. After some testing in 1994, the EPA notified Mrs. Allen that her property was contaminated, and that she would have to begin taking extraordinary measures to protect herself from harmful exposures.

32. Nothing was done to reduce Mrs. Allen's exposures to the hazardous materials until 2000-2001, when the EPA completed a partial remediation of a portion of her property.

33. The contamination on Mrs. Allen's property is an incurable defect, rendering her property unmerchantable and worthless. But for the contamination, her property would have had a fair market value at the time of trial of $90,000.00.

34. As a direct result of living and owning property on a "Superfund" site for more than twenty years, Mrs. Allen has suffered severe emotional distress.

35. Peggy Grandpre is a former resident of Gordon Plaza at 59 Gordon Plaza Drive. She moved to Gordon Plaza in 1981 and was a full time resident there until December 2002 when she and her family moved to 2069 Mirabeau Avenue in New Orleans.

36. Mrs. Grandpre's Gordon Plaza house is within the EPA's 1994 Superfund site boundaries.

37. Before she moved to Gordon Plaza, Mrs. Grandpre did not know that the site had once been a part of a City landfill.

38. The first time Mrs. Grandpre was told that there was an environmental problem with her property was in the late part of 1993.

39. After some testing in 1994, the EPA notified Mrs. Grandpre that her property was contaminated and that she would have to begin taking extraordinary measures to protect herself from harmful exposures.

40. Nothing was done to reduce Mrs. Grandpre's exposures to the hazardous materials until 2000-2001, when the EPA completed a partial remediation of a portion of her property.

41. The contamination on Mrs. Grandpre's Gordon Plaza home is an incurable defect. Using the other three Gordon Plaza houses as a guide, and averaging the appraised values of the other three houses (Lewis, Parker, Allen), Mrs. Grandpre's Gordon Plaza house would have had a fair market value at the time of trial of $96,500.00, but for the contamination of her property.

42. In 2002, Mrs. Grandpre sold her home at 59 Gordon Plaza Drive for $83,000.00. This amount is $13,500.00 less than the fair market value her property would have had at the time of trial but for the contamination.

43. As a direct result of living and owning property on a Superfund site for more than twenty years, Mrs. Grandpre has suffered severe emotional distress.

44. Lizette Gaines is a former resident of the adjacent area as that term is referred to in this case at 2945 Feliciana Street. She moved to that

address in 1977.

45. Before she moved to Feliciana Street, Mrs. Gaines did not know that the property across the street from her house had once been a part of a City landfill.

46. Mrs. Gaines still owns the house at 2945 Feliciana Street, but she moved from that address in 2002 to 7842 Schubert Avenue in New Orleans.

47. The first time Mrs. Gaines was told that the ASL site across the street from her house was contaminated was in the late part of 1993.

48. The proximity of Mrs. Gaines's house to the ASL Superfund site has caused her property to suffer a reduction in value of ten percent. But for its proximity to a Superfund site, her property would have had a fair market value at the time of trial of $45,500.00.

49. As a direct result of living in close proximity to a Superfund site for more than twenty years, Mrs. Gaines has suffered severe emotional distress.

50. Fannie Johnson is a former resident of Press Park. She lived in Press Park as a tenant of HANO from sometime in 1980 until 2001, at three addresses: 2913 Higgins Court; 3311 Press Street; 2915 Higgins Court. She now lives at 7001 Lawrence Road, Apt. 145 in New Orleans.

51. Mrs. Johnson's Press Park residences were all within the EPA's 1994 Superfund site boundaries.

52. Before she moved to Press Park in 1980, Mrs. Johnson did not know that the site had once been a part of a City landfill.

53. The first time Mrs. Johnson was told that there was an environmental problem with the Press Park property was in the late part of 1993.

54. After some testing in 1994, the EPA notified Mrs. Johnson that the Press Park property was contaminated and that she would have to begin taking extraordinary measures to protect herself from harmful exposures.

55. Nothing was done to reduce Mrs. Johnson's exposures to the hazardous materials until 2001, when she demanded that HANO relocate her to other Section 8 housing.

56. As a direct result of living on a "Superfund" site for more than twenty years, Mrs. Johnson has suffered severe emotional distress.

57. Iris Myers is a former resident of the adjacent area next to the ASL site. She lived in a house at 3014 Clouet Street from May 1990 to July 1995. She now lives at 4767 Arthur Street in New Orleans.

58. Before she moved to the adjacent area in 1990, Mrs. Myers did not know that a part of the ASL neighborhood had once been a part of a City landfill.

59. The first time Mrs. Myers was told that there was an environmental problem with the ASL site was in the late part of 1993.

60. As a direct result living in close proximity to a Superfund site for five years, Mrs. Myers has suffered severe emotional distress.

61. Diarra McCormick attended Moton Elementary School for six years, from Kindergarten through Fifth grade, in the 1988-89 through 1993-94 school years.

62. In addition to her attendance at Moton School, Ms. McCormick lived with her parents at 71 Gordon Plaza Drive from her birth in 1983 until 1998, when her family moved. Since 1998 she has lived at 3401 Franklin Avenue in New Orleans.

63. Ms. McCormick's elementary school (Moton) and her Gordon Plaza family home were within the EPA's 1994 Superfund site boundaries.

64. The first time Ms. McCormick was told that there was an environmental problem with her Gordon Plaza home and Moton School was in the late part of 1993.

65. Ms. McCormick learned about the nature and extent of the environmental problems at the ASL site from her parents and from her attendance at community meetings.

66. At no time while she was a student at Moton School was Ms. McCormick told that the School was built on contaminated soil.

67. At no time while she was a student at Moton School was Ms. McCormick told to take any special precautions to protect herself from exposures to

the contaminated soil on the School property.

68. At no time during the under-slab plumbing repairs at Moton School in 1991-1992 was Ms. McCormick told to take any special precautions to protect herself from exposures to the contaminated soil in the construction area or from dust generated by the construction activities.

69. As a direct result of living and attending school on a Superfund site for more than fifteen years, Ms. McCormick has suffered severe emotional distress.

CONCLUSIONS OF LAW

1. PRESCRIPTION

The Court finds for the following reasons that the Class Members' claims were timely filed August 31, 1993, in Civil Action 93-14333, and are not prescribed. La. Civ. Code Ann. art. 3447. Prescription is an affirmative defense; the party raising this defense carries the burden of proof at trial. La. Civ. Code art. 3452; La Code Civ. Proc. art. 927(B); *Campo v. Correa,* 797 So.2d 115, (La. App. 4 Cir. 2001).

The Plaintiffs' claims are subject to the liberative prescription of one year. La. Civ. Code art. 3492. Prescriptive statutes are to be applied liberally and without undue restriction by technical rules. *Battiste v. Jani King of New Orleans*, 753 So.2d 952 (La. App. 4 Cir. 2000). Under Louisiana law, prescription begins to run when "it can be objectively determined that the exercise of reasonable diligence would have alerted a reasonably minded plaintiff of the reasonable possibility that [it] was the victim of tortious conduct." *Kendall Co. v. Southern Medical Supplies, Inc.*, 913 F. Supp. 483, 488 (E.D. La. 1996), citing *Griffin v. Kinberger*, 507 So. 2d 821, 823 (La. 1987).

Louisiana courts have long recognized that prescription does not run against one unable to act, which is based on the ancient civilian doctrine of *contra non valentem agere nulla currit praescriptio*. *Hendrick v. ABC Ins. Co.,* 787 So.2d 283, 289 (La. 2001). In such case, the prescriptive period begins to run on the date that the injured party discovered or should have discovered the existence of facts that would entitle him to bring suit. Doskey v. Hebert, 645 So.2d 674, 679 (La. App. 4 Cir. 1994) (citing *Cartwright v. Chrysler Corporation*, 232 So.2d 285 (La. 1970)). There are four

categories of situations where Louisiana courts have applied the doctrine of contra non valentem to prevent the accrual of liberative prescription: (1) where there is some legal cause which prevented the Courts or their officers from taking cognizance of or acting on the plaintiff's action; (2) where there was some condition coupled with the contract or connected with the proceedings which prevented the creditor from suing or acting; (3) where the debtor himself has done some act effectually to prevent the creditor from availing himself of his cause of action; and (4) where the cause of action is not known or reasonably knowable by the plaintiff, even though his ignorance is not induced by the defendant. *Id.*

The first two categories of the doctrine are not relevant to this case. The third category applies to cases where defendant engages in conduct which prevents the plaintiff from availing himself of his judicial remedies. *Id.* at 680. The fourth category, commonly known as the discovery rule, provides that prescription does not run against one who is ignorant of the facts upon which his cause of action is based, as long as such ignorance is not willful, negligent or unreasonable. *Id.* (citing *Wimberly v. Gatch*, 635 So.2d 206, 211-212 (La.1994).

The Court finds that the principle of *contra non valentem* i.e. the discovery rule applies to the facts of this case. In this case, the Plaintiffs were given no information about the prior use of their neighborhood as a municipal landfill before they purchased their property or moved to the Site as a tenant.

From 1984 through 1993 the residents were told by various governmental agencies, including the EPA, the ATSDR, the Louisiana Department of Environmental Quality ("DEQ"), the Louisiana Department of Health, and the School Board that their neighborhood was safe. During this same period of time, the City and HANO were publicly silent. In fact, the City and HANO claim that they had no knowledge until 1993 that the property was contaminated.

The Court finds that the Plaintiffs did not know before they moved to the ASL neighborhood that the site had once been a City landfill. Although there were some environmental investigations in the ASL neighborhood in the mid-1980s, the Plaintiffs were not given sufficient information such that they should have known that their

properties were contaminated or that they were in danger. Until the late part of 1993, no one told any of the Plaintiffs that their health was at risk or that they should take any special precautions to protect themselves from exposure to the soil in their own properties.

The plaintiffs in this case testified extensively at the class certification hearing in 1999, a hearing on defendants' exception of prescription in 2003, and at trial on the subject of when they first learned that their property was contaminated. On each of these occasions, and particularly in this trial, the Plaintiffs were subject to rigorous, intense cross-examination by all defense counsel. The Court is impressed with the sincerity of these Plaintiffs and is convinced that they did not know, nor could they have reasonably known, until 1993 that their neighborhood is contaminated.

The Court also finds that the Defendants should not benefit from their own silence. During the same period of time, the Defendants claim they knew nothing about the contaminated condition of the soil or the hazardous materials to which the Plaintiffs were being exposed on a daily basis. Nevertheless, the Defendants claim that somehow the Plaintiffs, who are ordinary citizens with no special education or scientific training should have been able to acquire knowledge superior to that of the City, HANO, the School Board, the Louisiana Department of Health, DEQ, ATSDR, and the EPA.

2. ADVERSE PRESUMPTION

Plaintiffs assert that the Court should apply an adverse presumption against defendants for not calling certain witnesses. "One of the fundamental rules of evidence is that a failure to call an available witness possessing peculiar knowledge concerning facts essential to a party's case or to produce evidence of a more explicit, direct, and satisfactory character than that relied on by him, raises the inference or presumption that the testimony of the witness not called would not sustain his contention and that if more satisfactory evidence had been given it would prove detrimental in his cause." *Bates v. Blitz,* 17 So. 2d 816 (La. 1944). The Court noted that the adverse presumption is applicable particularly where no effort has been made to substantiate the statement of a witness whose credibility, although put in doubt, is susceptible of corroboration. *Id.* at 547.

The defendant had called two tenants as witnesses, who were both impeached. The Court made the presumption that the other tenants, who were not called, would not have substantiated the defendant's claim.

However, "[t]he presumption does not apply where the witness was equally available to either party. *Shelvin v. Waste Management, Inc.*, 580 So. 2d 1022 (La. App. 3 Cir. 1991). In *Shelvin*, the Court declined to find an adverse presumption, reasoning that the witness was no longer defendant's employee, that the other party had learned of his existence well before trial, and he was equally available to both parties.

Similarly, in *Sauve Heirs, Inc. v. Reynaud Construction Co., Inc.*, 441 So. 2d 239 (La. App. 4 Cir. 1983) the court declined to apply an adverse presumption. The court reasoned that the application of the rule of adverse presumption was particularly troublesome where the witness was available to both sides and because plaintiff had the resources and the time to interview him and even take his discovery deposition to determine whether his testimony would have been favorable.

In *Williams v. General Motors Corp.*, 639 So. 2d 275 (La. App. 4 Cir. 1994), the court did not apply the adverse presumption rule to a discarded piece of evidence after finding that it was inadvertently discarded.

The *Court* finds that the rule of adverse presumption does not apply in this case. It does not appear that any of the witnesses were surprises or were unavailable to plaintiffs. They had the opportunity to depose them, and in fact, did depose some of them.

3. **SPOLIATION OF EVIDENCE**

The general principle for deciding when to apply an adverse presumption for spoliation of evidence has been described as: "[T]he failure of a litigant to produce evidence within his reach raises the presumption that the evidence would have been detrimental to his case. However, this presumption is not applicable where the failure to produce the evidence is explained." *Babineaux v. Black*, 396 So. 2d 584, 586 (La. App. 3d Cir. 1981) (citations omitted). *See also Boh Bros. Const. Co. Inc. v. Luber-Finer, Inc.*, 612 So. 2d 270, 274 (La. App. 4th Cir. 1992), *writ denied*, 614 So. 2d 1256 (La. 1993);

McElroy v. Allstate Ins. Co., 420 So. 2d 214, 216 (La. App. 4th Cir.), *writ denied*, 422 So. 2d 165 (La. 1982). Consequently, this Court will not apply the adverse presumption if the party offers a reasonable explanation at trial for its failure to produce the evidence.

The Court finds that the adverse presumption for "spoliation" of evidence should be applied against the City of New Orleans. Specifically, (1) the City did not produce any records from its pre-1980 soil testing of the Gordon Plaza neighborhood site; and (2) the City did not offer or attempt to offer any explanation at trial for its failure to produce this document, or, if the document no longer existed, why it had been destroyed.

Marlin Gusman testified that as the Chief Administrative Officer ("CAO") of the City, he learned that the City had performed environmental testing at the Gordon Plaza site before it was developed in 1980. As CAO he learned that the City performed these tests because the site had been used as a landfill, and "they wanted to do some testing to make sure it was okay." He testified that he thought documents from the soil testing existed, but he could not remember who had them or where they were.

Since the City did not produce the soil testing report, and did not offer any evidence or explanation on the Record as to why it was never produced, the Court will apply the adverse presumption against the City for spoliation of this piece of evidence.

4. <u>"DISCRETIONARY FUNCTION" IMMUNITY</u>

The City, HANO, and School Board have all pleaded that even if they were negligent in their actions or inactions pertaining to the ASL site, they are nevertheless shielded from tort liability to the Class under the principle of "discretionary function" immunity. La. Rev. Stat. § 9:2798.1(B). For the following reasons, the Court finds that the "discretionary function" immunity does not apply to the Defendants' conduct toward the Class.

Section 9:2798.1 provides:

> B. Liability shall not be imposed on public entities or their officers or employees based upon the exercise or performance or the failure to exercise or perform their policymaking or discretionary acts when such acts are within the course and scope of their lawful powers and duties.
>
> C. The provisions of Subsection B of this Section are not applicable:
>
> (1) To acts or omissions which are not reasonably related to the legitimate

> governmental objective for which the policymaking or discretionary power exists; or
>
> (2) To acts or omissions which constitute criminal, fraudulent, malicious, intentional, willful, outrageous, reckless, or flagrant misconduct.

The Louisiana Supreme Court has established a two-step test for courts to follow when determining whether the immunity applies. *Simeon v. Doe*, 618 So. 2d 848, 852-53 (La. 1993). The court must first determine whether a statute, regulation, or policy requires the governmental agency to follow a particular course of action. *Id.* If there is such a requirement, then there is no choice or discretion, and the immunity does not apply. *Id.* If a court determines discretion is involved, the court must then determine whether that discretion "is the kind which is shielded by the exception, that is, one grounded in social, economic or political policy." *Id.* If it is, then the doctrine applies and the employee or agency is insulated from liability. *Id.* The application of this affirmative defense is "a question of fact to be determined through a trial." *Lambert v. Riverboat Gaming Enforcement Div.*, 706 So. 2d 172, 177 (La. App. 1 Cir. 1997). *See also Gary v. Meche*, 577 So. 2d 833, 835 (La. App. 3 Cir. 1991); *Chaney v. National Railroad Passenger Corporation*, 583 So. 2d 926, 930 (La. App. 1 Cir. 1991); *Verdun v. State, Dept. of Health & Human Resources*, 559 So. 2d 877, 879 (La. App. 4 Cir. 1990).

Once a discretionary decision is made, the government entity is not protected from liability for conduct in carrying out the discretionary decision. *Socorro v. Orleans Levee Bd.*, 561 So.2d 739, 756 (La. App. 4 Cir. 1990) (quoting *Wiggins v. United States*, 799 F.2d 962 (5th Cir.1986)). If the governmental entity is negligent in carrying out its policy, then the entity is not protected by the immunity. *Id.*

For example, the policy decision to maintain the roadway in a reasonably safe condition has already been made by the legislature. *Chaney v. National Railroad Passenger Corp.*, 583 So. 2d 926, 929 (La. App. 1 Cir. 1991). In *Chaney*, the court discussed the issue of immunity in the context of roadways:

> Any decision regarding the manner in which the roads are made reasonably safe are operational in nature, and La. Rev. Stat. 9:2798.1 does not provide immunity for liability stemming therefrom. * * * The only policy decision that a governmental authority can make relating to a roadway, is whether or not to construct it (or assume responsibility for it in some cases) in the first place. Once that decision is made, related decisions such as the design, method of construction, number and placement of signs and signals, level of maintenance, etc. are operational

decisions.

583 So. 2d at 929-30.

Once the government does undertake to supply a service, then it must be held responsible for negligent acts in supplying the service. 561 So.2d at 756. The discretionary exception only reaches the discretionary decision as to whether to supply the service or not. *Id.* Once the discretionary decision has been made to supply the service, then sovereign immunity is waived.

The Defendants raised the "discretionary function" immunity as an affirmative defense in their Answers and pleadings. Accordingly, the Defendants had the burden of proof as to their affirmative defense. An affirmative defense is one that, if proved, will absolve the defendant of liability, regardless of its otherwise-negligent conduct. *Zulli v. Coregis Ins. Co.,* 910 So.2d 437 (La. App. 5 Cir. 2005). It must be proved by a preponderance of the evidence. *Abadie v. Markey*, 710 So. 2d 327 (La. App. 5th Cir. 1998).

The City and HANO's decision to provide the service of low-income housing was certainly an act of discretion, as was the School Board's decision to build the Moton School. However, the defendants' immunity stops at that decision. The City, through its witnesses Criminal Sheriff Marlin Gusman, and Jerald White and Sharon Carrington of the Office of Environmental Affairs admitted that it had knowledge of the use of the ASL site as a landfill from the time it began consideration of that site to build housing. Similarly, the School Board had the knowledge from the time of purchase until the school closed that the proposed Moton School site was on a former landfill. Throughout the thirteen years of this litigation, the defendants continually fail to comprehend that it was their failure to make reasonable operational decisions that subjects them to liability.

In *Chaney*, *supra* the court listed examples of operational decisions. Design, method of construction, and level of maintenance, etc. are operational decisions. The following are just some of the defendants' decisions that the Court finds are not subject to discretionary immunity: the City and HANO's decisions not to test for hazardous substances or not to disclose the results of those tests; the School Board's decision not to follow their environmental consultants recommendations on the type of remediation

prior to construction of Moton School; the School Board's decision not to follow their environmental consultant's advise not to dig more than three feet when it was repairing the sewerage problem; the School Board's decision not to send the children and staff home during the sewerage repairs; the defendants' decisions not to provide residents, including susceptible children any protective gear during the initial construction of the housing and the school and during the EPA remediation; the City's decision not to relocate the residents of ASL despite its public acknowledgment that the EPA remediation was not adequate; the City and HANO's decision not to disclose that the project to solve the blight and low income housing problem in New Orleans was put on a landfill; and in general, the continuous decision over more than twenty years to do virtually nothing to address the fact that there are citizens of this City, in particular, children, the most vulnerable of the population, living on a toxic waste dump.

The Court will discuss the merits of liability on these issues *infra*. For the purposes of the discretionary immunity defense, the Court finds that none of the defendants carried their burden of proof to establish that their conduct qualifies them for protection from liability under the discretionary function immunity. The Court, therefore, finds that the record establishes instead that the Defendants' conduct giving rise to the Plaintiffs' claims are of an operational nature, and not of a social, economic, or political nature.

5. <u>CHOICE OF LAW</u>

A. Strict Liability

La. Civ. Code art. 2317.1 provides:

> The owner or custodian of a thing is answerable for damage occasioned by its ruin, vice, or defect, only upon a showing that he knew or, in the exercise of reasonable care, should have known of the ruin, vice, or defect which caused the damage, that the damage could have been prevented by the exercise of reasonable care, and that he failed to exercise such reasonable care. Nothing in this Article shall preclude the court from the application of the doctrine of res ipsa loquitur in an appropriate case.

Art. 2317.1 was amended in 1996 to add the element of knowledge. Prior to 1996, liability under this article was a form of strict liability with no consideration of knowledge. The 1996 amendment was a substantive change in the law, and is not to be applied retroactively. *Jacobs v. City of Bunkie*, 1998-2510 (La. 5/18/99); 737 So. 2d 14.

The Court finds that the acts and omissions on which the Plaintiffs base their claims against HANO and the School Board occurred, and the Plaintiffs' cause of action accrued, before April 16, 1996. Therefore, the Court will apply the law of strict liability as it existed prior to the 1996 amendments.

Prior to 1996, article 2317 provided: "We are responsible, not only for the damage occasioned by our own act, but for that which is caused by the act of persons for whom we are answerable, or of the things which we have in our custody." La. Civ. Code art. 2317 (1825). It is this original form of the article that applies to the fault of HANO and the School Board in this case, since all of their tortious acts causing harm to the Plaintiffs in this case occurred before April 16, 1996.

In an action asserting liability under La. Civ. Code art. 2317 before 1996, the plaintiff bore the burden of proving three elements: (1) that the thing which caused the damages was in the care, custody, and control (garde) of the defendant; (2) that the thing had a vice, ruin, or defect that presented an unreasonable risk of harm; and (3) that the vice, ruin, or defect was the cause-in-fact of the plaintiff's damages. *Dupree v. City of New Orleans*, 765 So.2d 1002, 1008 (La.,2000).

The record is clear as to the first requirement that HANO has care, custody, and control of Press Park apartments and town homes since it was developed in 1971 until February 1, 1994 when the Class was defined. Similarly the School Board does not deny that it had care, custody, and control of the Moton School site since the mid-1970s.

The second element that the plaintiff must prove is that the thing had a vice, ruin, or defect that presented an unreasonable risk of harm. 765 So.2d at1012. "The custodian is absolved from his strict liability neither by his ignorance of the defect or vice, nor by circumstances that the defect could not easily be detected. Whether a risk is unreasonable is 'a matter wed to the facts' and must be determined in light of the facts and surrounding circumstances of each particular case." *Id.* (citations omitted).

Some factors to be considered and weighed include: (1) the claims and interests of the parties; (2) the probability of the risk occurring; (3) the gravity of the consequences; (4) the burden of adequate precautions; (5) individual and societal rights

and obligations; and (6) the social utility involved. *Id.*

Just as the Court applies the law at the time, so must we look to the circumstances of that time to determine what would be considered an unreasonable risk of harm. Discussions for the development of the ASL site to address urban blight and housing shortage created by the destruction of Hurricane Betsy started as early as 1966 as evidenced by the HANO's minutes.

As early as 1921, Louisiana recognized the government's responsibility for environmental matters. Charles S. McCowan, Jr., *The Evolution of Environmental Law in Louisiana*, 52 La. L.Rev. 907, 910 (Mar. 1992). Article VI, § 1 of the Louisiana Constitution of 1921 stated "[t]he natural resources of the State shall be protected, conserved, and replenished." Early jurisprudence recognized that the government had the duty to preserve and promote public health. 52 La. L.Rev. at 907. In the mid-1960s to mid-1970's there were not many regulations on the operation of landfills or waste dumps.

Sanitation issues were regulated by sparse city code regulations. Code of the City of New Orleans, Louisiana, § 28 (1956). However, the City Code was amended in 1977 by M.C.S., Ord. No. 6353, § 1 which added an article on Solid Waste Disposal. These provisions can now be found under Chapter 138 of the 1995 Code. The Solid Waste Disposal ordinances defined solid waste and hazardous waste. Code of the City of New Orleans, Louisiana, § 28-39 (Supp. No. 6-77). The code mandated that all landfills be sanitary and prohibited disposal of hazardous waste in such landfills. §§ 28-42—28-45 (Supp No. 6-77). The procedures mandated that "[t]he disposal of toxic or hazardous waste which may create a condition harmful to the environment, shall, at the owners expense, be rendered safe and sanitary prior to delivery to the waste disposal facility." § 28-42(5) (Supp. No. 6-77). Procedures were also developed for proper closure and monitoring of landfills. § 28-52 (Supp. No. 6-77). Further, construction of buildings, sewage or gas or waster supply mains, parking lots, or paved areas on or throughout completed portions of sites with solid waste was prohibited without a special permit. § 28-42(7) (Supp. No. 6-77).

On a statewide level, there was a bustle of environmental laws passed between

the mid-1970s and the mid-1980s. In 1974, the legislature amended the constitution to state a new environmental mandate. La. Const. art. IX, § 1 (1974). Hazardous waste disposal was put under the control of the Department of Natural Resources by Act 334 of 1978. Then in 1979, the legislature enacted the Louisiana Environmental Affairs Act, La. Rev. Stat. § 30:2001 to maintain a healthful and safe environment for the people of Louisiana. In 1984, prompted by federal legislation, the Louisiana legislature addressed the problem of inactive and abandoned hazardous waste sites. La. Rev. Stat. § 30:2271. The legislature recognized that

> Hazardous chemicals and substances have been disposed of in Louisiana for many years in a manner that, although possibly legal at the time, was careless and inappropriate and created conditions which are extremely dangerous and may cause long-term health and environmental problems for the people of this state.

La. Rev. Stat. § 30:2271(A)(1).

Clearly if not by 1974 then at least by 1977, the City and HANO became aware that landfills posed an unreasonable risk to public health and safety, which prompted the enactment of new regulations on disposing of solid and hazardous wastes. At this time Press Park apartments and homes had been inhabited for at least six years. Even after the enactment of federal and state legislation recognizing the existence and dangers of hazardous waste, the City and HANO took no action with regard to the Press Park development. The City and HANO knew that the Agriculture Street Landfill was not closed according to the 1977 standards. Yet to this day, neither the City nor HANO took any steps to inquire whether there were any hazardous materials on the site. To this day, neither the City nor HANO took any steps to inquire about the safety of the residents at Press Park. As for the School Board, the risk of the toxic landfill was well known by the time Moton School was being built in 1986.

The Court notes that the Record establishes that the following conditions exist in the ASL neighborhood:

1. The soil is contaminated to a depth of twenty feet below the surface.
2. The contamination consists of more than one hundred and forty toxic and hazardous materials, more than forty of which are known to cause cancer in humans.

3. Although a partial remediation of approximately ten percent of the soil was conducted at the ASL site in 2000-2001, the remaining ninety percent of the soil throughout the ASL site is still contaminated.

4. The barrier separating the clean topsoil from the contaminated soil is "semi-permeable", that is, it does not stop or prevent contaminants from migrating upward to the surface.

5. The EPA will re-visit the ASL site every five years for an indefinite period to measure whether the contaminants are migrating to the surface.

6. The EPA found that the site posed an "immediate threat" to the health and safety of the ASL residents, and authorized a $20 million remediation.

7. The EPA included the ASL site on its "Superfund" list, indicating that it was so contaminated as to warrant priority federal funding for the remediation project.

Therefore, the Court finds that based on the standards and the circumstances of the time, these conditions constitute a "defect" that is "unreasonably dangerous" under Louisiana law. The Court finds as an issue of fact and law that the entire ASL site, within the boundaries drawn by the United States Environmental Protection Agency in 1994, is "unreasonably dangerous" as that term is defined in Louisiana.

With each passing year, there was more and more evidence that this landfill contained hazardous materials and was not properly closed or remediated. The Plaintiffs in this case who are overwhelmingly poor minorities were promised the American dream of first time homeownership. The dream turned out to be a nightmare. The Plaintiffs who are some of the most underrepresented in our society put their trust in the defendants' promises. Instead, the leaders of this community did nothing as the evidence of mounted that the former landfill was hazardous. Beyond creating an unreasonable risk of harm, the Court finds defendants' conduct shocking.

The City of New Orleans

The Court finds as an issue of fact and law that the City of New Orleans was negligent in its actions and inactions that resulted in the conversion of its own former municipal landfill into the residential area that has become known as the Agriculture

Street Landfill (ASL) neighborhood.

As a direct result of the City's negligence, and the unreasonably dangerous condition of the ASL site, the Members of the "John Johnson" Class, as defined in this Court's ruling of September 15, 1999, have suffered compensable damages and losses in the form of loss of property value and extraordinary mental and emotional distress. The Court finds that the City breached its duty to the ASL residents. The Court finds that the City's negligence is a cause in fact and in law of the Class Members' damages. La. Civ. Code art. 2315.

Housing Authority of New Orleans

The evidence establishes that HANO is the owner of the Press Park apartments and town homes. As the owner of the property, therefore, HANO is strictly liable to all of the tenants and residents of Press Park from 1971 through and including February 1, 1994 (the date specified in the Class definition), under pre-1996 liability standards, without regard to whether HANO had knowledge at the time that the Press Park property was contaminated, or that HANO's tenants were at an unreasonable risk of harm from exposure to the contaminated soil throughout the site. HANO had a non-delegable duty to protect its tenants and residents, but failed in its duty.

The Court finds as an issue of fact and law that the Housing Authority of New Orleans was negligent in its actions and inactions that resulted in the construction of the Press Park town homes and apartments on property that was formerly part of the City's municipal landfill on the ASL site.

As a direct result of HANO's negligence, and the "unreasonably dangerous" condition of the ASL site, the Class Members have suffered compensable damages and losses in the form of loss of property value and extraordinary mental and emotional distress. The Court finds that HANO breached its duty to the ASL residents. The Court finds that HANO's negligence is a cause in fact and in law of the Class Members' damages. As the owner and operator of Press Park, HANO is strictly liable to the Press Park tenants and residents. La. Civ. Code art. 2317.

Orleans Parish School Board

For the same reasons that apply to HANO's ownership and custody of Press Park, the Orleans Parish School Board is strictly liable to the former students and employees who attended or worked at Moton School from 1986-87 through and including the 1993-94 school year (the date specified in the Class definition). Under pre-1996 Civil Code article 2317, the School Board was and is the owner of the Moton School building and land. The contaminated condition of the soil renders the building and property "defective", and exposed the students and employees to an unreasonable risk of harm.

The School Board continually puts forth the defense that it did extensive testing and remediation and therefore reduced or eliminated the unreasonable risk of harm. The Court acknowledges that the School Board hired consultants and conducted a remediation prior to building the school. The Court also finds that the School Board did not follow the advise of its environmental consultants. The School Board did not remediate according the specifications. Further, during the remediation, the School Board did not do anything to prevent the soil from drifting to adjacent property or to keep children from accessing the work site. Then, when the sewerage problems occurred, the School Board again dismissed the advise of their environmental consultants and dug beyond the three feet clean soil barrier thereby re-opening pathways of exposure.

As a direct result of the School Board's negligence, the Class Members have suffered compensable damages and losses in the form of extraordinary mental and emotional distress. The Court finds that the School Board breached its duty to the Moton School students and employees. The Court finds that the School Board's negligence is a cause in fact and in law of these Class Members' damages. As the owner and operator of Moton Elementary School, the School Board is solely and strictly liable to all who were full time students or full time employees at Moton for at least one complete school year between and including the 1986-87 school year, through and including the 1993-94 school year. La. Civ. Code art. 2317.

6. LIABILITY

In the late 1960s, the City and the Housing Authority entered into a cooperative working agreement for the development of low-income residential housing. Specifically, this agreement was signed in May 1967.

In 1980, La. Civ. Code art. 2324 on the liability of joint tortfeasors was amended by Act 431. The amended article provides that joint tortfeasors are not solidarily bound unless the tort is intentional. Instead, a joint tortfeasor is only liable for his own percentage of fault, and cannot be solidarily liable with another tortfeasor.

The Code articles on obligations were amended again in 1984. Under amended article 1789, when the obligation between joint tortfeasors is "divisible", each joint obligor is bound to perform (*i.e.* pay) only his own portion of the damages. Combined with amended article C.C. 2324, which defined all non-intentional torts as joint and divisible, article 1789 means that under the amended law joint tortfeasors, even when they are all found to be liable to the plaintiffs, are each responsible for nothing more than their own percentages of fault (*i.e.*, their own "virile share").

In *Cole v. Celotex,* 599 So.2d 1058 (La. 1992), the Louisiana Supreme Court considered whether the law to be applied in allocating liability among the parties is comparative or pre-comparative fault. The Court concluded that in the context of long-latency occupational disease cases, when these tortious exposures occur before Act 431's effective date are (1) significant and (2) such exposures later result in the manifestation of damages, pre-Act law applies. *Id.*

Press Park was between 1969 and 1970. The first residents arrived in 1972. Gordon Plaza was tested in 1978 and 1979, developed in 1979 and 1980. The first residents arrived in 1981. The Court finds that the City and HANO's acts in the planning and development of Press Park, Gordon Plaza, the Senior Apartments, and the commercial area occurred before August 1, 1980. Therefore, the original Code article 2324, as it applies to this case, provides: "He who causes another person to do an unlawful act, or assists or encourages in the commission of it, is answerable, *in solido*, with that person, for the damage caused by such act." La. Civ. Code art. 2324 (eff. 1870).

Original Code article 2091 [which, as amended in 1984, was renumbered as article 1796], as it applies to this case, provides: "There is an obligation *in solido* on the part of the debtors, when they are all obliged to the same thing, so that each may be compelled for the whole, and when the payment which is made by one of them, exonerates the others toward the creditor." The City and HANO, therefore, are not joint tortfeasors for their negligent development of Press Park, but under pre-1980 law, they are solidary obligors.

Under pre-1980 law, the fact that the City and HANO may have different defenses, or that the elements of damages sought from each of them may be different does not change the *in solido* nature of their obligation to the Press Park residents. *Narcise v. Illinois Central R. Co.*, 427 So. 2d 1192, 1195 (La. 1983). Such factors may be important in determining whether each Defendant is liable to the Plaintiffs, but they do not affect the solidary relationship between these two tortfeasors to this part of the Class as a whole. *Carter v. EPSCO, Inc.*, 681 F.2d 1062, 1066 (5th Cir. 1982). Once the liability of each Defendant toward the Plaintiffs is determined, they become solidary obligors, and they each have an *in solido* obligation for all of the damages that are owed to this part of the Class. *Narcise,* 427 So. 2d at 1195. The defendants then each have a right of contribution from the other for their virile share of the damages. *Id.*

The same "cooperative agreement" of 1967 was still in place in the late 1970s, when the next phases of the neighborhood were planned. This means that HANO and its insurers are solidarily liable with the City for the City's negligence in approving Gordon Plaza for construction, despite the City's apparent awareness that the soil was contaminated from its prior use as a municipal landfill, and despite the City's soil testing that revealed the presence of contaminants. The Court finds, therefore, that the City and HANO, are solidary obligors.

The Court assesses the City's fault for the damages suffered by these Class Members at fifty percent (50%) and HANO's and its Insurers fault for the damages suffered by these Class Members at fifty percent (50%).

Moton School was completed in 1986 and operated until 1994. Therefore, the Court assesses the School Board's fault for the damages suffered by these Class

Members at one hundred percent (100%). Further, the Court finds that the School Board's negligent acts occurred before April 16, 1996; therefore, pre-1996 law applies to the School Board's conduct.

Insurance Carriers

The purpose of liability insurance is to afford the insured protection from damage claims. Policies therefore should be construed to effect, and not to deny, coverage. Thus, if policy language is subject to two or more reasonable interpretations, the interpretation which favors coverage must be applied. *Garcia v. St. Bernard School Bd.*, 576 So. 2d 975, 976 (La.1991); *Breland v. Schilling*, 550 So. 2d 609, 610 (La.1989). The Court finds as a matter of law that the Plaintiffs' claims for loss of property value and emotional distress are covered under the provisions of the "Personal Injury Liability Insurance" portion of each of the Insurers' policies.

In addition to the "Comprehensive General Liability Insurance" portion of each of the Insurers' policies, which provides "Coverage A – Bodily Injury" and "Coverage B – Property Damage," the policies contain separate and distinct "Personal Injury Liability Insurance" for what is termed under the policy "Coverage P – Personal injury." This coverage, which is set forth under a separate heading in each of the policies, is an additional aspect of coverage, for claims that are not covered under the "Comprehensive General Liability Insurance" policy. The Court finds that this "Personal Injury Liability" provides coverage for the Plaintiffs' loss of property values and emotional distress claims.

The Plaintiffs' claim that HANO "interfered with the plaintiffs' reasonable and comfortable use and enjoyment of their property." Since insurance policy provisions are to be construed broadly so as to afford coverage, "interfer[ence] with plaintiffs' reasonable and comfortable use and enjoyment of their property" falls within the broad "personal injury" coverage for "other invasion of the right of private occupancy."

The "personal injury" portion of each of the policies in question provides that the Insurer will pay "all sums" that the insured (HANO) becomes legally obligated to pay as a result of the insured's invasion of a right of private occupancy. Unlike the CGL portion of the policies in question, there is no declaration limiting the scope of this coverage.

Since the Plaintiffs' claims are for damages arising from the "interference with plaintiffs' reasonable and comfortable use and enjoyment of their property," *i.e.* an invasion of their right of private occupancy, the language of each of the Insurers' "personal injury" portion of their policies provides coverage for all of the Plaintiffs' claims asserted in this lawsuit.

When insurance policy language is subject to more than one reasonable interpretation, the interpretation that provides coverage should be adopted. *Albritton v. Fireman's Fund Insurance Company*, 70 So. 2d 111 (La. 1954). The Court can find no case in which another Louisiana court has ruled on whether claims such as those asserted in this case can be considered "personal injury" as defined under the policies in question.

One federal court, applying Louisiana law, determined that pollution claims did not constitute claims for personal injury under a policy that defined "personal injury" as "wrongful entry" or "eviction." *Gregory v. Tennessee Pipeline Co.*, 948 F.2d 203 (5th Cir. 1991). While this Court need not consider this case, as it has not been followed by any Louisiana court, it is nevertheless easily distinguished. The policy at issue in that case lacked the broad "other invasion of a right of private occupancy" language present in the policies at issue in this case. *See e.g. Titan Holdings Syndicate, Inc. v. City of Keene, N.H.*, 898 F.2d 265 (1st Cir. 1990) (contrasting policies containing "other invasion of a right of private occupancy" language with those merely defining personal injury as "wrongful entry or eviction"). The Court finds that jurisdictions with rules of construction similar to Louisiana's have determined that interference with a right of occupancy constitutes "personal injury" as opposed to "bodily injury", which usually means a physical injury or illness, under the same policy language contained in the "personal injury" coverage portion of the policies in question in this case. *See e.g. Millers Mut. Ins. Ass'n of Illinois v. Graham Oil Co.*, 282 Ill. App. 3d 129, 218 Ill. Dec. 60, 668 N.E.2d 223 (2d Dist. 1996); *Titan Holdings Syndicate, Inc. v. City of Keene, N.H.*, 898 F.2d 265 (1st Cir. 1990); *Pipefitters Welfare Educational Fund v. Westchester Fire Ins. Co.*, 976 F.2d 1037 (7th Cir. 1992).

In *Millers Mutual*, an Illinois state court applied rules of construction substantially similar to Louisiana's. That court found that seepage of gasoline onto the plaintiff's property from the defendant's property constituted a "wrongful entry" under the personal injury coverage portion of the policy and was covered, even though the same claim was not covered under the property damage or bodily injury coverage portions of the policy.

Similarly, in *Titan Holdings*, a federal court held that claims for damage from the operation of the defendant's facility constituted an "invasion of a right of private occupancy" giving rise to coverage under the "personal injury" portion of the policy at issue. Given Louisiana's rules of policy interpretation that favor coverage, this Court finds that the Plaintiffs' claims fall within the definition of "personal injury" in each of the Insurers' policies issued to HANO.[1]

Additionally, the Court rejects the Insurers' arguments regarding the time of manifestation of the Plaintiffs' injuries, finding that it does not apply to a claim for "personal injury" under their policies. HANO's Insurers argue that because the Plaintiffs did not know their property was contaminated, and did not begin to suffer emotional distress until 1994, their injuries did not manifest, *i.e.* "occur" within the policy period. In *Celotex,* the Court concluded that the insurance coverage is triggered by the mere exposure to the harmful conditions during the policy period. 599 So. 2d at 1076-77. The Court reasoned that the exposure theory comports with a literal construction of the policy language, maximizes coverage, and honors the contracting parties' intent by providing for consistency between the insured's tort liability and the insurer's coverage. *Id.*

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[1] The Court recognizes that some other jurisdictions have held that personal injuries do not include claims such as those asserted in this case. *See e.g. Lakeside Non-Ferrous Metals, Inc. v. Lakeside Ins. Co.*, 172 F.3d 702 (9th Cir. 1999); *Harrow Products v. Liberty Mut. Ins. Co.*, 64 F.3d 1013 (6th Cir. 1995). However, these other jurisdictions have based their decisions on grounds not applicable under Louisiana law. Those jurisdictions that have declined to find coverage under the personal injury coverage have done so not on the grounds that the claims could not reasonably be interpreted to fall within the definition of "personal injury," but because to do so would render as ineffective unambiguous pollution exclusion language applying to other coverage parts. This rationale does not apply under Louisiana law, because: (1) Louisiana law does not consider such pollution exclusions unambiguous; and (2) Louisiana law requires that policy exclusions be strictly and narrowly construed ***in favor of*** coverage. *Doerr v. Mobil Oil Corp.*, 00-0947 (La. 12/19/00); 774 So. 2d 119.

Here, the "personal injury" coverage in their policies does not place any restrictions on when the damages must occur for coverage to arise. Instead, the "personal injury" coverage portion in each of their policies states that the policy will provide coverage for ***all*** damages arising from an invasion of a right to a private occupancy regardless of the date of manifestation of the injury. For the coverage to apply, all the policies require is for the "invasion of the right of private occupancy" to take place during the policy period.

The Court finds that the Plaintiffs' emotional distress claims are claims for "bodily injury" under each of the policies that the Insurer Defendants issued in favor of HANO. Louisiana courts have construed claims for emotional distress to be claims for "bodily injury" for purposes of insurance coverage, and this Court follows that jurisprudence. *Crabtree v. State Farm Ins. Co.*, 93-0509 (La. 2/28/94), 632 So. 2d 736; *Levy v. Duclaux*, 324 So. 2d 1 (La. App. 4th Cir. 1975), *writ denied* 328 So. 2d 887 (La. 1976).

For example, in *Crabtree*, the Louisiana Supreme Court held that emotional injuries are "sickness or disease," because "[w]hile such an experience operates primarily on the mind of the victim such suffering cannot be isolated from the body." 632 So. 2d at 743. The Supreme Court went on to say, "We are unable to separate a person's nerves and tensions from his body." *Id.*

Therefore, the Court finds that the Plaintiffs' claims for emotional distress as a result of HANO's negligence are claims for "bodily injury", which are covered by each of the Insurers' policies issued in favor of their insured, HANO.

<u>Contributory Negligence</u>

Defendants assert that plaintiffs are contributorily negligent for any diminution in their property values because they put signs on their property to alert the public that there were toxins in the soil. It was not plaintiffs who developed low-income housing and a school on a former landfill. Plaintiffs were given the promise of the American dream of homeownership wrapped in a poisonous box. The only mechanism they had to be heard was in part to bring attention to the severity of the situation with such publicity. The Court finds this defense utterly without merit.

7. **DAMAGES**

Loss of Property Value

A. Property directly on the ASL site

The Court accepted Kermit Wayne Williams as an expert appraiser with an emphasis on stigma damages of real property affected by environmental problems. He was the only witness, who testified at the trial, who had performed an actual appraisal of the Plaintiffs' properties.[2] According to Mr. Williams, the toxic and hazardous contamination in the soil at the ASL site is an "incurable defect" in the properties, such that the Class Members are not economically or physically able to cure the problem through their own efforts. As Mr. Williams explained, given the socioeconomic status of the Plaintiffs, and the nature of the contamination, "The only way, in my opinion, it can be cured is to abandon the entire site and relocate." The Court agrees.

The Court finds that the Class Members' property, within the boundaries drawn by the United States Environmental Protection Agency in 1994 ("the ASL site"), cannot be fully and adequately environmentally remediated without the complete destruction of their homes or businesses. Accordingly, the stigma associated with being located directly on top of a Superfund Site, the permanent land use restrictions placed on the Class Members' properties (including the property owners' continuing obligation to maintain the semi-permeable barrier that now separates the clean topsoil from the contaminated soil), and the continuing presence of more than 140 toxic and hazardous materials directly under the Class Members' homes and businesses, have all combined to reduce the value of their properties to such a diminished state as to render them unmerchantable and worthless.

The Court is convinced that the Plaintiffs did not know before they moved to the ASL site that it was located on the City's former landfill. The Court is satisfied that if the Plaintiffs had known the true condition of the ASL site before they purchased their properties, or if they had been advised that their property was located on a former municipal landfill, they would not have agreed to buy property on the ASL site.

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[2] The Defendants' only property expert, Jimmie Thorns, was not asked to perform an appraisal of the homes, and apparently did not even go inside the Plaintiffs'

The Court finds, therefore, that all Class Members who owned property (whether developed or undeveloped) before February 1, 1994, within the boundaries drawn by the United States Environmental Protection Agency in 1994 ("the ASL site"), and did not know before their purchase that their property was located on a former municipal landfill, are entitled to compensation *in solido* for their damages from the City and HANO, and HANO's insurers (according to the years of their policies and coverage), in the full amount of their present fair market value, as that value is determined at the time they are appraised in support of their claims.

B. Property in the "adjacent area"

The Court finds that the Class Members who owned property (whether developed or undeveloped) before February 1, 1994, within the "adjacent area" (located within the boundaries of the Class and between Montegut and Feliciana Streets and the West side of Louisa Street), have suffered a diminution of value in their properties, due to the stigma associated with their close proximity (some as close as directly across the street) to the ASL "Superfund Site" ("the ASL site"). Further, they were exposed to the same contaminants as those who lived on the site during the construction and remediation.

Accordingly, the Court finds that these Class Members are entitled to compensation *in solido* for their damages from the City and HANO, and HANO's insurers (according to the years of their policies and coverage), in the amount of ten percent (10%) of their present fair market value, as that value is determined at the time they are appraised in support of their claims.

Mental and Emotional Distress

Louisiana recognizes claims for emotional distress, with limitations to protect against purely speculative or *de minimus* claims. In *Bonnette v. Conoco*, 837 So. 2d 1219 (La. 2003), plaintiffs sought compensatory damages for damages for fear of cancer, among others. The Bonnette Court considered whether plaintiffs could recover for past, present, and future mental anguish without accompanying physical injury. The Court recognized that such compensation occurs when there is an "especial likelihood

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homes.

of genuine and serious mental distress, arising from the special circumstances, which serves as a guarantee that the claim is not spurious." 837 So. 2d at 1234. The Court recognized that there are inherent problems in awarding damages for mental disturbance in the absence of manifest physical injury particularly in cases involving exposure to asbestos or other carcinogens. *Id.* Thus, the Court held that:

> [U]nder the rule announced in *Moresi*, which must be stringently applied in asbestos exposure cases due to their inherently speculative nature, in order for plaintiffs to recover emotional distress damages in the absence of a manifest physical injury, they must prove their claim is not spurious by showing a particular likelihood of genuine and serious mental distress arising from special circumstances.

In *Moresi v. State, Dept. of Wildlife and Fisheries,* 567 So. 2d 1081 (La. 1990), to which the Court refers, two 18-year olds were stopped by game wardens who suspected the boys of violating the duck hunting limit. The total time that the boys were detained was less than one hour. Following this incident, a State employee put a note on the front door of their fathers' hunting camp indicating that the State was "after them and would get them next time." The boys' fathers filed suit for a violation of their sons' civil rights, and claimed that the note on the door caused the boys to suffer mental distress. There were no other allegations of harm or injury.

The district court awarded damages of $43,000, which included an award to each plaintiff of $1,000 for mental distress, punitive damages of $4,000, and attorneys' fees of $32,939.10. On appeal, the Third Circuit affirmed the compensatory award, reversed the punitive damage award, and reduced the attorneys' fees. The Supreme Court went one step further and reversed the award of damages for mental distress.

In reversing the mental distress damages, the Supreme Court observed that the case did not involve a separate tort such as "assault, battery, false imprisonment, trespass to land, nuisance, or invasion of the right to privacy." *Id.* at 1095. The Supreme Court reasoned that some other circumstances or types of harm are usually required in such cases to serve as a guarantee that the claim is genuine.

Unlike the Plaintiffs in this case, the boys in *Moresi* were not told that their children could not play outside in the dirt, or that they could not grow and eat vegetables in their yard. They were not told to take extra measures to clean dust from their homes several times each day. The 18-year-olds in *Moresi* were not told that they had been

living on a Superfund Site for twenty years or longer. They were not told that there were 149 toxic materials on their property, and that 49 of them are known to cause cancer in humans. They did not have to face the loss of their investments in the most valuable thing they own – their homes.

If ever there were a case where there were special circumstances to create a particular likelihood of genuine and serious mental distress, this is the case. Plaintiffs in this case learned in 1993 that for more than twenty years they had been living and were still living on some of the most toxic soil in the country. The Court observed the Plaintiffs as they testified about their thoughts, feelings, fears, and concerns. The Court finds their testimony to be credible and reasonable, given their unique circumstances. It is not every day that a court is faced with Plaintiffs such as these who are living directly on one of the most contaminated sites in the county. The Court finds that suffering the compounded fear, worry, anxiety, and concern is considerably more than a "mere inconvenience". The Court finds, therefore, that these unique facts meet the "special circumstances" described in *Moresi* and *Bonnette*, and that the Plaintiffs' claims for emotional distress damages are not spurious.

C. Orleans Parish School Board

The Court finds the Orleans Parish School Board's conduct particularly offensive and egregious because of its heightened duty in the realm of elementary school children. For the former full time students and full time employees of Moton Elementary School, the Court finds that these Class Members are entitled to emotional distress damages based on their years of attendance or employment at Moton School. From the 1986-87 school year through the 1993-94 school year, these former students and employees were not advised that their School was located directly on top of contaminated soil, and they were not told of the dangers associated with exposure to the numerous toxic and hazardous materials in the soil on the School property.

Nevertheless, in 1994, when the United States Environmental Protection Agency declared a portion of the ASL neighborhood to be a "Superfund Site", the Moton School property was included within the "Superfund" boundaries. This caused these Class Members to suffer extreme stress beginning in 1994, when the EPA first published its

findings from soil testing at the ASL site, and resulted in the closure of the School in 1994.

The Court recognizes that the School Board performed a partial remediation of the Moton School site before the School was built and occupied, but there is no barrier of any kind separating the clean topsoil from the contaminated soil just three feet below the surface. Nor was any barrier installed or constructed to prevent or restrict the contaminants from migrating upward to the surface. Further, and despite the warnings issued years earlier by its own consultants, the School Board breached the topsoil barrier in 1992, when it engaged in extensive under-slab plumbing repairs at Moton that were carried out while School was in session. Finally, the School Board has not demonstrated that it established a plan or system for routinely testing the Moton School site to ensure that the contaminants in the soil throughout the School property are not migrating upward to the surface, despite their consultants' recommendations to do so.

Through the trial testimony of 19-year-old Diarra McCormick, the Court finds that the stress suffered by these Class Members since 1994 is of a type that is so unique and extraordinary in nature that it is not merely speculative, but is real and compensable. The Court, therefore, finds that these Class Members are entitled to compensation from the Orleans Parish School Board in the amount of $2,000.00 for each year of their full time attendance or full time employment at Moton School from and including the 1987-88 school years through and including the 1993-94 school years.

D. Plaintiffs directly on the ASL site

The Court finds that the Class Members who lived or worked directly on the ASL site (that portion of the ASL neighborhood located within the EPA's 1994 "Superfund" boundaries) have suffered mental and emotional distress due to the shocking realization in 1994 that their homes and businesses were located on a "Superfund Site". These Class Members began to suffer extreme stress in 1994, when the EPA first published its findings from soil testing at the ASL site, and placed the site on the National Priorities List ("NPL").

The Court finds that the stress suffered by these Class Members since 1994 is of a type that is so unique and extraordinary in nature that it is not merely speculative, but is real and compensable. Although there is no evidence of any Class Member having been diagnosed with a personal injury or disease that has been causally related to the contaminated soil, the actual and extensive damage to the Class Members' property has been clearly established. The Court notes, in particular, that it cost the EPA more than $20 million to perform a partial remediation in 2000-2001 of only approximately ten percent of the site, leaving ninety percent of the toxic and hazardous materials in place on the Class Members' property. Accordingly, the Court finds that these Class Members are entitled to compensation *in solido* for their damages from the City and HANO, and HANO's insurers according to the years of their policies and coverage.

In 2000-2001, the EPA performed a partial remediation of approximately ten percent of the ASL site. The contaminants at the very surface of a portion of the ASL site were excavated and replaced with clean soil. There was no excavation of the contaminated soil under the streets or under any homes or buildings. A semi-permeable barrier was installed between the clean topsoil and the contaminated soil that is just two feet below the surface and less than two feet in some areas due to the presence of underground utilities, water lines, phone lines, and the like.

Although the partial remediation may have reduced the most immediate health risk from hazardous exposures that the Class Members previously faced, the Court finds that this reduced health risk exists only as long as the semi-permeable barrier is not breached. The Court notes that the Class Members themselves are now responsible for protecting and maintaining the integrity of the barrier. Placing this kind of responsibility on these Class Members, especially given their socioeconomic status, creates additional stress and future concerns. Further, the EPA will continue to conduct five-year assessments indefinitely. The uncertainty of knowing what these five-year assessments will reveal, particularly considering the history of deception, the Court finds that the Class Members are entitled to compensation for emotional distress based on their years of residence on the ASL site. The Court notes that the ASL site has recently been devastated by Hurricanes Katrina and Rita, which rendered the site uninhabitable.

Therefore, the Court finds that August 29, 2005 is an appropriate cut-off date for assessing damages.

The Court finds that it is reasonable for each Class Member's emotional distress to be proportional to the length of time they have lived or worked on the ASL site and were thereby exposed on a daily basis to the hazardous and toxic materials that were at the surface of their properties and at a depth of twenty feet in the soil. Therefore, for each Class Member who lived or worked directly on the ASL site, and within the EPA's 1994 boundaries, the Court finds that it is appropriate for each of them to be compensated for their emotional distress in direct proportion to the length of time they lived or worked on the ASL site up through and including August 29, 2005.

The Court, therefore, awards these Class Members the following amounts based on their years of residence:

For 1- up to 5 years	$4,000.00 (per year)
For 5- up to 10 years	$25,000.00 (total)
For 10- up to 15 years	$30,000.00 (total)
For 15- up to 20 years	$40,000.00 (total)
For 20 years or more	$50,000.00 (total)

E. Plaintiffs in the "adjacent area"

For residents of the "adjacent area", the Court finds that although they are entitled to damages for the emotional distress they suffered from learning in 1994 that they had been living or working directly adjacent to a "Superfund Site" for many years, they are not entitled to the same level of compensation as the Class Members who lived or worked directly on the contaminated property, and within the EPA's 1994 boundaries. Therefore, the Court awards each Class Member, who lived or worked for one full year in the "adjacent area" before February 1, 1994, the total amount of $2,500.00 in emotional distress damages.

8. ORLEANS PARISH SCHOOL BOARD'S CROSS CLAIM AGAINST CITY OF NEW ORLEANS AND HANO

The School Board asserted a claim against the City of New Orleans in its capacity as a prior owner of the land and operator of the former landfill under the

Hazardous Waste Control Law ("HWCL"), La. Rev. Stat. § 30:2276. The legislature enacted the HWCL to identify sites at which hazardous substances may have been disposed or discharged and to provide a way for the Department of Environmental Quality (DEQ) to insure that those who contributed to the discharge or disposal are responsible for the costs of cleaning up the site. *Margone, L.L.C. v. Addison Resources, Inc.*, 896 So.2d 113, 116 (La. App. 3 Cir. 2004). If a person voluntarily cleans up a hazardous waste site before the Secretary demands remediation, that person may sue other alleged responsible parties for remediation costs, as long as the Secretary approved his remediation plan. *Id.*

No action shall be commenced under this Chapter unless it is commenced within ten years from the date of the discovery of the disposal or discharge for which remedial action must be undertaken. La. Rev. Stat. § 30:2276(H)(1). However, such action shall be barred if the plaintiff does not make written demand on the defendant by certified mail, return receipt requested, at least sixty days prior to initiation of suit based on the cause of action provided in this Subsection. La. Rev. Stat. § 30:2276(G)(3). The School Board did not provide proof that it complied with section (G)(3). Accordingly, the Court dismisses the School Board's claim against the City of New Orleans for contribution under HWCL.

The School Board also claims that it is a class plaintiff against HANO. The School Board claims it suffered stigma damages and diminution of property value due to HANO's failure to act. The School Board claims that it would not have been placed on the Superfund list if HANO had followed the recommendations of consultants it hired prior to the development of the ASL site. The Court finds that the School Board knew of any potential claims against HANO when it discovered the nature of the site in 1983. Such delictual actions are subject to a one-year liberative prescriptive period. The Court finds that the School Board's claims in the capacity of class plaintiff are prescribed.

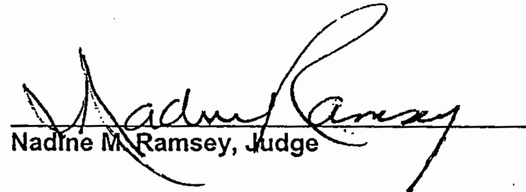
9. **COSTS, EXPENSES, JUDICIAL INTEREST**

The Court finds that the City, HANO and its Insurers, and the School Board are each liable to the Plaintiffs for one-third of the Plaintiffs' costs and expenses that are

chargeable to this trial.

The Court also finds that the City, HANO and its insurers, and the School Board are each liable to the Plaintiffs for their respective percentages of pre-Judgment interest in the amount prescribed by law, and for all post-Judgment interest until paid in the amount prescribed by law.

REASONS FOR JUDGMENT RENDERED AND SIGNED at New Orleans, Louisiana, this 12th day of January, 2006.



Nadine M. Ramsey, Judge