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SUPREME COURT OF KENTUCKY
2008 – SC – 000886 DG
(2006 CA 000918 – MR; 2006 CA 000962 – MR
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SUPREME COURT

CERTAINTEED CORPORATION — APPELLANT

v.

MARSHALL CIRCUIT COURT
Case No. 02-CI-00310

AVA NELL DEXTER, Individually
and JAMES M. DEXTER, Executor
of the Estate of James G. Dexter — RESPONDENTS

BRIEF FOR APPELLANT, CERTAINTEED CORPORATION

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INTRODUCTION

The Circuit Court granted a new trial in this asbestos personal injury case on the ground that the jury, in failing to allocate fault to any company named on the verdict sheet other than the two companies that went to trial, ignored material uncontested evidence. The Court of Appeals reversed. The issue is whether the Court of Appeals erred in overlooking substantial, uncontradicted record evidence strongly supporting the Circuit Court's decision.

STATEMENT CONCERNING ORAL ARGUMENT

Movant CertainTeed Corporation requests oral argument. The case presents important issues concerning the proper role of the Court of Appeals in reviewing grants of new trial motions and this Court may have questions about the record unanticipated by the parties' briefs. Moreover, the case turns largely on the evidence the Circuit Court relied on – and which the Court of Appeals disregarded – and counsel would welcome the opportunity to be assured that Movant's position has been clearly stated.

STATEMENT OF POINTS AND AUTHORITIES

1. The Court of Appeals ignored the strict standards for reviewing a Circuit Court's new trial order and acted as a factfinder rather than a reviewer of the Circuit Court's decision. Pp. 6-9.

a. A trial court's power to grant a new trial is expansive and central to the right of a jury trial.

City of Louisville v. Allen, 385 S.W.2d 179 (Ky. 1964), p. 6.

Gasperini v. Ctr. for Humanities, Inc., 518 U.S. 415 (1996), p. 7.

Slatton v. Martin K. Eby Constr. Co., 506 F.2d 505 (8th Cir. 1974), p. 7.

Hazelwood v. Beauchamp, 766 S.W.2d 439 (Ky. App. 1989), p. 7.

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Commonwealth Life Ins. Co. v. Pendleton, 231 Ky. 591, 21 S.W.2d 985 (Ky. 1929), p. 8.

Husbands v. Paducah & Ill. R.R., 186 Ky. 294, 216 S.W.2d 840 (Ky. 1919), p. 8.

Louisville & N.R.R. v. Chambers, 165 Ky. 703, 178 S.W.2d 11041 (Ky. 1915), p. 8.

b. An appellate court must presume that a trial court's grant of a new trial motion is correct, and may reverse only if the trial court's decision is clearly erroneous.

Davis v. Graviss, 672 S.W.2d 928 (Ky. 1984), p. 8.

Prater v. Arnett, 648 S.W.2d 82 (Ky. App. 1983), p. 8.

City of Louisville v. Allen, 385 S.W.2d 179 (Ky. 1964), pp. 8, 9.

2. The Court of Appeals overlooked substantial, uncontested evidence of exposure, causation, and liability on the part of companies identified on the verdict sheet that supported the Circuit Court's decision. Pp. 11-18.

Greenleaf v. Garlock, Inc., 174 F.3d 352 (3d Cir. 1999), p. 18.

a. Opening statements clearly made are judicial admissions.

Samuels v. Spangler, 441 S.W.2d 129, 131 (Ky. 1969), p. 11.

Co-De Coal Co. v. Combs, 325 S.W.2d 78, 79 (Ky. 1959), p. 11.

Lambert v. Franklin Real Estate Co., 37 S.W.3d 770, 774-75 (Ky. App. 2000), p. 11.

b. A plaintiff may show that a product is defective by proving that it lacked adequate warnings.

Clark v. Hauck Mfg. Co., 910 S.W.2d 247, 251 (Ky. 1995), p. 15.

c. A product manufacturer or premises owner may likewise be liable for failure to give adequate warnings.

Edwards v. Hop Sin, Inc., 140 S.W.3d 13, 17 & n.14 (Ky. App. 2003), p. 15.

STATEMENT OF THE CASE

James G. Dexter ("Mr. Dexter") brought this lawsuit for asbestos-related injuries in 2002. His wife (Ava Dexter) and son (James M. Dexter) were substituted as plaintiffs in 2004 upon his death from lung cancer at age 79. R. 20-35, 3334. The case was tried twice.

1. The First Trial. The first trial took place in May 2005. The evidence showed that Mr. Dexter started smoking at age 9 and smoked a pack a day for over 50 years. All of the medical experts agreed that smoking was a cause of Mr. Dexter's lung cancer. The evidence also showed that Mr. Dexter had abundant exposure to asbestos-containing insulation products through his work for over 40 years as a union pipefitter in many industrial facilities in western Kentucky. By contrast, Mr. Dexter's only contact with any CertainTeed product was in 1963 or 1964 when he worked part-time, after a full day's work as a pipefitter, helping to install asbestos cement water pipe in Gilbertsville (and doing some repairs in later years). Mr. Dexter's Social Security records showed that he earned $270 at this part-time job, representing about one week's pay throughout his 40-year career.

Plaintiffs' amended verified complaint named nineteen corporate defendants as bearing responsibility for Mr. Dexter's lung cancer, and eleven more companies were named as third-party defendants. App. Tab E.[1] By the time the case was submitted to the jury, however, CertainTeed and Garlock Sealing Technologies, LLC were the only two defendants who had not settled the case. Mr. Dexter's exposure to those companies' asbestos-containing products was miniscule in comparison to his exposure, during his 40-year pipefitting career,

[1] "App. Tab" references are to the Appendix appearing at the end of this brief.

to the asbestos-containing insulation products of many other companies with which Plaintiffs had already settled.

The jury was instructed that, if it found CertainTeed or Garlock liable, it should allocate fault among a total of 28 companies. App. Tab F. Despite abundant and *uncontested* evidence of Mr. Dexter's exposure to asbestos fiber from products or at premises of several of those other companies, and of that exposure's contribution to his lung cancer, the jury allocated no fault to any companies but CertainTeed and Garlock. *Id.*[2]

Accordingly, the jury having irrationally failed to allocate *any* responsibility to *any* company other than the ones before it, the Trial Court – which heard all of the evidence first hand and was in a perfect position to judge – set aside the verdict as "manifestly unsupported by the evidence and manifestly a product of passion and prejudice." App. Tab C.

2. The Second Trial. The second trial took place in January and February 2006 and involved largely the same evidence as the first one. The jury allocated 60% of the fault to Mr. Dexter, 17% to Garlock, 2% to CertainTeed, and 21% to other companies listed on the verdict sheet. App. Tab G. It awarded $1,600,000 in compensatory damages and assessed punitive damages of $100,000 against CertainTeed and $700,000 against Garlock. *Id.* On February 22, 2006, the trial court entered judgment of $132,294.98 against CertainTeed and $874,507.33 against Garlock. App. Tab D. On May 1, 2006, Plaintiffs appealed the trial court's decision to grant a second trial. R. 7514. On May 8, 2006, CertainTeed filed a cross-appeal. R. 7523.

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[2] The jury allocated 35% of the fault to Mr. Dexter, 35% to Garlock and 30% to CertainTeed. *Id.* It awarded $5,000,000 in compensatory damages and no punitive damages against either company. *Id.* This was one of the largest asbestos verdicts ever recorded in Kentucky.

3. The Decision of the Court of Appeals. On August 8, 2008, in a 2-1 decision with Justice Graves dissenting, the Court of Appeals reversed the Trial Court's grant of a new trial. App. Tab A. It appeared to believe that its role was to weigh all of the evidence as if it were sitting as the jury. Indeed, it started its analysis by saying, "This case presents intriguing factual issues to resolve." Opin. p. 11. It then reviewed *some* of the record evidence and concluded that, although it supported a case against the empty chair defendants of exposure to asbestos from their products or at their premises, CertainTeed "utterly fail[ed] to provide us with any substantial proof that would establish that any other specific defendant's conduct actually caused [Mr. Dexter's] injury." Opin. pp. 15-16. That ruling ignored uncontradicted evidence of record.

ARGUMENT

The Court of Appeals badly misperceived its role in reviewing the Circuit Court's grant of a new trial. The uncontested evidence at the first trial of this case proved that other companies in addition to CertainTeed and Garlock bore responsibility for Mr. Dexter's injury. The jury was not free to disregard that evidence. When it did, the Circuit Court was compelled to grant a new trial under the long-settled principle, recognized in Kentucky jurisprudence as well as closely related federal court decisions, that a jury may not ignore material, uncontested evidence and rest a decision on speculation.

This Court has stressed the deference that is due to trial court orders granting a new trial, emphasizing that reversal is warranted "only in the rare instance when it can be said that [the trial court] *has clearly erred.*" *City of Louisville v. Allen*, 385 S.W.2d 179, 183-84 (Ky. 1964) (emphasis in original). The Court of Appeals in this case gave only lip service to the abuse of discretion standard. It did not look to see whether the trial judge had a

"substantial reason" for his decision – the appropriate role of an appellate court reviewing a trial court decision for abuse of discretion – but instead acted as a surrogate factfinder in undertaking a review of the evidence to resolve "intriguing factual issues." Opin. p. 11. It impermissibly substituted its reading of the evidence for the judgment of the trial judge who had sat through all three weeks of the first trial, and compounded its error by simply missing or disregarding *unrebutted* evidence on key issues that the Circuit Court rightly decided the jury was not free to ignore.

Accordingly, this Court should reaffirm the proper roles of trial courts and Courts of Appeals in this important area, and reverse the decision of the Court of Appeals.

I
THE COURT OF APPEALS IGNORED THE STRICT STANDARDS FOR REVIEWING A CIRCUIT COURT'S NEW TRIAL ORDER AND ACTED AS A FACTFINDER RATHER THAN A REVIEWER OF THE CIRCUIT COURT'S DECISION.

A. The Trial Court Must Set Aside The Verdict When The Jury Ignores Uncontroverted Evidence.

A trial court's power to grant a new trial is expansive and central to the right of a jury trial. *Gasperini v. Ctr. for Humanities*, 518 U.S. 415, 433 (1996) ("'If it should clearly appear that the jury have committed a gross error, or have acted from improper motives * * * it is as much a duty of the court to interfere, to prevent the wrong, as in any other case.'") (citation omitted); *see also Slatton v. Martin K. Eby Constr. Co.,* 506 F.2d 505, 508 (8th Cir. 1974) ("[T]he action of a trial court in setting aside a jury verdict is not in derogation of the right to a trial by jury, 'but is one of the historic safeguards of that right.'") (citation omitted).

Indeed, under settled Kentucky jurisprudence, the trial court *must* grant a new trial when the jury has failed to perform its duty. Thus, in *Hazelwood v. Beauchamp*, 766 S.W.2d

439 (Ky. App. 1989), the Court of Appeals held that it was reversible error for the trial court not to grant a new trial where the jury had awarded plaintiff only a nominal amount for pain and suffering and nothing for lost wages. The appellate court reasoned that the jury "was not free to disregard the *uncontroverted evidence* of the nature of the accident itself and the medical procedures performed," nor "the *undenied evidence* of [plaintiff's] lost wages attributable solely to the accident." *Id.* at 441 (emphasis added). *See also Phipps v. Bisceglia*, 383 S.W.2d 367, 368 Ky. 1964) (new trial must be awarded where jury "disregards uncontroverted evidence as to the elements of damage"); *Hayes v. Hayes*, 357 S.W.2d 863, 864-65 (Ky. 1962) ("where there is uncontradicted evidence by a disinterested witnesses who knows of that which he speaks and the witness is in no way discredited and the story is not improbable, the evidence is conclusive, and the jury may not arbitrarily disregard it");[3] *Perfection Harwood Flooring Co. v. Bowling*, 300 S.W.2d 550, 552 (Ky. 1957) (same); *Commonwealth Life Ins. Co. v. Pendleton*, 231 Ky. 591, 594, 21 S.W.2d 985, 986 (Ky. 1929) (generally uncontradicted testimony of disinterested witnesses may not be disregarded); *Husbands v. Paducah & Ill. R.R. Co.*, 186 Ky. 294, 297, 216 S.W.2d 840, 841 (Ky. 1919) (holding that jury was not free to disregard uncontroverted evidence of diminution of property value and ordering new trial). *Cf. Louisville & N.R.R. v. Chambers*, 165 Ky. 703, 707, 178 S.W.2d 1041,1043 (Ky. 1915) (jury verdict at variance with physical evidence may require trial court to set aside verdict and grant new trial).

[3] As will appear *infra,* much of the uncontradicted testimony that established the fault of the empty-chair defendants came from disinterested witnesses such as Mr. Dexter's co-workers or from admissions by Plaintiffs or their experts.

B. Appellate Courts May Not Overturn A New Trial Order Unless It Is "Clearly Erroneous."

It is also settled that that an appellate court must presume that a trial court's grant of a new trial motion is correct, and may reverse only if it finds that the trial court abused its discretion. In *Prater v. Arnett*, 648 S.W.2d 82, 86 (Ky. App. 1983), the Court of Appeals explained that its role was *not* to "step[] into the shoes of the trial couort" but instead only to review "the actions of the trial judge" and whether they "constituted an error of law," which only occurs where the judge "abused his discretion and thereby rendered his decision clearly erroneous." This Court approved of *Prater*'s description of "the different functions of trial and appellate courts" in *Davis v. Graviss*, 672 S.W.2d 928, 933 (Ky. 1984). It also said that *Prater* comported with *City of Louisville v. Allen*, 385 S.W.2d 179, 183-84 (Ky. 1964), where this Court stated:

> It serves to emphasize the initial and primary role of the trial judge in determining these issues; that his decision shall be *prima facie correct* and final; and that only in the rare instance when it can be said that he *has clearly erred*, i.e., abused his discretion, will he be reversed. [Emphasis in original.] [Quoting 6 Moore's Federal Practice § 59.08.]
> * * * *
> The administration of justice demands respect for [the trial court's] judgment within this area. * * * It will not be overturned if it can be sustained. * * * If the record supports [the trial court's] ruling, it will not be reversed. Even if in our opinion the record would more strongly support a different conclusion, if there is *substantial reason* for his decision, then he has not clearly erred. [Emphasis added.]

Allen explained that such deference to the trial court was justified because it "hears the witnesses and has even a better opportunity, perhaps, for judging of the demeanor and surroundings as liable to improperly affect the result of the trial, than the jurors themselves

have." *Id.* at 181;[4] *see also Morgan v. Scott*, 291 S.W.3d 622, 642 (Ky. 2009) ("Since 'a proper ruling on a motion for new trial depends to a great extent upon factors which may not readily appear in an appellate record[,]' we may not disturb a trial court's decision to deny a motion for a new trial unless that decision is 'clearly erroneous.'") (citation omtitted).

The Court of Appeals in this case slipped these established constraints. Rather than determining whether the Circuit Court *clearly erred*, as it should have, it stepped into the Circuit Court's shoes and undertook to reweigh the evidence. In doing so, it overlooked – or at the very least failed to give appropriate weight to – the voluminous and uncontested evidence that provided a "substantial reason" for the Circuit Court's decision. *Allen*, 385 S.W.2d at 184.

[4] *Allen* also held that it was error for the trial court to limit the new trial to the issue of damages only rather than order a new trial on all issues. 385 S.W.2d at 182. That part of the decision was overruled in *Nolan v. Spears*, 432 S.W.2d 425 (Ky. 1968), which held that "we discard the concept that not to retry every issue embraced in a compromise verdict would be an injustice." *Allen*'s holding on the standard of review remains good law.

II.
THE COURT OF APPEALS OVERLOOKED SUBSTANTIAL, UNCONTESTED EVIDENCE OF EXPOSURE, CAUSATION, AND LIABILITY ON THE PART OF COMPANIES ON THE VERDICT SHEET

Unequivocal admissions in opening statements are judicial admissions.[5] Plaintiffs' opening statement told the jury: "We're not trying to suggest that GE or Johns-Manville or some other company didn't have a role or responsibility. *No, we think that there's many companies that participated in causing the death of Mr. Dexter.* * * * We think these companies are *significant* and the evidence will show that they caused Mr. Dexter to have *significant* exposure to their products." App. Tab H, 5/12/05 Tr. at 35 (emphasis added).[6] The evidence bore out that statement in spades. Mr. Dexter worked at Paducah Gaseous Diffusion Plant, two Tennessee Valley Authority electrical powerhouses, multiple chemical and heavy industrial facilities in Calvert City, and the GE plant in Mount Vernon, Indiana, all premises that were on the verdict sheet. To focus just on Mr. Dexter's work between 1969 and 1971 at the GE plant, the evidence of exposure, causation, and liability with respect to GE, Owens Corning, Rapid American, Johns Manville, and Triangle Insulation – all companies that were included on the verdict sheet – was *uncontroverted*.[7] Indeed, Plaintiffs did not even object to the inclusion on the verdict sheet of GE, Johns Manville, or Triangle. 5/24/05 Trial Tape at 9:49:30–9:59:56. As we now show, the evidence of exposure,

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[5] *Samuels v. Spangler*, 441 S.W.2d 129, 131 (Ky. 1969) (party may be held to unequivocal admission in opening statements); *Co-De Coal Co. v. Combs*, 325 S.W.2d 78, 79 (Ky. 1959) (same); *Lambert v. Franklin Real Estate Co.*, 37 S.W.3d 770, 774-75 (Ky. App. 2000) (same).

[6] Citations to the jointly stipulated stenographic record are cited by date and transcript page number.

[7] GE was sued as a premises defendant; the other four companies were insulation manufacturers or suppliers – *i.e.*, all products defendants.

causation, and liability with respect to those companies was both substantial and uncontroverted.

A. Evidence of Exposure. Proof of exposure came from Mr. Dexter's *verified* complaint, admitted in evidence, which states that he was exposed to asbestos from products or at premises of some 18 companies besides CertainTeed, including GE, Rapid American, and Triangle. App. Tab E. Further evidence came from Plaintiffs' sworn interrogatory answers, which were read to the jury and which stated that, while working as a pipefitter at GE's Mount Vernon facility in 1969-71, Mr. Dexter worked with or around "Kay[l]o pipe and block insulation [manufactured by Owens-Corning], Careytemp pipe covering [sold by Rapid American]* * * and asbestos tape." App. Tab I, Pl. Resp. to GE Interrog. No.1, 5/24/05 Trial Tape at 3:47:22–3:48:55. James M. Dexter, Mr. Dexter's son, also testified that he worked in the "immediate vicinity" of his father at the GE plant and that they were exposed to dust from the asbestos-containing insulation being applied by the insulators. App. Tab J, 5/18/05 Tr. at 28-29, 31-32.

Ron Eades, an insulator for Triangle Insulation Company who worked at the same GE plant during the same years as Mr. Dexter, testified that "if [Mr. Dexter] was at Mount Vernon at the General Electric plant working as a pipefitter, he was exposed to asbestos." App. Tab J, 1/12/05 Eades Dep. at 15. (All deposition testimony cited herein was actually read to or played to the jury.) He also testified that the asbestos insulation products used at the plant around pipefitters like Mr. Dexter included Careytemp insulation, insulation manufactured by Johns Manville and Owens-Corning, and insulation supplied and installed by Triangle Insulation. *Id.* at 35-36, 45-46, 54, 68.

James M. Dexter testified that Kaylo insulation was manufactured by Owens Corning. App. Tab J, 5/18/05 Tr. at 81-82. Richard Hatfield, an expert offered by Plaintiffs, testified that Careytemp insulation was sold by Rapid America. App. Tab L, 5/13/05 Tr. at 130. Hatfield showed the jury a work place simulation video with a worker cutting Owens Corning's Kaylo asbestos-containing block insulation with a saw, generating substantial fiber release. *Id.* at 190-92.[8]

In addition, a defense expert, Dr. Graham, offered unrebutted testimony that amosite fiber – the type of asbestos fiber associated with insulation products – was overwhelmingly the type of fiber found in Mr. Dexter's lung, confirming that, through his 40 years as a pipefitter, Mr. Dexter had a "substantial exposure" to amosite fiber from thermal insulation products. App. Tab M, 3/10/05 Graham Dep. at 64-65, 82-83, 94-95. Moreover, the amosite asbestos found in Mr. Dexter's lungs could not have come from CertainTeed pipe or Garlock gaskets, since those products did not contain that type of asbestos fiber.

B. Evidence of Causation. Specific evidence of causation came in through the *uncontradicted* testimony of the medical experts that Mr. Dexter's exposure to the asbestos insulation products at GE's Mt. Vernon plant actually was a substantial factor in causing his lung cancer. On examination by Plaintiffs' counsel, Mr. Dexter's treating physician testified that he agreed "that *each and every exposure to asbestos* was a substantial contributing factor to Mr. Dexter's resulting asbestos-related diseases". App. Tab N, 10/28/04 Culbertson Dep. at 30-31 (emphasis added). Plaintiff's expert Dr. Frank gave the same testimony:

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[8] All Mr. Dexter's co-workers testified that he was exposed to Owens Corning's Kaylo: James M. Dexter, App. Tab J, 5/18/05 Tr. at 81-82; Billy Robertson, App. Tab O, 5/17/05 Tr. at 71-73, 104; Ron Eades (above), App. Tab K; and Herman Mitchell, App. Tab P, 5/19/05 Tr. at 53.

> Q: Do you have an opinion, Dr. Frank, with regards to whether *each and every exposure to asbestos* was a substantial contributing factor in causing these two asbestos-related diseases?
>
> A: Yes. * * * Every exposure he would have had in all the years that he would have been exposed to *any and all products* would have added to his burden and *would have contributed* to the development of both of these [asbestos-related] diseases.

App. Tab Q, 5/12/05 Tr. at 5-6 (emphasis added); *see also id.* at 54-55 ("[T]he exposures he would have had to any and all products * * * would have contributed to his asbestosis and to his lung cancer.").

In addition, Plaintiffs' medical expert Dr. Hammar testified that Mr. Dexter's lung tissue showed asbestos exposure at the "very top" of the scale for pipefitters, "the head of the class," and that if Mr. Dexter had worked around asbestos insulation from Johns-Manville, Owens-Corning (Kaylo), or Rapid American (Careytemp) for an extended time, those exposures would have been a substantial factor in causing his cancer. App. Tab R, 5/16/05 Tr. at 62-63, 132-33, 152-54. As we have seen, the evidence left no room for "ifs": Mr. Dexter in fact worked around Kaylo and Careytemp and a Johns-Manville product at GE's plant for as many as three years in 1969-71.

Accordingly, Plaintiffs' verified complaint and sworn interrogatory answers (read to the jury), and the testimony of James M. Dexter, Eades, Hatfield, and Graham provided specific, *unrebutted* evidence that Mr. Dexter was extensively exposed from 1969-71 to asbestos at the GE plant from specific insulation products manufactured and/or supplied by Owens Corning, Rapid American, Johns Manville, and Triangle, and that his lungs at death were full of fiber characteristic of those products. There was also specific, *unrebutted* testimony from medical experts Culbertson, Frank, and Hammar that that exposure actually was a substantial factor in causing Mr. Dexter's cancer.

C. Evidence of Liability. The record also contains ample evidence of knowledge by the empty chair defendants of the hazards of asbestos and of their failure to warn.[9] Numerous witnesses testified that the dangers of asbestos were known long before Mr. Dexter worked at the GE plant from 1969-71. *E.g.*, App. Tab Q, 5/12/05 Tr. at 36-41, 83 (Dr. Frank) (asbestos was known in the 1930s to cause asbestosis, and suspected in the 1940s of causing cancer; an article on asbestos and lung cancer was published in *Scientific American* in 1949; an epidemiological study linking asbestos workers and lung cancer was published in 1955; scientific literature on dangers of asbestos was freely available in libraries); App. Tab M, 3/10/05 Graham Dep. at 20-22 (1930s medical literature described asbestos as a cause of death; a 1955 epidemiological study linked lung cancer and asbestos; more medical articles were published on the subject in the 1960s). Plaintiffs also introduced a memorandum concerning the well-publicized 1964 Selikoff conference, which was attended by representatives from many industrial companies and which discussed the "increased evidence that insulation workers and laggers, with low exposures to asbestos dust" – workers like Mr. Dexter – were at risk for contracting cancer. App. Tab S, 11/10/64 Horowitz Mem., p. 2; *see also* testimony of Lloyd Ambler, App. Tab T, 5/23/05 Tr. at 28.

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[9] A plaintiff may show that a product is "defective" by proving that it lacked adequate warnings. *Clark v. Hauck Mfg. Co.*, 910 S.W.2d 247, 251 (Ky. 1995). A product manufacturer or premises owner may also be liable in negligence for failure to give adequate warnings. *Brewster v. Colgate-Palmolive Co.*, 279 S.W.3d 142, 148 (Ky. 2009); *Edwards v. Hop Sin, Inc.*, 140 S.W.3d 13, 17 & n.14 (Ky. App. 2003). Although there was sufficient uncontroverted liability evidence concerning the empty-chair defendants, CertainTeed agrees with Garlock that (1) plaintiffs did not preserve this issue for appeal, and (2) Kentucky law does not require liability evidence against empty-chair defendants for allocation purposes – only evidence of exposure and causation – as the Circuit Court instructed the jury. *See Instr. No. 8,* App. Tab F. That settled Kentucky law reflects sound public policy: requiring a defendant to prove liability by an absent defendant could greatly prolong and complicate trials. Proof of exposure and causation is, and should be, sufficient for allocation to absent defendants.

Kentucky law does not require that a supplier of a product have "actual knowledge" of the hazards to have a duty to warn. Instead, the duty extends to dangers that a supplier of a product (either a manufacturer or a distributor) "knew or should have known" at the time the product was sold or used.[10] Given the Frank and Graham testimony concerning knowledge in the 1940's and 1950's and the memorandum concerning the Selikoff conference in 1964, there was ample, *unrebutted* evidence that Owens Corning, Rapid American, Triangle, and Johns Manville "knew or should have known" by 1969 that asbestos was hazardous and could cause cancer. Indeed, given the undisputed evidence that Mr. Dexter worked with a CertainTeed product only in 1963-64, the jury's finding that CertainTeed was liable necessarily included a finding – based on that same evidence – that CertainTeed "should have known" of the hazards of asbestos some *five years before* Mr. Dexter worked with the insulation products from these companies at the GE plant.[11]

As for warnings, the Court of Appeals stated that there was no evidence "from which the jury could have determined whether these products carried warnings, and if so, whether the warnings were sufficient." Opin. p. 16. That statement is demonstrably incorrect. Mr. Dexter's coworkers testified without contradiction that they never saw any warnings on the insulation and other asbestos products they identified at the various job sites, and that that no

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[10] *E.g., Edwards, supra*, 140 S.W.3d at 16-17 (manufacturer must warn against "reasonably foreseeable" risks; negligent failure to warn is shown if restaurant owner "knew or should have known" that oysters were hazardous).

[11] Because GE was a premises owner, Kentucky law requires evidence of actual knowledge of asbestos hazards to impose a duty to warn. *See Brewster,* 279 S.W.3d at 149. As noted above, however, Plaintiffs did not object to the submission of GE on the verdict sheet. *See* 5/24/05 Trial Tape at 9:49:30-9 – 9:59:56. In addition, Plaintiffs' verified Complaint, admitted into evidence, alleged that GE had actual knowledge of asbestos hazards, and this evidence was unrebutted. *See* Complaint ¶¶ 11-12, App. Tab E; *see also* App. Tab I, Pl. Resp. to GE Interrog. No. 3, 5/24/05 Trial Tape at 3:49:30-3:50:27 (stating that GE had violated OSHA asbestos regulations with respect to Mr. Dexter by not giving warnings).

warnings or safety equipment, such as respirators, were given to Mr. Dexter and his coworkers. Thus, for example, Billy Robertson, Mr. Dexter's long-time co-worker, testified about the absence of warnings,[12] and Herman Mitchell, another co-worker, did the same. App. Tab P, 5/19/05 Tr. at 60, 72-73 (no masks or respirators or warnings at TVA, Penwalt, or other sites where Mr. Dexter worked).

Finally, Plaintiffs' sworn interrogatory answers, which were read to the jury, were explicit on the point: with respect to Mr. Dexter's work at the GE plant from 1969-71, Plaintiffs stated that GE –

> fail[ed] to provide adequate warning to Mr. Dexter regarding the health hazards associated with working with and around asbestos-containing products. In addition, GE failed to provide Plaintiff's Decedent with adequate respiratory protection and other breathing apparatus to protect him from dust inhalation * * *. [App. Tab I, Pl. Response to GE Interrog. No.3, 5/24/05 Trial Tape at 3:49:26–3:50:24.]

In short, there was ample, *unrefuted* evidence that the absent defendants failed to warn.

D. Summary. The jury was not free to ignore the foregoing uncontested evidence against GE, Johns-Manville, Owens-Corning, Rapid American, and Triangle of exposure, causation, and liability – and therefore the Circuit Court had a duty to grant a new trial. That conclusion is compelled under the Kentucky cases cited at pp. 7-8 above, and strongly supported by *Strickland v. Owens-Corning*, 142 F.3d 353 (6th Cir. 1998), decided under Kentucky law. There the jury allocated 70% of the fault to Company A, a distributor of

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[12] "Q. To what extent, if any, are you aware of any general knowledge in the pipefitting community in the 1950s or sixties about the dangers of asbestos?
"A. *There was no warnings put out whatsoever.*
"Q. Do you ever recall having any discussions with any pipefitters in which you were personally involved in the fifties or sixties where you sat around and talked about the dangers of asbestos?
"A. *There was no warnings back then.* It wouldn't hurt you. If they was, I didn't know anything about it." App. Tab O, 5/17/05 Tr. at 41-42 (emphasis added).

Kaylo, and 30% to all other manufacturers of asbestos products, including Company B, the manufacturer of the Kaylo that Company A distributed. The court required a new trial, since "there is simply no evidence to support an allocation of fault to [Company A] which exceeds that attributed to all other companies selling asbestos-containing products combined, including Company B." *Id.* at 358.

Reversal is also supported by analogous federal law. Thus, in *Greenleaf v. Garlock, Inc.*, 174 F.3d 352, 365-67 (3d Cir. 1998), the court granted the defendants in an asbestos case a new trial where, as here, the jury returned a verdict against only the two companies that defended the case at trial, and disregarded unrebutted evidence that also established the fault of several non-appearing companies that were listed on the verdict sheet. Finding "no rational explanation for the jury's verdict," the Third Circuit granted a new trial, to prevent a "miscarriage of justice." *Id.* at 367.

The same is true here. A new trial was especially warranted in this case because of the huge disparity between Mr. Dexter's *40 years* of exposure to asbestos-containing insulation products as a pipefitter and his almost trivial exposure to CertainTeed's product (work for which he earned $270). *See* p. 4, *supra.* The Circuit Court performed its duty and averted a miscarriage of justice by granting a new trial, a decision for which, as we have seen, there was plainly a "substantial reason." *Allen,* 385 S.W.2d at 184. The Court of Appeals has reinstated the miscarriage of justice by misperceiving its proper role – acting as *de novo* factfinder rather than a reviewer of the Circuit Court's decision – and then by overlooking numerous material facts in the record that supported the new trial order. Its decision should not be permitted to stand.

CONCLUSION

The Court should reverse the judgment of the Court of Appeals.

Respectfully submitted,

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