COMMONWEALTH OF KENTUCKY

SUPREME COURT OF KENTUCKY
2008 – SC – 000886 DG
(2006 CA 000918 – MR; 2006 CA 000962 – MR
2006 CA 000988 – MR & 2006 CA 001025 MR)

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

REPLY BRIEF OF APPELLANT CERTAINTEED CORPORATION

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I hereby certify under SCR 3.290 that copies of this brief were served on Kenneth L. Sales, Esq., Joseph D. Satterley, Esq., and John R. Shelton, Esq., SALES TILLMAN WALLBAUM CATLETT & SATTERLEY, Suite 1900 – Waterfront Plaza, 325 West Main Street, Louisville, KY 40202; John K. Gordinier, Esq. and Stanley W. Whetzel, Esq., PEDLEY ZIELKE GORDINIER & PENCE, PLLC, 2000 Meidinger Tower, 462 South Fourth Avenue, Louisville, KY, 40202; the Honorable Paul W. Rosenblum, Marshall Circuit Court, 101 Judicial Building, 80 Judicial Drive, Benton, KY, 42025, and the Kentucky Court of Appeals, 360 Democrat Drive , Frankfort, KY 40601, by first-class mail, postage prepaid, on March 29, 2010, 2009. The undersigned also certifies that the record of appeal was not withdrawn by Appellant.

Eric A. Ludwig / ufs

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INTRODUCTION

Plaintiffs do not deny that Mr. Dexter worked with CertainTeed's asbestos-cement pipe for total of about one week's time during his 40-year career as a pipefitter in industrial facilities. Assuming a 50-week work year, Mr. Dexter worked for 2000 weeks over those 40 years. That means that he was exposed to CertainTeed's pipe for .0005% of his working career; or, conversely, that he worked around other products for 99.9995% of his career.

Plaintiffs' expert witness Dr. Culbertson testified without contradiction that pipefitters' exposure to asbestos occurs "usually because of the insulation materials around the pipes."[1] Defense expert Dr. Graham testified without contradiction that amosite fiber – which is associated with insulation materials, not CertainTeed pipe or Garlock gaskets – was overwhelmingly the type of fiber found in Mr. Dexter's lungs.[2] And Plaintiffs' expert witness Dr. Hammar testified without contradiction that, of the many hundreds of pipefitters' lung tissue he had examined, Mr. Dexter's lung tissue showed "the most [asbestos bodies] I've ever seen."[3]

Given these undisputed facts – and the evidence against the empty chair defendants – when the jury at the end of the first trial returned a verdict against CertainTeed and Garlock alone, the trial court rightly concluded that the jury had disregarded uncontroverted evidence and exercised its duty to set that verdict aside.[4]

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[1] App. Tab N, 10/28/04 Culbertson Dep. at 33.

[2] App. Tab M, 3/10/05 Graham Dep. at 64-65, 82-83, 94-95

[3] App. Tab R, 5/16/05 Tr. at 62-63; *see also id. a*t 132-33, 152-54.

[4] *See Hazelwood v. Beauchamp*, 766 S.W.2d 439, 441 (Ky. App. 1989) (the jury "was not free to disregard the uncontroverted evidence"); *Phipps v. Bisceglia*, 383 S.W.2d 367, 368 Ky. 1964) (same); *Hayes v. Hayes*, 357 S.W.2d 863, 864-65 (Ky. 1962) (same); *Perfection Harwood Flooring Co. v. Bowling*, 300 S.W.2d 550, 552 (Ky. 1957) (same); *Commonwealth Life Ins. Co.*

In reinstating that verdict, the Court of Appeals disregarded this Court's clear mandate that an appellate court may overturn a new trial order "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)."[5] CertainTeed's opening brief demonstrated that there was "substantial reason" for the trial court's ruling, which should have been upheld. *Id.* ("[I]f there is substantial reason for his decision, then he has not clearly erred."). Nothing in Plaintiffs' responsive brief affects that conclusion.

STATEMENT OF POINTS AND AUTHORITIES

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v. Pendleton, 231 Ky. 591, 594, 21 S.W.2d 985, 986 (Ky. 1929) (same); *Husbands v. Paducah & Ill. R.R. Co.*, 186 Ky. 294, 297, 216 S.W.2d 840, 841 (Ky. 1919) (same).

[5] *See also Morgan v. Scott*, 291 S.W.3d 622, 642 (Ky. 2009); *Davis v. Graviss*, 672 S.W.2d 928, 933 (Ky. 1984); *Prater v. Arnett*, 648 S.W.2d 82, 86 (Ky. App. 1983).

ARGUMENT

The Court of Appeals concluded that the evidence at the first trial showed that Mr. Dexter had been exposed to the products or at the premises of the empty chair defendants, and Plaintiffs say nothing to the contrary. Much of their brief is comprised of legal propositions that are either noncontroversial or inapposite. The heart of their argument appears at pp. 19-21, where they contend that evidence of causation and liability was lacking and that the Restatement (Second) of Torts § 433A requires affirmance of the decision below. We take up these points in turn.

A. The Evidence of Causation Was Sufficient.

CertainTeed's opening brief showed (at pp. 13-14) that Plaintiffs' medical experts testified that Mr. Dexter's exposure to the asbestos insulation products at GE's Mt. Vernon plant was a substantial factor in causing his lung cancer. *See* App. Tab N, 10/28/04 Culbertson Dep. at 30-31 "*([E]ach and every exposure to asbestos* was a substantial contributing factor to Mr. Dexter's resulting asbestos-related diseases" (emphasis added); App. Tab Q, 5/12/05 Frank Dep. at 5-6 ("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." (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.").

Plaintiffs say that the testimony of their experts Culbertson and Frank was contradicted by the testimony of their expert Dr. Hammar in response to the question whether Mr. Dexter's exposure to Owens-Corning Kaylo asbestos insulation would have contributed to any of his asbestos diseases. Dr. Hammar said: "It's the intensity, the duration

that they were exposed to it and the number of years or months or whatever they were exposed to it." App. Tab R, 5/16/05 Hammar Tr. pp. 153. Plaintiffs argue that this Court must assume that the jury believed Dr. Hammar, in which case the jury could have concluded that the defendants "failed to prove the necessary intensity and duration of [Mr. Dexter's] exposures to other companies' asbestos-containing products in order to find causation." Resp. Br. p. 19.

The Court should reject this argument out of hand. The reason why Plaintiffs introduced expert testimony from Drs. Culbertson and Frank that *any and every* exposure to asbestos was a substantial factor in causing Mr. Dexter's asbestos-related diseases was that he was exposed to CertainTeed's asbestos pipe for only .0005% of his 40-year pipefitting career and Plaintiffs desperately needed a hook on which to hang their theory that CertainTeed's product caused his injury. If the jury disbelieved that testimony, and believed instead that asbestos-related diseases are contracted only on the basis of the duration and intensity of the exposure, they would have been *more* rather than less likely to return a verdict against the empty-chair defendants, to whose products (or on whose premises) Mr. Dexter was exposed for a duration of years, not a single week. Accordingly, even assuming that Dr. Hammar actually contradicted Drs. Culbertson and Frank, his testimony further supports the decision of the trial court to set aside the verdict.[6]

[6] Plaintiffs' assertion that they objected across the board to apportionment to any company other than CertainTeed or Garlock (Resp. Br. p. 5) is incorrect. Plaintiffs did not 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. Elsewhere Plaintiffs acknowledge that they objected only to the inclusion of certain companies. Resp. Br. 13.

B. The Evidence of Liability Was Sufficient.

CertainTeed's opening brief recounted in detail (at pp. 15-16) the evidence that the dangers of asbestos were known long before Mr. Dexter worked at the GE plant from 1969-71, and that GE, Owens Corning, Rapid American, Triangle, and Johns Manville "knew or should have known" by 1969 that asbestos was hazardous and could cause cancer.[7] We also set forth the evidence demonstrating that these empty-chair defendants failed to warn of the dangers of asbestos – *i.e.,* (a) the testimony of Mr. Dexter's coworkers Billy Robertson and Herman Mitchell, and (b) Plaintiffs' sworn interrogatory answers (which were read to the jury) that GE "fail[ed] to provide adequate warning to Mr. Dexter regarding the health hazards associated with working with and around asbestos-containing products."[8] Accordingly, the evidence necessary for a finding of liability – knowledge and a failure to warn – was in ample supply.

Respondents say that it was within the jury's discretion to conclude that the empty chair defendants did not know or should not have known of the dangers of asbestos at the relevant time, but that is incorrect. As noted (see note 7), for some empty chair defendants there was unrebutted evidence of actual knowledge. Moreover, given the uncontroverted testimony of Drs Frank and Graham regarding the state of knowledge in the 1930's, 1940's, and 1950's, and the introduction of a memorandum describing the widely-attended 1964

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[7] Indeed, Plaintiffs' verified Complaint, admitted into evidence, alleged that GE, Rapid American, and Triangle had actual knowledge of asbestos hazards, and this evidence was unrebutted. *See* Complaint ¶¶ 11-12, App. Tab E. Hence Plaintiffs' contention that there was no evidence of GE's actual knowledge (Resp. Br. p. 19) is incorrect.

[8] App. Tab I, Pl. Response to GE Interrog. No.3, 5/24/05 Trial Tape at 3:49:26–3:50:27. Thus, Plaintiffs are wrong when they assert (Resp. Br. p. 20) that the only evidence of lack of warnings was the testimony of Hermann Mitchell.

Selikoff conference (which discussed the "increased evidence" that insulation workers with low exposures to asbestos dust were at risk for contracting cancer), the jury did not have discretion to decide that any of the empty chair defendants should not have known of the dangers of asbestos by 1969-1971.

In short, the evidence of knowledge and absence of warnings was sufficient.

C. Restatement (Second) of Torts § 433A Is Inapplicable.

Restatement (Second) of Torts § 433A is entitled "Apportionment of Harm To Causes." It provides that, if there is not "a reasonable basis for determining the contribution of each cause to a single harm," then damages cannot be apportioned among two or more causes," in which case multiple tortfeasors are subject to joint and several liability. Resp. Br. p. 21. The Court of Appeals cited this provision in support of its decision (Op. p. 21) and Plaintiffs as well contend that it requires that CertainTeed and Garlock be held jointly and severally liable in this case. Resp. Br. pp. 20-22.

The fault in that analysis is that (a) Kentucky has rejected joint and several liability and (b) when apportionment is not available under § 433A, the trial court must give a comparative fault instruction, as it did here.

This Court adopted a comparative fault regime in *Hilen v. Hayes,* 673 S.W. 2d 713 (Ky. 1984), and the Legislature codified that ruling in 1988. *See* KRS 411.182. As the Court explained in *Kentucky Farm Bureau Mut. Ins. Co. v. Ryan*, 177 S.W.3d 797, 800 (Ky. 2005):

> In 1988, Kentucky codified certain procedural aspects of our comparative fault system with the passage of KRS 411.182, thus representing the legislature's intent to eliminate, once and for all, joint and several liability and to protect plaintiffs and defendants alike from being penalized for the fault of another. KFB aptly points out that the adoption of comparative fault and its codification in KRS 411.182 were designed to prevent the result reached by the Court of Appeals herein, i.e., a plaintiff being able to

> allocate fault against a tortfeasor far in excess of that tortfeasor's actual liability.
>
> * * * Emphasizing the underlying foundation of the equitable policies of comparative fault, we recently reiterated that "the core principle of comparative negligence is that 'one is liable for an amount equal to his degree of fault, no more and no less.'" *Regenstreif v. Phelps*, 142 S.W.3d 1, 6 (Ky. 2004) (quoting *Stratton v. Parker*, 793 S.W.2d 817, 820 (Ky. 1990).

Moreover, this Court has held that, when apportionment of damages is impossible in the circumstances referred to in Restatement § 433A, then the trial court should give the comparative fault instructions authorized by KRS 411.182. In *Owens Corning Fiberglas Corp. v. Parrish*, 58 S.W.3d 467, 479 (Ky. 2001), the Court explained:

> Where injuries can properly be apportioned to separate causes based on evidence in the record, there is no occasion to invoke the doctrine of comparative negligence; and if injuries cannot be separately apportioned, then the comparative negligence ratio controls, unaltered by some independent assessment of degree of causation. The whole point of comparative negligence is that the relation between the injury and cause cannot be accurately determined, and an allocation based on the degree of negligence of each party becomes the measure of liability.

Id. p. 478 (quoting *Kalland v. North American Van Lines*, 716 F.2d 570, 573 (9th Cir. 1982)).

The Court then concluded:

> To summarize, if distinct causes produce distinct harms, or if distinct causes produce a single harm and the evidence presented at trial provides a reasonable basis for determining the contribution of each cause to the single harm, a trial court should instruct the jury to apportion the damages to the distinct causes without resorting to comparative fault. If, however, as is the case here, the evidence does not permit apportionment of the damage between separate causes, then comparative fault principles apply, and the trial court should instruct the jury to apportion damages according to the proportionate fault of the parties.

Id. p. 479. Accordingly, both the Court of Appeals and Plaintiffs err in supposing that Restatement § 433A has any role in this case.[9]

D. Summary: The Court of Appeals Ignored the Governing Standards.

The Court of Appeals in this case took on the role of a substitute factfinder in undertaking a review of the evidence to resolve "intriguing factual issues." Op. p. 11. It gave no credit to the judgment of the trial judge who had sat through the three-week trial, and then inexplicably overlooked *unrebutted* evidence on key issues that the jury was not free to ignore. This Court ruled in *City of Louisville* that "[t]he administration of justice demands respect for [the trial court's] judgment within this area. * * * It will not be overturned if it can be sustained. * * * 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." 385 S.W.2d at 183-84. Here, as we have seen, the Circuit Court had substantial reason for its new trial order and therefore the Court of Appeals erred in setting it aside.

CONCLUSION

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

Respectfully submitted,

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[9] Plaintiffs cite a number of cases that they say stand for the proposition that an appellate court will not set aside a jury's apportionment of fault "if there is any evidence which under any reasonable view supports the apportionment." Resp. Br. 9-10. None of those cases is from a Kentucky court. None involves an appeal from a trial court new trial order. None involved the failure of a jury to apportion fault in the face of uncontroverted evidence requiring an apportionment. In short, none of these cases supports the Court of Appeals' decision in this case.

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