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Supreme Court

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(2006 CA 000918-MR; 2006 CA 000962-MR
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CERTAINTEED CORPORATON — APPELLANT

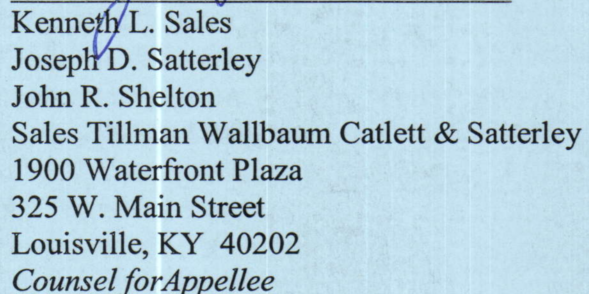
v.

MARSHALL CIRCUIT COURT
Case No. 02-CI-00310

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

BRIEF OF APPELLEES, AVA NELL DEXTER AND JAMES M. DEXTER

Submitted by:



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John R. Shelton

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II. COUNTER STATEMENT OF THE CASE

A. INTRODUCTION

Plaintiffs James M. Dexter, the son and Executor of the Estate of James G. Dexter (Appellee), and Ava Nell Dexter, the widow of James G. Dexter announced ready for trial against six defendants. Before evidence got underway, Plaintiffs had settled their claims against all but two of these defendants, Appellants Certaineed Corp. and Garlock Sealing Technologies, Inc. These two remaining Defendants did not come to trial prepared to prove any contributory fault on the part of any other party. As a result, these two Defendants (along with Plaintiff's decedent) were found 100% at fault by the jury.

The Trial Court set aside the jury's verdict and ordered a new trial because it found that "other" asbestos companies, in addition to Certainteed and Garlock, contributed to Plaintiffs' decedent's injury and death. This ruling was clearly erroneous. In reversing, the Court of Appeals correctly held that there was not undisputed evidence in the record from which the jury was compelled to assess fault against any other specific company. Garlock conceded as much in its post-trial motion seeking leave from the Trial Court to introduce additional evidence of other companies' fault at the re-trial of the case,

> In the interest of justice, this Court should allow Garlock and Certainteed reasonable latitude to prepare and present their defenses for the new trial. This is especially so if only to avoid the consequences of re-trying the case on weak or insufficient evidence that does not enable the jury to understand the facts and render a fair and reasonable verdict. Unless the parties are allowed to disclose supplement lay witnesses, the new trial will be only a "re-trial" with a different jury. Without additional witnesses to testify about the facts of the Plaintiffs' exposure, it is entirely possible that the same result may occur.

After reviewing the voluminous record in this case, including the entirety of the evidence in the first trial, the Court of Appeals correctly concluded that "[T]here is little wonder why the jury failed to allocate fault beyond Certainteed and Garlock" [in the first trial].[1]

B. THE FIRST TRIAL

During its case-in-chief, Plaintiffs called Billy Joe Blackford. He testified that his plumbing and heating company installed a water main in Gilbertsville, Kentucky in the 1960's using Certainteed asbestos cement water pipe. Certainteed asbestos cement pipe was made up of between 15-20% asbestos fibers.[2] Plaintiff's decedent Dayton Dexter ("Dayton"), a long-time Gilbertsville resident and Local Union 184 pipefitter whose front yard the water line went through, worked for Blackford on this project for approximately eight (8) months.[3] When it was necessary to cut the pipe, Blackford had Dayton make most of these cuts using a portable concrete blade saw.[4] Blackford testified he never saw any kind of warning on the Certainteed pipe advising users to wear a mask when cutting the pipe or not to use a power saw to cut the pipe.[5] In fact, the pipe installation field manual suggested the use of a power saw.[6] He testified that Dayton subsequently became the Gilbertsville Water District superintendent and did repairs (cuts) to the pipe during this time.[7] He identified Certainteed representatives as visiting the Gilbertsville project

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[1] Kentucky Court of Appeal 8/08/08 Opinion Revising and Remanding, p. 16; Appendix 1.
[2] Lloyd Ambler 5/28/05 testimony, pg. 18.
[3] Billy Joe Blackford 5/13/05 testimony pg. 222-224. The parties to this appeal jointly filed with the Marshall Circuit Court Clerk transcripts of most o the testimony from the first trial. (R. 7531-7534; Appendix No. 2). Plaintiffs will cite to these transcripts by witness, date of testimony, and transcript page number.
[4] Id. at pg. 237-239.
[5] Id. at pg. 224-245.
[6] Plaintiff's Exhibit 40, pg. 39. Attached as Appendix 3.
[7] Id. at pg. 246-247.

to make sure the pipe was being installed correctly. None of these sales representatives warned Blackford or his crew not to cut the pipe with a power saw.[8]

Industrial hygienist Leon Horowitz, who went to work for Certainteed in 1962, testified he knew of the association between asbestos exposure and cancer as early as September 1960.[9] Certainteed's corporate representative, Lloyd Ambler, testified that in the early 1960's Certainteed conducted dust counts in its own asbestos pipe manufacturing plants to ensure that its workers were not being exposed to excessive levels of asbestos dust. It made respirators available to its workers and instituted a disease preventative chest x-ray program.[10]

Despite Certainteed's obvious knowledge of the dangers of asbestos dust in the early 1960's, Certainteed never tested its pipe to determine the amount of asbestos fiber released when cutting it with a power saw. Such a test was done in 1977 by an asbestos pipe manufacturing trade group.[11] After receiving the results of this study, which showed asbestos fiber levels well in excess of the OSHA excursion exposure limit, Certainteed issued its first warning to distributors/purchasers concerning the dangers of cutting the pipe with an abrasive disk saw.[12] However, it was not until 1979 that Certainteed put a warning label on the pipe itself.[13]

Plaintiffs called Richard Hatfield, a materials scientist, who is employed by Materials Analytical Services ("MAS"), which tests a variety of materials/products,

[8] Id. at pg. 248.
[9] Leon Horowitz 2/1/82 depo., pg. 158-159.
[10] Lloyd Amber 5/28/05 testimony, pgs. 31, 78-81.
[11] Id. at pg. 139-142.
[12] Id. at pg. 160.
[13] Id. at pg. 63-64.

including asbestos-containing products.[14] MAS tested Certainteed asbestos cement pipe and asbestos gaskets to determine the amount of asbestos fibers released when these products were cut.[15] MAS' test results showed that the amount of fibers released when Certainteed's asbestos pipe was cut using a power saw far exceeded certain OSHA exposure limits.[16]

With respect to medical causation testimony, Dr. Arthur Frank, a medical doctor and Professor of Public Health at Drexler University School of Public Health, testified that Dayton's asbestos exposure was a substantial contributing cause of his lung cancer; however, he conceded cigarette smoking probably played some role in causing the cancer as well.[17] He testified that Dayton's exposure to dust from cutting asbestos cement pipe and from manipulating asbestos gasket materials was a substantial contributing factor to the development of his lung cancer.[18] Plaintiffs also called Sam Hammar, M.D., a board certified anatomic and clinical pathologist. Dr. Hammar reviewed pathology specimens taken from Dayton's lungs and testified that the amount of asbestos bodies found in the specimens was probably the most he had ever seen in a pipe fitter.[19] He testified that based upon the MAS asbestos fiber release study results he had reviewed, if Dayton had made only 75 cuts of Certainteed asbestos pipe using a power saw, then the amount of asbestos fibers he would have breathed during this time would have been a major contributing factor to his cancer.[20]

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[14] Richard Hatfield 5/13/05 testimony, pg. 4-5.
[15] Id. at pg. 6-7.
[16] Id. at pg. 32-38 and pg. 80-81 and pg. 89-90.
[17] Dr. Arthur Frank 5/12/05 testimony, pg. 26.
[18] Id. at pg. 44-47.
[19] Sam Hammar, M.D. 5/16/05 testimony, pg. 62-63.
[20] Id. at pg. 162-163.

Plaintiffs' proposed apportionment of fault verdict form listed only Defendants Garlock and Certainteed. (R. 6113-6135). Plaintiffs' specifically objected to the Trial Court instructing the jury it could apportion fault to any Defendant other than Garlock or Certainteed because there was insufficient evidence that any other party's product or conduct was a substantial contributing factor to Dayton's asbestos-related diseases. (Trial Tape 5/25/05 9:49:30-9:59:56).

The case was submitted to the jury on May 25, 2005, which unanimously found in favor of the Plaintiffs on their strict liability claims and in favor of the Defendants on the negligence claims. The jury apportioned fault as follows: Dayton Dexter 35%, Certainteed 30% and Garlock 35%. The jury did not allocate fault to any other party or entity. The jury awarded the Estate of James (Dayton) Dexter $66,376 for past medical expenses, $5,000,000 for physical and mental pain and suffering, and $6,750 for funeral expenses, for a total judgment of $5,073,126. Judgment was entered June 10, 2005, against Certainteed in the amount of $1,521,938 and against Garlock in the amount of $1,775,594. (R. 6260-6264).

C. FURTHER PROCEEDINGS AFTER THE FIRST TRIAL

Both Certainteed and Garlock filed Motions for a New Trial. (R. 6286-6287 and R. 6316-6336). On September 8, 2005, the Trial Court granted both Motions, "[b]ecause the jury's verdict, finding no fault to be apportioned to any Defendant except Garlock Sealing Technologies, LLC and Certainteed Corporation, was manifestly unsupported by the evidence and manifestly a product of jury passion and prejudice". The Trial Court rejected all other grounds asserted by these Defendants for a new trial and/or judgment notwithstanding the verdict. (R. 6597-6598; Appendix No. 4). In their Motions for a

New Trial, Certainteed and Garlock set forth what they considered to be the undisputed evidence of Plaintiff's exposure to other asbestos-containing products at various industrial facilities. Tellingly, neither Defendant identified in their new trial motion what specific empty-chair defendant was undisputedly at fault and why. (R. 6288-6315 and 6316-6336). However, the evidence of other parties' "fault" was far from conclusive.

On December 7, 2005, the Trial Court entered an Order granting Plaintiff's Motion that no witness shall testify at the retrial that was not timely disclosed prior to the original trial in May 2005 unless good cause was shown. (R. 6719). On December 9, 2005, Garlock filed a Motion for Good Cause to Disclose Supplemental Lay Witnesses out of time. (R. 6720-6820). Garlock's stated "good cause" was that:

> In the interest of justice, this Court should allow Garlock and Certainteed reasonable latitude to prepare and present their defenses for the new trial. This is especially so if only to avoid the consequences of re-trying the case on weak or insufficient evidence that does not enable the jury to understand the facts and render a fair and reasonable verdict. **Unless the parties are allowed to disclose supplement lay witnesses, the new trial will be only a "re-trial" with a different jury. Without additional witnesses to testify about the facts of the Plaintiffs' exposure, it is entirely possible that the same result may occur.**

(R. 6720-6820; Appendix No. 5)(emphasis added). The Trial Court granted this Motion and a similar one filed by Certainteed. (R. 6959-6960 and R. 6961).

In its Brief, Certainteed asserted the evidence in the second trial "involved largely the same evidence as the first one."[21] This is true with respect to Plaintiff's case. Plaintiffs called the same witnesses as they did during the first trial. This is not true with respect to the Defendants' evidence. Certainteed called a new witness, Dr. Peter Barrett, who testified that Dayton's lung cancer was solely attributable to his smoking. Garlock

[21] Certainteed Brief, pg. 5.

put onto the stand for the first time Dr. Robert Sawyer, who testified extensively concerning the contribution of Dayton's smoking to his lung cancer and co-workers Leon Parker, Bobby Gibson, and Alton Herndon, who all testified concerning Dayton's alleged exposure to asbestos insulation. Garlock also called for the first time Doug Ware, who testified concerning Westinghouse's asbestos-insulated turbines that Dayton allegedly worked around during his career. (2/22/06 Judgment, R. 7286-7288).

Nevertheless, the second jury found in favor of Plaintiffs and against both Defendants on both their strict liability and negligence claims. On February 22, 2006, the Trial Court entered judgment against Certainteed in the total amount of $132,294 and Garlock in the amount of $874,507. (R. 7286-7288).

On August 8, 2008, the Kentucky Court of Appeals ruled in favor of Plaintiff's Estate on its appeal of the Trial Court's grant of a new trial to Certainteed and Garlock.[22] Because the Trial Court wholly failed to identify the evidence that allegedly should have compelled the jury to assess fault against one or more of the empty chair defendants, the Court of Appeals was left to guess why the Trial Court set aside the original judgment.

> Our review is particularly difficult when, as occurred here, the trial lasted for approximately two and a half weeks, consisted of numerous witnesses, many hours of testimony and exhibits, and required vast resources from all parties, all of which resulted in a voluminous record. Yet, we are left to speculate as to the Trial Court's determination of precisely how the evidence was insufficient to support the jury's verdict, and exactly how the verdict was contrary to law.[23]

[22] Widow Ava Nell Dexter is only a cross-appellee in this appeal. The jury in the first trial awarded her nothing on her loss of consortium claim and the jury in the second trial awarded her $15,000.

[23] Court of Appeals Opinion, pgs. 9 – 10.

After thoroughly reviewing the evidence introduced at the first trial, the Court of Appeals concluded that not only was there an absence of undisputed evidence that should have compelled the jury to find fault against one of the empty chair defendants, but *had* the jury assessed fault against any of the other empty chair defendants, then this finding would not have been supported by the evidence in the record.[24] Consequently, the Court of Appeals reversed the Trial Court's grant of a new trial and remanded this action to the Trial Court with instructions to reinstate the initial jury verdict.

III. ARGUMENT

A. NEW TRIAL STANDARD OF REVIEW

The Trial Court granted the Defendants a new trial pursuant to CR 59.01(f), which provides for a new trial if the jury's verdict, "is not sustained by sufficient evidence, or is contrary to law". (Order, Appendix 4, pg. 1). On appeal, a trial court's finding of insufficient evidence to support a verdict is presumptively correct and is not to be reversed unless the court is deemed to have abused its discretion by rendering a clearly erroneous decision. Prater v. Arnett, Ky. App., 648 S.W. 2d 82, 86 (1983). In reviewing such decisions, an appellate court is to carefully review the record to determine if it reasonably justified the trial court's decision. The record must disclose a substantial or "sound" reason for the ruling. City of Louisville v. Allen, Ky. App., 385 S.W. 2d 179, 182 (1964); Burton v. Spurlock's Adm'r, Ky., 171 S.W. 2d 1012, 1016 (Ky. 1943). In reviewing the record, an appellate court must resolve all reasonable inferences and deductions in favor of the prevailing party. Meyers v. Chapman Printing Co., Ky., 840 S.W. 2d 814, 822 (1992).

[24] Id. at p. 17.

While a trial court has the discretion to set aside a jury verdict due to a perceived insufficiency of evidence, it must exercise this discretion with great caution. Kentucky appellate courts have always been reluctant to disturb a jury verdict. Wilkins v. Hopkins, Ky., App., 128 S.W. 2d 772, 774 (1939).

> The role of the jury in interpreting the evidence and finding the ultimate facts is an American tradition so fundamental as to merit constitutional recognition. U.S. Const. Amend. VII; Ky. Const. Sec. 7. The conscious of the community speaks through the verdict of the jury, not the judge's view of the evidence.

Horton v. Union, Light, Heat and Power Co., Ky., 690 S.W. 2d 382, 385 (1985).

A trial court may not set aside a jury verdict merely because it does not agree with it, if there is sufficient evidence to support the verdict. Spears v. Burchett, Ky. App., 289 S.W. 2d 731, 735 (1956). A new trial may not be granted arbitrarily or capriciously. Burton v. Spurlocks Adm'r, supra. In determining whether to set aside a verdict, the trial court must follow settled principles of law and not base its decision on its own sense of justice or morals. City of Louisville v. Allen, Ky. App., 385 S.W. 2d 179, 182 (1964).

B. APPORTIONMENT OF FAULT STANDARD OF REVIEW

This Court should review the jury's apportionment of fault under the substantial evidence standard. The appellate court (or trial court) may not set aside the jury's apportionment of fault if there is any evidence which under any reasonable view supports the apportionment. Von Beltz v. Stuntman, Inc., 207 Cal. App. 3d 1467, 1483 (CA App. 1989); Metzger v. Barnes, 74 Cal. App. 3d 6, 9-10 (CA App. 1977); Allen v. Payne, 1999 Tenn. App. LEXIS 794 at p. 2 (TN App. 1999); Neider v. Spoehr, 165 N.W.2d 171 (Wisc. Sup. Ct. 1969). The jury's power to apportion fault is as broad as its sweeping duty and power to resolve conflicts in the evidence and assess credibility of witnesses.

Hyatt v. Sierra Boat Co., 79 Cal. App. 3d 325, 346 (CA App. 1978). Mindful of the jury's broad discretion in assessing fault, the Minnesota Court of Appeals in Akre v. Metlife, 2008 Minn. App. unpub. LEXIS 1002, pp. 10-11 (MN App. 2008) reversed a trial court's modification of the percentages of fault assigned by the jury.

The apportionment of negligence is peculiarly within the province of the jury and only in an unusual case will the court upset a jury's apportionment, particularly where the negligence of each party is not of the same kind or character. Jagmin v. Simonds Abrasive Co., 211 N.W. 2d 810 (Wisc. 1973); Caldwell v. Piggly-Wiggly Madison Co., 145 N.W. 2d 745 (Wisc. 1966). As one commentator has noted, "[C]ourts in comparative negligence states are usually circumspect about altering determinations made by the jury. The courts will rarely disturb the jury's apportionment of negligence between parties or reverse findings for the plaintiff or defendant". Rosh v. Cave Imaging Systems, Inc., 26 Cal. App. 4th 1225, 1233 (Cal. App., 1994), citing Schwartz, Comparative Negligence (2d Ed. 1986) Section 18.1 at page 315.

C. THE COURT OF APPEALS CORRECTLY APPLIED THE PROPER STANDARD OF REVIEW

The Court of Appeals used the proper standard when it reviewed the Trial Court's order granting a new trial. In order for the Appellate Court to determine if the Trial Court clearly erred, of course it had to (and did) thoroughly review the evidence in the case. *See* Vaughn v. Blackburn, 431 S.W.2d 887, 888 (Ky. App. 1968) (appellate court examined the record of the first trial to measure the judicial discretion exercised in granting a new trial); Williams v. Shepherd, 452 S.W.2d 406 (Ky. App. 1970) (same); Sanders v. Drane, 432 S.W.2d 54 (Ky. App. 1968) (same).

When reviewing the record, the Court of Appeals had to (and did) resolve all evidentiary inferences and all credibility issues in favor of the Plaintiff – the prevailing party. After so doing, the Court correctly determined that there was no uncontradicted evidence of one or more empty-chair defendants "fault." Failing to find such evidence, the Court correctly held that the Trial Court clearly erred by substituting its view of the evidence for that of the jury's and thereby improperly interjected itself into the classic jury issue of who was at fault. Having determined there was no undisputed evidence of other parties' "fault," the Court of Appeals correctly reversed the Trial Court's ruling which amounted to a post-trial directed verdict of negligence or strict liability against one or more unidentified parties.

D. UNDER KENTUCKY LAW, A PARTY MAY NOT BE ASSESSED "FAULT" WITHOUT SUFFICIENT EVIDENCE OF LIABILITY

In order to qualify for inclusion on the apportionment verdict form, there must be evidence of a party's legal liability sufficient to withstand a motion for directed verdict. There are numerous decisions applying Kentucky apportionment law that have held proof of a defendant's liability **and** that its conduct was a substantial factor in causing the injury, is necessary before that defendant can be included on the apportionment verdict form. The first such decision was Wemyss v. Coleman, 729 S.W.2d 174 (Ky. 1987). In that case, the Kentucky Supreme Court adopted its definition of "fault" within the meaning of KRS 411.182. This definition is quite explicit in requiring evidence of liability and substantial causal relation.

> "Fault" includes acts or omissions that are in any measure negligent or reckless toward the person or property of the act or others, or that subject a person to strict tort liability. The term also includes breach of warranty, unreasonable assumption of risk not

> constituting an enforceable expressed consent, misuse of a product for which the defendant otherwise would be liable, and unreasonable failure to avoid an injury or to mitigate damages. Legal requirements of causal relation apply both to fault as the basis for liability and to contributory fault.

Id. at pg. 178; Owens Corning Fiberglas v. Parrish, 58 S.W.3d, 467, 473 (Ky. 2001).

In Floyd v. Carlisle Construction Company, 758 S.W. 2d 430 (1988). This Court held that, "If there is an active assertion of a claim against joint tortfeasors, **and the evidence is sufficient to submit the issue of liability to each**, an apportionment instruction is required whether or not each of the tortfeasors is a party-defendant at the time of trial." Id. at pg. 432. (emphasis added)

The Sixth Circuit relied upon this Court's holding in Floyd in Barnes v. Owens-Corning Fiberglass Corp., 201 F. 3d 815 (6th Cir. 2000). In this asbestos-injury case, the Sixth Circuit interpreted Kentucky law as clearly requiring evidence of a defendant's legal liability and conduct constituting a substantial contributing factor in causing the injury, prior to that party being placed on the apportionment verdict form

Kentucky law is well-settled that proof of a defendant's legal liability **and** that its conduct was a substantial factor in causing the injury, are both necessary before that defendant can be included on an apportionment verdict form. In its August 8, 2008 Opinion, the Court of Appeals correctly observed that Garlock and Certainteed had failed to come forward with such evidence with respect to any of the empty-chair defendants included on the apportionment verdict form. That is to say, far from proving beyond dispute that one or more specific parties were also at fault; i.e. negligent or strictly liable, Defendants could not even muster enough liability evidence to qualify additional party's inclusion on the apportionment verdict form.

This Court may well wonder how twenty-six (26) empty-chair defendants ended up on the verdict form. During arguments/objections on the jury instructions, Plaintiffs' counsel strenuously objected to many of these companies being placed on the apportionment verdict form because sufficient evidence of their "fault" had not been introduced. Despite these objections, and in the face of well-established case law, the Trial Court never required the Defendants to identify the specific evidence in the record from which reasonable jurors could possibly determine one or more of those companies were at "fault." Instead, the Trial Court included *en masse* every company Plaintiff had named in the Complaint; every company Plaintiff had filed a bankruptcy claim against; every company the Defendants had brought in by third-party Complaint, and did not require Certainteed to identify where in the record there was actual proof of liability.

E. DEFENDANTS FAILED TO INDISPUTABLY PROVE THAT ONE OR MORE OTHER COMPANY'S PRODUCT/CONDUCT WAS A SUBSTANTIAL FACTOR IN CAUSING PLAINTIFF'S LUNG CANCER

In its Order granting a new trial, the Trial Court found the record did not support the jury's findings that Certainteed and Garlock's asbestos-containing products alone were responsible for causing Dayton Dexter's lung cancer. The Trial Court did not identify in its Order the evidence in the record which it believed established that a specific company's conduct or product was indisputably a substantial factor in causing Plaintiff's death.[25] This Court therefore finds itself in the same predicament the Court of Appeals found itself in: What was the evidentiary basis of the Trial Court's decision? Which of the twenty-six companies did it feel should have been assigned fault? Was it

[25] While not a requirement, this Court has urged trial courts to set forth in orders granting new trials a finding of fact to support the order. "Such is not indispensable but should be done". City of Louisville v. Allen, Ky. App., 385 S.W. 2d 179, Footnote 1, pg. 180.

North Brothers, Inc. or Triangle Insulation, and if so, what witness(es)' undisputed testimony established that Plaintiff was exposed to a sufficient amount of asbestos insulation installed by these companies such that it was undisputedly a substantial factor in causing his disease? What medical testimony undisputedly established that Plaintiff's exposure to Owens-Corning's and/or Johns-Mansville's asbestos insulation, as opposed to Pittsburg Corning's or Rapid American's, was a substantial factor in causing his lung cancer? What evidence was introduced establishing the percentage of asbestos fibers in these companies' products? What evidence existed that these manufacturers and the other companies at issue failed to warn about the dangers of inhaling dust from their products?

In order for a plaintiff in an asbestos case to get past a directed verdict motion, he/she must introduce sufficient proof on each of the above issues. As one can see from this trial, this is no simple task. It is tedious, difficult, expensive and time-consuming work. It cannot be accomplished as an after-thought. It took Plaintiffs five full days (May 13-May 18, 2005) to put on the necessary evidence of legal causation against just two defendants. Plaintiffs introduced evidence of significant exposure to each of these two Defendants' asbestos-containing products; proved there were no warnings on their products (thereby making them unreasonably dangerous); and provided medical testimony that Dayton's exposure to their products was a substantial factor in causing his asbestos-induced diseases. Certainteed and Garlock merely attempted to prove that asbestos pipe insulation, in general, was an additional substantial factor. The jury did not apportion fault to asbestos insulation companies because Defendants failed to put on

sufficient evidence from which the jury could determine which, if any of them, were a legal cause of Dayton's cancer.

The Court of Appeals held in a case, with similar facts, that a jury's failure to apportion fault against settling defendants was supported by the evidence where the defendant failed to prove the settling defendants were a legal cause of the plaintiff's injury. Owens-Corning Fiberglass Corp. v. Golightly, Ky. App., No. 95-CA-0135-MR; aff'd 976 S.W. 2d 409 (Ky. 1998)[26] was an asbestos products liability action wherein the plaintiff alleged Owens-Corning's Kaylo asbestos insulation pipe covering injured him. At trial, plaintiff admitted to using asbestos pipe covering manufactured by many other companies, all of whom had settled with plaintiff before trial. Despite this evidence, the jury assessed 100% fault against Owens-Corning. On appeal, Owens-Corning argued the jury's failure to apportion fault against other parties to the action was unsupported by the evidence. In affirming the jury's verdict, the Court of Appeals noted that plaintiff presented medical testimony establishing Kaylo as a substantial contributing factor in causing his illness, but that no testimony was offered by Owens-Corning establishing any other product was a substantial contributing factor in causing his injuries. Id. at pp. 7-8.[27]

F. DEFENDANT HAS FAILED TO IDENTIFY UNCONTROVERTED EVIDENCE OF OTHER PARTIES' FAULT

Neither in their opening statements, nor in their closing arguments, nor in their Motions for a New Trial, did Certainteed or Garlock state what specific company should have been apportioned what specific percentage of fault. In fact, during his closing argument in the first trial, Certainteed counsel's barely touched upon apportionment. He

[26] A copy of this decision is included as Appendix No. 6.
[27] A copy of this unpublished Kentucky Court of Appeals decision is included as Appendix No. 7.

merely referenced Dayton's sworn complaint and interrogatory responses and reminded the jury Dayton worked around dusty thermal insulation pipe covering and block during his 40 year career as a pipe fitter.[28] Garlock's counsel made **zero** reference to apportionment during his closing argument![29] If defense counsel did not/could not state specific reasons why specific companies should be assigned specific percentages of fault, then how in the world was the jury expected to make this determination without engaging in impermissible guess-work?

Contrast the Defendants' fleeting references to apportionment at the end of the first trial to the substantial attention they devoted to the issue when given a second bite at the apple. At the second trial, Certainteed's counsel spent approximately **twenty-four (24) minutes** and Garlock's counsel spent over **twenty (20)** minutes talking about apportionment, including a detailed review of the testimony concerning Dayton's exposure to asbestos insulation; the names of the companies who had been identified as the manufacturers and installer of this insulation; and the locations and times where the exposures occurred.[30] Given a second chance, Certainteed's counsel **finally and for the first time** suggested to the jury which of the companies on the apportionment verdict form were primarily responsible for Dayton's asbestos insulation exposure.[31] The Trial Court indicated in its Order granting a new trial that the jury should have assigned fault to the other defendants. However, it is not enough for the Trial Court to state that "others" were responsible or for the Defendants to argue that "asbestos insulation" played a part in

[28] Certainteed closing argument, 5/25/05 transcript, pg. 8, 12 and 50.
[29] Garlock closing argument, 5/25/05 transcript, pps. 55-84.
[30] Certainteed's Closing Argument, Trial Tape 2/19/06 10:51-11:15:00); Garlock Closing Argument, Trial tape 2/9/06, 1:01:20-1:16:00 and 1:17:44-1:20:01 and 1:20:01-1:22:01 and 2:06-2:09-40 and 2:15:20-2:19:03.
[31] Id. 11:06:00-11:09:25.

Dayton's injury. A jury cannot (and certainly should not) be asked to speculate as to when and where these other exposures occurred and to what extent which of the twenty-six (26) companies on the apportionment verdict form were also negligent or strictly liable.

In its Brief, Certainteed cites to various scraps of pleadings and testimony introduced into evidence at the first trial and argues therefrom that any reasonable jury should have been compelled to piece these scraps together and conclude that some other company on the verdict form was indisputably negligent and/or strictly liable. (Certainteed Appellant Brief, pp. 13-18). To the contrary, viewing this evidence in a light most favorable to the Plaintiff, including resolving all evidentiary inferences and credibility issues in Plaintiff's favor, this simply was not possible.

Certainteed cites Dayton's verified Complaint and sworn interrogatory answers wherein he **alleged** that he worked with or around various parties' insulation products. These allegations are far from conclusive evidence of sufficient intensity and duration of exposure. They do not come close to establishing the legal liability of any other party. Similarly, Certainteed relies upon remarks made by counsel during Plaintiffs' opening statement to the effect that other companies participated in causing the death of Dayton. These remarks were nothing more than acknowledgement of the obvious fact that Dayton had been exposed to asbestos from different sources. If all that is required to mandate fault is an allegation in a complaint, then what is the purpose of a trial?

In its Brief, Certainteed focused upon Dayton's exposure to asbestos insulation at the General Electric Mt. Vernon Plant between 1969 – 1971 and advances GE as the prime example of a party against whom the jury should have assessed fault.

(Certainteed' Brief, p. 12, 14, 17). Certainteed cited the testimony of Ron Eades, an insulator for Triangle Insulation Company who worked at the GE Plant during the same years as Dayton; Plaintiff's sworn interrogatory answers concerning his exposures at GE Mt. Vernon and other co-worker testimony concerning the amount of asbestos insulation at this Plant. Truth be told, Eades never worked with Dayton at GE Mt. Vernon. Eades testified (by way of deposition) that he never knew Dayton and would not recognize him if he saw him.[32] Eades did identify Johns-Mansville, Owens-Corning, Thermobestos, Pabco and Carey Temp as manufacturers of insulation products used at GE Mt. Vernon; however, he was never asked and did not testify that these were "asbestos" insulation products.[33] This is particularly significant because Eades testified that both asbestos-containing and asbestos-free insulation materials were used at this Plant.[34] While Eades and Dayton's son, Jim Dexter, both testified either that Dayton would have been/was exposed to asbestos insulation at GE Mt. Vernon, neither testified as to the intensity or duration of that exposure.

Regardless of the above, GE never should have been placed on the apportionment verdict form because the Defendants failed to put on the proof necessary to establish GE's liability as a premises owner. In Owens v. Clarey, 75 S.W. 2d 536, 537 (1934), Kentucky's former high Court held that a premises owner is not responsible to an independent contractor's employee for injury caused by defects or dangers which the contractor knows of, or ought to know of. This decision was recently re-affirmed by this Court in Brewster v. Colgate- Palmolive, Co., 279 S.W. 3d 142, 144 (Ky. 2009). At the

[32] Ron Eades 1/12/05 deposition, p. 15.
[33] Id. at p. 35-36.
[34] Id. at p. 38-39.

first trial of this case, it was undisputed that Dayton, a union pipefitter, was employed by an independent contractor hired by GE to perform pipefitting work at its Mt. Vernon Plant. Neither Defendant introduced any evidence establishing that GE had actual knowledge of the dangers of asbestos in the 1969 – 1971 time frame. When it comes to apportionment, defendants are to be held to the same proof requirements as plaintiffs to establish liability or "fault." Therefore, as there was clearly a lack of legal liability evidence against GE at the first trial, any fault assessed by the jury against GE would have had to have been reversed.

With respect to **causation evidence**, it is true that Plaintiff's expert Dr. Arthur Frank and other physicians testified that each and every exposure to asbestos was a substantial contributing factor to Dayton's lung cancer. However, other experts at trial contradicted this testimony. Dr. Hammar was asked on cross-exam by Defendants whether Dayton's exposure to Owens-Corning Kaylo asbestos insulation would have contributed to any of his asbestos diseases. Dr. Hammar replied, "It's always the same issue. 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."[35] Assuming that the jury believed this causation testimony (as this Court must), then the jury could have easily concluded that the Defendants failed to prove the necessary intensity and duration of Dayton's various exposures to the other companies' asbestos-containing products in order to find causation.

With respect to **evidence of liability**, Defendants argue that because the dangers of asbestos were generally well known by the 1960s, it satisfied its requirement of

[35] Dr. Sam Hammar 5/16/05 testimony, p. 153.

proving that the empty-chair defendants should have known of the dangers of asbestos (for negligent purposes) and/or should have provided a warning on their products (for strict liability). However, whether an entity "should have known" any factual matter is a quintessential jury issue. It was well within the jury's discretion to conclude that there was insufficient evidence that the empty-chair defendants did not know or should not have known the dangers of asbestos at the time Dayton was exposed to their products. No attempt was made by the Defendants to introduce any evidence of the empty-chair defendants' actual knowledge of the dangers of asbestos. Contrast this to the evidence Plaintiff put on with respect to Certainteed's actual knowledge of the dangers of asbestos as early as 1960. (*See* Counter Statement of Facts, p. 1).

Finally, with respect to warnings, Certainteed contends that numerous witnesses testified "without contradiction" that they never saw any warnings on the insulation and other asbestos products that are identified at the various job sites. (Certainteed Brief, p. 16). The only reference to such testimony in Certainteed's Brief is the following question and answer directed to co-worker Herman Mitchell:

> Q: Did Garlock ever tell you anything about asbestos-causing cancer?
>
> A: Nobody has ever done that.

(Certainteed Brief, Appendix P, p. 73)

G. THE COURT OF APPEALS PROPERLY APPLIED THE RESTATEMENT (SECOND) OF TORTS, SECTION 433A

The Trial Court may well have felt the evidence of Dayton's exposure to asbestos insulation in general was so abundant that it would simply be unfair to hold Garlock and Certainteed solely responsible for his injuries. But a trial court has to base its rulings on

principles of law and not on what it considers right or wrong, fair or unfair. (City of Louisville v. Allen, supra at p. 11). Furthermore, the common law has long held that where it appears a single harm was caused by many different actors' conduct, but only one or two of the responsible actors' conduct has been sufficiently proven at trial, then the actors who have been identified are responsible for the **entire** injury.

KRS 411.182 did not completely supplant Kentucky's common law comparative fault principles, which would include those portions of the *Restatement (Second) of Torts* dealing with apportionment of fault. Instead, the Statute simply codified the common law evolution of the procedures for determining the respective liabilities of joint tortfeasors, whether joined in the original complaint or otherwise. Kentucky Farm Bureau v. Ryan, Ky., 177 S.W. 3d 797, 801 (2005). The *Restatement (Second) of Torts*, Section 433A, at p. 434 (1965), regarding apportionment of fault, states:

(1) damages for harm are to be apportioned among two or more causes where:
  (a) there are distinct harms, or
  (b) there is a reasonable basis for determining the contribution of each cause to a single harm.

(2) damages for any other harm cannot be apportioned among two or more causes.

Prosser and Keeton, in, *Law of Torts*, Section 52 at p. 345 (5th ed. 1984), explained why the interests of justice would have been served if the Trial Court had denied a new trial:

> Once it is determined that the defendant's conduct has been a cause of some damage suffered by the plaintiff, a further question may arise as to the portion of the total damage sustained which may properly assigned to the defendant, as distinguished from other causes. The question is primarily not one of the fact of causation, but of the feasibility and practical convenience of splitting up the total harm into separate parts which may be attributed to each of two or more causes. Where a factual basis can

> be found for some rough practical apportionment, which limits a defendant's liability to that part of the harm of which that defendant's conduct has been a cause in fact, it is likely that the apportionment will be made. **Where no such basis can be found, the courts generally hold the defendant for the entire loss, notwithstanding the fact that other causes have contributed to it.** [emphasis added].

Due to insufficient evidence introduced by the Defendants at trial, the amount of fault attributable to any one of the asbestos insulation companies listed on the apportionment verdict form simply could not be determined by the jury. Under such circumstances, as per the above *Restatement (Second) of Torts*, Defendants Garlock and Certainteed (and Dayton Dexter) are required to bear 100% of the fault.

H. THE JURY'S APPORTIONMENT VERDICT WAS NOT THE RESULT OF ITS PASSION OR PREJUDICE

Finally, the Trial Court's finding that the jury's apportionment verdict was the product of passion and sympathy for the Dexters is clearly contradicted by the entirety of its verdict. The jury assessed thirty-five (35%) percent fault to Dayton, who had quit smoking some twenty (20) years before he was diagnosed with lung cancer. This very significant apportionment of fault against the Plaintiffs evidenced both that: (1) the jury thoughtfully considered the evidence in determining which person/company was at "fault" in causing Dayton's death, and (2) despite whatever sympathy or passion they may have had for the Plaintiffs, they nevertheless reduced a large percentage of their award to the them because they found the evidence of smoking warranted it. In addition, the jury awarded no punitive damages. These factors belie any suggestion that the jury was prejudiced against the Defendants or were pre-disposed to award excessive amounts to the Plaintiff's family.

I. THE DECISIONS CITED BY DEFENDANTS IN THEIR BRIEFS ARE DISTINGUISHABLE FROM THIS CASE

In its Brief, Certainteed cites *Strickland v. Owens-Corning*, 142 F.3d 353 (6th Cir. 1998), wherein a verdict was reversed because the court felt the jury awarded too high of a percentage of fault against Owens-Corning (hereinafter "OCF"). OCF was a distributor of Kaylo asbestos insulation, which was manufactured by another defendant on the apportionment verdict form, Owens-Illinois (hereinafter "O-I"). OCF appealed the jury's 70% assessment of fault against it, claiming the manufacturer and other distributors of the Kaylo the plaintiff was exposed to should have been assessed more of the fault by the jury.

In granting a new trial, the Sixth Circuit observed that plaintiffs' theory of liability against OCF was that it was aware of and failed to warn about the dangers of Kaylo. This awareness was based solely upon general public information. *Id.* at p. 357. The Court noted the plaintiff had introduced no evidence OCF had any specific private knowledge about asbestos that the other defendants did not have. The Court also noted that O-I, which manufactured the Kaylo, had actual knowledge of the dangers of Kaylo pursuant to tests it had performed on the insulation and had failed to share these tests results with OCF until sometime later. *Id.* at pp. 356-357. Under these facts, the Court held that there was no foundation in the evidence for OCF being assessed more share of the fault than O-I as the manufacturer.

In contrast, in the case at bar, Plaintiff introduced evidence that both Defendants, Certainteed and Garlock, had private knowledge about the dangers of asbestos at or about the time it sold the products Dexter worked with. No such similar evidence was

introduced by the Defendants with respect to the other companies. A second important distinguishing factor is that in *Strickland* there was only one product and one type of exposure at issue, *i.e.* Kaylo insulation. Therefore, in *Strickland* both O-I and OCF were similarly situated. This is not at all the situation in the case at bar. Here, there were premises owners, cement pipe manufacturers, asbestos gasket manufacturers, asbestos insulation manufacturers, asbestos product distributors and suppliers, asbestos insulation installers, and construction companies listed on the apportionment verdict form. There were greatly varying degrees of evidence introduced with respect to Dexter's exposure or non-exposure to products associated with each of these various companies.

The only other case relied upon by Certainteed is *Greenleaf v. Garlock, Inc.*, 174 F.3d 352 (3rd Cir. 1999), where a new trial was granted because the jury had assessed fault against the only two defendants who defended at trial and none against five non-appearing co-defendants. The non-appearing co-defendants were all asbestos insulation manufacturers. At that trial, defendants introduced interrogatory responses from non-appearing defendants at trial establishing that each of their products contained asbestos. The plaintiff and a co-worker testified that plaintiff was regularly exposed to all five of these defendants' asbestos insulation for over 30 years. They also testified they had never seen a warning on any of these defendants' products. Because the evidence introduced against these asbestos insulation companies was virtually identical to the evidence introduced against Owens-Corning, the Court could find, "no rational explanation for the jury's failure to find the non-appearing defendants at fault as well." *Id.* at p. 367. *Greenleaf*, like *Strickland*, is distinguishable from the case at bar because

Certainteed and Garlock never introduced evidence of non-appearing defendants' asbestos products and failed to introduce co-worker evidence.

Two years after *Strickland*, the U.S. Sixth Circuit decided *Barnes v. Owens-Corning Fiberglas Corporation*, 201 F.3d 815 (6th Cir. 2000), wherein the Court rejected the plaintiff's argument that the jury should have assessed substantially more fault to Owens-Corning. The Court found that reasonable jurors could have apportioned fault as they did based upon the evidence presented to them in the case.

> The dispositive issue presented to the jury was whether exposure to Owens-Corning's asbestos products caused the decedents' mesothelioma, and the jury apparently found the evidence in these cases too weak to support an inference of more than minimal exposure to any Owens-Corning product. Significantly, in *Becht*, which was also consolidated with these cases for trial but appealed and decided separately, the jury apportioned 40% liability to Owens-Corning, indicating its ability to evaluate the evidence in each case independently for the purpose of assessing the level of exposure to Owens-Corning's products.

Id. at p. 821.

IV. CONCLUSION

For all the foregoing reasons, the Trial Court clearly erred when it set aside the original jury verdict assessing fault solely to Dayton Dexter, Certainteed and Garlock. Plaintiff, the Estate of James (Dayton) Dexter, respectfully requests this Court to affirm the Court of Appeals August 8, 2008 Opinion Revising and Remanding.

Respectfully Submitted,

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