Commonwealth of Kentucky
Supreme Court

2008-SC-000890
(2006-CA-000918; 2006-CA-000962;
2006-CA-000988; and 2006-CA-001025)

GARLOCK SEALING TECHNOLOGIES, LLC — 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 FOR APPELLANT, GARLOCK SEALING TECHNOLOGIES, LLC

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CERTIFICATE OF SERVICE

I hereby certify that copies of this brief were served on Kenneth L. Sales, Joseph D. Satterley, and John Shelton. SALES TILMAN WALLBUM CATLETT & SATTERLEY, Waterfront Plaza, Ste. 1900, 325 W. Main Street, Louisville, KY 40202; Elizabeth R. Geise and William F. Sheehan, GOODWIN PROCTER, LLP, 901 New York Ave, N.W., Washington, D.C. 20001; David C. Marshall and Eric A. Ludwig, HAWKINS & PARNELL LLP, 4000 SunTrust Plaza, 303 Peachtree Street N.E., Atlanta, GA 30308; Lisa A. Carter, OWEN, CARTER & CARTER, P.O. Box 259, 1113 Poplar St., Benton, KY 42025; Hon. Paul W. Rosenblum, Marshall Circuit Court, 101 Judicial Bldg., 80 Judicial Dr., Benton, KY 4205; and Clerk, Kentucky Court of Appeals, 360 Democrat Dr., Frankfort, Kentucky, 40601, by first-class mail, postage prepaid January 4, 2010. The undersigned also certifies that the record on appeal was not withdrawn by Appellant.

Ilam E. Smith

INTRODUCTION

This is an asbestos products liability case in which the jury rendered a verdict for the plaintiff. The case was tried twice as a result of the trial court's grant of new trial in the defendants' favor. The case is before the Court on discretionary review from an opinion of the Court of Appeals reversing the trial court's order granting a new trial.

STATEMENT CONCERNING ORAL ARGUMENT

In granting discretionary review, this Court ordered "This matter shall be scheduled for oral argument on the same day as CertainTeed Corporation v. Ava Nell Dexter, Individually, et al., 20089-SC-000886-DG." Appellant, Garlock Sealing Technologies, LLC, understands and heartily agrees that this case will be orally argued before this honorable Court.

STATEMENT OF POINTS AND AUTHORITIES

STATEMENT OF THE CASE

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

The first trial took place in May 2005. *Slip op.* at 5. The evidence showed that Mr. Dexter worked for over 40 years as a pipefitter in industrial facilities in western Kentucky and had abundant exposure to asbestos-containing insulation products. *Id.* at 4. Like most pipefitters working during this time period, Mr. Dexter was exposed to numerous sources of asbestos containing products, including friable asbestos in thermal insulation, which was banned for all uses in the 1970's because of its inherent dangers. *See e.g.* VR #5; 5/13/05 at 11:56:50-02:00:15.

Mr. Dexter was also a smoker. 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. *Slip op.* at 4. After he retired, Mr. Dexter developed lung cancer. *Id.* As the lower court correctly observed Mr. Dexter and his wife:

> "filed a lawsuit in Marshall Circuit Court alleging that Dayton contracted an asbestos-related disease by reason of his occupational exposure to asbestos-containing products during his pipefitter career. They named nineteen corporate defendants as bearing responsibility for Dayton's injuries . . . . The Dexters' principal theories for recovery against the asbestos-containing products manufacturers . . . were strict products liability and common law negligence. By third-party complaint, eleven additional corporate defendants were brought into the litigation for purposes of the apportionment of liability." *Id.* at 4.

Other than Garlock Sealing Technologies, LLC ("Garlock") and CertainTeed Corporation ("CertainTeed"), all of the other defendants either settled or were granted summary judgment. So Plaintiff proceeded at trial against Garlock and CertainTeed alone. *Id.* at 5. The instructions in the first trial included an apportionment verdict form that named 29 separate entities, including Mr. Dexter, Garlock, and CertainTeed. *Id.*, at 4. "The jury found in favor of the Dexters on the

products liability claim and in favor of Garlock and CertainTeed on the negligence claim." *Id.* Of great importance here, the jury only apportioned fault among the parties to the action: Mr. Dexter, Garlock, and CertainTeed. *Id.* The jury apportioned no fault to any of the other 26 defendants included on the verdict form. (hereinafter the "apportionment defendants").

The trial court subsequently granted Garlock and CertainTeed's motion for a new trial on grounds that the jury's failure to apportion any fault against any of the 26 apportionment defendants was "manifestly unsupported by the evidence and manifestly a product of jury passion and prejudice." *New Trial Order* at 1 (attached as Exhibit "B"). At retrial, the jury again found for the Dexters and against Garlock and Certainteed. *Slip op.* at 6. 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 various other companies listed on the verdict sheet. R. 7205. 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. R. 7286. On May 1, 2006, Plaintiffs appealed the trial court's decision to grant a second trial. R. 7514. Both Garlock and CertainTeed cross appealed. Garlock contended the directed verdict on defective design precluded a judgment on failure to warn, and that the trial court erred in denying Garlock's motions for directed verdict and JNOV on punitive damages.

In a 2-1 decision, the Court of Appeals agreed with the Dexters and reversed the trial court's new trial order. Judge Graves filed a dissenting opinion, in which he argued that the absence of findings of fact and conclusions of law in the trial court's new trial order required the Court to affirm the trial court's new trial order. Subsequently, this Court granted Garlock and

CertainTeed's motions for discretionary review and this appeal followed.

ARGUMENT

I. Court of Appeals' Error

Comparative fault is founded in fairness and equity "[t]he core principle of [which] 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))." "Comparative negligence calls for liability for any particular injury in direct proportion to fault. . . . [It] shifts the focus of attention from liability to damages, and divides the damages between the parties who are at fault." *Id.* at 4. Consequently, just as "a plaintiff who is only partially at fault cannot fairly be required to bear the entire loss . . . a defendant who is only partially at fault in causing an injury should not be required to bear the entire loss but should, likewise, be chargeable only to the extent of his fault." *Kentucky Farm Bureau Mut. Ins. Co. v. Ryan*, 177 S.W.3d 797, 802 (Ky. 2005). Keeping with these equitable principles, the trial court in Dexter 1 looked at the great abundance of evidence that the apportionment defendants in this case were at fault for causing Mr. Dexter's lung cancer, concluded that the jury's failure to allocate *any* fault to these defendants was the product of passion and prejudice, and properly granted a new trial. In reversing this action by the trial court, the Court of Appeals lost its focus and, hence, lost its way.

Rather than focusing on the highly deferential clearly-erroneous review of the trial court's ruling granting a new trial, the Court of Appeals essentially reviewed the record *de novo,* and independently re-weighed the evidence to erroneously find that there was no evidence in the record establishing any of the apportionment defendants' liability. To reach this result, the Court of Appeals had to assign zero weight to the affirmative allegations of liability and causation in

the Complaint and other evidence at trial. In other words, the Court of Appeals necessarily held that Garlock and CertainTeed could not rely on evidence introduced by the plaintiffs in order to establish the fault of the apportionment defendants. Thus, according to Court of Appeals, Garlock and CertainTeed bore the burden of producing affirmative evidence on each and every element of liability and causation. But in *Kemper v. Gordon*, 272 S.W.3d 146 (Ky. 2008), this Court expressly held that in seeking an apportionment instruction, a defendant "may rely on any evidence introduced into the record." *Id.* at 156-57.

The Court of Appeals committed other serious errors as well, most of which resulted from its failure to apply the correct standard of review.

A. Standard of Review

The trial court granted a new trial under CR 59.01 based on its finding that "Garlock Sealing Technologies, LLC and CertainTeed Corporation are entitled to a new trial on the issues of apportionment because the jury's verdict finding no fault to be apportioned to any defendant except Garlock . . . and CertainTeed . . . is manifestly unsupported by the evidence and manifestly a product of jury passion and prejudice." *New Trial Order* at 1. "A CR 59.01 ruling [is] a discretionary function assigned to the trial judge who has heard the witnesses firsthand and observed and viewed their demeanor and who has observed the jury throughout the trial." *Turfway Park Racing Ass'n v. Griffin*, 834 S.W.2d 667, 669 (Ky. 1992). In reviewing a trial court's CR 59.01 ruling, appellate courts are "precluded from stepping 'into the shoes' of the trial court, and [are] precluded from disturbing [the trial court's] ruling unless it was found to be clearly erroneous." *Id.* This is because "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. [So only] if the appellate court concludes that the trial court's order was clearly erroneous may it reverse." *Id.* So

the issue before the Court of Appeals was simply whether the trial court's new trial order was clearly erroneous.

Under a clearly erroneous review,

> [r]egardless of conflicting evidence, the weight of the evidence, or the fact that the reviewing court would have reached a contrary finding, "due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses" because judging the credibility of witnesses and weighing evidence are tasks within the exclusive province of the trial court. Thus, "[m]ere doubt as to the correctness of [a] finding [will] not justify [its] reversal," and appellate courts should not disturb trial court findings that are supported by substantial evidence. *Moore v. Asente*, 110 S.W.3d 336, 354 (Ky. 2003) (internal footnote omitted).

B. The Court of Appeals Framed the Issue Incorrectly and Didn't Apply the Clearly Erroneous Standard

The Court of Appeals erroneously framed the issue before it as follows:

> This case presents intriguing factual issues to resolve. Did the jury in Dexter I improperly *fail* to allocate fault to defendants other than those present at trial? And, if so, was its *failure* to do so "manifestly unsupported by the evidence and manifestly a product of jury passion or prejudice" necessitating a new trial? *Slip op.* at 10 (emphasis in original).

This was not the issue on appeal. The issue raised and argued on appeal was whether the trial court clearly erred in granting Garlock and CertainTeed's motion for a new trial. No Kentucky authority allows an appellate court to "resolve" factual issues under a clearly erroneous review in these circumstances.

C. The Court of Appeals Also Applied the Wrong Test for Fault

After erroneously undertaking to resolve these "factual issues", the Court of Appeals explained:

> [i]n order to address these questions we must first examine what proof is necessary in order to allocate fault. For fault to be assigned to a tortfeasor in Kentucky, there must first exist sufficient evidence that a defendant has legally caused a plaintiff's injury. *Id.*

The Court then held that proof of legal causation required "significant proof" of liability

according to the elements of the jury instruction on product liability.[1] This constituted error in more than one respect. First, this liability test addressed matters not preserved for review. As noted in the plaintiff's brief to the Court of Appeals,

> Dexter's proposed apportionment of fault verdict form listed only Defendants Garlock and CertainTeed. Dexter's counsel specifically objected to the Trial Court instructing the jury [that it] could apportion fault to any Defendant other than Garlock or CertainTeed because there was insufficient evidence that any other defendant's product or conduct was a substantial contributing factor to Dayton Dexter's asbestos-related diseases.

Appellant's Court of Appeals' brief at 7. Thus, the only issue properly preserved by the Dexters for review was whether sufficient proof of causation existed in the record in order to find the apportionment defendants at "fault".

Secondly, and more importantly, the Court of Appeals' legal-liability requirements test was in error because this Court has already answered the question what constitutes "fault." In *Owens Corning Fiberglas Corp. v. Parrish*, 58 S.W.3d 467 (Ky. 2001), this Court defined "fault" as including "acts or omissions that are in any measure negligent or reckless toward the person or property of the actor or others, or that subject a person to strict tort liability." *Id.* at 471, n.5.

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[1] The Court of Appeals required "substantial proof" of each and every of the following five elements in order for the jury to apportion "fault" against any of the apportionment defendants:

> [P]ursuant to the court's instructions, in order to find a manufacturer liable, the jury was required to find that 1) Dayton was exposed to a product manufactured or distributed by each defendant; 2) the product was in a defective condition rendering it unreasonably dangerous; 3) the defective condition existed at the time its product was sold; 4) the existence of the defective condition caused such a risk of harm to persons exposed to its products that an ordinarily prudent manufacturer being fully aware of this risk would not have put it on the market without a warning of reasonably foreseeable dangers; and 5) the defective condition was a substantial factor in causing Dayton's injury. *Similar substantial evidence was necessary in order to hold any of the installers, suppliers and distributors, or premises owners liable as well.* Clearly, significant proof[1] of causation was necessary to support a finding against any defendant in this litigation. *Slip op.* at 11-12 (emphasis added).

As to the apportionment defendants that manufactured asbestos-containing products to which Mr. Dexter was exposed, "fault" turns on the question of strict product liability. This required proof that the manufacturers' asbestos-containing products were "in a defective condition and unreasonably dangerous," and "such defective condition existed at the time [of the sale of the product]," and that "such defective condition was a substantial factor in causing injury to [Mr. Dexter." *Ford Motor Co. v. Fulkerson,* 812 S.W.2d 119, 121 -122 (Ky. 1991).

As to the premise owners, their "fault" required proof that they breached "a general duty to exercise ordinary care to keep the premises in a reasonably safe condition and warn invitees of dangers that are latent, unknown or not obvious," and that breach of that duty was a substantial factor in causing Mr. Dexter's lung cancer. *Lewis v. B & R Corporation*, 56 S.W.3d 432, 438 (Ky. App. 2001).

Finally, as to suppliers and distributors of asbestos-containing products, their "fault" simply required proof that "knew or should have known at the time of distribution or sale of such product that the product was in a defective condition, unreasonably dangerous to the user or consumer," KRS 411.340, and that the asbestos-containing products were substantial factor in causing Mr. Dexter's lung cancer. *See e.g.*, *Edwards v. Hop Sin, Inc.*, 140 S.W.3d 13, 17 (Ky. App. 2003).

Here, there was ample evidence in the record that supported finding most if not all of the apportionment defendants at "fault" for causing Mr. Dexter's lung cancer. Hence, the trial court's decision to grant a new trial was not clearly erroneous.

D. Proof of Apportionment Defendants' "Fault" at the First Trial

Evidence of the fault of the apportionment defendants exists in many forms. In opening statement, plaintiff's counsel admitted that there were other manufacturers, distributors, installer,

and premises owners that were at fault for causing Mr. Dexter's lung cancer: "We're not trying to suggest that GE or Johns-Manville[2] or some other company didn't have a role or responsibility. *No, we think that there're many companies that participated in causing the death of Mr. Dexter.*" VR #3; 5/12/05 at 02:04:30-05:00 (emphasis added). In some circumstances, opening statements can constitute admissions that "dispense with the necessity of proof as to the admitted facts." 88 C.J.S. *Trial* § 270 (updated June 2009). Kentucky courts have recognized such statements in openings can be judicial admissions "where the admission is clear." *Co-De Coal Co. v. Combs,* 325 S.W.2d 78, 79 (Ky. 1959). Here, the circumstances are met. Plaintiff counsel's statement is perfectly clear. More importantly, the evidence adduced at trial fully and completely supports this admission.

i. Evidence of Exposure

In his verified complaint, Mr. Dexter averred that, "in his employment, [he] has worked with and been exposed to asbestos products of the Defendants for many years." Complaint at ¶5. He also averred that he "contracted an asbestos-related disease as a result of his occupational exposure to the asbestos products in . . . locations in the United States manufactured and/or sold by the defendants herein." *Id.* at ¶6. Because the Complaint was verified, under Kentucky law the averments in the Complaint are judicial admissions. *Jackson v. Schine Lexington Corp.*, 205 S.W.2d 1013, 1014 (Ky. 1947); *Center v. Stamper*, 318 S.W.2d 853, 855 (Ky. 1958). More evidence of expose came from the Dexters' sworn answers to interrogatories. These answers became judicial admissions upon being introduced as evidence by reading them to the jury. *See e.g. Childers Oil Co., Inc. v. Adkins* 256 S.W.3d 19, 24 (Ky. 2008) (holding that the appellant's answers to interrogatories constituted an "effective judicial admission that it was the employer of

[2] GE and Johns-Manville Corp. were both apportionment defendants listed on the comparative fault verdict form.

Adkins and the proper defendant in this action"); *accord* 32 C.J.S. *Evidence* § 553 (updated June 2009).

In Plaintiffs' response to GE Interrogatory #1, the Dexters admitted that while working as a pipefitter at GE's Mount Vernon facility in 1969-71, Mr. Dexter worked with or around "Kay[1]o pipe and block insulation, Careytemp pipe covering * * * and asbestos tape." VR 5/24/05; at 3:47:22–48:55. James M. Dexter 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:

Q: Other than grinding asbestos gaskets on flanges, were you as a pipefitter ever exposed to asbestos in the workplace?

A: Yes sir.

Q: How?

A: I think in some instances on pipe covering.

* * * * *

As a pipefitter we put the pipe in. The insulators cover the pipe. . . . In most instances the pipe has to be tested and we've [pipefitters] are probably 80 or 90 percent complete with our piping before the insulators really get on it. [But it often] don't work out that way. A lot of times, we'll move on until they [insulators] get done in an area. We just kind of swap out to where you don't inconvenience one another.

Q: . . . . Was one of the times where you did—you worked with your father up at a plant in Mt. Vernon, Indiana, a GE plant, did you not?

A: Yes sir.

Q: Was there a point in time where you believe that you and your father may have breathed some asbestos dust from those insulators?

A: Yes, sir.

Q: To what extent, if any, did you try to avoid those insulators in the dust they were creating when you were up there?

A: We tried the best we could. In the circumstances as it was in a small building, it was, I mean . . . the area we was in was small and contained to where there was some dust.

Q: That you all were exposed to dust?

A: Yes.

VR # 9; 5/18/05 at 02:41:00-43:30.

He also testified that he had seen Kalyo, which was manufactured by Owens Corning, used as a pipe covering at several the plants where he and his father had worked. . VR #10; 5/18/09 at 03:55:30-56:00.

Richard Hatfield, an expert offered by Plaintiffs, testified that Careytemp was made by Rapid American. VR #5; 5/13/05 at 11:5900-15. Mr. Hatfield showed the jury a work place simulation video with a worker cutting Kaylo asbestos-containing block insulation with a saw, generating substantial fiber release. *Id.* at 02:13:15-02:15:15. The following other witnesses supplied more evidence that Mr. Dexter was exposed to asbestos produced from asbestos-containing produced manufactured, supplied, or installed by or located on worksites owned and operated by apportionment defendants.

Billy Robertson: Mr. Robertson was a retired pipefitter who worked for many years out of the same local union as Mr. Dexter. VR #8; 5/17/05 at 11:11:00-05. He testified that both he and Mr. Dexter were exposed to and inhaled dust created by insulators on job sites. *Id.* at 10:53:50-55:20. He further testified that Triangle Insulation and Sheet Metal Co.[3] provided the thermal insulation at Air Products and Chemicals, Inc., Meadwestvaco Corp., ISP Chemical Products, Inc, and the Shawnee Power Plant.[4] *Id.* at 11:22:15-23:15. According to Mr. Robertson Triangle insulators would be working above him and once the dust and debris from the insulation falling on him covered his hood "with the stuff." *Id.* at 23:15-24:00. Mr. Robertson further

[3] Triangle was an apportionment defendant listed on the comparative fault verdict form.
[4] These 4 entities were all apportionment defendants listed on the comparative fault verdict form.

testified that Johns-Manville Corp.'s thermal insulation was present at most of the industrial sites in Calvert City, KY where Dexter worked. *Id.* at 11:32:45-33:20. Additionally, Mr. Robertson testified that Mr. Dexter worked around various asbestos-containing products provided by Henry A. Petter Suply Co. and Hannan Supply Co.[5] *Id.* at 12:05:00-45.

Herman Mitchell: Mr. Mitchell worked for about fifty-three years out of the same local union as Mr. Dexter. VR #10; 5/19/05 at 11:23:50-24:15. The two worked together at many of the same job sites, including the Paducah Gaseous Diffusion Plaint, a/k/a Union Carbide Corp.[6], the Shawnee Steam Plant, and GE's Mount Vernon, IN plant. *Id.* at 11:30:30-35:00; 11:42:10-35. Mr. Mitchell testified that Triangle Insulation and Sheet Co. supplied the thermal insulation products at the Shawnee Steam Plant, where he worked closely with Mr. Dexter for a number of years. *Id.* at 37:40-38:20. He also testified about his and Mr. Dexter's exposure to thermal insulation when working with and around the turbines provided and installed by Westinghouse Electric Corp.[7] at the Shawnee Steam Plant. *Id.* at 35:00-37:40. And Mr. Mitchell specifically identified Kaylo thermal pipe insulation being used at one or more of these job sites.

Ron Eades: Mr. Eades was an insulator for Triangle Insulation Company who worked at the same GE plant and during the same years as Mr. Dexter. Mr. Eades testified that "if [Mr. Dexter] was at Mount Vernon at the General Electric plant working as a pipefitter, he was exposed to asbestos," and 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.[8]

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[5] These 2 entities were apportionment defendants listed on the comparative fault verdict form.
[6] Union Carbide was an apportionment defendant listed on the comparative fault verdict form.
[7] Westinghouse was an apportionment defendant listed on the comparative fault verdict form.
[8] Mr. Eades was designated as a product-id witness to identify asbestos-containing products at the GE plant in Mt. Vernon, IN. His deposition was read to the jury at VR #11; 5/19/09 at 04:11:30-26:30. The citations given above are to Mr. Eades' deposition testimony the relevant portions of which are attached as Exhibit "C."

1/12/05 Eades Dep. at 35-36, 45, 54, 68 (attached as Exhibit "C"). Mr. Eades also testified concerning a number of job sites on which Mr. Dexter worked and concerning job sites where thermal insulation was provided by Triangle. *See* Eades deposition generally. He identified Johns-Manville and Kaylo as being used at the TVA steam plant and at the GE plant in Mt. Vernon, Indiana. *Id.* at 33:03-08; 35:06-36:09. He confirmed that North Brothers, Inc.[9] supplied thermal insulation to which Mr. Dexter was exposed at the Shawnee Power Plant. *Id.* at 53:20-54:16.

The above evidence adduced at trial constitutes substantive evidence that Mr. Dexter was exposed to asbestos-containing products manufactured and supplied by many of the apportionment defendants and at various premises owned and operated by other apportionment defendants.

ii. Defective Condition Unreasonably Dangerous

Having continued unabated for over three decades, "[a]sbestos litigation is the 'longest-running mass tort' in U.S. history." Mark A. Behrens, 28 Rev. Litig. 501, 501 (Spring 2009). At this point in the process it seems beyond the pale that there is any question that thermal insulation—both spray on and pipe covering—is a defective product within the meaning of Kentucky's Product Liability Act. This type of insulation, unlike Garlock's gaskets, has been completely banned for use or manufacture for years. *See* 40 CFR 763.160 *et seq.*; VR #5; 5/13/05 at 11:56:50-02:00:15 (admission by the plaintiff's expert Richard Hatfield). This Court has affirmed sizable product liability verdicts against manufacturers of asbestos-containing thermal insulation, including Owens Corning Corp., which was an apportionment defendant in this case. *See e.g.*, *Owens-Corning Fiberglas Corp. v. Golightly*, 976 S.W.2d 409, 411 (Ky. 1998) (noting that the jury found against OCF, which manufactured Kaylo "on the theory of

[9] North Brothers, Inc. was an apportionment defendant listed on the comparative fault verdict form

strict liability, *i.e.* that it designed, manufactured or marketed a product that was defective and unreasonably dangerous"). Nonetheless, the Dexters argued on appeal that, in the limited universe of this case, there was no proof that the asbestos-containing thermal insulation manufactured and supplied by the apportionment defendants was a product in a defective condition unreasonably dangerous. Surprisingly, the Court of Appeals agreed. But the record demonstrates otherwise.

In addition, there was a great deal of evidence that inhaling raw asbestos fibers is extremely dangerous and can cause a number of dangerous and deadly diseases in humans, including lung cancer. For example:

Dr. Michael Graham testified on behalf of the defendants at trial. On cross examination, he testified that medical literature by the 1930s established that asbestosis was a cause of death, and by the 1950s it was generally accepted that inhaling raw asbestos fibers could cause lung cancer.[10] Graham depo. at 20:13-21:01. Dr. Arthur Frank, an expert for the Dexters, testified that knowledge of the dangers of breathing raw asbestos dates back to at least 1900. Dr. Frank also testified consistent with Dr. Graham's testimony that the medical dangers of raw asbestos were well known in the 1930s and that inhaling raw asbestos could cause lung cancer was generally accepted by the 1950s. VR #4; 5/12/05 at 04:32:20-35:30. He also testified that this information had spread beyond the medical literature and could be found in popular magazines and in encyclopedias. *Id.* at 04:35:30-36:50. Robert Spence, an industrial hygienist called as an expert by CertainTeed, testified that friable thermal insulation and spray-on insulation pose serious health hazards in large part because the ease in which they emit asbestos fibers. And as shown below, there was a great deal of evidence that Mr. Dexter's exposure to asbestos manufactured,

[10] Dr. Graham testified via video deposition at VR #11; 5/19/09 at 01:56:00- 04:00:00. The citations above are to the deposition transcript, relevant portions of which are attached as Exhibit "D."

supplied, and installed by the apportionment defendants was a substantial factor in causing his lung cancer.

iii. Substantial Factor: Causation

The Dexters' expert Dr. William Culbertson testified on direct examination that "each and every exposure to asbestos was a substantial contributing factor resulting asbestos-related diseases." Culbertson depo. at 32:40-31:02 attached as Exhibit "E." And Dr. Arthur Frank testified that exposure to a single asbestos fiber or one-day's exposure could have caused Mr. Dexter's cancer:

> What this basically is, as the dose of exposure to asbestos goes up, the likelihood of a response . . . goes up . . . . When you have a zero dose, no exposure [and] you can't get a response . . . . With a little bit of dose you get a little bit of response. . . . [F]or the problem of asbestosis . . . everyone agrees . . . that it takes relatively a lot of asbestos. **Mr. Dexter clearly had a lot of asbestos because they measured it in his lungs. . . .**
>
> But for the cancers, and this is for any carcinogen, any cancer-causing substance, a small dose carries a small risk. A larger dose carries more risk. As the dose goes up, the risk gets greater. While it would [be] virtually impossible to prove, theoretically one fiber could cause cancer. . . .**Cancer can occur even with very small doses.**
>
> We know this from human studies and from animal studies. We have studies in animals **as little as one day of exposure, one day, will produce both lung cancer and mesotheliomas.** We know from humans, well documented, an exposure of less than a month, up to one month, doubles your risk of lung cancer. So it's not a lifetime of exposure. **It is a month or less in a factory setting that's been documented. . . .**
>
> Q. With regard to cancers, is there a safe level of exposure to asbestos?
>
> * * * * *
>
> A. . . . . There is no safe level. The government also regulates asbestos and tells us that there are amounts that are to be allowed in the workplace and over the years they have brought those levels down but even now at the level that is allowed in the workplace, the government recognizes that even those lower levels compared to some years ago carry with it risk of additional cases of cancer. VR #4; 5/12/05 at 04:24:00-27:45 (emphasis added).

So according to Dr. Frank's testimony, a month's exposure or less to asbestos *in his workplace* could have been a substantial factor in causing Mr. Dexter's injury. Interestingly, the Court of Appeals Opinion establishes that Mr. Dexter suffered a month or more exposure *in his workplace* to asbestos-containing products (1) manufactured by apportionment defendants, *e.g.* Kaylo manufactured by Owens-Corning; (2) supplied by apportionment defendants, *e.g.*, Triangle Insulation & Sheetmetal Co.; and (3) installed at worksites owned and/or operated by apportionment defendants, *e.g.*, TVA. *Slip op.* at 13-15. Nonetheless, the Court of Appeals found that there was no proof of causation against the apportionment defendants. In order to make this finding the Court of Appeals had to ignore Dr. Frank's testimony as well as plaintiff's other expert testimony such as Dr. Sam Hammar, who testified concerning Mr. Dexter's exposure as a pipefitter to thermal insulation:

> Q. You are familiar with pipefitter's role with regards to pipes and gaskets, aren't you?
>
> A. Yes. . . . In doing [their job pipefitters] have to do different things. Sometimes they would actually have to remove insulation from a pipe that was existing and repair that part of the pipe and then they would have to put back on the insulation. Tape #6, May 16, 2005 at 11:25:00-22.

Dr Hammar further 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 could have been a substantial factor in causing his cancer. *Id.* at 11:22:45-23:15; 02:21:00-22:00; 02:42:20-44:40.

Dr. Stephen Smith linked Mr. Dexter's exposure to thermal insulation to his disease:

> Because [Mr. Dexter] was exposed directly to working with insulating materials, pipe coverings and because other people that he worked around every day were also manipulating these insulating materials he had a substantial exposure to free floating asbestos fibers and that's what caused his disease. Tape # 12, May 20, 2005 at

09:52:56-53:15

Dr. Frank expanded on the fact that exposure to all sources of asbestos, including thermal insulation, contributed to Mr. Dexter's injury:

> Every exposure [Mr. Dexter] 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 diseases. VR #4; 5/12/09 at 04:01:00-30.

And Dr. Culbertson linked Mr. Dexter's injury to his exposure to thermal insulation:

> [Mr. Dexter] said that he was a pipefitter for 50 years. And in my experience, [asbestos exposure is] usually because of the insulation materials around the pipes. Exhibit "E" at 33:08-11.

Finally, Dr. William Graham also testified that exposure to thermal insulation in the workplace played a causative role in Mr. Dexter's injury:

> Q. If [Mr. Dexter] were exposed to amosite thermal insulation at the General Electric plant for—while working as a pipefitter right next to insulators, would that be something that you—knowing what you know about Mr. Dexter's fiber-burden analysis—would lead you to believe that his exposure to amosite at that facility may have contributed to his condition?
>
> A. Yes. . . .
>
> Q. And why is that? [I]s that because . . . Dr. Dodson identified the amosite fibers in his lungs?
>
> A. I think historically we recognize that pipefitters as a group experience heavy exposures in the United States all from the amosite. And so if you're telling me that he is working in usual job as a pipefitter, what pipefitters usually do in industrial settings, I would expect him to have exposure to amosite. Graham depo., at 63:17-64:10.

Dr. Graham also offered unrebutted testimony that amosite fiber – the type of asbestos fiber associated with thermal insulation products (and not with CertainTeed pipe or Garlock gaskets) – 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. Graham depo. at 64-65, 82-83, 94-95.

The above is strong, compelling, and unrefuted evidence that Mr. Dexter's exposure to asbestos-containing products manufactured, supplied, and installed by the apportionment defendants were a substantial factor in causing his lung cancer. The Court of Appeals either ignored this evidence altogether or improperly weighed the evidence for itself rather than considering whether the trial court's ruling was clearly erroneous.

a. The Court of Appeals Improperly Weighed the Evidence

The following excerpt from the Court of Appeals decision shows it utterly discounted the importance of evidence that large amounts of asbestos fibers that did not and could not have come from Garlock's products were found in Mr. Dexter's lungs:

> CertainTeed and Garlock apparently rely on evidence in the record establishing the number and types of asbestos fibers found in Dayton's lungs from an autopsy performed after his death. They direct us to the testimony of their expert, Dr. Michael Graham, who asserted that the predominant type of fiber found in Dayton's lungs was amosite, a type not contained in products manufactured by either CertainTeed or Garlock. [Thus], they contend, Dayton was exposed to "enormous" amounts of amosite asbestos fibers and relatively few of the crocidolite fibers which would have been found in their products. Thus, they conclude, the jury must have ignored this evidence by finding only CertainTeed and Garlock at fault. This argument is disingenuous at best.
>
> **At first glance Appellee's argument appears to have merit.** Yet, in order to fully understand the nature of asbestos fibers, one must first consider what types of asbestos fibers exist. Appellees direct us to testimony at trial which indicates that amosite asbestos fibers are found in thermal insulation, while CertainTeed products contain crocidolite asbestos fibers. What they fail to acknowledge is that another type of asbestos fiber, chrysotile, is the predominant fiber found in CertainTeed asbestos pipe and Garlock gaskets. **Appellee's assertion that Dayton was obviously exposed to far more thermal fibers ignores other proof presented by the Dexter's expert**, Dr. Sam Hammar, M.D., a board certified anatomic and clinical pathologist, countered that it was not uncommon to find little evidence of chrysotile in lungs of workers exposed to substantial amounts of this fiber. *Slip op.* at 16-17 (emphasis added).

The above is patent weighing of the evidence and judging the credibility of witnesses by the Court of Appeals. The presence of amosite fibers in Mr. Dexter's lungs is overwhelming

proof that he was exposed in the workplace to the asbestos-containing thermal insulation products made, supplied and installed by the apportionment defendants. Coupled with the expert evidence that each exposure to asbestos contributed to causing Mr. Dexter's lung cancer, the presence of the amosite fibers in his lungs is proof that exposure to thermal insulation either caused or contributed to his lung cancer. Finally, when considered in light of the substantial proof that Mr. Dexter was exposed to asbestos fibers from thermal insulation manufactured, installed, or supplied by or located on worksites owned and operated by the apportionment defendants, the conclusion that the apportionment defendants were at "fault" for causing Mr. Dexter's lung cancer is inescapable. In finding otherwise, the Court of Appeals completely abandoned the highly deferential review it was required to use in reviewing the trial court's ruling. *Bayless v. Boyer*, 180 S.W.3d 439, 451 (Ky. 2005) (holding that "review of a trial court ruling on a motion brought pursuant to CR 59.01 is subject to the clearly erroneous standard, and requires a great deal of deference to the trial court"). This was clear and obvious error. *See e.g.*, *Moore*, 110 S.W.3d at 354.

E. A Word about Warnings

Based on the jury instructions, the Court of Appeals reversed the trial court's new-trial order in part because Garlock and CertainTeed did not "provide . . . evidence from which the jury could have determined whether these products carried warnings, and if so, whether the warnings were sufficient." *Slip op.* at 15. So the Court of Appeals necessarily and incorrectly limited proof of causation against the apportionment defendants to a failure-to-warn theory of liability. But *Parrish, supra,* sets forth no such limitation. In a products liability case, recovery is allowed for defective design or manufacture. "The plaintiff need only prove one." *Worldwide Equipment, Inc. v. Mullins*, 11 S.W.3d 50, 55 (Ky. App. 1999). Garlock has the same right as the

Dexters did to prove the fault of the apportionment defendants under any applicable theory. As demonstrated above, the proof at trial clearly and plainly supported a finding a liability against the apportionment defendants under the theories of either defective design or manufacture. Whether the asbestos-containing products to which Mr. Dexter was exposed and which were manufactured, supplied, or installed by apportionment defendants carried warnings is simply not relevant and should not have been considered by the Court of Appeals.[11]

II. The Trial Court did not Abuse its Discretion by Ordering a New Trial

The trial court granted Garlock and CertainTeed's motion for a new trial on grounds that the jury's failure to apportion fault against any of the 26 apportionment defendants was "manifestly unsupported by the evidence and manifestly a product of jury passion and prejudice." *New Trial Order* at 1. This ruling is "presumptively correct." *Prater v. Arnett*, 648 S.W.2d 82, 86 (Ky. App. 1983); *accord Davis v. Graviss*, 672 S.W.2d 928, 932 (Ky. 1984). On appellate review, an "appellate court [should] not hastily substitute its judgment for that of the trial judge, who monitored the trial and was able to grasp those inevitable intangibles which are inherent in the decision making process of our system." *Id.* The quantity and quality of evidence introduced at trial demonstrates that the trial judge had a firm grasp on both the evidence and the intangibles of this case.

The undisputed expert testimony at trial was that lung cancer caused by exposure to asbestos is dose related. That is, the more exposure one has to asbestos fibers, the more likely one is to develop lung cancer. So if cancer does develop as it unfortunately did in Mr. Dexter, then each of Mr. Dexter's exposures to asbestos was indeed a substantial factor in causing his disease. There was undisputed evidence that Mr. Dexter was exposed to and worked with and

[11] As pointed out in CertainTeed's brief, however, there was evidence regarding the lack of warnings by the apportionment defendants. So again, this is case of the Court of Appeals overlooking the record.

around asbestos-containing products that were manufactured, distributed, and installed by many of the apportionment defendants and/or that were located on premises owned and operated by other apportionment defendants. There was undisputed evidence that the manufacture and use of asbestos-containing thermal insulation has been banned for decades because of the health dangers it creates. Finally, there was undisputed evidence that a large of amount amosite fibers were found in Mr. Dexter's lungs. Amosite fibers come from the thermal insulation manufactured, distributed, and installed by apportionment defendants and do not come from the products manufactured by either Garlock or CertainTeed, which contain chrysotile asbestos fibers. *Slip op.* at 16-17. Because this strong and compelling evidence was undisputed, the likelihood is a near certainty that the jury simply disregarded the evidence and the law by failing to allocate *any* fault against the apportionment defendants. *See e.g.*, *Chenault v. Chenault*, 799 S.W.2d 575, 579 (Ky. 1990) (holding that a spouse's testimony when coupled with the "absence of evidence to the contrary" was sufficient to establish that shares of stock held by the spouse were non-marital property).

No rational finder of fact could disregard all the undisputed scientific and medical evidence concerning the asbestos-containing products (including thermal insulation) manufactured, distributed, and installed by apportionment defendants and/or located worksites owned and operated by apportionment defendants. Accordingly, the jury's finding that none of the apportionment defendants were at fault for causing Mr. Dexter's lung cancer is wholly unsupported by the record. Consequently, the record strongly supports that trial court's finding that the jury's failure to apportion fault to any of the apportionment defendants was the product of passion and prejudice favoring the Dexters. *See e.g.*, *Hazelwood v. Beauchamp*, 766 S.W.2d 439 (Ky. App. 1989).

In *Hazelwood*, the plaintiff's hand was mangled by farm machinery. The jury awarded him $250.00 for pain and suffering and $0.00 for future lost wages. The plaintiff moved for a new trial on grounds that the damages were inadequate. The trial court denied the motion. In reversing, the Court of Appeals explained:

> The jury's meager award for pain and suffering and its decision to award nothing for lost wages bears no relationship at all to the losses suffered by the appellant and are not supported by the evidence of record. It was uncontroverted that the appellant's hand was lodged in the baler for a long period of time before he was freed from the machine, that the palm of his hand was crushed and mangled, and that he underwent three surgical procedures. **While it is true that the jury did not have to believe Hazelwood's testimony regarding the pain he claims to have endured, it was not free to disregard the uncontroverted evidence of the nature of the accident itself and the medical procedures performed.** The jury's award of $0 and later $250 is not adequate to compensate the appellant, and a new trial is indicated.
>
> *Id.* at 440-41 (emphasis added).

Like in *Hazelwood*, the jury in the first trial was not free to disregard the uncontroverted evidence of causation against the apportionment defendants. Therefore, the Court should reverse the Court of Appeals and reinstate the trial court's order granting Garlock and CertainTeed's motion for a new trial. If the Court grants Garlock this relief, then this raises the question of how to address the issues raised on appeal from the judgment in the second appeal.

III. Appeal from the Judgment in the Second Trial

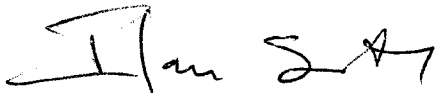
In its cross appeal in the case below, Garlock raised two issues. Because the Court of Appeals reversed the trial court's order granting a new trial and reinstated the judgment from the first trial, the Court of Appeals necessarily never reached the issues raised by Garlock on cross appeal. So as to these issues, there was no "decision" by the Court of Appeals within the meaning of CR 76.20 from which Garlock could seek discretionary review. Moreover, there appears to be no case law that sets forth the proper procedure in a situation such as this.

In an abundance of caution, Garlock filed a cross-motion for discretionary review basically asking the Court for guidance on this question. Because the Court has not ruled on this motion, Garlock will not address the issues raised on the appeal from the second judgment at this time. So for relief, Garlock asks the Court to either address these issues by cross appeal in its response brief or to reverse the Court of Appeals and remand with instructions to reach the merits of Garlock's appeal from the second judgment in this case.

CONCLUSION

Because the Court of Appeals applied the wrong standard of review and incorrectly independently weighed the facts of this case, the Court should REVERSE the Opinion of the Court of Appeals.

Respectfully submitted:



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