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

REPLY BRIEF FOR APPELLANT,
GARLOCK SEALING TECHNOLOGIES, LLC

Submitted by:

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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 42025; and Clerk, Kentucky Court of Appeals, 360 Democrat Dr., Frankfort, Kentucky, 40601, by first-class mail, postage prepaid March 24, 2010. The undersigned also certifies that the record on appeal was not withdrawn by Appellant.

Ilam E. Smith

STATEMENT OF POINTS AND AUTHORITIES

ARGUMENT

I. Kentucky's Clearly Erroneous Standard of Review is Dispostive of This Appeal

Appellees do not dispute that under Kentucky law, the applicable standard of review which should be applied by an appellate court reviewing a trial court's decision to grant a new trial is whether such decision was clearly erroneous. *City of Louisville v. Allen,* 385 S.W.2d 179, 183-84 (Ky. 1964). If substantial reason supports the trial court's decision, no clear error can have occurred. *Id.* Furthermore, even if the appellate court believes the record more strongly supports a different conclusion that does not mean substantial reason does not exist and that error has occurred. *Id.* Thus, the fact that there may be contradictory evidence does not mean substantial evidence does not exist in the record for the trial court's ruling. The decision of the trial court is presumptively correct, and under Kentucky law, the appellate court may not step into the trial court's shoes and render its own fact finding by a weighing of the evidence. *Davis v. Graviss*, 672 S.W.2d 928, 933 (Ky. 1984); *Prater v. Arnett*, 648 S.W.2d 82, 86 (Ky. App. 1983); See also *Allen*, *supra* at 183-84.

Applying the above required standard of review, the Court of Appeals should have upheld the trial court's ruling where substantial evidence clearly exists to support that decision. Although much, if not all, of this evidence is uncontradicted, even where evidence is contradicted, all that is required is a "substantial" basis for the ruling.

The substantial basis in the record for the trial court's decision to grant a new trial has already been presented to this Court in Garlock and Certainteed's principal briefs and motions for discretionary review. It includes, *inter alia*, Mr. Dexter's verified Complaint

and claims against nineteen (19) corporate defendants; a third party complaint against almost a dozen more entities; plaintiff's counsel's opening statement; plaintiff's own testimony and sworn interrogatory answers; plaintiff's claim forms showing exposures to other asbestos products. There is also testimony from Mr. Dexter's son, James M. Dexter, testimony from Ron Eades, an insulator, testimony from Herman Mitchell and Billy Robertson, pipefitters.

Plaintiff's experts, including Richard Hatfield, a materials scientist, Arthur Frank, M.D. an expert in occupational disease, Dr. Hammar, a pathologist, as well as from plaintiff's treating physician, Dr. Culbertson, all testified to the substantial contribution of products manufactured by plethora of companies. And there is testimony from defendants' experts, Michael Graham, M.D., a pathologist, Dr. Stephen Smith, a physician, and Robert Spence an industrial hygienist. All of this evidence provided the substantial grounds for the trial court's decision.

This evidence showed Mr. Dexter's exposure to various thermal insulation or other asbestos containing products made or supplied by numerous entities, and that his lungs were full of fiber characteristics of many of those products. The evidence outlined the facilities where Mr. Dexter worked, and the premises' owners', manufacturers' and suppliers actual and constructive knowledge of the dangers of asbestos. This evidence too demonstrated the fault of certain of the apportionment defendants, and established their products or conduct as a substantial factor in causing Mr. Dexter's lung cancer. From this evidence an adequate basis existed for the inclusion of empty chair defendants on the verdict form. Kentucky law allows such inclusion where some evidence exists from which a reasonable juror could determine empty chair defendants are at fault. See

Barnes v. Owens–Corning Fiberglass Corp. 201 F.3d 815 (6th Cir. 2000). This determination can be inferred from circumstantial evidence of exposures or made from admissions of exposures or other direct evidence. *Id.* at 827-828.

From all of this evidence the trial court needed only to find that the jury arbitrarily failed to render apportionment against one of the twenty-six (26) empty chair defendants to support its ruling for a new trial. Contrary to Appellee's argument, the jury was not required to speculate about the occurrence of other exposures, the fault of the empty chair defendants, or their role in the causation of Mr. Dexter's injury.

II. Plaintiff's Adverse Judicial Admissions Were Conclusive

With respect to the Plaintiff's judicial admissions in the verified complaint, interrogatory answers, and the opening statement by plaintiff's counsel, their binding and conclusive nature, even without scrutiny by the jury, is well established:

> A judicial admission is conclusive as to that fact and has the effect of removing the fact from "the field of [a] disputed [factual] issue." (*citation omitted*). **As a consequence, the judge is required "to direct the jury to accept the [judicial] admission as conclusive of the disputed fact."** *Id.* This concept is more thoroughly explained as follows:
>
> > A party is bound and concluded by his or her own uncontradicted testimony, whether elicited on direct or cross-examination. Ordinarily, uncontradicted testimony remains subject to the scrutiny of the trier of fact as to its credibility and may be rejected by them where it is not believed. However, this rule does not apply to uncontradicted testimony by a party adverse to his or her interest; his or her adversary is entitled to hold the testifying party to the testimony given and to demand a verdict or finding accordingly as a matter of law. (Footnotes omitted.)

Zapp v. CSX Transp., Inc. 300 S.W.3d 219, 223 (Ky. App. 2009) (emphasis added).

These judicial admissions took those matters away from the jury and actually relieved Garlock of any duty to introduce proof on them (even if a legal basis existed

which required such action from Garlock). For this reason alone then, Garlock was not required to develop any proof regarding these matters. Among other things, these admissions vitiate Appellees' argument that "GE never should have been placed on the apportionment verdict form because the Defendants failed to put on proof to establish GE's liability as a premises owner." *Appellees' Brief at p. 19.*

III. Dexter's Reliance On Foreign Law is Misplaced

The record substantially supports the 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. Because this outcome cannot be avoided by proper application of the clearly erroneous standard of review, Appellees rely on cases from California, Wisconsin and Tennessee. This reliance is misplaced for multiple reasons. One, foreign law from other jurisdictions does not control an issue for which Kentucky law is squarely on point. In addition, cases in those jurisdictions have even held where "apportionment is so grossly disproportionate, and so contrary to the facts and circumstances of the record ... that ... justice has been miscarried. . . (and) order(ed) a new trial in the interest of justice...." See e.g. *Klinzing v. Huck*, 173 N.W.2d 159, 164 (Wis. 1970).

IV. Dexter Waived a Request for Findings of Fact

Appellees are also critical of the trial court for not citing the specific evidence which compelled jurors to apportion fault against the empty chair defendants in its new trial order. Appellees' complain the trial court did not make findings which set out which specific company's conduct was indisputably a substantial factor in causing Plaintiff's

injury. However, Appellees never requested specific findings of fact under Ky. R. Civ. P. 52.04. Thus, under Kentucky law Appellees waived that issue by failing to request such findings. See *Vinson v. Sorrell*, 136 SW2d 465, 471 (Ky. 2004) (holding "Failure to bring such an omission to the attention of the trial court by means of a written request will be fatal to an appeal"). The trial court simply had no obligation to do that. What it was required to do was have a substantial basis for its decision.

V. The Court of Appeals' Decision in *Golightly* is Distinguishable

Appellees also rely in error on the distinguishable Kentucky Court of Appeals decision in *Owens–Corning Fiberglass Corp. v. Golightly* Ky. App. No. 95-CA-0135-MR (October 4, 1996) (Appellees' Brief, App. 7). *Golightly* did not involve appellate review of whether a trial court's decision to grant a new trial was clearly erroneous. In *Golightly*, the Court of Appeals upheld a jury verdict assessing 100% fault against Owens-Corning notwithstanding claims that verdict was unsupported by the evidence. The Court of Appeals reached its conclusion on the basis there was no evidence establishing any other product was a substantial contributing factor. In the case at bar, such evidence clearly exists and no binding precedent required Garlock to be the party which introduced it. In addition, the Court of Appeals noted on page 7 of its opinion that Owens Corning claimed plaintiff's counsel "admitted in his closing argument that other manufacturers were at least a 20% substantial contributing factor to Plaintiff's injuries and perhaps as much as 50%, but the Court determined "this statement cannot be found in the trial record." By way of stark contrast, the admissions in the instant litigation are readily apparent in the record.

VI. Dexter Erroneously Contends Garlock Failed to Preserve Error

Although Instruction No. 8[1], only required evidence of exposure and causation for apportionment, and was not challenged by Appellees on appeal, Appellees erroneously claim on page 22 in their brief before this Court that Garlock failed to previously raise the issue of the empty chair defendants' fault. Contrary to Appellees' contention, Garlock did raise this issue on pages 5-6 in its Motion for Discretionary Review where Garlock argued that the Court of Appeals used the wrong definition of "fault" in discussing the apportionment instructions. So this is by no means a new issue on appeal.

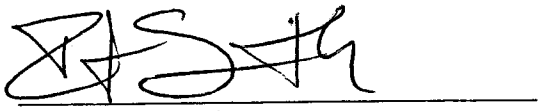
VII. Dexter's Red Herring Arguments Are Intended to Distract

Finally, Appellees pitch several other "red herring" arguments such as Garlock failed to tell the jury in closing argument what specific percentage of fault should be allocated to each empty chair defendant, and Garlock moved the Court to call several new witnesses at the second trial, but neither of these are relevant issues. In addition, Appellees cite no law which required Garlock to tell the jury what specific percentage of comparative fault should be assigned each empty chair defendant. Dexter also argues that the question of what an empty chair defendant knew or should have known about the dangers of asbestos is "quintessential jury question" and because the jury allocated no fault to these defendants at the first trial its decision could not properly be disturbed. But Dexter cites no law which shows this precludes a trial judge from granting a new trial in situations where the evidence was not sufficient for the jury's verdict. These arguments are simply intended as distractions from the narrow dispositive issue before the Court. The same is true for Appellees' contention that the Court of Appeals properly applied

[1] The trial court's instructions from the first trial can be found at App. F in Certainteed's principal brief.

Restatement (Second) of Torts, Section 433A. If applicable, the trial court was well within its discretion in finding the evidence of record provided the "reasonable basis" called for in the Restatement for "determining the contribution of each cause" to Mr. Dexter's injury. But regardless of that, the controlling issue was whether substantial reason existed for the new trial order.

Respectfully submitted:



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