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NO. 96-CA-2417-MR

WALTER PARRISH and
SHIRLEY PARRISH — APPELLANTS

APPEAL FROM JEFFERSON CIRCUIT COURT
v. HONORABLE WILLIAM E. McANULTY, JR., JUDGE
ACTION NO. 90-CI-008795

OWENS-CORNING FIBERGLAS CORP. — APPELLEE

AND NO. 96-CA-2419-MR

JAMES COYLE — APPELLANT

APPEAL FROM JEFFERSON CIRCUIT COURT
v. HONORABLE WILLIAM E. McANULTY, JR., JUDGE
ACTION NO. 88-CI-005618

OWENS-CORNING FIBERGLAS CORP. — APPELLEE

OPINION
VACATING AND REMANDING

* * *

BEFORE: GUDGEL, CHIEF JUDGE, GARDNER, AND SCHRODER, JUDGES.

SCHRODER, JUDGE. These appeals are from judgments in two products liability actions against the same defendant to recover for injuries sustained as a result of appellants' occupational exposure to asbestos. Upon consideration of appellants' arguments, in light of the voluminous record herein and the applicable law, we vacate and remand for proceedings consistent with this opinion.

Plaintiff/appellant, James Coyle, began working for Louisville Gas & Electric ("LG&E") in 1969. Coyle primarily worked outside as a rigger's assistant. However, during periods of inclement weather, Coyle worked as an assistant to the insulators at LG&E. Coyle claimed he was exposed to asbestos-containing insulation products during these times. Eventually around 1974, Coyle became a mechanic and thereafter worked as such for the next 19 years. As a mechanic, he worked with asbestos-containing brake pads and clutches.

Plaintiff/appellant, Walter Parrish, began working for the Louisville Water Company ("LWC") in 1959 in the maintenance department. His job duties included the repair of steam lines, pumps and electric motors. Parrish testified that in performing these duties, he handled or came into contact with asbestos-containing products nearly every day. Parrish retired from LWC in 1990.

Parrish and his wife and Coyle instituted separate products liability personal injury actions in the Jefferson Circuit Court to recover for injuries sustained as a result of

Parrish's and Coyle's exposure to asbestos-containing products. Coyle's action was brought on July 14, 1988, and named the following fifteen (15) defendants in his original complaint: appellee, Owens-Corning Fiberglas Corp. ("OCF"); Anchor Packing Company; A.P. Green Refractories Co.; Armstrong World Industries, Inc.; Celotex Corporation; Combustion Engineering; Eagle-Picher Industries, Inc.; Fibreboard Corporation; The Flintkote Company; Foster Wheeler Energy Corporation; GAF Corporation; H.K. Porter Company; Keene Building Products Corporation; Owens-Illinois, Inc.; and Raymark. His complaint was later amended to add an additional defendant, Garlock, Inc. The Parrishes' action, filed October 26, 1990, named the following sixteen (16) defendants in their original complaint: OCF; A.P. Green Refractories Co.; Armstrong World Industries, Inc.; Garlock, Inc.; Eagle-Picher Industries, Inc.; Fibreboard Corporation; Foster-Wheeler Energy Corporation; National Gypsum Company; Owen-Illinois, Inc.; Pittsburgh Corning Corp.; Southern Textile Corp.; United States Gypsum Company; and W. R. Grace & Co. On or about May 23, 1996, OCF filed a Notice of Assertion of Claim in both the Coyle and Parrish cases against the Manville Corporation Asbestos Disease Compensation Fund for the purpose of naming Johns-Manville Corporation as a third-party defendant.

Prior to trial, Coyle settled with nine (9) of the defendants and one other asbestos product manufacturer not named as a defendant. The Parrishes settled with nine (9) of the

defendants and two companies not named as defendants. All of the remaining defendants except OCF were dismissed prior to trial.

One of the defendants with which Coyle and the Parrishes both settled was Owens-Illinois ("OL"). OL manufactured an asbestos-containing product known as "Kaylo" from the early 1940's until 1958, when the Kaylo division was purchased by OCF.

Evidence was introduced establishing that in the early 1940's, OL contacted a laboratory in New York, Saranac Lake, to conduct tests to determine whether Kaylo was hazardous. One of the first letters OL received from Saranac Lake, from Dr. Leroy Gardner, advised OL that, since the product contained asbestos and quartz, it contained "all of the ingredients for a first-class hazard." Dr. Vorwald, the director of Saranac Lake, advised OL that it had a dangerous product.

When OCF bought the Kaylo line, OL boxed up all the documentation pertaining to Kaylo and the experiments being conducted on the product and shipped them to OCF. After receiving the information, OCF continued selling and manufacturing Kaylo without warnings. John Thomas, a former President of OCF, testified that he and others at OCF knew, in the 1940's, that the asbestos was dangerous. He testified they did not warn insulators about the product, and admitted OCF should have warned them.

Coyle and Parrish both claimed that they suffered from asbestosis, a disease of the lungs caused solely by exposure to

asbestos. Coyle and Parrish also claimed to be at an increased risk in the future of developing lung cancer and mesothelioma, a rare and deadly form of cancer caused by exposure to asbestos.

Coyle's case and the Parrishes' case were tried simultaneously in the Jefferson Circuit Court, beginning on June 5, 1996 and continuing through June 17, 1996. Although OCF was the only defendant left in the suit, the instructions submitted to the jury gave the jury the opportunity to allocate fault against: all of the defendants originally sued; the additional entities with which Coyle and Parrish settled; Parrish's employer, LWC, with which Parrish had settled a workers' compensation claim; and Nicolet, an asbestos-manufacturing company with which neither Parrish nor Coyle settled and which was never named as a party. The trial court also submitted jury instructions regarding the plaintiffs'/appellants' comparative negligence.

The jury found that both Parrish and Coyle were comparatively negligent and apportioned 50% of the fault to each plaintiff. As to Parrish, the remaining fault was apportioned as follows: 20% to OCF; 20% to OL; and 10% to LWC. As to Coyle, 25% of the fault was assessed against OL and 25% to OCF. No fault was assessed against any other party named on the verdict forms in either case. The jury awarded Coyle and Parrish each $55,000, which was broken down as follows on the verdict forms:

> a. Mental or physical pain and suffering sustained and which you reasonably expected in the future as a direct result of exposure

> to asbestos (not to exceed the sum of $1,000,000.00, the amount claimed): $50,000
>
> b. Increased likelihood of contracting cancer, (not to exceed the sum of $1,000,000.00, the amount claimed): $ 5,000
>
> TOTAL: $55,000

From the judgments pursuant to the jury verdicts, Coyle and Parrish now appeal.

Appellants first argue that the trial court improperly submitted a contributory negligence instruction to the jury. The instruction, which was given separately as to both Coyle and Parrish regarding their asbestosis and future cancer claims, stated as follows:

> It was the duty of the Plaintiffs, James Coyle and Walter Parrish, to exercise that degree of care for his[/]their health and safety as expected of a reasonably prudent person under the same or similar circumstances.
>
> Question No. 1 [Question No. 2]: Do you believe from the evidence that the Plaintiff Coyle [Plaintiff Parrish] failed to exercise that degree of care for his own health and safety as expected of a reasonably prudent person under the same or similar circumstances, and that such failure was a substantial factor in causing his claimed injury?

Upon reviewing the above instruction, it is clear that said instruction was not a true contributory negligence instruction since plaintiffs'/appellants' claims were not barred by the jury's finding that plaintiffs were negligent. Rather, it was a comparative negligence instruction, as plaintiffs were found to be 50% at fault. In any event, appellants argue that

the instruction was given in error because under KRS 411.320(3), in a products liability action, the plaintiffs' negligence is relevant only if it relates to use of the product, and there was no evidence that either plaintiff was negligent in his use of the asbestos-containing products.

We shall first look at the evidence of appellants' possible negligence presented at trial to determine whether appellants' fault was even an issue. Appellee maintains there was evidence of Parrish's negligence in that he testified that he sometimes did not wear a mask when one was provided by his employer. Upon reviewing Parrish's testimony regarding the mask, he testified that masks were not provided by his employer until later in his career. However, he stated that he could not wear it for long because the filter would become filled with dust and his employer would only provide one filter. This evidence was apparently the basis for the court's submission of the comparative fault instruction as to Coyle and Parrish. Clearly, that was not a sufficient basis for such an instruction as to Coyle as there was no evidence that Coyle failed to wear a mask. Further, as to the evidence regarding Parrish's not wearing his mask, we do not believe it warranted a comparative fault instruction. Parrish was not provided a mask until late in his career, after he had already been exposed to asbestos for many years. Moreover, he had a justifiable reason for not always wearing his mask because when the filter became clogged, he could not breathe and the employer refused to provide another one.

The only other evidence which the jury may have found to be proof of appellants' comparative fault was the evidence of appellants' cigarette smoking history during the time they were exposed to asbestos. Appellants argue that the comparative fault instruction was in error because it allowed the jury to consider evidence of appellants' cigarette smoking as evidence of appellants' comparative fault. Appellants contend that since they were only seeking damages for injuries sustained as a direct result of exposure to asbestos, which the instructions so reflected, there was no justification for reducing appellants' damages because they smoked cigarettes. Appellees argue there is no reason to preclude the consideration of appellants' smoking for purposes of determining comparative fault in an asbestos products liability action.

There must be sufficient evidence of plaintiff's comparative fault in order to submit a comparative fault instruction to the jury. Skaggs v. Assad By and Through Assad, Ky., 712 S.W.2d 947 (1986). In reviewing the record, we did not see any evidence linking cigarette smoking to the disease of asbestosis. The medical evidence was undisputed that asbestosis is caused solely by exposure to asbestos. Thus, the jury should not have been instructed as to appellants' comparative fault regarding the asbestosis claim, and the trial court erred to the extent it so instructed the jury.

As to appellants' claim for the increased likelihood of contracting cancer due to asbestos exposure, there was evidence

introduced in the form of expert medical testimony establishing that smoking cigarettes combined with exposure to asbestos has a synergistic effect which increases the likelihood of contracting lung cancer. The testimony established that those who smoked and were exposed to asbestos had a much greater risk of contracting cancer than those who were exposed to asbestos and did not smoke. Thus, it was proper to instruct the jury as to appellants' comparative fault regarding the cancer claim so long as KRS 411.320(3) does not apply, as we shall discuss below.

KRS 411.320(3) provides:

> In any product liability action, if the plaintiff failed to exercise ordinary care in the circumstances in his use of the product, and such failure was a substantial cause of the occurrence that caused injury or damage to the plaintiff, the defendant shall not be liable whether or not said defendant was at fault or the product was defective.

Under KRS 411.320(3), the plaintiff's negligence is limited to his use of the product, in which case it is a complete bar to recovery. Since appellants' smoking is clearly not evidence of negligence as to use of the product, it cannot be considered by the jury as evidence of contributory negligence if KRS 411.320(3) applies. Hence, the next issue for our determination is whether KRS 411.320(3) or KRS 411.182(1) applies.

KRS 411.182, enacted after KRS 411.320 and effective July 15, 1988, applies the law of comparative negligence:

> In all tort actions, including products liability actions, involving fault of more than one party to the action, including third-party defendants and persons who have been released under subsection (4) of this section, . . .

KRS 411.182(1).

Appellee argues that KRS 411.320(3) was superseded by the enactment of KRS 411.182 such that appellants' negligence should not be confined to their use of the product, but could also include evidence of their cigarette smoking.

In Reda Pump v. Finck, Ky., 713 S.W.2d 818 (1986), cited by appellants, the Court held that despite the adoption of comparative negligence in Hilen v. Hays, Ky., 673 S.W.2d 713 (1984), KRS 411.320(3) remained in effect in products liability cases because the statute specifically applied to products liability cases. After the enactment of KRS 411.182, the Court, in Ingersoll-Rand Co. v Rice, Ky. App., 775 S.W.2d 924 (1988), held that KRS 411.182 adopted comparative negligence in products liability cases and, thus, it superseded KRS 411.320(3) and statutorily overruled Reda Pump, supra. Smith v. Louis Berkman Co., 894 F. Supp. 1084 (W.D. Ky. 1995) also recognized that KRS 411.320 did not survive the adoption of KRS 411.182. Likewise, in Caterpillar, Inc. v. Brock, Ky., 915 S.W.2d 751 (1996), the Court held that KRS 411.182 repealed KRS 411.320 by implication. However, just when it appeared that the issue had finally been resolved, the Supreme Court came out with Monsanto Co. v. Reed, Ky., 950 S.W.2d 811 (1997), wherein it reaffirmed the holding in Reda Pump, supra, and held that the Products Liability Act (KRS 411.300-KRS 411.340) still applies to claims arising from the use of products. Interestingly, the Court made no mention of KRS

411.182, Ingersoll-Rand Co., supra, or Caterpillar, Inc., supra, in the opinion.

As we see it, the above-stated conflict in the case law is of no concern to Coyle's case since his action was filed on July 14, 1988, prior to the effective date of KRS 411.182, and KRS 411.182 cannot be applied retroactively. Ingersoll-Rand Co., supra. Under the law existing at the time Coyle's action arose (Reda Pump, supra), there is no question that KRS 411.320(3) would apply to his case. Accordingly, a contributory negligence instruction would be improper since there was no evidence of Coyle's negligence as to use of the product.

Parrish's action, however, was filed on October 26, 1990, and his testimony at trial established that his cause of action arose in 1989 (after the effective date of KRS 411.182) when he was first informed of his asbestosis diagnosis. Thus, we must address the conflicting Supreme Court opinions. Upon a closer reading of the facts in Monsanto Co., supra, we see that it was concerned only with sections (1) and (2) of KRS 411.320 (alteration and modification of a product) and did not address section (3) (negligence in the use of the product), which is the section relevant to the case at bar. Further, the Court's holding in Monsanto appears to be based on the common law principle set out in Section 388 of the Second Restatement of Torts that a plaintiff is barred from recovering if the product was not used in its original, unaltered, and unmodified condition. Thus, we deem Monsanto to be distinguishable from the

instant case. Therefore, the law in Ingersoll-Rand Co., supra, would be controlling and the principles of comparative negligence under KRS 411.182 would apply. Accordingly, as to Parrish's claim for the increased likelihood of contracting cancer in the future, a comparative fault instruction would be warranted.

Given our rulings above, we vacate and remand as to both appellants for new trials consistent with the dictates of this opinion. As an advisory matter, we shall nevertheless address some of the remaining issues raised by appellants that may arise again on remand.

Appellants argue that the allocation of fault instructions placed undue emphasis on appellants' comparative negligence. Appellants complain that the error in giving the previously discussed comparative fault instruction was compounded by the following language in the allocation of fault instruction:

> Further, if you found under Instruction No. 6 that Plaintiff failed to exercise that degree of care for his own health and safety as expected of a reasonably prudent person under the same or similar circumstances, and that such failure was a substantial factor in causing his claimed injury, you will also determine and indicate below . . . his share of the total fault.

This issue would only be pertinent to Parrish on remand since only he would receive a comparative fault instruction (as to the cancer claim). In our view, there is nothing improper in the above-stated portion of the allocation of fault instruction. It simply clarified what the jury was to do after the initial finding that the plaintiff was at fault.

Appellants also argue that the trial court improperly instructed the jury to allocate fault to other entities besides appellee. KRS 411.182(1)(b) provides:

> (1) In all tort actions, including products liability actions, involving fault of more than one party to the action, including third-party defendants and persons who have been released under subsection (4) of this section, the court, unless otherwise agreed by all parties, shall instruct the jury to answer interrogatories or, if there is no jury, shall make findings indicating:
> (b) The percentage of the total fault of all the parties to each claim that is allocated to each claimant, defendant, third-party defendant, and person who has been released from liability under subsection (4) of this section.

It has been held that apportionment can only occur between or among parties named in the plaintiff's complaint, parties before the court, or parties who have "bought their peace from the litigation by way of releases or settlements." Bass v. Williams, Ky. App., 839 S.W.2d 559, 564 (1992); Floyd v. Carlisle Construction Co., Inc., Ky., 758 S.W.2d 430 (1988); and Copass v. Monroe County Medical Foundation, Inc., Ky. App., 900 S.W.2d 617 (1995). Thus, so long as there is sufficient evidence of the tortfeasor's fault (see Floyd, supra), it is proper to give an apportionment instruction as to any tortfeasor who was named as a party to the complaint or who had previously settled with plaintiff.

Specifically, appellants argue it was error to instruct the jury to apportion fault against Nicolet, an asbestos manufacturing company, which was never made a party to the action

and with which appellants never settled. We agree. In Baker v. Webb, Ky. App., 883 S.W.2d 898 (1994), the Court held it was reversible error for the court to instruct a jury to allocate fault to a non-settling non-party.

Parrish argues that the court improperly instructed the jury to apportion fault against Parrish's employer, LWC, which the jury found was 10% at fault. LWC was not ever named a party to the action herein, but prior to trial, Parrish settled a workers' compensation claim with LWC based on the resultant disability from the asbestos exposure. First, as this was a product's liability action, we see no justification for apportioning fault to LWC since it had nothing to do with the "manufacture, construction, design, formulation, development of standards, preparation, processing, assembly, testing, listing, certifying, warning, instructing, marketing, advertising, packaging or labeling of any product." See KRS 411.300(1). Nor was the employee a wholesaler, distributor or retailer. See KRS 411.340. Secondly, in reviewing the record, we do not believe there was sufficient evidence of the employer's negligence to warrant an allocation of fault instruction.

For the reasons stated above, the judgments are vacated and remanded for new trials consistent with this opinion.

GARDNER, JUDGE, CONCURS.

GUDGEL, CHIEF JUDGE, CONCURS IN RESULT ONLY.

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