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Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-000918-MR

GARLOCK SEALING TECHNOLOGIES, LLC — APPELLANT

APPEAL FROM MARSHALL CIRCUIT COURT
v. HONORABLE PAUL W. ROSENBLUM, SPECIAL JUDGE
ACTION NO. 02-CI-00310

AVA NELL DEXTER, INDIVIDUALLY;
JAMES M. DEXTER, EXECUTOR OF THE
ESTATE OF JAMES G. DEXTER, DECEASED;
AND CERTAINTEED CORPORATION — APPELLEES

AND NO. 2006-CA-000962-MR

JAMES M. DEXTER, EXECUTOR OF THE
ESTATE OF JAMES G. DEXTER, DECEASED — APPELLANT

APPEAL FROM MARSHALL CIRCUIT COURT
v. HONORABLE PAUL W. ROSENBLUM, SPECIAL JUDGE
ACTION NO. 02-CI-00310

CERTAINTEED CORPORATION AND
GARLOCK SEALING TECHNOLOGIES, LLC — APPELLEES

AND NO. 2006-CA-000988-MR

CERTAINTEED CORPORATION CROSS-APPELLANT

CROSS-APPEAL FROM MARSHALL CIRCUIT COURT
v. HONORABLE PAUL W. ROSENBLUM, SPECIAL JUDGE
ACTION NO. 02-CI-00310

AVA NELL DEXTER, INDIVIDUALLY; AND
JAMES M. DEXTER, EXECUTOR OF THE ESTATE
OF JAMES G. DEXTER, DECEASED CROSS-APPELLEES

AND NO. 2006-CA-001025-MR

GARLOCK SEALING TECHNOLOGIES, LLC CROSS-APPELLANT

CROSS-APPEAL FROM MARSHALL CIRCUIT COURT
v. HONORABLE PAUL W. ROSENBLUM, SPECIAL JUDGE
ACTION NO. 02-CI-00310

AVA NELL DEXTER, INDIVIDUALLY;
JAMES M. DEXTER, EXECUTOR OF THE ESTATE
OF JAMES G. DEXTER, DECEASED; AND
CERTAINTEED CORPORATION CROSS-APPELLEES

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: CLAYTON AND DIXON, JUDGES; GRAVES,[1] SENIOR JUDGE.

DIXON, JUDGE: Ava Nell Dexter and James M. Dexter, executor of the estate of James G. "Dayton" Dexter (Dayton), appeal from an order of the Marshall Circuit Court granting Appellees a new trial pursuant to CR[2] 59.01 following the first trial in the proceedings below. Garlock Sealing Technologies, LLC, and CertainTeed[3] Corporation cross-appeal from a judgment for damages entered upon a jury verdict, following retrial, adjudging them liable upon Appellants' claims relating to Dayton's exposure to asbestos while working in close proximity to the asbestos-containing products manufactured by the companies.

FACTUAL AND PROCEDURAL BACKGROUND

Dayton Dexter worked as a pipefitter from 1946 until his retirement in 1984. In the course of his pipefitter duties, Dayton was exposed to asbestos-containing products and materials, including asbestos-containing pipe gaskets and sealants manufactured by Garlock, and asbestos-containing waterpipe manufactured by CertainTeed. Dayton was also a former long-term cigarette smoker.

Prior to the commencement of the present litigation, Dayton was diagnosed with lung cancer. In connection with Dayton's cancer treatment and

[1] Senior Judge John W. Graves, sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

[2] Kentucky Rules of Civil Procedure.

[3] "CertainTeed" is also spelled "Certainteed" in the record. We have followed the spelling used by the company in its appellate brief.

other medical examinations it was determined that his lungs contained significant levels of asbestos fibers. It is undisputed that Dayton's lung cancer was caused by a combination of his exposure to asbestos and his long-term cigarette smoking. Dayton died in March 2004, while this litigation was still pending, at the age of 79. Dayton's son, James M. Dexter, as executor of his estate, was substituted as a party following Dayton's death.

On July 8, 2002, Dayton and Ava 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, including Garlock and CertainTeed.[4] The Dexters' principal theories for recovery against the asbestos-containing products manufacturers, including Garlock and CertainTeed, 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.[5]

[4] The nineteen named defendants were as follows: Triangle Insulation and Sheetmetal Co.; 4520 Corporation, Inc; Henry A. Petter Supply Company; Robertson-Ceco Corporation; Motion Industries, Inc.; North Brothers, Inc.; ACandS, Inc.; Westinghouse Electric Corporation; General Electric Company; CertainTeed Corporation; Garlock, Inc.; Mine Equipment and Mill Supply Company; Hannan Supply Company; Combustion Engineering, Inc.; Rapid-American Corporation; John Crane, Inc.; Metropolitan Life Insurance Company; Southern Manufacturing, Inc.; and Union Carbide Corporation.

[5] The eleven third-party defendants were as follows: Mead Westvaco Corporation; CC Metals and Alloys, LLC; Air Products and Chemicals, Inc.; Tennessee Valley Authority; ISP Chemical Products, Inc.; Arkmea, Inc.; Federal-Mogul Corporation; Federal-Mogul Products, Inc.; Owens-Corning Corporation; Crawford Russell Corporation; and Johns Mansville Corporation.

Some of the companies were granted summary judgment, and various settlements were made prior to the first trial (Dexter I), none of which is at issue in this appeal. Ultimately only Garlock and CertainTeed did not settle and remained to try the case to verdict. The trial in Dexter I commenced on May 11, 2005.

The case was submitted to the jury in Dexter I on May 25, 2005. The jury found in favor of the Dexters on the products liability claim and in favor of Garlock and CertainTeed on the negligence claim. The jury returned a verdict awarding Dayton's estate $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 verdict of $5,073,126. The jury apportioned fault as follows: Dayton Dexter, 35%; CertainTeed, 30%; and Garlock, 35%, and allocated no fault to the other remaining companies appearing on the verdict form. On June 10, 2005, the trial court entered judgment in accordance with the jury verdict.

Garlock and CertainTeed subsequently moved for a new trial pursuant to CR 59.01, arguing that the jury's failure to allocate any fault to any of the other empty-chair defendants whose products and materials were identified as potential sources for Dayton's asbestos exposure, or upon whose premises the exposure occurred, was so contrary to the evidence as to entitle them to a new trial. Ultimately, the trial court awarded Appellees a new trial upon all issues.

The second trial (Dexter II) took place in January and February 2006. The trial court permitted Garlock and CertainTeed to present new and additional

evidence against the empty-chair defendants, as well as additional evidence of Dayton's smoking habit. At the conclusion of the trial the jury returned a verdict finding Appellees liable under both the Dexters' products liability and negligence theories. Damages were returned as follows: $63,005 for past medical expenses; $1,500,000 for pain and suffering; $6,744 in funeral expenses; and $15,000 for lost of consortium. In addition, the jury assessed $100,000 in punitive damages against CertainTeed, and $600,000 in punitive damages against Garlock. Thus, the total verdict for damages in Dexter II was $2,314,749. Fault was apportioned as follows: Dayton Dexter, 60%; CertainTeed, 2%; Garlock, 17%; remaining companies, 21%. On February 22, 2006, the trial court entered judgment in accordance with the jury verdict. The judgment also ordered that post-judgment interest be allowed at the statutory rate of 12% per annum.

Following entry of the judgment in Dexter II, Garlock and CertainTeed each moved for judgment notwithstanding the verdict, which motions were denied. These appeals followed raising multiple issues. Because we find the Dexters appeal dispositive, all remaining issues are rendered moot.

Paramount to our decision is the Dexters' argument that the trial court erred in granting Garlock and CertainTeed's motions for a new trial following Dexter I. On appeal, the Dexters make several interrelated claims concerning the trial court's decision under CR 59.01 to grant Appellees a new trial. In short, they contend 1) that the jury had insufficient evidence to allocate fault to other

defendants listed in the jury instructions; 2) that Appellees failed to indisputably prove one or more other company's product/conduct was a substantial factor in causing Dayton's lung cancer; and 3) that Appellees failed to identify which of the 26 other companies' products were a substantial factor in causing Dayton's injury. As each of these issues is interrelated, we address all issues collectively.

In its September 8, 2005, order awarding Garlock and CertainTeed a new trial, the trial court explained its reasoning for granting a new trial as follows:

> Defendants, Garlock Sealing Technologies, LLC and CertainTeed Corporation have moved the Court for a new trial under CR 59.01. The basis for the motion filed by these defendants is the jury's failure to apportion fault to any but two (2) of the twenty-eight (28) defendants included on the verdict for which said defendants contend is so contrary to the evidence adduced at trial. The Court has considered the record herein as well as arguments of counsel. The Court being thus sufficiently advised, it finds that the motion of Garlock Sealing Technologies, LLC and CertainTeed Corporation are entitled to a new trial on the issue of apportionment because the jury's verdict finding no fault to be apportioned to any defendant except Garlock Sealing Technologies, LLC and CertainTeed Corporation is manifestly unsupported by the evidence and manifestly a product of jury passion and prejudice. Under CR 59.01(f), this Court may grant a new trial if "the verdict is not sustained by sufficient evidence, or is contrary to law." The jury's finding that Garlock Sealing Technologies, LLC and CertainTeed Corporation were alone responsible for the plaintiffs' decedent, James G. Dexter's exposure to the asbestos fibers that led to his developing an asbestos-related disease and contributed to causing his lung cancer is not supported by the evidence.

CR 59.01(f) permits a new trial to be granted when a jury's, "verdict is not sustained by sufficient evidence, or is contrary to law." As an appellate court, we review the circuit court's ruling on a motion for a new trial motion for an abuse of discretion and will reverse only if there is clear error. *Miller v. Swift*, 42 S.W.3d 599, 601 (Ky. 2001); *Rippetoe v. Feese*, 217 S.W.3d 887, 890 (Ky.App. 2007) (citing *Thomas v. Greenview Hospital Inc.*, 127 S.W.3d 664 (Ky.App. 2004) overruled on other grounds by *Lanham v. Commonwealth*, 171 S.W.3d 14 (Ky. 2005)). The trial court's decision is presumed correct and will not be reversed absent clear error. *Shortridge v. Rice*, 929 S.W.2d 194, 196 (Ky. App. 1996). This rule recognizes that a decision on a motion for a new trial depends, to some extent, upon factors and impressions not included in the appellate record. *Id.* A trial court has broad discretion in ruling upon a motion for a new trial and we will not disturb such ruling absent an abuse of that discretion. *Lewis v. Grange Mut. Cas. Co*., 11 S.W.3d 591 (Ky.App. 2000). "An abuse of discretion occurs when a 'trial judge's decision [is] arbitrary, unreasonable, unfair, or unsupported by sound legal principles.'" *Farmland Mut. Ins. Co.*, 36 S.W.3d at 368, 378 (Ky. 2000) (quoting *Goodyear Tire and Rubber Co. v. Thompson*, 11 S.W.3d 575, 581 (Ky. 2000)). "The discretion of the trial judge, who participates in the conduct of the trial, in refusing or granting a new trial will be interfered with only in exceptional cases." *Wilkins v. Hopkins*, 278 Ky. 280, 128 S.W.2d 772, 774 (Ky.App. 1939).[6]

[6] The parties make various arguments concerning the proper standard of appellate review upon the granting of a motion for a new trial. We need not address those arguments, however, as the standard is well established and remains as set forth above.

While we do not lightly disturb a trial court's discretion under CR 59.01, upon a thorough review of the extensive record in this case, it is our view that the trial judge's decision in Dexter I to set aside the jury's verdict constituted an abuse of discretion and was clearly in error.

At the outset, we note the inherent difficulty in reviewing decisions under CR 59.01. Unfortunately, this rule does not require the trial court to reveal its reasoning when nullifying a jury's finding of fact. Our review is particularly difficult when, as occurred here, the trial lasted for approximately two and one-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.

While a trial court does possess broad discretion under CR 59.01, such discretion is not limitless. For example, where conflicting testimony would support a verdict for either party,

> [i]t is the function of the jury to determine questions of credibility and issues of fact where the evidence is conflicting. While the trial court has a broad judicial discretion in granting or refusing a new trial, it may not set aside a verdict of a jury because it does not agree with the verdict if there was sufficient evidence to support it.

Conley v. Dunn, 552 S.W.2d 671, 672 (Ky. App. 1977), *quoting Woods v. Asher,* 324 S.W.2d 809, 811 (Ky. 1959). Additionally, "a trial court's discretion is abused by granting a new trial when no sufficient or sound reason exists therefor, or where the court travels outside the record to find grounds for granting the new trial." *Daniel v. H.B. Rice and Co*., 275 S.W.2d 924, 925 (Ky. 1955). Further, as recognized by the Court in *Aetna Life Ins. Co. v. Shemwell,* 273 Ky. 264, 116 S.W.2d 328, 330 (Ky. 1938),

> it is the well-known rule that the courts are not authorized to reverse the verdict of a jury upon the grounds that it is contrary to the preponderance of the evidence, unless the verdict is so flagrantly against the evidence as to raise the presumption that it was rendered under passion or prejudice. While a mere scintilla of evidence is not sufficient to sustain the verdict of a jury, yet, if there is any evidence of a substantial and probative nature to sustain the verdict, the courts are unauthorized to disturb it.

And finally, as noted by a panel of this court in *Embry v. Turner*, 185 S.W.3d 209, 218 (2006), "[t]he overturning of a jury verdict in favor of a new trial is a matter of the utmost seriousness, and should only occur when the specific criteria set forth in CR 59.01 are carefully considered and met."

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?

In 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. We have adopted the legal causation standard set forth in the *Restatement (Second) of Torts,* § 431 (1965):

> § 431 What Constitutes Legal Cause
> The actor's negligent conduct is a legal cause of harm to another if
> (a) his conduct is a substantial factor in bringing about the harm, and
> (b) there is no rule of law relieving the actor from liability because of the manner in which his negligence has resulted in the harm.

See Bailey v. North American Refractories Co., 95 S.W.3d 868, 871 (Ky. App. 2001); *Deutsch v. Shein,* 597 S.W.2d 141, 144 (Ky. 1980); *Claycomb v. Howard,* 493 S.W.2d 714, 718(1973).

Once fault has been established, KRS[7] 411.182 controls allocation of fault in all tort actions, including product liability. According to subsection 2, "[i]n determining the percentages of fault, the trier of fact shall consider both the nature of the conduct of each party at fault and the extent of the causal relation between the conduct and the damages claimed." Thus, there must be sufficient evidence presented against each defendant that they were not only at fault in

[7] Kentucky Revised Statutes.

causing Dayton's illness, but the extent to which their conduct caused his illness in order to allocate fault.

Specifically here, pursuant 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 of causation was necessary to support a finding against any defendant in this litigation.

The Dexters proceeded to trial only against CertainTeed and Garlock, having settled with all other defendants who had not been dismissed for various reasons. Little evidence was presented against any other defendant by either side during the trial in Dexter I. While CertainTeed and Garlock contend that there was "substantial, uncontested evidence that [Dayton] had significant exposure to asbestos fiber from products and at premises of several defendants listed on the

verdict sheet," they have failed to provide us with sufficient evidence from which a jury verdict against any of these other defendants could have been supported. It is not enough that general asbestos exposure has been established. "[A]pportionment of fault to defendants where the evidence is insufficient to support liability is error." *Barnes v. Owens-Corning Fiberglas Corp.,* 201 F.3d 815, 825-826 (6th Cir. 2000). "The jury must apportion fault considering evidence of conduct and causation. If the evidence is such that no reasonable juror could determine a given party is at fault, logic dictates that the jury should not be instructed to apportion fault to that party." *Id.*

Significantly, the testimony Appellees reference consists entirely of a recitation of *possible* sources of exposure but not *how* this exposure was causally related to Dayton's illness. For example, Billy Robertson, a retired pipefitter who worked for many years out of the same union hall as Dayton, testified that Triangle Insulation and Sheet Metal Co. provided asbestos-containing thermal insulation at worksites operated by third-party defendants Air Products and Chemicals, Inc.; Mead Westvaco Corporation; ISP Chemical Products, Inc.; and Tennessee Valley Authority. Robertson further testified to the effect that Dayton worked in proximity to thermal insulation manufactured by Johns-Manville Corporation; Rapid American Corporation; Owens-Corning Corporation; John Crane, Inc., and Federal-Mogul Corporation at various worksites. Robertson also testified that Dayton had worked in proximity to asbestos-containing products

manufactured by Combustion Engineering Inc.; Henry A. Petter Supply Co.; and Hannan Supply Co., and that Dayton had worked at worksites operated by CC Metals and Alloys, LLC, f/k/a SKW; and Arkema, Inc., f/k/a Goodrich.

Similarly, Herman Mitchell, who worked as a pipefitter out of the same union hall as Dayton, testified that he recalled Dayton working around asbestos-containing insulation manufactured by Triangle Insulation and Sheet Metal Company and Westinghouse at the TVA Shawnee Steam Plant; and Ron Eades testified that Dayton worked in proximity to thermal insulation produced by North Brothers, Inc. at the TVA Shawnee Power Plant and to pipe covering manufactured by Owens-Corning and Johns Manville at various other facilities.

Lastly, Appellees refer us to Dayton's verified complaint and interrogatories, and to James Dexter's testimony. They state that Dayton claimed that nineteen companies were responsible for exposing him to asbestos in his Complaint, and that he testified by deposition that he had worked with or around asbestos products at the GE plant in Mount Vernon, the AEC plant in Paducah, Air Products, B.F. Goodrich, GAF and SKW in Calvert City, the TVA Shawnee Steam plant, the TVA Paradise Steam plant and Westvaco in Wickliffe.

James Dexter testified at trial that he had worked with his father at several plants and recalled one instance when they were exposed to asbestos from work performed by insulators at the GE plant in Mount Vernon. He also testified that Triangle Insulation installed insulation at the B.F. Goodrich plant and he

recalled Owens Corning Kaylo insulation at a number of job sites. While this evidence demonstrates that Dayton had possible exposure from a number of sources, Appellees utterly fail to provide us with any substantial proof that would establish that any other specific defendant's conduct actually caused Dayton's injury.

Based upon the foregoing proof, there is little wonder why the jury failed to allocate fault beyond CertainTeed and Garlock. This evidence is a mere recitation of defendants without any proof of legal causation on their part. In fact, many of the entities referred to above were either third-party defendants or non-parties. Absent in the foregoing testimony is evidence of the length of exposure to asbestos. Nor can we find evidence that any product manufactured by any of these companies was in a "defective condition unreasonably dangerous." Also lacking is reference to testimony that any of these defendants might have expected that Dayton would use or be exposed to their products or such products on their premises. Nor do Appellees provide us evidence from which the jury could have determined whether these products carried warnings, and if so, whether the warnings were sufficient. Lastly, lacking is proof that any of these defendants' products or conduct was a substantial factor in causing Dayton's illness and death. From the foregoing evidence, it is just as likely that the jury could have believed that the non-parties were at fault for some of Dayton's illness as opposed to any named defendant. Because these entities were not listed on the verdict form, there

is no way to know. Obviously, the failure of the jury to allocate fault to these non-parties would not merit a new trial under CR 59.01. Certainly, no more evidence of legal causation existed against any named defendant (other than Appellees) than these non-parties. Consequently, *had* the jury found any of the other defendants liable, that finding could not have been supported by the evidence in this record. Even Garlock acknowledged this fact in arguing to the trial court that Appellees should be allowed to introduce additional evidence against the other defendants at a second trial. In their motion, Garlock states:

> [i]n the interest of justice, [the trial court] should allow Garlock and CertainTeed reasonable latitude to prepare 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.*

(emphasis ours). By granting Garlock's motion, the trial court tacitly agreed. In fact, the court allowed Appellees wide latitude in permitting them to supply additional proof even as to Dayton's smoking. It is unclear how this new evidence had bearing upon allocation of damages between defendants.

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. Consequently, 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 that 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. Dr. Hammar elucidated that chrysotile has a half life of only 90-120 days while amosite and crocidolite fibers have half lives of 10-20 years.

Next, Appellees argue that under a Sixth Circuit decision, *Strickland v. Owens Corning,* 142 F.3d 353 (1998), the trial court would have committed reversible error had it not granted a new trial. In *Strickland,* the Sixth Circuit held, in a case tried under Kentucky law, that the district court erred when it denied a motion for a new trial in an asbestos case where the jury had apportioned 70% of the fault for the plaintiff's illness to the distributor of an asbestos product and only 30% of the fault to the product manufacturer. After the verdict, Owens Corning filed a motion under the Federal Rules of Civil Procedure seeking a new trial. The district court rejected this motion and held that the verdict was "supported by sufficient evidence." On appeal, the Sixth Circuit determined that the jury's verdict was against the weight of the evidence where there was no evidentiary basis for attributing a greater percentage of fault to the distributor of an asbestos product than to all other companies selling asbestos-containing products, including the manufacturer of the product actually sold by Owens Corning. *Id.* at 359. Such is not the case here.

Despite Appellees' claims to the contrary, as has previously been demonstrated, little evidence against any other defendant exists. Furthermore, here, CertainTeed and Garlock *are* the manufacturers of the asbestos-containing products, not merely a supplier, as was the case in *Strickland*. Abundant evidence in the record exists in which the jury could have reasonably relied upon to find Appellees liable. Several witnesses testified that they had worked with Dayton

who had seen him exposed to substantial amounts of asbestos dust coming from CertainTeed and Garlock products over a number of years.

The testimony established that Dayton had routinely removed Garlock asbestos-containing gaskets from the 1950's to 1986. Evidence presented also showed that Appellees were aware, or should have been aware, of the cancer risk their asbestos products posed to individuals installing them. Proof presented by the Dexters showed however, that despite this knowledge, Appellees failed to warn those who would be exposed to these dangerous fibers. Additionally, Arthur Frank, M.D., a Professor of Public Health at Drexel University School of Public Health, testified that Dayton's asbestos 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. Dr. Hammar testified that had Dayton made only 75 cuts of CertainTeed asbestos pipe using a power saw, the amount of asbestos fibers he would have breathed during this time alone would have been a major contributing factor to his illness. Dr. Hammar further testified that if Dayton removed Garlock asbestos gaskets over a 30-year period, then this exposure also contributed to his contraction of lung cancer. This is but a small portion of the evidence presented by the Dexters against Appellees over the course of this two-week trial.

Moreover, while it may have seemed “unfair” to the trial court that CertainTeed and Garlock bore most of the burden of Dayton's illness (apart from

the 35% allocated to Dayton himself), our system of tort law has set the foundation for this apportionment. The *Restatement (Second) of Torts, §* 433A, at p. 434 (1965), allows for apportionment of damages only where there are distinct harms or where there is a reasonable basis for determining the contribution of each cause to a single harm. Conversely, where there is no proof of a distinct harm or where no reasonable basis exists to make such a determination, allocation of damages is not permitted. As previously addressed, here there was a complete lack of proof as to the type, length or depth of asbestos exposure by any other defendant.

For the reasons stated herein, the judgment of the Marshall Circuit Court is reversed and this matter is remanded with instructions for the court to enter judgment upon the jury's verdict entered on June 10, 2005.

CLAYTON, JUDGE, CONCURS.

GRAVES, SENIOR JUDGE, DISSENTS AND FILES SEPARATE OPINION.

GRAVES, SENIOR JUDGE, DISSENTING: I dissent solely because I believe CR 59.01, even though flawed, has not been followed to the letter. Until this rule is amended by the Supreme Court, we are stuck with the judgment of the trial court.

This is precisely the kind of case that needed the common sense judgment of the community. The centrality of the jury lent weight, credibility, reality, and democracy to the trial. Paradoxically, CR 59.01, as it is now written and interpreted, empowers a trial judge to find that such a verdict could not be

reached by a reasonable jury. However, CR 59.01 does not require revealing reasons for such ruling. For appellate review to be reliable in complex technical cases, findings of fact are necessary to explain the conclusion that the verdict was plainly wrong. To justify nullification of the jury's finding of fact the trial judge should make known the points missed by the jury.

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