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Commonwealth of Kentucky

Court of Appeals

NO. 2004-CA-000525-MR

CARDINAL INDUSTRIAL
INSULATION CO., INC. APPELLANT

APPEAL FROM JEFFERSON CIRCUIT COURT
v. HONORABLE BARRY WILLETT, JUDGE
ACTION NO. 02-CI-003468

MARY J. NORRIS, INDIVIDUALLY
AND AS ADMINISTRATRIX
OF THE ESTATE OF CHARLES P.
NORRIS APPELLEE

AND NO. 2004-CA-000575-MR

MARY J. NORRIS, INDIVIDUALLY
AND AS ADMINISTRATRIX
OF THE ESTATE OF CHARLES P.
NORRIS CROSS-APPELLANT

CROSS-APPEAL FROM JEFFERSON CIRCUIT COURT
v. HONORABLE BARRY WILLETT, JUDGE
ACTION NO. 02-CI-003468

CARDINAL INDUSTRIAL INSULATION
CO., INC.; GARLOCK, INC.; JOHN CRANE,
INC.; ANCHOR PACKING COMPANY; AND
SCIENTIFIC DESIGN COMPANY CROSS-APPELLEES

AND NO. 2004-CA-000645-MR

SCIENTIFIC DESIGN COMPANY, INC. CROSS-APPELLANT

CROSS-APPEAL FROM JEFFERSON CIRCUIT COURT
v. HONORABLE BARRY WILLETT, JUDGE
ACTION NO. 02-CI-003468

MARY J. NORRIS, INDIVIDUALLY,
AND AS ADMINISTRATRIX OF THE
ESTATE OF CHARLES P. NORRIS CROSS-APPELLEE

OPINION
2004-CA-000525-MR - REVERSING AND REMANDING
2004-CA-000575-MR - AFFIRMING
2004-CA-000645-MR - AFFIRMING

** ** ** ** **

BEFORE: ACREE, KELLER AND LAMBERT, JUDGES.

ACREE, JUDGE: Charles "Pat" Norris, having been exposed to asbestos in the workplace, contracted malignant mesothelioma and, after initiating this action, died. A Jefferson Circuit Court jury determined that, among others, Cardinal Industrial Insulation Company, Inc., was liable to his estate and to his widow, and awarded total damages of $1,117,796.30. In addition to Cardinal, the jury

apportioned liability among asbestos products manufacturer Johns-Manville Corporation, and Norris' employer, Rohm & Haas Corporation. The jury found two other manufacturers of asbestos-containing products, Garlock Sealing Technologies LLC and John Crane, Inc., not liable. Before the case was given to the jury, the trial court granted a directed verdict in favor of Scientific Design Company, Inc., an engineering firm believed by Norris to have incorporated asbestos products in its design of Norris' workplace.

We are reviewing three appeals relative to this case. They have been consolidated for our review. Each appeal enumerates a multitude of errors which we will address as necessary.

I. FACTS

Norris was employed by Rohm & Haas at its Louisville facility from 1967 until 1999. While there, he performed a variety of jobs requiring him to work in many parts of the 120 acre facility. Norris spent a large portion of his time in the older sections of the Rohm & Haas facility, including notably the "old power house," one of the earliest constructed buildings there. This entire facility had been originally constructed and operated by the federal government during and after World War II. That original construction incorporated a substantial amount of asbestos. Asbestos was used to insulate the many pipes that carried steam and other gases and liquids that achieved extreme temperatures. Rohm & Haas acquired the facility around 1960 and soon undertook its renovation. Scientific Design Company, Inc., provided certain engineering and design services for

portions of that renovation, including the selection of building materials. In the 1960s, asbestos was still commonly used for purposes of insulation, and such products were used in this renovation.

Periodic maintenance and replacement of these asbestos products occurred throughout this period until around 1972 when the federal government banned the use of certain asbestos products, notably products used as thermal insulation. After the ban, Rohm & Haas began utilizing non-asbestos materials and engaging in asbestos abatement.

A number of different firms manufactured, supplied or installed a variety of asbestos products used at the facility. We are unsure who installed the asbestos insulation used in the original World War II construction, much of which Rohm & Haas employees still worked around during the period of Norris' employment. We do know that Louisville Insulation Company installed Johns-Manville products in the 1960s when the facility was renovated. Cardinal installed asbestos products from Philip Carey Corporation and Johns-Manville from the late 1960s until around 1973. Both Garlock Sealing Technologies LLC and John Crane, Inc., manufactured asbestos-containing gaskets or packing materials installed in facility machinery, pipe valves and flanges. These products were not among those banned by the federal government.

In the 1980s, Cardinal began asbestos abatement at the facility. Asbestos abatement was intended to reduce the health risk posed by human exposure to asbestos materials by removing it in accordance with guidelines

promulgated by the Environmental Protection Agency and the Occupational Safety and Health Administration.

Norris' employment at Rohm & Haas exposed him to asbestos. He contracted malignant mesothelioma and died.

II. PROCEDURE

Before he passed away on June 12, 2002, Norris and his wife, Mary, brought suit against thirteen (13) defendants[1] asserting claims for negligence, strict liability, and loss of consortium. After Norris' death, Mary was appointed administratrix of Norris' estate, whereupon she amended the complaint to reflect these changed circumstances, and to assert a claim for wrongful death.[2] Third-party practice brought in two more parties, Norris' employer, Rohm & Haas, and Johns-Manville.

Scientific Design moved the trial court for a grant of summary judgment in its favor arguing that it was not the same entity that had performed the engineering work during the renovation of the facility in the early 1960s. This motion was denied.

Trial was commenced against only four (4) defendants: Cardinal, John Crane, Garlock, and Scientific Design. Before instructing the jury, the trial

[1] The Complaint named as Defendants: Cardinal Industrial Insulation Company, Inc.; Triangle Insulation and Sheetmetal Co.; General Electric Company; ACandS Inc.; Garlock Sealing Technologies LLC; Anchor Packing; John Crane, Inc.; Combustion Engineering, Inc.; Rapid-American Corporation (in a variety of capacities including as successor-in-interest to Glen Alden Corporation, Philip Carey Corporation and Celotex Corporation); and Metropolitan Life Insurance Company. By Second Amended Complaint, Scientific Design Company, Inc., North Brothers, Inc., and Ford, Bacon & Davis, LLC, were added as defendants.

[2] For clarity, we will continue to refer to all appellants as "Norris."

court granted a directed verdict in favor of Scientific Design. Subsequent to deliberating, the jury found that John Crane and Garlock were not liable. The jury found Cardinal liable to Mary and the Norris estate, apportioning liability as follows: Cardinal – 20%; Johns-Manville – 28%; and Rohm & Haas – 52%.

Asserting a variety of grounds, Cardinal claims in its appeal (No. 2004-CA-000525-MR): that the trial court erred in failing to grant a directed verdict in its favor; that the judgment should be reversed because it is not supported by the evidence; and that the trial court's procedural errors warrant a new trial.

Also asserting a variety of errors, Mary, individually and on behalf of the Norris estate, claims in her appeal (No. 2004-CA-000575-MR): that the trial court's jury instructions were fatally flawed; that the trial court erred by not granting directed verdict against all defendants with regard to their liability; that the trial court erred by permitting certain unqualified expert testimony; that misconduct during closing argument by Garlock's counsel justifies a new trial; and that the trial court erred as a matter of law by directing a verdict in favor of Scientific Design.

Scientific Design brought a defensive appeal of the trial court's denial of its motion for summary judgment (No. 2004-CA-000645).

This Court rendered an opinion in this case on May 19, 2006, after which Cardinal, John Crane, Garlock and Scientific Design filed separate petitions

for rehearing.[3] All petitions were granted and this Court entered an order that the May 19, 2006, opinion be withdrawn. Furthermore, the three appeals were "reassigned to another panel of this Court for renewed consideration and a decision on the merits."

We will discuss additional facts and procedure as necessary in the context of specific arguments.

III. CARDINAL'S CLAIMS OF ERROR (No. 2004-CA-000525-MR)

Failing to direct a verdict in favor of Cardinal.

Cardinal argues that the jury's verdict against it was based only upon speculation and the possibility, not the probability, that Norris inhaled asbestos entrained in the air by Cardinal. Therefore, the trial court should have granted a directed verdict or judgment notwithstanding the verdict. We agree.

The appropriate standard for review of denial of a motion for directed verdict is set forth in *Lewis v. Bledsoe Surface Mining Company*, 798 S.W.2d 459 (Ky. 1990). In determining whether the circuit court erred in failing to grant the motion, all evidence favoring the prevailing party must be taken as true, and the reviewing court is not at liberty to assess the credibility of witnesses or determine

[3] The original Court of Appeals panel assigned to these cases included Judge Barber (presiding), Judge (now Chief Justice) Minton, and Judge Taylor. Before the Petitions for Rehearing were ruled upon, Judge Barber left the bench and Judge Minton was elected to the Supreme Court. For purposes of deciding the Petitions for Rehearing, Judge Taylor became the presiding judge and Senior Judges Emberton and Huddleston replaced Judges Barber and Minton.

what weight is given the evidence. *Id.* at 461. As prevailing party, Norris is entitled to all reasonable inferences that may be drawn from the evidence. *Id.* Appellate review is limited to determining whether the verdict is " 'palpably or flagrantly' against the evidence so as 'to indicate that it was reached as a result of passion or prejudice.' " *Id.*, *quoting NCAA v. Hornung*, 754 S.W.2d 855, 860 (Ky. 1988).

The trial of this case lasted three weeks. In that time, the jury absorbed and assessed an abundance of evidence. A fair, if simplified, summary of that evidence, as it relates to this issue, is as follows: when Rohm & Haas acquired the facility in 1960, there was a substantial amount of asbestos insulation, in various states of deterioration, in many of the structures; Cardinal and others, including Rohm & Haas workers, installed or handled asbestos products or engaged in asbestos abatement at the facility from the late 1960s, when Norris began working there, into the 1980s; workers, including Norris, were exposed to asbestos fibers at Rohm & Haas; Norris died as a result of inhaling asbestos, the only known cause of the disease he contracted, malignant mesothelioma.

Wherever courts address claims of liability due to asbestos exposure, they are faced with the difficult task of balancing the "needs of the plaintiff, by recognizing the difficulties of proving contact, with the rights of the defendant – to be free from liability predicated upon guess work." 63 Am.Jur.2d Products Liability § 72 (2008). Asbestos litigation nationally has generated a variety of causation tests attempting to achieve this difficult task. *See*, *generally*, Charles T.

Greene, *Determining Liability in Asbestos Cases: The Battle to Assign Liability Decades After Exposure*, 31 Am. J. Trial Advoc. 571 (Spring 2008). This Court addressed two of those causation tests in *Bailey v. North American Refractories Co.*, 95 S.W.3d 868 (Ky.App. 2001) – a case reversing the grant of summary judgment favoring an asbestos defendant.

Bailey first considered the "frequency-regularity-proximity test" initially articulated in *Lohrmann v. Pittsburgh Corning Corporation*, 782 F.2d 1156 (4th Cir. 1986). *Bailey* at 872. This test has been utilized more frequently than any other, having been adopted in all but three federal circuits, and many of our sister states.[4]

> This test requires that "[t]o support a reasonable inference of substantial causation, there must be evidence of exposure to specific [asbestos-containing] product on a regular basis over some extended period of time in proximity to where the plaintiff actually worked." [*Lohrmann,* 782 F.2d] at 1162-1163. In sum, the test

[4] Federal courts in all but the D.C., First and Second Circuits have adopted the frequency-regularity-proximity test. *Slaughter v. Southern Talc Co.*, 949 F.2d 167, 171, 171 fn3 (5th Cir.1991). The following states have also adopted the test: Arkansas, *Chavers v. General Motors Corp.,* 79 S.W.3d 361 (Ark.2002); Illinois, *Thacker v. UNR Industries, Inc.*, 603 N.E.2d 449 (Ill.1992); Maryland, *Eagle-Picher Industries, Inc. v. Balbos*, 604 A.2d 445 (Md.1992); Mississippi, *Gorman-Rupp Co. v. Hall*, 908 So.2d 749 (Miss.2005); New Jersey, *Sholtis v. American Cyanamid Co.*, 568 A.2d 1196 (N.J.Super.A.D.1989); Pennsylvania, *Gregg v. V-J Auto Parts*, 943 A.2d 216 (Pa.2007); South Carolina, *Henderson v. Allied Signal, Inc.*, 644 S.E.2d 724 (S.C.2007); *see also*, Texas, *Borg-Warner Corp. v. Flores*, 232 S.W.3d 765, 772 (Tex.2007)(rejecting the frequency-regularity-proximity test because "proof of mere frequency, regularity, and proximity is necessary but not sufficient, as it provides none of the quantitative information necessary to support causation under Texas law."); and New York, *Tronlone v. Lac d'Amiante Du Quebec, Ltee*, 297 A.D.2d 528, 747 N.Y.S.2d 79, 81 (N.Y.A.D. 1 Dept.2002)(Affirming the denial of asbestos manufacturer's motion for summary judgment, the New York court held that the plaintiff raised "triable issues of fact as to . . . the frequency, regularity and proximity of the decedent's exposure to asbestos.") Additionally, after the Ohio Supreme Court rejected the frequency-regularity-proximity test in *Horton v. Harwick Chem. Corp.*, 653 N.E.2d 1196 (Ohio 1995), the Ohio legislature adopted it by legislative enactment. *Wilson v. AC&S, Inc.*, 864 N.E.2d 682, 699-700 (Ohio App. 12 Dist.2006).

> requires a claimant to have been exposed while in close proximity to an asbestos product on a regular and extended basis to prove injury.

Bailey at 872.

Second, *Bailey* addressed the "fiber-drift" theory, summarized well by the Third Circuit. This causation theory

> takes as its starting point that asbestos fibers may become airborne or re-entrained and thus be carried from their source to other areas. Under this theory, however, both the specific locale of the product's use and the specific areas of the plaintiff's employment become irrelevant. The substance of the fiber drift theory is that once an asbestos-containing product can be placed anywhere in the . . . plant, any plaintiff working at any point within that plant is entitled to have the question of causation submitted to the jury because it is likely, given that fibers can drift, that a given plaintiff was exposed to fibers originating in a particular defendant's product.

Robertson v. Allied Signal, Inc., 914 F.2d 360, 376 (3rd Cir. 1990).

The fiber drift theory relies upon three major premises: (1) the immutability and continuing danger of mesothelioma-causing fibers; (2) the possibility of endless re-entrainment of the fibers; and (3) with time, no geographical limits to fiber drift. Taken to its logical end, the fiber drift theory alone would admit of the *possibility* of a causal connection between *any* asbestos

defendant and *any* claimant's disease.[5] This is why we agree with the conclusion reached in *Robertson* that

> The fiber drift theory cannot stand alone; it must be supported by evidence showing the frequency of a product's use and the regularity of the plaintiff's employment in an area into which there is a reasonable probability that the fibers drifted.

Robertson at 380. In other words, even where there is expert testimony of the fiber drift theory supporting the *possibility* of causation, there must be additional evidence of the asbestos claimant's proximity to the range of that drift sufficient to satisfy the requirement that the evidence support the *probability* of causation.[6] *See*, *Briner v. General Motors Corp.*, 461 S.W.2d 99, 102 (Ky. 1970), *citing Highway Transport Co. v. Daniel Baker Co.*, 398 S.W.2d 501, 502 (Ky. 1966) (plaintiff "must introduce sufficient proof to tilt the balance from *possibility* to *probability*." Emphasis in original); *see also Huffman v. SS. Mary and Elizabeth Hospital*, 475 S.W.2d 631, 633 (Ky. 1972)("evidence that will support a reasonable inference must indicate the probable as distinguished from a possible cause"). The "probability" standard must be met for "otherwise, the jury verdict [will be] based on speculation or surmise." *Midwestern v. V.W. Corp. v. Ringley*, 503 S.W.2d 745, 747 (Ky. 1973); *see also, Perkins v. Trailco Mfg. and Sales Co.*, 613 S.W.2d 855,

[5] This is why at least one court has rejected the fiber drift theory outright, stating, that "it is inconsistent with the requirement . . . that an actor's negligence be a substantial factor in causing the injury." *Eagle-Picher Industries, Inc. v. Balbos*, 326 Md. 179, 217, 604 A.2d 445, 463 (1992). The Maryland Court of Appeals ruled in *Eagle-Picher* that evidence of "causation in fact under the 'fiber drift theory' " was so "extremely attenuated" that it was insufficient as a matter of law to impose liability. *Id.*

[6] It is no coincidence that the relevant terms, "proximity" and "proximate cause," share a common etymology.

857-58 (Ky. 1981), *quoting Holbrook*, 458 S.W.2d at 158 ("the essence of the test concerning the sufficiency of plaintiff's circumstantial evidence concerning causation is that the proof must be sufficient to tilt the balance from 'possibility' to 'probability.' "). *Bailey* is consistent with all these views.

We specifically declined in *Bailey* to adopt either "fiber drift" or "frequency-regularity-proximity" as *the* legal test of causation in asbestos litigation. *Bailey* at 873 ("[W]e believe the fiber-drift theory and the frequency-regularity-proximity test merely present two competing theories of causation."). The fiber drift theory, particularly, was placed in what this Court believes to be its proper context. It is not a proper test of legal causation, but merely evidence concerning a subject – the aerodynamic properties of asbestos fibers – not previously acquired by persons of ordinary experience, and therefore the proper subject of expert testimony. *See, Black Starr Coal Corp. v. Reeder*, 278 Ky. 532, 128 S.W.2d 905, 906 (1939)("[O]ne who by reason of special knowledge, study, education or extensive observation has knowledge of the subject on the inquiry not acquired by persons of ordinary experience may give expert evidence concerning such subject.").

In *Bailey*, two categories of evidence, each relating logically to one of the tests described therein, were key to reversing the summary judgment. *Bailey* at 873-74. The first category, relating to the fiber drift theory, was expert evidence that asbestos fibers can travel some uncertain distance. The second category, relating to the frequency-regularity-proximity theory and termed "pivotal" in

Bailey, was evidence that the asbestos plaintiffs worked in close proximity to, that is, within the fiber drift range of, the specific products manufactured by the asbestos defendants – in fact, some asbestos plaintiffs personally handled the specific asbestos defendants' products as part of their duties. *Bailey* at 873-74. "We concluded that the theory[, that is, the expert evidence of fiber drift,] *coupled with* the facts in those appeals [regarding the workers' proximity to the asbestos defendants' product] was sufficient to create a material issue of fact upon causation." *Id.* at 875 (emphasis supplied).

Bailey should be understood as re-affirming that we already have the proper test – the substantial factor test – for determining legal causation, and even for determining what quantum of evidence is sufficient to overcome a motion for directed verdict. Sister state courts have analyzed the causation question in asbestos litigation similarly. *See, e.g., Check v. Owens-Corning Fiberglas Corp.*, 181 Wis.2d 1004, 513 N.W.2d 708 (Table)(Wis.App. 1994)("to apply the 'frequency, regularity and proximity test' would be inconsistent with Wisconsin's 'substantial factor' test").

In *Deutsch v. Shein*, 597 S.W.2d 141, 143-44 (Ky. 1980), our Supreme Court adopted the substantial factor test for causation set forth in § 431 of the Restatement (Second) of Torts, which is entitled "What Constitutes Legal Cause." In pertinent part, the section states that the "actor's negligent conduct is a legal cause of harm to another if his conduct is a substantial factor in bringing about the harm." Comment (a) to § 431 explains that "[t]he word 'substantial' is

used to denote the fact that the defendant's conduct has such an effect in producing the harm as to lead reasonable men to regard it as a cause, using that word in the popular sense, in which there always lurks the idea of responsibility[.]"

In *Pathways, Inc. v. Hammons*, 113 S.W.3d 85 (Ky. 2003), our Supreme Court expounded further on causation, approving of § 434 of the Restatement (Second) of Torts. That section

> addresses the issues of when legal causation is a question of law for the court and when it is a question of fact for the jury. The court has the duty to determine "whether the evidence as to the facts makes an issue upon which the jury may reasonably differ as to whether the conduct of the defendant has been a substantial factor in causing the harm to the plaintiff." § 431(1)(a) [*sic*; this quotation is, in fact, from § 434(1)(a), and not § 431].

Pathways at 92. The Court held that the standard expressed in § 434 is consistent with Kentucky law. *Id., citing, e.g., McCoy v. Carter*, 323 S.W.2d 210, 215 (Ky. 1959), *and* 57A Am.Jur.2d, Negligence § 446 (1989)("where it appears from the undisputed facts that the act of negligence complained of is not the efficient or proximate cause of the injury, then the question is for the court.").

As we did in *Bailey*, we must apply the substantial factor standard to the evidence below, considering first the evidence as to the range of asbestos fiber drift caused by Cardinal's actions, and second the evidence as to Norris' proximity to that range.

Cardinal is correct that there was no expert testimony regarding the fiber drift theory despite the fact that one expert witness for the Norris estate was

Dr. Arthur L. Frank – the same expert whose fiber drift testimony was the basis of the reversal of summary judgment in *Bailey*. Specifically, Dr. Frank did not testify as to how far from Cardinal's worksites any fiber may have drifted. He stated his role was to discuss the medical implication of inhaling asbestos fibers and not to testify regarding Norris' exposure to fibers entrained specifically by Cardinal. He simply stated that *if* Norris actually breathed asbestos fibers released into the air by Cardinal, he would then be able to testify that such asbestos fibers, "along with any other asbestos, contributed to his disease." (Video Transcript ("VT") No. 3, 10/15/03; 17:21:30 – :22:30).[7] This places the cart before the horse. How Dr. Frank would testify if the evidence supported a finding that Norris' inhaled fibers released by Cardinal has no bearing on whether such an event did or did not occur.

Another expert, Dr. James Girard was engaged by the Norris estate shortly before trial. He testified that he was not provided enough information upon which he could render any opinion regarding fiber drift or Norris' exposure to asbestos fibers entrained by Cardinal. He did say, however, that no one could determine the asbestos fiber concentration in air being breathed 100 feet from a monitored source of air containing asbestos fibers.

The evidence to which the Norris estate points as support for fiber drift is the cross-examination testimony of Donna Ringo, an industrial hygienist retained by Garlock. Ringo testified that asbestos fibers can stay airborne for a

[7] We cite to the record in this opinion because a clerical error in marking and sealing the seventeen videotapes in envelopes resulted in some unintentional mis-citing to the record in the parties' briefs. The references here correct that error.

long time. However, she did not quantify what she meant by "a long time" and we would be speculating were we to try to quantify it. More importantly, she did not testify that asbestos fibers drift or travel any distance whatsoever. She did say, however, that for any particular fibers to have an impact on Norris, they would have to have been in his breathing zone – the area in the immediate proximity of his mouth and nose.

Therefore, of the two categories of evidence coupled in *Bailey* to support a reasonable inference of causation, this case lacks the first. Still, the lack of expert testimony of fiber drift is not necessarily fatal to plaintiff's claims. If there is evidence that Cardinal's work and Norris' work were in such proximity to one another that Norris probably, not merely possibly, breathed asbestos fibers entrained into the air by Cardinal, such evidence would support the reasonable inference that Cardinal's actions were a substantial factor in causing Norris' disease and ultimate death.

Comprehensive examination of the record shows that the best evidence that Norris was in the proximity of Cardinal's work was the testimony of three of his co-workers – James Norris, Darryl Goldsmith, and Ronnie Moore.

Pat Norris' brother, James, began working at Rohm & Haas in May 1972. The brothers never worked in the same department and only worked on the same shift from 1974 to 1979. James' opportunity to observe his brother was therefore limited. He could not testify that he ever observed his brother in any close proximity to any site at Rohm & Haas where Cardinal was working. When

asked that question, he simply answered, "I probably did." However, he could not recall any "specific instance," nor could he identify a year in which he might have made such an observation. (VT No. 8, 10/22/03; 10:12:45 – :13:25).

Darryl Goldsmith worked "side-by-side" with Pat Norris beginning in 1982, though he had no knowledge of Norris' asbestos exposure during the fifteen years prior to then. Goldsmith testified that he and Norris regularly worked inside the old power house which he described as dusty and dirty and deteriorating. Asbestos insulation, installed when the building was constructed in the 1940s, would fall in pieces and as dust particles simply due to age and the vibration of the large motors housed there. Occasionally, he and Norris would have to "knock down the precipitators." To do this, they would go outside to the precipitators – large pipes standing three to five stories high and covered in old insulation – and bang on them with sledgehammers to loosen fly ash. (VT No. 7, 10/21/03; 15:16:50 – :17:27). Goldsmith recalled a subsequent "major" abatement project conducted by Cardinal relative to those precipitators. The abatement was made necessary by an explosion – a bursting precipitator – that blew off a lot of old insulation. (Ronnie Moore testimony, VT No. 6, 10/20/03; 14:20:08 – :20:40). Goldsmith testified that Cardinal constructed a plastic enclosure of the precipitators and worked for three to five months on the repair project. (VT No. 7, 10/21/03; 15:09:20 – :10:30). When Cardinal finished, Rohm & Haas inspected the work just as with every Cardinal project. (VT No. 7, 10/21/03; 15:33:15 – :33:20). The inspections did not reveal any defects in the work and Goldsmith

believed that Cardinal always complied with the law and the applicable Rohm & Haas work permit. (VT No. 7, 10/21/03; 15:33:20 – :33:45, 15:37:10 – :37:20). Goldsmith did express his "personal opinion" that it was impossible to contain every asbestos fiber in an abatement project. He testified that several days after Cardinal completed the precipitator project, he saw asbestos dust on the precipitators and inside the old power house where Norris was working. (VT No. 7, 10/21/03; 15:15:20 – :18:40). However, he also testified that he could not tell whether the dust he saw was left from the Cardinal abatement project or was old power house asbestos residue deposited there, as before the abatement project, by the vibrating motors in the old power house. (VT No. 7, 10/21/03; 15:31:50 – :32:07).

Ronnie Moore worked in the same old power house where Norris worked. Moore's and Norris' duties there included removing old asbestos insulation from pipes and machinery using a saw or wrench or hammer; the loosened insulation would fall to the concrete floor, or through metal floor grates, and filter through the building as dust. (VT No. 6, 10/20/03; 14:56:24 – :57:20). Moore's co-worker, Nick Bibelhouser, testified that he performed the same kind of old asbestos removal in the old power house using a hatchet. (VT No. 7, 10/21/03; 13:31:55 – :32:23). Moore also testified regarding Norris' exposure to asbestos entrained by Cardinal. He initially testified that Cardinal installed insulation "everywhere" at the 120-acre facility and that Norris worked "everywhere". When asked whether he had observed Norris working "near people installing insulation,"

he responded, "To the best of my recollection, yes." (VT No. 6, 10/20/03; 14:23:30 – :24:00). When Moore was reminded of his deposition testimony to the contrary, he requested and received a break, after which Moore testified as follows.

> Q: Sir, I believe the last question I had asked you was whether you had personally observed Pat Norris in an area where anyone was installing insulation.
>
> A: Uh, with a clearer thought now, I'd have to say that I really couldn't say that I did see that.
>
> Q: And is it fair to say that you never saw Mr. Norris in an area where Cardinal Industrial Insulation Company was installing insulation, did you?
>
> A: Uh, no. I'd say no. I really didn't actually – I can't remember ever saying I did see that.
>
> Q: So earlier, when you were talking about all the work Cardinal was doing, you never actually saw Mr. Norris anywhere near that did you?
>
> A: No.

(VT No. 6, 10/20/03: 14:53:10 – :54). He then acknowledged "just speculating" about Pat Norris being in an area where Cardinal was working. (VT No. 6, 10/20/03; 14:54:00 – :20). Neither Moore nor any other witness could ever place Norris any closer to Cardinal's worksite than "about one-and-one-half city blocks." (VT No. 6, 10/20/03; 14:09:40 – :16:32, 14:15:46 – 16:32, 14:54:06 – :20).

The question whether Cardinal's acts probably caused Norris' mesothelioma must be viewed in the context of Norris' other substantial exposure to asbestos – a factor not even present in *Bailey*. We conclude that it is unreasonable to infer that Norris, already working in an asbestos-filled

environment in the old power house and other utility buildings, probably contracted mesothelioma by inhaling asbestos fibers released by work Cardinal performed no closer than about one-and-one-half city blocks away. The evidence simply does not support any reasonable inference that Cardinal's work was a substantial factor in causing Norris' disease and death. While possible, it is simply not probable. In the end, the asbestos defendant, like every tort defendant, remains entitled to have a causative link proven between that defendant's specific tortious acts and the plaintiff's injuries. *Estes v. Gibson*, 257 S.W.2d 604, 607 (Ky. 1953)(absent connection between specific act and injury, there is no legal liability). That necessary link is absent in this case.

Additionally, we note that Norris claims error in the trial court's failure to instruct the jury separately as to negligence in addition to strict liability under KRS 411.340. This argument has no impact on our analysis here since "these theories of liability have one common denominator, which is that causation must be established." *Huffman v. SS. Mary and Elizabeth Hospital*, 475 S.W.2d 631, 633 (Ky. 1972).

Because we conclude that the trial court should have entered a directed verdict in favor of Cardinal, it is not necessary to address Cardinal's other claims of error.

IV. NORRIS' CLAIMS OF ERROR (No. 2004-CA-000575-MR)

A. The Jury Was Improperly Instructed.

The Norris estate argues that the trial court erred by not properly instructing the jury. Errors alleged regarding jury instructions are considered questions of law and are to be reviewed on appeal under a *de novo* standard of review. *Hamilton v. CSX Transportation, Inc*., 208 S.W.3d 272, 275 (Ky.App. 2006). "Our approach to instructions is that they should provide only the bare bones, which can be fleshed out by counsel in their closing arguments if they so desire." *Cox v. Cooper*, 510 S.W.2d 530, 535 (Ky. 1974). This standard "is buttressed by a long line of Kentucky cases which call for a substantially similar approach." *Bayless v. Boyer*, 180 S.W.3d 439, 450 (Ky. 2005). With this standard in mind, we consider Norris' specific arguments regarding the instructions.

1. Trial court's failure to instruct jury regarding the duty to warn.

Relying on *Clark v. Hauck Mfg. Co.*, 910 S.W.2d 247 (Ky. 1995), Norris claims the trial court should have instructed the jury separately on the manufacturer cross-appellees' duty to warn of the defective condition of the products they manufactured.[8] We believe Norris reads *Clark* too narrowly.

The jury instruction issue in *Clark* was "whether a plaintiff must prove that a product is both defective *and* has inadequate warnings." *Id.* at 250 (emphasis supplied). Under such an instruction, a jury could reach the absurd result that the product was not defective, but the defendant was still liable because

[8] Cardinal responds by repeating the argument in its brief in Appeal No. 2004-CA-000525, that it was not a manufacturer of any asbestos product and, as such, was not subject to liability pursuant to KRS 411.320(1). Because we determined that the trial court should have granted a directed verdict in Cardinal's favor, we need not further consider Cardinal's response. We will address only the responses of the cross-appellees who were, in fact, manufacturers.

of the inadequate warning. 2 Palmore Kentucky Instructions to Juries, § 49.01, p. 49-3 (5th ed. June 2008 Supp.). The Supreme Court concluded that "by using 'and' instead of 'or' in the instructions[, the trial court] improperly linked two distinct theories of recovery. Thus the burden of proof was misstated." *Id.* at 251. That is not the case before us.

There is, as Norris notes, "a basic tenet of Kentucky law, to wit: that a party is entitled to a jury instruction in every duty supported by the facts[.]" *Id.* We believe the trial court satisfied that entitlement with a liability instruction – its Instruction No. 1 – substantively indistinct from that in *Ford Motor Co. v. Fulkerson*, 812 S.W.2d 119 (Ky. 1991). As the Supreme Court said in *Fulkerson*,

> we believe the trial court properly stated the products liability issue in Instruction No. 2. Since the time Kentucky adopted the doctrine of "strict liability" in products cases as stated in the Restatement, Second, Torts, § 402A, in the case of *Dealer's Transport Company v. Battery Distributing Company*, Ky., 402 S.W.2d 441 (1966), the Kentucky practice has been to state the liability issue in the terms of [the] Restatement: Did the defendant manufacture, sell or distribute the product "in a defective condition unreasonably dangerous to the user . . . ?"

Fulkerson at 122; *see also, Nichols v. Union Underwear Co., Inc.*, 602 S.W.2d 429, 431 (Ky. 1980)("The instructions given were based on section 402A of the Restatement."). The Supreme Court also said that considerations such as "*warnings* and instructions, . . . while they have a bearing on the question as to whether the product was manufactured 'in a defective condition unreasonably dangerous,' are all factors bearing on the principal question *rather than separate*

legal questions." *Montgomery Elevator Co. v. McCullough*, 676 S.W.2d 776, 780-81 (Ky. 1984)(emphasis supplied). "A trial court is well advised to leave consideration of these evidentiary factors to the arguments of counsel rather than attempting to frame them up in the instructions on the ultimate questions." *Fulkerson* at 124.

As we have found in the past,[9] under the circumstances of this and similar cases, we are persuaded that the appellants' proposed negligent failure to warn instruction was redundant with the strict liability instruction actually given. In considering whether the asbestos was in a defective condition unreasonably dangerous, the jury was obligated to consider as one of the factors in reaching its determination whether warnings were required and, if so, whether those warnings were properly given. While the strict liability instruction did not explicitly identify this duty to warn, the warning issue was exhaustively addressed by the Norris' witnesses, and the consequences of the duty were driven home by counsel in closing arguments. Under these circumstances, a separate negligence instruction regarding failure to warn would have been redundant with the strict liability instruction.

Like the trial court in *Fulkerson*, the trial court below stated the liability issue in terms of the Restatement of Torts, § 402A. Although Norris'

[9] We thoroughly addressed this issue in *Lane v. Deere and Co.,* No. 2001-CA-001895-MR, 2003 WL 1923518 (March 21, 2003), and borrow its reasoning and language, in part. Although Kentucky Rules of Civil Procedure (CR) 76.28(4)(c) permits, under narrow circumstances, citation to unpublished Kentucky Appellate decisions rendered after January 1, 2003, we do not cite *Lane* for precedential purposes, but merely to reflect a continuity in our jurisprudence.

proposed instruction contained valid legal propositions, they exceeded the requirements of the "bare bones" approach. *See*, *id.* ("Unlike the many jurisdictions that use pattern instructions, and otherwise explain the law of the case to the jury, the practice in Kentucky abjures the abstract and requires the trial court, applying (rather than stating) the underlying legal principles, to frame the dispositive issue."). The controlling issue is not which set of proposed instructions best stated the law, but rather whether the delivered instructions misstated the law. *Olfice, Inc. v. Wilkey*, 173 S.W.3d 226, 230 (Ky. 2005). The instructions herein clearly did not misstate the law.

2. Trial court's failure to instruct jury regarding the duty of ordinary care.

Norris sought a negligence instruction in addition to an instruction on strict liability. This argument pertains only to Garlock and John Crane.[10]

A party plaintiff is entitled to have his theory of the case submitted to the jury if there is any evidence to sustain it. *Clark v. Hauck Mfg Co.*, 910 S.W.2d 247, 250 (Ky. 1995). If the evidence presented at trial supported both a Restatement § 402A strict liability instruction and the proposed negligence instructions, an instruction under both theories should have been given. *Id.* Again, under the circumstances of this case, we are persuaded that an instruction for negligence would be redundant with the 402A strict liability instruction. It is

[10] Again, our ruling in Section III renders this argument irrelevant in relation to Cardinal. Because the trial court granted a directed verdict in favor of Scientific Design, a ruling we do not disturb, *see* Section IV.G. *infra*, the argument also does not impact Scientific Design.

unnecessary to give a redundant instruction. *Reynolds v. Commonwealth*, 257 S.W.2d 514, 516 (Ky. 1953).

In order to state a cause of action based on negligence, a plaintiff must establish a duty on the defendant, a breach of the duty, and a causal connection between the breach of the duty and an injury suffered by the plaintiff. *Lewis v. B & R Corporation*, 56 S.W.3d 432, 436-37 (Ky.App. 2001). The issues of causation and injury would clearly be the same under either a negligence or a strict liability standard. *Huffman v. SS. Mary and Elizabeth Hospital*, 475 S.W.2d 631, 633 (Ky. 1972). Further, we are persuaded that the issue of duty is the same under either theory. Under either a negligence or strict liability theory, the manufacturers' fundamental duty was not to place a product on the market in a defective and unreasonably dangerous condition. In fact, Norris' burden of proof was simplified under the strict liability theory, in which case full knowledge of the condition and dangers of a product is presumed, as opposed to its burden under a negligence theory, in which case the manufacturer must have known or reasonably should have known of the condition and dangers of the product. Thus, the proposed negligence instruction is subsumed within the strict liability instruction.

The foregoing has previously been stated as follows:

> It [is] apparent that when the claim asserted is against a manufacturer for deficient design of its product, the distinction between the so-called strict liability principle and negligence is of no practical significance so far as the standard of conduct required of the defendant is concerned. In either event the standard required is reasonable care.

Jones v. Hutchinson Manufacturing, Inc., 502 S.W.2d 66, 69-70 (Ky. 1973). "Thus, the fact finder in a design defect case must decide whether the manufacturer that placed in commerce the product made according to an intended design acted prudently, i.e., was the design a defective condition which was unreasonably dangerous." *Nichols v. Union Underwear Co.*, 602 S.W.2d at 433. In light of this, we are persuaded that the strict liability instruction under Restatement 402A adequately took into consideration any evidence presented by Norris with respect to negligence.

3. Inclusion of Rohm & Haas in the apportionment instruction.

Norris argues that the trial court committed reversible error by including Rohm & Haas in the apportionment instruction. We disagree.

In *Owens Corning Fiberglas Corp. v. Parrish*, 58 S.W.3d 467 (Ky. 2001) our Supreme Court said:

> The law has now developed to the point that in tort actions involving the fault of more than one party, *including third-party defendants and persons who have settled the claim against them*, an apportionment instruction, if requested, must be given whereby the jury will determine the amount of the plaintiff's damage and the degree of fault to be allocated to each claimant, defendant, third-party defendant, and person who has been released from liability.

Parrish at 481 fn40, *quoting Stratton v. Parker*, 793 S.W.2d 817 (Ky. 1990)(emphasis supplied).

Therefore, if Rohm & Haas was either a third-party defendant or a party that has been released from liability, the apportionment instruction was appropriate.

Before trial, Garlock moved to file a third-party complaint against Rohm & Haas. Norris acknowledged in response that the purpose for making Norris' employer a party to the action was specifically to justify an apportionment instruction that included Rohm & Haas. (R. 2228-2229). Rohm & Haas, in its motion to dismiss the third-party complaint, also acknowledged that this was the purpose. (R. 2403). Norris asserts in its brief, without citation to the record, that the trial court granted summary judgment in favor of Rohm & Haas on the third-party complaint. However, we have examined the record carefully and find no order either dismissing Rohm & Haas or granting it summary judgment.

The record therefore indicates that, at the time the jury was instructed, Rohm & Haas remained a third-party defendant. Under such circumstances, an apportionment instruction including Rohm & Haas was proper. KRS 411.182(1); *Dix & Associates* at 28 ("apportionment is required even as to joint tortfeasors brought in as defendants in a third-party complaint")(citation omitted).

Even if a summary judgment had been granted, or if Rohm & Haas had been dismissed from the action, the apportionment instruction including Rohm & Haas still would have been proper. That is because "[a] tortfeasor who is not actually a defendant is construed to be one for purposes of apportionment *if he has settled the claim against him*." *Parrish* at 481 (footnotes omitted; emphasis

supplied), *citing Dix & Associates Pipeline Contractors, Inc. v. Key,* 799 S.W.2d 24, 28 (Ky. 1990), *quoting Floyd v. Carlisle Const. Co., Inc.*, 758 S.W.2d 430, 432 (Ky. 1988). Norris asserts that he "never made a claim, nor settled with Rohm & Haas [and therefore] *Parrish* has no application[.]" (Appellee/Cross-appellant Norris brief, p. 29). However, the record contains proof to the contrary.

In its motion to dismiss the third-party claim against it, Rohm & Haas informed the trial court that it had settled all claims with Norris.

> In connection with his retirement from Rohm and Haas, Mr. Norris signed an Agreement and Release ("Release"), which states that Mr. Norris, his representatives, successors, heirs and assigns . . .
>
> > completely release and forever discharge Rohm and Haas . . . from any and all manner of claims, demands, actions, causes of action, suits, arbitration proceedings, debts, costs, judgments, executions, claims and demands of whatsoever nature, direct or indirect, known or unknown, asserted or unasserted, matured or not matured, which Mr. Norris, his spouse . . . successors or assigns, or other representatives (collectively, the "RELEASING PARTIES"), either individually or collectively, ever had, now or hereinafter can, shall or may have against the RELEASED PARTIES [Rohm & Haas], from the beginning of time until the present, arising out of or in any manner relating to all events or circumstances in any way related to Mr. Norris' employment with Rohm and Haas or the separation therefrom.

(R. 2405). This constitutes Norris' settlement of his claim against, and the release from liability of, Rohm & Haas for his contraction of mesothelioma leading to his death. It binds the estate as well.

Norris, therefore, is mistaken. He did settle with Rohm & Haas. Rohm & Haas was a third-party defendant. *Parrish* is directly applicable. The apportionment instruction, including Rohm & Haas, was proper.

We find no merit in Norris' alternative argument that, by operation of the Kentucky Workers Compensation Act, Rohm & Haas is immune from liability in this civil suit. Given the clarifying language of *Dix & Associates*, such an argument must fail. *Dix & Associates* at 28 ("the plaintiff's employer, *by providing* workers compensation *coverage*, occupied the same position as a settling tortfeasor"; emphasis supplied). Rohm & Haas was not immune from liability, but took responsibility for that liability by providing workers compensation coverage.

B. Denial of Norris' motion for directed verdict that Norris contracted mesothelioma due to asbestos exposure at Rohm & Haas.

Norris claims the trial court committed reversible error by failing to "direct[] a verdict against all Defendants that Charles Norris' exposure to asbestos at Rohm & Haas caused him to contract mesothelioma." We disagree.

In effect, Norris argues that the evidence was irrefutable that Norris contracted his disease in the workplace and, therefore, the trial court should have precluded all asbestos defendants from arguing otherwise. That is, however, far from justifying the entry of a liability verdict as a matter of law as to each or any of the asbestos defendants. The argument overlooks the individualized nature of a cause of action. A plaintiff does not assert one cause of action against multiple

defendants. Rather, a plaintiff asserts one or more causes of action against an individual defendant. While a plaintiff may, as here, join in one lawsuit the causes of action he has against one defendant with those he has against another, the cause of action he asserts against each defendant remains distinct. *Ieropoli v. AC&S Corp*., 577 Pa. 138, 156, 842 A.2d 919, 930 (Pa. 2004).

On the other hand, the evidence is such that, had this fact issue been resolved in Norris' favor on motion for partial summary judgment, we likely would be compelled to affirm it. Even then, such a partial summary judgment would not have taken Norris any closer to a determination of *liability* of any asbestos defendant, because it says nothing about causation.

In the end, the jury did not hesitate to find, just as Norris urged the trial court to find, that Norris' exposure to asbestos at Rohm & Haas caused him to contract mesothelioma. Therefore, while we believe there was no error, any error that may be conceived was harmless.

C. Effect of matters deemed admitted by Garlock.

Early in the litigation, Norris served upon Garlock twenty-five requests for admission. Garlock failed to respond. During the trial, Norris sought and was granted an order that, by operation of CR 36.01(2), these twenty-five requests were deemed admitted. The trial court properly ruled these admissions were conclusive and could not be refuted by contradictory evidence, though they could be explained by evidence not inconsistent with the admissions.[11] Norris

[11] At one point, the trial court suggested to the jury that the admissions should be treated as testimony and believed or not believed as any live testimony. In view of the fact that the jury

argues that the trial court erred by failing to direct a verdict against Garlock based on these admissions. We disagree.

"The penalty for failure to respond [to requests for admission] is that the matters are deemed admitted, not entry of judgment against the non-responding party." *Brown v. Kentucky Lottery Corp*., 891 S.W.2d 90, 91 (Ky.App. 1995). On the other hand, if these admissions, taken together, factually satisfy *all* elements necessary to establish a cause of action, they "*may* be the underlying basis for a summary judgment, directed verdict, or judgment notwithstanding the verdict." *Berrier v. Bizer*, 57 S.W.3d 271, 279 (Ky. 2001)(emphasis supplied). They are, after all, judicial admissions. Robert G. Lawson, *The Kentucky Evidence Law Handbook* § 8.15[4], at 590 (4th ed. 2003 & 2008 Cumulative Supp.). As such, however, they must be "narrowly construed." *Witten v. Pack*, 237 S.W.3d 133, 136 (Ky. 2007). Therefore, we examine the admissions in the context of the elements of Norris' claims.

Norris identifies three specific facts which it believes Garlock admitted. Norris believes that, taken together, these facts support all the elements necessary to require the entry of a directed verdict against Garlock.

First, Garlock admitted selling asbestos containing products to Rohm & Haas. Even today, Garlock acknowledges that its products, gaskets and industrial pump and valve packing material, contained non-friable asbestos.

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was later informed, more than once, that the factual matters contained in the requests were conclusively decided, we see no error.

Second, Norris asserts that Garlock "admitted its asbestos sold to Rohm & Haas emitted asbestos dust," but this particular language does not appear among the twenty-five admissions. The closest any request for admission comes to this fact is Request for Admission No. 22, which alleges that Garlock

> allowed individuals working at the Rohm & Haas property in Louisville, Kentucky to be exposed to asbestos fibers.

At most, this admits that Garlock did nothing to prevent the exposure of two or more workers on Rohm & Haas property to asbestos fibers emitted from some entity's product. The request for admission does not specify Norris. It does not specify *all* Rohm & Haas employees. It does not even exclude individuals working there who were not Rohm & Haas employees. Furthermore, it does not specify that the fibers were emitted from any Garlock product. It may be true that Garlock did nothing to prevent the exposure of some Rohm & Haas workers to asbestos fibers emitted from non-Garlock sources, including, as virtually every employee testified, from the deteriorating, friable asbestos insulation in the old power house. That does not equal Garlock's admission of liability.

Third, Norris indicates that Garlock admitted its products were dangerous and that it failed to provide a warning of that danger. Request No. 11 does ask Garlock to admit that it "never warned the employees at Rohm & Haas of the dangers of asbestos that was located at Rohm & Haas" but there is nothing in these requests or their admission that Garlock admitted *its* products were dangerous or that they required a warning.

In sum, even presuming Garlock's duty was to refrain from selling products "in a defective condition, unreasonably dangerous to the user," these admissions do not establish that Garlock breached that duty. Under such circumstances, there is no justification for directing a verdict against Garlock. The trial court did not err by refusing to do so.

D. Improper conduct by Garlock's counsel during closing argument.

During closing argument on behalf of his client, Garlock's attorney attempted to tell the jury that it was his own conduct – his failure to respond to requests for admission – that resulted in these requests being deemed admitted. He stated, "I screwed up." Counsel for Norris immediately objected and a bench conference ensued. Garlock's counsel cited an old United States Supreme Court case for the proposition that, when it comes to "admissions of counsel, . . . nothing should be taken, without full consideration, against the party making the statement or admission. He should be allowed to explain and qualify it, so far as the truth will permit[.]" *Oscanyan v. Arms Co.*, 103 U.S. 261, 264 (1880). This argument did not sway the trial court. Norris' objection was sustained and Garlock's counsel resumed his closing, saying nothing further regarding the admissions except that they were deemed conclusive against his client.

Norris cites *Risen v. Pierce*, 807 S.W.2d 945 (Ky. 1991) as holding that improper closing argument is presumptively prejudicial. It asserts that the trial court's admonition to disregard counsel's statement was insufficient to overcome that prejudice. We disagree.

We believe Norris applies *Risen* too broadly. The closing commentary deemed improper in *Risen* involved far more objectionable matters than now before us. *Risen* at 948 (commenting upon excluded evidence, suggesting exclusion of evidence meant plaintiff had something to hide, twice indicating plaintiff's counsel's objections during closing revealed weakness in plaintiff's case). The Supreme Court even termed the closing argument in *Risen* "egregious." *Id.* at 949.

The comment "I screwed up" in the case now before us was improper because there was no evidence in the record to support blaming the attorney for the resultant admissions. *Monohan v. Grayson County Supply Co.*, 245 Ky. 781, 54 S.W.2d 311, 314 (1932)("It is the settled rule that counsel must restrict himself to the record for his facts[.]"). This statement therefore qualifies, in the strictest sense, as an impropriety, but that does not end the analysis.

> Even if an argument is improper, however, the question remains whether the probability of real prejudice is sufficient to warrant a reversal. In making this determination, each case must be judged on its unique facts. An isolated instance of improper argument, for example, is seldom deemed prejudicial.

Rockwell Intern. Corp. v. Wilhite, 143 S.W.3d 604, 631 (Ky.App. 2003), *citing Stanley v. Ellegood*, 382 S.W.2d 572, 575 (Ky. 1964), *City of Cleveland v. Peter Kiewit Sons' Co.*, 624 F.2d 749, 756 n.123 (6th Cir.1980) *and Murphy v. Cordle*, 303 Ky. 229, 197 S.W.2d 242, 244 n.122 (1946). We view this comment as an isolated instance of improper argument, corrected by the trial court before it could

have any impact upon the jury's deliberations by sustaining the objection and admonishing the jury. Garlock's counsel never returned to the subject matter.

We find no error in the trial court's denial of a new trial on this basis.

E. Admission of expert testimony of Donna Ringo and Dr. Robert Sawyer.

Norris argues that the trial court allowed Donna Ringo and Dr. Robert Sawyer to testify to facts that contradicted Garlock's admissions. We have examined the testimony of Ringo and Sawyer, with particular attention to that portion of the record cited by Norris in briefs, and concluded otherwise.

Norris' counsel cross-examined Ringo by asking her whether Garlock told her it had admitted allowing Rohm & Haas workers to be exposed to asbestos products. Ringo was understandably perplexed by the question and she stated, "That would be hard for me to imagine that they would admit that." Norris did not object to that response.

Counsel for Norris then asked Ringo whether Garlock had told her it admitted failing to provide respirators to Rohm & Haas workers. Ringo attempted to answer by explaining what circumstances would justify Garlock's supplying of respirators, but Norris' counsel interrupted. Garlock's counsel asked the trial court to allow Ringo to complete her answer and the court so ordered. However, before she could answer, Norris' counsel asked for a sidebar during which he argued that to allow Ringo to answer would contradict Garlock's admission that it did not provide respirators. The objection was overruled. When Ringo was finally allowed to answer, she said there was no reason for Garlock to provide respirators

because, based on her expert knowledge, there is no exposure to asbestos from gaskets that would justify the need for respirators. Clearly, this in no way contradicts any admission by Garlock that it did not provide respirators.

Similarly, Norris argues that Dr. Sawyer's testimony contradicted Garlock's admission that it provided no asbestos warnings relative to its products. After Norris objected, the trial court allowed Dr. Sawyer to testify. However, he simply testified that he was completely unfamiliar with what written materials, including warnings, Garlock provided in its packages. Again, this testimony in no way contradicts Garlock's admissions.

Though Norris cites no other references, our review of other portions of the testimony reveals none that contradicts any of Garlock's admissions. None of this testimony was improperly admitted into evidence.

F. Other objections to Ringo's expert testimony.

Norris claims Ringo's testimony was contrary to the requirements of *Daubert v. Merrell Dow Pharmaceuticals, Inc*., 509 U.S. 579, 113 S.Ct. 2786 (1993). At no time prior to the conclusion of testimony did Norris ever object to or challenge Ringo's testimony as to its scientific reliability. *See* Kentucky Rules of Evidence (KRE) 702. Under such circumstances, the argument is not preserved for appellate review. *Love v. Commonwealth*, 55 S.W.3d 816, 822 (Ky. 2001). We therefore decline to address this argument comprehensively. However, we have, in the context of other arguments, necessarily reviewed Ringo's qualifications and the

subject matter of her testimony. We see no manifest injustice that would justify closer scrutiny of the matter.

G. Grant of directed verdict in favor of Scientific Design.

Scientific Design was responsible for providing design and engineering services to Rohm & Haas from 1960 to 1962 in the construction of the adipic acid plan located on a portion of the facility.[12] Norris claimed Scientific Design was professionally negligent because it incorporated asbestos insulation in the design.[13] The trial court directed a verdict in favor of Scientific Design, citing *Harmon v. Rust*, 420 S.W.2d 563, 564 (Ky. 1967)(Professional "negligence must be established by . . . expert testimony unless the negligence and injurious results are so apparent that laymen with a general knowledge would have no difficulty in recognizing it."). We find no error in that ruling.

Norris' negligence claim required proof that Scientific Design breached a duty. To determine whether the degree of care and skill exercised by a professional in a given case meets the standard of care, the act or failure to act is judged by the quality of professional conduct customarily provided by members of that profession. *Daugherty v. Runner*, 581 S.W.2d 12, 16 (Ky. 1979). Therefore,

[12] For purposes of Scientific Design's motion for directed verdict, the trial court presumed that the party-defendant before it and the entity that designed the adipic acid plant were one and the same. For purposes of this review, we embrace the same presumption. The basis of Scientific Design's appeal (No. 2004-CA-000645) of the trial court's denial of its summary judgment motion is that it is not the same entity, nor does it have successor liability, having purchased the prior entity's assets, including the name, Scientific Design Company, Inc.

[13] The estate's second amended complaint asserted several claims against Scientific Design. By trial, these claims had been reduced simply to one for professional negligence in the engineering design services provided to Rohm & Haas.

expert testimony is ordinarily required to establish the standard of care; an exception is recognized where the negligence of the professional is so apparent that a layperson would have no difficulty recognizing it. *Baptist Health Care Systems, Inc. v. Miller*, 177 S.W.3d 676, 681 (Ky. 2005). Stated differently, an expert is required to establish the standard of care unless such standard is within the common knowledge of laypersons.

Norris' argument suggests that expert testimony was unnecessary to establish Scientific Design's standard of care. We disagree. Engineers are licensed professionals in the Commonwealth of Kentucky. KRS 323.040. These licensed professionals present themselves as having special knowledge, skill or expertise. A person who presents oneself as having special knowledge, skill or expertise must perform according to that profession's standards. *Mullins v. Commonwealth Life Ins. Co.*, 839 S.W.2d 245, 249 (Ky. 1992). The proper standard of care applied to engineers in the early 1960s regarding the use of asbestos in commercial construction, particularly in the construction of an adipic acid plant, is not within the common knowledge of laypersons.

We agree with the trial court that it was incumbent upon Norris to present expert testimony establishing the standard of care of a professional engineer in the early 1960s when Scientific Design designed the plant. The evidence Norris presented did not meet this standard. Norris' expert, Dr. Frank, testified that the risks of asbestos exposure were known in the medical and scientific community before the 1960s. However, he was not qualified to testify,

and did not testify, as to the standard for engineers incorporating asbestos in industrial construction. There was other evidence that alternatives to asbestos were commercially available at the time. Still, there was no expert testimony that Scientific Design's failure to recommend those alternatives in the early 1960s was a breach of any engineering standard of care.

Because Norris failed to present the requisite expert testimony regarding the proper standard of care, we find no error in the trial court's grant of a directed verdict in favor of Scientific Design.

V. SCIENTIFIC DESIGN'S CLAIM OF ERROR (No. 2004-CA-000645-MR)

Because we affirm the trial court's directed verdict in favor of Scientific Design, review of Scientific Design's claim that the trial court erred by failing to grant its motion for summary judgment is unnecessary.

VI. CONCLUSION

For the foregoing reasons, in Appeal No. 2004-CA-000525-MR, we reverse the judgment entered against Cardinal Industrial Insulation Company, Inc., and remand the case for entry of an order directing a verdict in its favor. In Appeal No. 2004-CA-000575-MR, we find no error with regard to those claims of error asserted by Mary J. Norris, individually, and as executrix of the estate of Charles "Pat" Norris, and affirm the judgment to the extent it is not in conflict with our holding in Appeal No. 2004-CA-000525-MR. Because we affirm the directed verdict in favor of Scientific Design Company, Inc., in Appeal No. 2004-CA-

000575-MR, we decline to address Appeal No. 2004-CA-000645-MR as the arguments contained therein are moot. These matters are remanded to the Jefferson Circuit Court for further proceedings not inconsistent with this opinion.

LAMBERT, JUDGE, CONCURS.

KELLER, JUDGE, CONCURS IN RESULT ONLY.

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