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Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-000918-MR

GARLOCK SEALING TECHNOLOGIES, LLC — APPELLANT

ON REMAND FROM SUPREME COURT OF KENTUCKY
NO. 2012-SC-000235-DG

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

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

AND

NO. 2006-CA-001025-MR

GARLOCK SEALING TECHNOLOGIES, LLC — CROSS-APPELLANT

ON REMAND FROM SUPREME COURT OF KENTUCKY
NO. 2012-SC-000235-DG

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ACTION NO. 02-CI-00310

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

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CLAYTON, DIXON AND JONES, JUDGES.

DIXON, JUDGE: Garlock Sealing Technologies, LLC, appeals the Marshall Circuit Court's judgment in favor of Ava Nell Dexter and James M. Dexter, executor of the estate of James G. "Dayton" Dexter (collectively, "the Estate"). After careful review, we conclude that Garlock was not entitled to a directed verdict and that punitive damages were properly awarded; accordingly, we affirm the judgment.

Dayton Dexter worked as a pipefitter from 1946 until 1984. During the course of his employment, Dayton was exposed to various products and materials that contained asbestos. Dayton was ultimately diagnosed with lung cancer, which was attributed to a combination of his occupational exposure to asbestos and his long-term cigarette smoking. In July 2002, Dayton and his wife filed a lawsuit in Marshall Circuit Court against nineteen corporate defendants, including Garlock, based on products liability (failure to warn) and common-law negligence theories relating to Dayton's exposure to asbestos during the course of his employment. Following Dayton's death in March 2004, his son, James M. Dexter, as executor of his estate, was substituted as a party in this litigation.

In May 2005, a jury trial was held on the Estate's claims against the two remaining defendants, Garlock and CertainTeed.[1] The jury returned a verdict in favor of the Estate on the products liability claim; however, the trial court granted Garlock and CertainTeed a new trial pursuant to CR 59.01 due to the jury's failure to apportion any fault among the empty-chair defendants.

The second trial began in late January 2006, and lasted three weeks. The jury returned a verdict in favor of the Estate on both products liability and negligence. Damages were returned as follows: $93,005 for past medical expenses; $1,500,000 for pain and suffering; $6,744 in funeral expenses; and $600,000 in punitive damages against Garlock. The award of compensatory damages totaled $1,599,749, and the jury apportioned seventeen percent of the liability to Garlock. On February 22, 2006, the trial court entered judgment in accordance with the jury verdict, ordering Garlock to pay the Estate $874,507.33. The trial court subsequently denied post-judgment motions, and the parties filed

[1] The other defendants either settled with the Estate or were granted summary judgment.

appeals and cross-appeals in this Court.[2] We now address Garlock's claims on remand.[3]

Garlock contends that it was entitled to a directed verdict or judgment notwithstanding the verdict[4] because the Estate failed to prove that Garlock knew or should have known that its gaskets posed a risk of asbestos exposure to consumers, requiring Garlock to warn of the danger. Garlock also contends it was entitled to a directed verdict as to punitive damages because the Estate failed to prove that Garlock engaged in outrageous conduct. Alternatively, Garlock contends the punitive damage award was unconstitutionally excessive.

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[2] In an opinion rendered August 8, 2008, this Court addressed the Estate's direct appeal and concluded the trial court erred by granting a new trial. We reversed the trial court's judgment of February 22, 2006, and remanded with instructions to reinstate the original jury verdict rendered June 10, 2005. Garlock and CertainTeed were each granted discretionary review in the Kentucky Supreme Court. Although the Supreme Court agreed to consider the cases together, Garlock's appeal was stayed during its bankruptcy proceedings; consequently, the Supreme Court's opinion solely addressed CertainTeed's appeal. *CertainTeed Corp. v. Dexter*, 330 S.W.3d 64, 70 n. 3 (Ky. 2010). In *CertainTeed Corp.*, the Supreme Court reversed and remanded the matter to this Court for consideration of CertainTeed's remaining claims of error. *Id*. at 83. Thereafter, the Estate reached a settlement with CertainTeed, and CertainTeed was dismissed as a party in the pending appeals. Once Garlock's bankruptcy stay was lifted, the Supreme Court issued an order vacating and remanding this Court's decision as to Garlock with instructions to consider Garlock's claims on appeal pursuant to the opinion in *CertainTeed, supra*.

[3] This is the second time we are reviewing Garlock's claims on remand. Our previous opinion, rendered in March 2012, summarily disposed of Garlock's appeal because its appellate brief failed to comply with CR 76.12(4)(c)(v). The Supreme Court granted discretionary review and remanded the matter to this Court for a decision on the merits of Garlock's appeal.

[4] We review the court's denial of JNOV under the same standard set forth for reviewing a lower court's denial of a directed verdict. *Prichard v. Bank Josephine*, 723 S.W.2d 883, 885 (Ky. App. 1987).

I.

When ruling on a motion for directed verdict, the trial court must consider all of the evidence in the light most favorable to the non-moving party. *Taylor v. Kennedy*, 700 S.W.2d 415, 416 (Ky. App. 1985). The court may not grant a motion for directed verdict "unless there is a complete absence of proof on a material issue in the action, or if no disputed issue of fact exists upon which reasonable men could differ." *Id*.

On appellate review of the denial of a directed verdict, this Court will uphold the lower court's decision unless the jury's verdict was so "palpably or flagrantly against the evidence so as to indicate that it was reached as a result of passion or prejudice." *National Collegiate Athletic Ass'n v. Hornung*, 754 S.W.2d 855, 860 (Ky. 1988) (internal quotation marks omitted). We are also mindful that this Court "is rarely in as good a position as the trial judge who presided over the initial trial to decide whether a jury can properly consider the evidence presented." *Bierman v. Klapheke*, 967 S.W.2d 16, 18 (Ky. 1998).

At trial, the Estate's theory of the case was premised on Garlock's failure to warn pipefitters like Dayton about the risks of exposure to asbestos in Garlock's gaskets. A manufacturer's liability for failing to warn a consumer is established "if it knew or should have known of the inherent dangerousness of the product and failed to 'accompany [ ] it with the quantum of warning which would be calculated to adequately guard against the inherent danger.'" *CertainTeed*

Corp., 330 S.W.3d at 79, *quoting Post v. Am. Cleaning Equip. Corp.*, 437 S.W.2d 516, 520 (Ky. 1968).

Garlock argues that the Estate presented evidence regarding the general dangers of exposure to asbestos; accordingly, Garlock asserts that insufficient evidence existed to establish that Garlock knew or should have known that its gaskets posed a danger to consumers. Garlock points out that its gaskets were manufactured with the asbestos encapsulated inside the gasket, which minimized the exposure to asbestos. Garlock also relies on the testimony of its industrial hygienist, Donna Ringo, who studied air quality during the removal of gaskets and determined the asbestos exposure was within the limits established by OSHA.

The jury heard testimony from Dayton's son, James, who worked alongside his father as a pipefitter on numerous job sites between 1967 and 1986. James recalled that Garlock gaskets were the most prominent gaskets used on the job sites, and the process of removing a gasket from a steam pipe required using a wire brush or grinder to completely remove the deteriorated gasket so a new gasket could be installed. The removal process produced dust that covered the person who was removing the gasket from the pipe. James explained that he saw his father remove hundreds of gaskets over the time they worked together. The Estate also presented expert testimony regarding the levels of asbestos exposure to an individual grinding a gasket from a steam pipe. The jury also heard testimony from Garlock's corporate representative, James Heffron. Heffron's testimony

established that Garlock began protecting its own employees from asbestos exposure in its manufacturing plant in 1947. Heffron acknowledged that Garlock representatives attended asbestos-industry meetings where information was provided regarding the link between asbestos exposure and cancer. Heffron admitted that Garlock knew that its gaskets would have to be removed over time and that pipefitters may have to use the grinding method to fully remove the deteriorated gasket. Heffron asserted that Garlock began putting a warning on its asbestos gaskets in 1977.

We have recounted just a fraction of the evidence presented during the course of the three-week jury trial. Although Garlock relies on evidence that was favorable to its defense, the Estate produced evidence that conflicted with Garlock's theory that it did not know or should not have known that its gaskets posed a danger of asbestos exposure. It was wholly within the province of the jury to weigh the evidence and assess the credibility of the witnesses. *Bierman*, 967 S.W.2d at 18. After reviewing the record, we conclude there was sufficient evidence to establish that Garlock knew or should have known that its gaskets posed a risk of asbestos exposure and that it failed to warn consumers of that risk. Garlock's gaskets contained asbestos, and asbestos exposure was linked to cancer. Garlock knew that the end-user of the gasket may have to grind the gasket to remove it; consequently, it was reasonable for the jury to conclude that Garlock should have known the foreseeable consequence of removing an asbestos-containing gasket was inhalation of asbestos dust. After thoroughly considering

the record before us, we conclude the jury's verdict in favor of the Estate was supported by the evidence, and it was not the result of passion or prejudice. Garlock was not entitled to a directed verdict or judgment notwithstanding the verdict.

II.

Garlock also contends it was entitled to a directed verdict on the issue of punitive damages because there was no evidence of outrageous conduct by Garlock. Garlock alternatively argues it was denied due process because the punitive damage award was excessive.

A.

"In order to justify punitive damages there must be first a finding of failure to exercise reasonable care, and then an additional finding that this negligence was accompanied by wanton or reckless disregard for the lives, safety or property of others." *Horton v. Union Light, Heat & Power Co.*, 690 S.W.2d 382, 389-90 (Ky. 1985). "The distinguishing characteristic in cases where punitive damages are authorized has not been whether the injury was intentional but whether the misconduct has the character of outrage." *Id*. at 389.

We have already concluded that sufficient evidence existed for the jury to conclude that Garlock knew or should have known that its gaskets posed a risk of asbestos exposure to end-users like Dayton and that it failed to warn consumers of that risk. Garlock opines that its conduct cannot be considered outrageous because its testing showed that it complied with OSHA regulations for

asbestos exposure, and Garlock voluntarily added warnings to its gaskets in 1977. We disagree.

Although Garlock points to evidence in its favor, the Estate presented evidence that conflicted with Garlock's assertions. The jury was entitled to weigh the conflicting evidence and assess the credibility of the witnesses. *Bierman*, 967 S.W.2d at 18. The evidence showed that Garlock's gaskets contained asbestos, and by the 1940s, Garlock knew that asbestos exposure was linked to cancer. Further, Garlock knew that the end-user of the gasket may have to grind the gasket to remove it, yet Garlock did not put warnings on its asbestos-containing gaskets until 1977. In sum, sufficient evidence was presented for the jury to conclude that Garlock's failure to warn constituted a wanton or reckless disregard for the health and safety of end-users like Dayton. Garlock was not entitled to a directed verdict or judgment notwithstanding the verdict on the issue of punitive damages.

B.

An excessive punitive damage award violates a tortfeasor's right to due process. *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 416, 123 S. Ct. 1513, 1520, 155 L. Ed. 2d 585 (2003). In *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 575, 116 S. Ct. 1589, 1599, 134 L. Ed. 2d 809 (1996), the United States Supreme Court delineated three guideposts for reviewing a punitive damage award. Pursuant to these guideposts, a court should consider:

> (1) the degree of reprehensibility of the defendant's misconduct, (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive

> damages award, and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases.

State Farm, 538 U.S. at 418, 123 S. Ct. at 1520 (*citing Gore*, 517 U.S. at 575, 116 S. Ct. at 1599). On appeal, we review a constitutional challenge to an award of punitive damages *de novo*. *Ragland v. DiGiuro*, 352 S.W.3d 908, 916 (Ky. App. 2010).

Assessing reprehensibility includes "considering whether: the harm caused was physical as opposed to economic; the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; the target of the conduct had financial vulnerability; the conduct involved repeated actions or was an isolated incident; and the harm was the result of intentional malice, trickery, or deceit, or mere accident." *State Farm*, 538 U.S. at 419, 123 S. Ct. at 1521 (*citing Gore*, 517 U .S. at 575, 116 S. Ct. at 1599).

The evidence established that Dayton suffered physical harm, as he developed lung cancer and ultimately died, due in part to his exposure to asbestos. There was evidence that Garlock knew of the risks associated with asbestos exposure in the 1940s, yet failed to warn consumers until 1977. It was reasonable to infer that Garlock's repeated failure to warn prior to 1977 exhibited a reckless disregard for the health and safety of the pipefitters grinding and removing the gaskets. James Dexter testified that, when he worked with his dad in the late 1960s and early 1970s, they did not wear protective masks because they did not know the dust from grinding gaskets was harmful. James also noted that he did not

remember ever seeing a warning about asbestos on a Garlock gasket. Further, the Estate's expert, Richard Hatfield, presented evidence that Garlock sought to manipulate the results of an asbestos study that he performed on Garlock's gaskets, which could support an inference that Garlock engaged in trickery or deceit regarding the risk of harm associated with its gaskets. Although Garlock criticizes the evidence presented by the Estate, there was substantial evidence to support a conclusion that Garlock's conduct was reprehensible.

Garlock opines that the punitive damage award of $600,000 was disproportionate because it was more than twice the amount of the $271,957.33 in compensatory damages the jury apportioned to Garlock. While there is no bright line rule, a single-digit ratio between punitive and compensatory damages is more likely to comport with due process. *Id*. at 425, 123 S. Ct. at 1524. We are not persuaded that a substantial disparity existed between the actual harm to Dayton and the punitive damage award of $600,000. Dayton worked as a pipefitter for forty years, and he retired in 1986. The jury heard testimony that Dayton was an avid hunter, he was enjoying his retirement, and he had been in good health prior to his cancer diagnosis. Dayton lived for twenty-one months after he was diagnosed with lung cancer, and he underwent two surgeries, including a partial lung removal. Dayton's quality of life diminished, and he was ultimately bedfast. After careful review, we conclude the ratio between compensatory and punitive damages was reasonable.

After considering all of the relevant factors, we find that Garlock was not denied due process because the punitive damage award was not grossly excessive. Accordingly, Garlock was not entitled to judgment notwithstanding the verdict on this issue.

For the reasons stated herein, we affirm the judgment of the Marshall Circuit Court.

ALL CONCUR.

BRIEF FOR APPELLANT/ CROSS-APPELLANT:

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BRIEF FOR APPELLEES/CROSS-APPELLEES:

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