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NOT TO BE PUBLISHED

# Commonwealth of Kentucky

# Court of Appeals

NO. 2009-CA-000483-MR

GARLOCK SEALING TECHNOLOGIES, LLC. APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE A.C. MCKAY CHAUVIN, JUDGE
ACTION NO. 07-CI-005173

DOLORES ANN ROBERTSON,
INDIVIDUALLY AND AS EXECUTRIX
OF THE ESTATE OF THOMAS E.
ROBERTSON APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE, COMBS AND WINE, JUDGES.

ACREE, JUDGE: Garlock Sealing Technologies, LLC, appeals the Jefferson Circuit Court's judgment and order of December 1, 2008, in favor of Dolores Ann Robertson individually and as executrix of the estate of Thomas E. Robertson.

Because Garlock was not entitled to a directed verdict and because the award of punitive damages was proper, we affirm the judgment.

## ***Facts and Procedure***

Thomas Robertson was employed as a pipefitter-welder from 1961 until he retired in 1999. During that time he came into contact with a variety of asbestos-containing products, including Garlock gaskets. He was diagnosed with lung cancer in March 2006 and passed away as a result of that disease in July 2006.

Robertson's widow, Dolores, brought an action on behalf of his estate alleging multiple claims against multiple defendants, including claims against Garlock for strict liability, negligence and breach of warranty, claiming Robertson's exposure to asbestos-containing Garlock gaskets had contributed to his illness and led to his death.[1] She also brought a claim in her individual capacity for loss of consortium. Prior to trial, Dolores settled claims against all defendants except Garlock and E.I. DuPont De Nemours and Company.[2]

Following a lengthy trial, a jury returned a verdict against the defendants and awarded damages to the estate totaling $1,471,870.00, including $97,418.00 for necessary and reasonable medical expenses, $565,158.30 for loss of income, $400,000.00 for physical and mental pain and suffering, $9,294.10 for necessary and reasonable funeral expenses, and $400,000.00 in punitive damages. The jury

[1] The complaint also named fourteen other defendants and an amended complaint added one more. Some defendants named in the complaint filed third-party complaints, adding thirty-one third-party defendants.

[2] The estate's claim against DuPont was a claim of negligence only.

also awarded Dolores $50,000 on her loss of consortium claim. Twenty-five percent of the liability for the compensatory damages was apportioned to Garlock; the $400,000 punitive damage award was assessed only against Garlock. Therefore, Garlock was ordered to pay $667,967.50 to the estate and $12,500 to Dolores. This appeal followed.

On appeal, Garlock contends the circuit court erred when it denied motions for directed verdict because Robertson's estate failed to establish that Garlock produced defectively-designed gaskets, and failed to establish that Garlock knew or should have known of any dangers created by those gaskets. In particular, Garlock contends there was insufficient evidence that its gaskets were unreasonably dangerous or posed a known health hazard, or that a feasible safer alternative gasket design exists. Garlock also argues the award of punitive damages was unconstitutional because there was no evidence of reprehensible behavior; Garlock further contends punitive damages were not available under Kentucky law, specifically Kentucky Revised Statutes (KRS) 411.184. Finally, Garlock asserts the punitive damage instruction was erroneous because it failed to define "malice." We address each argument in turn.

***Motions for directed verdict as to liability***

Our review of a trial court's denial of a directed verdict motion is limited. "All evidence which favors the prevailing party must be taken as true and the reviewing court is not at liberty to determine credibility or the weight which should be given to the evidence, these being functions reserved to the trier of fact." *Lewis v. Bledsoe Surface Min. Co.*, 798 S.W.2d 459, 461-62 (Ky. 1990) (citations omitted). Further, "[t]he prevailing party is entitled to all reasonable inferences which may be drawn from the evidence." *Id.* at 462. We may reverse a denial of a motion for a directed verdict only upon concluding that the fact finder's decision was palpably or flagrantly against the evidence. *Id.* When the evidence is in direct conflict on an element of strict liability, the jury's verdict will be upheld. *See Post v. American Cleaning Equipment,* 437 S.W.2d 516, 519 (Ky. 1968).

The estate prevailed at trial under two theories. The first, a strict liability claim, was based on the theory that the product was defective, either in its design, or due to the manufacturer's failure to provide adequate instructions or warnings, or both.[3] *See* Restatement (Third) Torts: Product Liability § 1 (1998). The second claim was that Garlock negligently failed to provide adequate warnings about the dangers of its gaskets. In the instant case, the jury found that Garlock was both strictly liable and negligent in causing Robertson's illness and death.

[3] "Questions of design defects and defects based on inadequate instructions or warnings arise when the specific product unit conforms to the intended design but the intended design itself, or its sale without adequate instructions or warnings, renders the product not reasonably safe. If these forms of defect are found to exist, then every unit in the same product line is potentially defective." Restatement (Third) Torts: Product Liability §1 cmt. A (1998).

***Strict liability: feasible safer alternative***

Garlock posits that a plaintiff asserting a claim for strict liability based on a design defect must demonstrate the existence of a feasible safer alternative to the product which caused the plaintiff's alleged injury. There is support in our jurisprudence for that position.[4] "Kentucky law . . . stands for the proposition that design defect liability requires proof of a feasible alternative design." *Toyota*

[4] This is true despite a more nuanced explanation of the law of strict liability found in other sources:

> The manufacturer is *presumed to know* the qualities and characteristics, and the actual condition, of his product at the time he sells it, and the question is whether the product creates "such a risk" of an accident of the general nature of the one in question "that an ordinarily prudent company engaged in the manufacture" of such a product "would not have put it on the market." Considerations such as feasibility of making a safer product, patency of the danger, warnings and instructions, subsequent maintenance and repair, misuse, and the products' inherently unsafe characteristics, 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. In a particular case, as with any question of substantial factor or intervening cause, they may be decisive.

*Montgomery Elevator Co. v. McCullough by McCullough*, 676 S.W.2d 776, 780-81 (Ky. 1984) (quoting *Nichols v. Union Underwear Co., Inc.,* 602 S.W.2d 429, 433 (Ky. 1980); emphasis in original). According *Montgomery Elevator* then, proof of the feasibility of a safer design, while a relevant consideration, is not necessarily required for a strict liability claim.

*Motor Corporation v. Gregory,* 136 S.W.3d 35, 42 (Ky. 2004).[5] It is at least generally so that

> Liability is imposed for a defective design when the foreseeable risks of harm posed by the product could have been reduced or avoided by the adoption of a reasonable alternative design by the seller or other distributor, or a predecessor in the commercial chain of distribution, and the omission of the alternative design renders the product not reasonably safe.

Restatement (Third) Torts: Product Liability § 2 (1998). We need not now directly address whether absence of proof of a feasible alternative design, in and of

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[5] This broad statement was made in the context of a crashworthiness claim, a type of products liability claim which necessarily requires proof of a "reasonably safer design, practical under the circumstances," for reasons that do not translate to products liability claims more generally. *See Gregory,* 136 S.W.3d at 35. The conclusion was also based upon rules articulated in *Jones v. Hutchinson Manufacturing, Inc.,* 502 S.W.2d 66 (Ky. 1973), and *Ingersoll-Rand Company v. Rice,* 775 S.W.2d 924 (Ky. App. 1989). *Jones*, in which the product at issue was a grain auger, is distinguishable on several grounds: the Court noted farming is commonly known to be a dangerous activity, the machine alleged to be faultily designed was consistent with industry standards (which were not found to be careless), and the negligence of the plaintiff's father was the sole cause of the injury. *Rice* was based on two statutory presumptions which the plaintiff failed to rebut and which were not made an issue in the instant case. Those presumptions are contained in KRS 411.310 as follows:

> (1) In any product liability action, it shall be presumed, until rebutted by a preponderance of the evidence to the contrary, that the subject product was not defective if the injury, death or property damage occurred either more than five (5) years after the date of sale to the first consumer or more than eight (8) years after the date of manufacture.
>
> (2) In any product liability action, it shall be presumed, until rebutted by a preponderance of the evidence to the contrary, that the product was not defective if the design, methods of manufacture, and testing conformed to the generally recognized and prevailing standards or the state of the art in existence at the time the design was prepared, and the product was manufactured.

KRS 411.310.

itself, insulates a manufacturer from liability. In this case, Garlock's argument that Dolores failed to present such evidence is refuted by the record.

A key piece of evidence supporting the position of the estate and Dolores was Garlock's own advertisement for asbestos-free products, admitted into evidence as Plaintiff's Exhibit 27. Although this advertisement was from the 1990s, it included the promotion of its feasible alternative, non-asbestos gaskets which it began developing years earlier. The advertisement drew the reader's attention with a bold-type headline stating: "IT'S TIME TO STOP USING ASBESTOS AND NOBODY HAS BEEN MORE AWARE OF IT THAN GARLOCK." This was followed by text including the following.

> Time is running out for asbestos. . . . Beginning in the 1960's [sic], Garlock extended its R&D programs to include the search for better performing materials. . . [I]n the 1970's [sic], Garlock began introducing a series of cost-effective and highly successful *asbestos-free* sealing products. . . . We became the leader in high quality, *asbestos-free* gasketing and packing materials . . . . [L]ong before federal regulations were being considered, Garlock was up and running with proven *asbestos-free* products.

(Plaintiff's Ex. 27; emphasis in original). With respect to gaskets in particular, the ad proclaimed the superiority of these alternatives to asbestos gaskets, stating, "For handling high pres[sure] and extreme environments, *Garlock's asbestos-free* gaskets and packings have no equal. Both offer excellent resiliency and recovery. Without [sic] the loss in sealability caused by the creep relaxation of asbestos gaskets." (Id.; emphasis in original). The ad included additional similar references

intended to convey Garlock's belief that its asbestos-free gaskets could accomplish the same functions as its asbestos-containing products.

Exhibit 73 is also promotional material created by Garlock for its asbestos-free sealing products.[6] A witness for Dolores testified it was produced sometime after 1980, but could give no more specific date; however, the exhibit indicates that Garlock was founded in 1887 and that this material was produced as part of its 100th anniversary. The exhibit claimed that "Garlock took the lead in the asbestos-free market almost 20 years ago. Today, Garlock customers throughout the world are replacing asbestos with a minimum of difficulty, because our time-tested asbestos-free products are measurably superior in performance." (Plaintiff's Ex. 73). The ad also asserts Garlock's asbestos-free products will help customers "realize significant savings" and generally extols the benefits of asbestos-free gaskets.

Such evidence was sufficient to support the jury's conclusion that an alternative product was available at the time Robertson was exposed to asbestos in Garlock gaskets, even in the face of the countervailing evidence Garlock presented.

Garlock attempted to cast this alternative product in a different light by presenting testimony that the consumers of the gaskets were ultimately responsible for deciding whether to use asbestos-free or asbestos-containing gaskets. Garlock witnesses testified that use of the wrong gasket could result in a joint failure, causing serious injury or death to people nearby. Presumably, the purpose of

[6] The ad includes information about gasketing products, packing materials, seals, joints, and industrial textiles.

eliciting this testimony was to suggest that asbestos-free gaskets (as opposed to an improperly-sized gasket, for example) created greater safety risks than asbestos-containing gaskets and were therefore not always a reasonable alternative. When challenged, however, this evidence was shown to be hypothetical as there was no testimony that the alternative asbestos-free gaskets were, in fact, less efficient or more dangerous than the asbestos-containing gaskets. Given the weak nature of Garlock's evidence on this matter, and the comparatively strong nature of the estate's evidence, the jury could have reasonably concluded there was a feasible safer alternative.

***Redundant instructions and possibility of inconsistency***

Included in the portion of Garlock's brief which addresses a safer feasible alternative is the following passage: "Because failure to warn is a 'subset' of design defect under KY [sic] law, See: *Sturm Roger & Co. v. Bloyd,* 586 SW2d 19 (Ky. 1979) [sic], the inclusion of the failure to warn language under Instruction No. 2 resulted in a redundancy with the contradictory result of a requirement to warn about a product that may be found, as a matter of law, not unreasonably dangerous." We treat this statement as presenting a separate argument. However, we find this argument unpersuasive.

Instruction No. 1 permitted the jury to find for Robertson under a theory of strict liability, while Instruction No. 2 instructed the jury to find for the plaintiff if it found Garlock had negligently failed to adequately warn of its product's dangers.

Garlock appears to argue that in a "failure to warn" case, it is error to instruct both on a strict liability theory and a negligence theory.

This issue arose in *Tipton v. Michelin Tire Company,* 101 F.3d 1145 (6th Cir. 1996). In *Tipton,* as in the instant case, the jury was instructed on both strict liability and negligence. Unlike Robertson's case, however, the jury in *Tipton* found for the defendant under the theory of strict liability and for the plaintiff under the negligence theory. In so doing, the jury implicitly found the product in question was not in a defective condition for purposes of strict liability, but that it was defective for purposes of negligence. The *Tipton* court held the two findings were inconsistent and reversed. Here, there is no such inconsistency, and we agree with the appellees that any error in the instructions, if one existed at all, was therefore harmless.

***Strict liability: unreasonable danger***

Garlock did not present evidence contradicting the estate's evidence that friable asbestos, if inhaled, can cause cancer and death. And, it acknowledged that 75% to 85% of the raw material in its suspect gaskets was asbestos. However, Garlock's defense was that during the gaskets' manufacture, all the potentially friable asbestos was encapsulated in a material that, so long as it was undisturbed, prevented the asbestos fibers from being entrained in the air. Yet this does not present the whole story the jury heard.

The jury also heard that when an installed asbestos gasket, having been subjected to extremes of pressure and temperature, can no longer maintain a

seal between two pieces of metal, it must be replaced. The first step in replacement is removal of the old gasket. Clearly this is an ordinary and predictable part of the use for which Garlock's asbestos-containing product was intended. Removal of the old gasket is a pipefitter's job and usually destroys the encapsulating material, rendering the asbestos friable, and entraining asbestos fibers in the pipefitter's breathing zone. *See*, *e.g.*, *Bailey v. North American Refractories Co*., 95 S.W.3d 868, 874 (Ky. App. 2001)(for a description of a similar process that entrained asbestos fibers in the air where they could be inhaled by workers).

Having heard this evidence, the jury could reasonably infer that Garlock was aware that the normal use of its product would result in a pipefitter's inhalation of friable asbestos.

Garlock's countervailing evidence on this issue came primarily from an industrial hygienist, Donna Ringo, who conducted studies which failed to reveal that the removal of asbestos gaskets created levels of asbestos exposure which violated Occupational Health and Safety Administration (OSHA) emission limits. The estate's experts, however, testified that there were problems with the methods Ringo employed which called her conclusions into question.

Garlock also argues that the fact that OSHA regulations did not require warnings on its product when first placed into commerce was proof the product was not dangerous. The estate's experts disputed this contention, testifying that in their interpretation of OSHA regulations, there may have been a

requirement for warnings based on the fact that foreseeable use of the products when removed rendered them friable.

Finally, Garlock disputes the validity of the appellees' experts' testimony because none was an industrial hygienist. In advancing this argument, Garlock claims the testimony of its industrial hygienist – the only one to testify – should have been conclusive on the matter. However, Garlock had the opportunity to cross-examine the appellees' witnesses and call attention to the fact that their expertise was in a different field of study, not specifically industrial hygiene. The jury could then weigh the credibility of all the testimony in light of the experts' respective areas of expertise. Our review of the record indicates this did occur.

While Garlock has identified evidence which weighs against a verdict in favor of Robertson's estate, it has failed to convince us the verdict was achieved as the result of passion or prejudice and not based on substantial evidence. *Lewis,* 798 S.W.2d at 461-62. The testimony conflicted as to whether Garlock's gaskets were dangerous, and the jury was entitled to weigh that testimony, ascribing credibility as it saw fit. So long as there is substantial evidence supporting a verdict, as there is here, we lack any basis for disturbing it.

***Negligence: failure to warn***

Garlock next contends it was entitled to a directed verdict on the negligence claim as well because, similarly to the strict liability claim, the estate failed to demonstrate Garlock knew or should have known its asbestos-containing gaskets

were hazardous. Accordingly, contends Garlock, there was no duty to warn Robertson of any hazards.

In a negligence action, a manufacturer is required to warn only about foreseeable dangers associated with its products. *See* Restatement (Second) Torts § 388 (1965). Garlock contends it was not obligated to warn pipefitter-welders such as Robertson about the dangers of asbestos in its gaskets because the manufacturer was not aware of said dangers and had no reason to be aware of them. To this end, Garlock contends that while there was proof Garlock knew raw asbestos and asbestos insulation created risks of serious harm, that does not lead to the conclusion the manufacturer had any reason to believe its asbestos-containing gaskets in particular were dangerous.

As stated above, however, there was evidence to the contrary; Garlock gaskets, when used in the manner pipefitters tend to use them, produce dust which they breathe, thereby creating a risk of exposure to asbestos that causes cancer. It was reasonable for the jury to conclude that Garlock could foresee that removal of its asbestos-containing gaskets in the ordinary course of replacing them would entrain into the breathing zone of a pipefitter the very asbestos Garlock used in its manufacture of gaskets.

Other evidence of such foreseeability was presented in the form of testimony by a former employee of Rohm & Haas, a consumer of a considerable quantity of Garlock's asbestos-containing gaskets. The employee testified that as early as 1973, it was Rohm & Haas policy to require protective measures (breathing masks,

for example) when removing asbestos-containing gaskets. The company's internal memoranda from that year reveal concern that exposure to asbestos from the removal of asbestos-containing gaskets created hazards to the health and safety of employees.

Given such evidence, the jury could have reasonably inferred that if a consumer of Garlock's product could foresee such hazards to its employees' health, so could Garlock.

In sum, we conclude that none of Garlock's arguments challenging the denial of its motions for directed verdict as to liability is sufficiently persuasive to justify reversal.

***Punitive damages***

Garlock also appeals the circuit court's denial of its motion for a directed verdict on the issue of punitive damages, asserting the plaintiffs were not entitled to them because: (1) there was no evidence Garlock's conduct was reprehensible, and therefore an award of punitive damages violates federal due process requirements; and (2) Garlock's behavior was not so outrageous under Kentucky law as to merit punishment and deterrence. Garlock also argues the circuit court erroneously failed to include the definition of malice in the jury instructions.

Jury Instruction No. 4 permitted the jurors to assess punitive damages against Garlock if they were "satisfied by clear and convincing evidence that Garlock acted with reckless disregard for the lives, safety or property of others, including Mr. Robertson[.]" It went on to list factors the jurors could consider in

making their decision, including the "reprehensibility" factors enumerated in *BMW of North America v. Gore,* 517 U.S. 559 (1996). The instruction did not use or define the word *malice*.

***Punitive damages under the United States Constitution***

Constitutional challenges to punitive damage awards are reviewed *de novo*. *Steel Technologies, Inc. v. Congleton*, 234 S.W.3d 920, 931 (Ky. 2007) (citing *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 436, 121 S.Ct. 1678, 1685-86, 149 L.Ed.2d 674 (2001). *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 116 S.Ct. 1589, 134 L.Ed.2d 809 (1996) provides "the substantive standard for determining the jury award's conformity with due process." *Cooper Industries*, 532 U.S. at 431, 121 S.Ct. at 1683, fn. 4. In *Gore*, the United States Supreme Court instructs reviewing courts to consider three guideposts:

> (1) the degree of reprehensibility of the defendant's conduct; (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 Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 418, 123 S.Ct. 1513, 1520, 155 L.Ed.2d 585 (2003) (citing *Gore*, 517 U.S. at 575, 116 S.Ct. at 1599).

Garlock's only constitutional challenge is its argument that there was no evidence supporting the jury's determination that its conduct was reprehensible,[7] that reprehensibility is the "most important indicium of the reasonableness of a punitive damages award[,]" *Campbell*, 538 U.S. at 419 (quoting *Gore*, 517 U.S. at 575 at 1599), and that absent evidence of reprehensibility, an award of punitive damages violates due process. We find Garlock's argument unpersuasive.

*Campbell* tells us that there are at least five factors bearing on the reprehensibility guidepost. Those factors require that we consider

> 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.

*Campbell,* 538 U.S. at 419, 123 S.Ct. at 1515-16 (citing *Gore* 517 U.S. at 576-77).

Applying these factors, we find first that the harm to Robertson was primarily physical: all the evidence demonstrated that he contracted lung cancer and died. Although Robertson incurred economic liabilities in the form of medical expenses and lost income, those damages were merely incidental to the primary injury. The harm cannot be classified as economic as opposed to physical, and therefore analysis under this factor supports an inference that Garlock's behavior was reprehensible.

[7] Garlock repeats its argument, addressed and rejected earlier in the opinion, that there was no proof that its product was defective or unreasonably dangerous.

As the estate notes, there was evidence that from the time Garlock learned of the disease-causing properties of asbestos (perhaps as early as the 1930s) until it considered including a warning in some of its packaging (the late 1970s), Garlock intentionally disregarded the health of pipefitters who removed Garlock gaskets for replacement by grinding them off pipe flanges. Such evidence could support the inference that Garlock thereby evinced an indifference to the health of the persons who used its product; it thereby supports an inference of reprehensibility.

Evidence also supported the conclusion that Garlock's behavior was not an isolated incident but a pattern of repeated actions that placed asbestos in the hands of consumers whose ordinary use of the product risked their health. The testimony of one of Robertson's former supervisors, as well as testimony of Robertson's brother, supported the conclusion that many pipefitter-welders had been so exposed on a routine basis. A witness from Garlock testified that, while the manufacturer began placing warning labels on gasket materials in 1977, the warnings were ineffective as they were unlikely to reach end-users of the gaskets, namely Robertson and other pipefitter-welders. Combined with the testimony of the retired pipefitter-welders that they had never seen a warning on any asbestos-containing gasket, this evidence supported the conclusion that Garlock's tortious failure to warn was repeated. This supports an inference of reprehensibility.

Finally, the estate also notes that it presented evidence that Garlock interfered with testing of its gaskets to minimize the appearance of the risk to which pipefitters were exposed. This evidence, argues the estate, supports another

factor in the reprehensibility analysis – that the harm Robertson suffered was the result of intentional malice, trickery, or deceit, and not mere accident.

Therefore, considering the *Campbell* reprehensibility factors, we cannot agree with Garlock that there was no evidence of reprehensibility.

***Punitive damages under Kentucky law***

Garlock's next argument is that Kentucky law does not permit an award of punitive damages in the instant case. We disagree.

Applying the jural rights doctrine, *Williams v. Wilson*, 972 S.W.2d 260 (Ky. 1998), declared that KRS 411.184(1)(c) unconstitutionally limited the availability of punitive damages to "conduct that is carried out . . . with a subjective awareness that such conduct will result in human death or bodily harm." *Williams*, 972 S.W.2d at 269. Therefore, it remains that, as a matter of state law, "punitive damages could be recovered for negligent conduct which exceeded ordinary negligence whether such conduct was expressed as gross negligence, recklessness, wantonness, or some other such term." *Id.* at 263. Read in the context of *Horton v. Union Light, Heat & Power Co.,* 690 S.W.2d 382 (Ky. 1985), the defendant's actions must amount to "something more than the failure to exercise slight care . . . there must be an element of either malice or willfulness or such an utter and wanton disregard of the rights of others as from which it may be assumed the act was malicious or willful." *Cooper v. Barth,* 464 S.W.2d 233 at 235 (Ky. 1971).

Garlock contends its conduct could not be outrageous – and therefore could not warrant punitive damages – because it exercised "slight care," as evinced by its

compliance with OSHA regulations. This argument fails for two reasons. First, whether Garlock complied with OSHA regulations was a disputed fact with substantial evidence supporting a reasonable jury's conclusion either way.[8] Second, even if Garlock had complied with all applicable OSHA regulations, whether Garlock's behavior evinced a reckless disregard for the health and safety of others remained an issue of fact for the jury. Testimony was presented that compliance with OSHA regulations did nothing to reduce the risk of cancer as the result of exposure to asbestos. Therefore, regulatory compliance cannot be said to have been dispositive of the issue. Given all the evidence, much of which has been described earlier in this opinion, the jury was entitled to conclude that Garlock's failure to discover the dangers inherent in the removal of their gaskets and the failure to adequately warn Robertson constituted "gross negligence, recklessness, wantonness, or some other such term." *Williams*, 972 S.W.2d at 263.

***Jury instruction***

[8] At trial, Garlock asserted it went beyond OSHA requirements and placed warnings on the materials from which its asbestos-containing gaskets were formed in the manufacturing process, despite the fact that it was not required to do so. This assertion was based upon Garlock's position that the asbestos in the gaskets was encapsulated and therefore needed no warning. Experts for Robertson's estate, however, testified that the asbestos became friable – and the encapsulation had no protective effect – when put to foreseeable use by pipefitter-welders such as Robertson. The evidence on this was therefore in controversy.

Garlock also asserted at trial that, based on the results of the study conducted by industrial hygienist Donna Ringo, the rate of asbestos emitted from the gaskets was below the permissible amount established by OSHA regulations. As noted previously, the validity of that study was called into question by various witnesses for the estate, and the jury was entitled to believe or disbelieve the claim that Garlock was in fact compliant.

Finally, Garlock contends the circuit court erred in failing to define "malice" in the jury instruction in accordance to KRS 411.184(1)(c). That section of the statute provides,

> "Malice" means either conduct which is specifically intended by the defendant to cause tangible or intangible injury to the plaintiff or conduct that is carried out by the defendant both with a flagrant indifference to the rights of the plaintiff and with a subjective awareness that such conduct will result in human death or bodily harm.

KRS 411.184(1)(c). As noted, however, the Kentucky Supreme Court declared KRS 411.184(1)(c) unconstitutional.

Nevertheless, Garlock argues that two cases – *Caneyville Volunteer Fire Department v. Green's Motorcycle Salvage, Inc.,* 286 S.W.3d 790 (Ky. 2009) and *Gilbert v. Barkes,* 987 S.W.2d 772 (Ky. 1999) – combine to overturn *Williams'* prohibition against abolishing jural rights and *Williams'* declaration that the definition of malice in KRS 411.184(1)(c) is unconstitutional.

We first address *Gilbert*, in which the Supreme Court abolished the common law cause of action for breach of promise to marry. Garlock reads this case as permitting the courts to eliminate common law causes of action. This contention is apparently based upon the following passage: "when this court finds a common law cause of action to be anomalous, unworkable or contrary to public policy, it will abolish the action." *Gilbert,* 987 S.W.2d at 776 (citing *D&W Auto Supply v. Department of Revenue,* 602 S.W.2d 420 (Ky. 1980)). Neither that statement, nor *Gilbert's* holding, however, affects the holdings of *Wilson*. The

*Gilbert* court specifically held the jural rights doctrine was not implicated in its decision because the ruling did not "eradicate[e] the ability of a party to seek a remedy for such a wrong, but rather . . . modif[ied] the form that remedy may take." *Gilbert*, 987 S.W.2d at 776. The Supreme Court made it a point to specifically distinguish *Williams* from *Gilbert*; *Gilbert* therefore does not alter *Williams'* holding in any way.

Neither does *Caneyville* alter *Williams*' holding. The Supreme Court in *Caneyville* addressed the interplay of the oft times conflicting principles of sovereign immunity and jural rights. Ultimately, the Court in *Caneyville* upheld the statutory protection from suit the legislature granted to firefighters and fire departments stating, "[t]he reigning authority on the matter holds that sovereign immunity (as embodied in Ky. Const. §231) will trump jural rights (Ky. Const. §§14, 54, 241) because it is a specific provision of the Constitution, rather than a general provision." *Caneyville*, 286 S.W.3d at 801 (citation omitted). The holding of *Caneyville* applies to firefighters and fire departments because of their unique role in the history of the government of the Commonwealth and does not overrule *Williams*. There is no issue of sovereign immunity in the instant case, and therefore the legislature's attempt to alter the ability to recover punitive damages in KRS 411.184(1)(c) does not enjoy the protections of the statute at issue in *Caneyville.*

*Gilbert* and *Caneyville* do not address KRS 411.184(1)(c) and are distinguishable on the other grounds noted. They do not overrule *Williams.*

Therefore, it would have been improper to include in the jury instruction the unconstitutional statutory definition of malice set forth in KRS 411.184(1)(c).

***Conclusion***

Because the jury's verdict was based upon reasonable conclusions supported by substantial evidence, we affirm the circuit court's denial of Garlock's motions for a directed verdict. We also affirm the assessment of punitive damages against Garlock as the award did not violate federal due process standards and was permissible under Kentucky law. Garlock was not entitled to a jury instruction on the definition of malice codified in KRS 411.184(1)(c). Therefore, we affirm.

ALL CONCUR.

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