RENDERED: FEBRUARY 14, 2014; 10:00 A.M.
TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2012-CA-000845-MR

WANDA MCGUIRE, EXECUTRIX
OF THE ESTATE OF WILLIAM MCGUIRE — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE CHARLES L. CUNNINGHAM JR., JUDGE
ACTION NO. 10-CI-002831

LORILLARD TOBACCO COMPANY
and HOLLINGSWORTH & VOSE
COMPANY — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: LAMBERT, MOORE, AND VANMETER, JUDGES.

MOORE, JUDGE: Wanda McGuire, executrix of the estate of William "Bill" McGuire, filed claims of negligence and products liability in Jefferson Circuit Court against appellees, Lorillard Tobacco Company ("Lorillard") and

Hollingsworth & Vose Company ("H & V"). Following a defense verdict on those claims, she now appeals. Upon a careful review, we affirm.

FACTUAL AND PROCEDURAL HISTORY

In March of 2010, Bill McGuire was diagnosed with mesothelioma. Shortly thereafter, he and his wife, Wanda, filed suit in Jefferson Circuit Court asserting claims of products liability and negligence against 33 separate entities, alleging that each entity had exposed him to asbestos and that each exposure was a substantial factor in causing his disease. Bill alleged that many of these entities had exposed him to asbestos over the course of his employment as an ironworker. However, as it related to two of these entities—Lorillard and H & V—Bill alleged that he had been exposed to asbestos by virtue of the "Original Kent" cigarette. To explain, between 1952 and 1956, Lorillard's Louisville plant manufactured Original Kents, a type of cigarette featuring what Lorillard dubbed the "micronite filter." This filter media was manufactured by H & V and it contained a type of asbestos called "crocidolite," which is a known cause of mesothelioma. And, not only did Bill smoke Original Kent cigarettes during that period of time, he also worked at Lorillard's plant from August, 1953, to August, 1954.

Bill died from mesothelioma on March 15, 2011. Wanda filed an amended complaint on her behalf and on behalf of Bill's estate. This matter only proceeded to trial against Lorillard and H & V. After a four-week trial, a jury returned a verdict in favor of Lorillard and H & V, and the circuit court entered

judgment in conformity with these verdicts and dismissed Wanda's claims. Wanda now appeals.

We will discuss additional facts and procedural history relating to this matter as they become relevant to our analysis of the issues Wanda has presented in this appeal. The issues raised by Wanda fall into two general categories: 1) jury instruction issues; and 2) evidentiary issues.

ANALYSIS

I. JURY INSTRUCTION ISSUES

Initially, Wanda asserted that Bill's mesothelioma was caused by either 1) his alleged exposure to asbestos in the air he breathed at Lorillard's plant in Louisville while employed there for a year beginning in August, 1953; or 2) his alleged exposure to asbestos in the smoke he breathed through Lorillard's Original Kent cigarettes between 1953 and 1956.[1] On these bases, Wanda brought suit against both Lorillard and H & V on theories of negligence and strict liability. When this matter was eventually submitted to the jury, however, Wanda's claims were pared down somewhat. As it related to H & V's liability, the jury instructions provided:

> INSTRUCTION NO. 2 – DUTY OF HOLLINGSWORTH & VOSE CO.
>
> You will find for the Plaintiff, Wanda McGuire, against the Defendant, Hollingsworth & Vose Company

[1] Before he died, Bill testified that he began smoking Original Kent cigarettes with micronite filters shortly after commencing his year of employment with Lorillard in August, 1953, and that he continued to do so "probably a couple years at least" after his employment with Lorillard ceased.

(hereinafter, "H & V"), if you are satisfied from the evidence as follows:

a) the filter media it manufactured was unreasonably dangerous to persons whom H & V should have expected to use or be exposed to it, either in its design or by the failure of H & V to reasonably warn of said danger, such that an ordinarily prudent company engaged in the manufacture of filter media, had it been aware of the risk, would not have placed them in the market;

AND

b) his exposure, if any, to asbestos from the filter media while working at the Defendant Lorillard's Louisville factory was a substantial factor in causing William McGuire's mesothelioma.

Otherwise you will find for H &V.

As it related to Lorillard's liability, the jury instructions similarly provided:

INSTRUCTION NO. 3 – DUTY OF LORILLARD TOBACCO COMPANY

You will find for the Plaintiff, Wanda McGuire, against the Defendant, Lorillard Tobacco Company (hereinafter, "LTC"), if you are satisfied from the evidence as follows:

a) the Kent cigarettes it manufactured and which contained asbestos in the filter were unreasonably dangerous to persons smoking them, either in their design or by the failure of LTC to reasonably warn of the danger, such that an ordinarily prudent company engaged in the manufacture of cigarettes, had it been aware of the risk, would not have placed them in the market;

AND

b) his exposure to asbestos, if any, by smoking Kent cigarettes after leaving his employment with LTC was a substantial factor in causing William McGuire's mesothelioma.

Otherwise you will find for LTC.

To summarize, the submitted jury instructions: 1) omitted any potential for liability on the part of H & V based upon Bill's alleged exposure to asbestos in the smoke he breathed through the Original Kent cigarettes; 2) omitted any potential for liability on the part of Lorillard based upon Bill's alleged exposure to asbestos in the air he breathed at Lorillard's plant in Louisville while employed there for a year beginning in August, 1953; 3) omitted any potential for liability on the part of Lorillard based upon Bill's alleged exposure to asbestos through smoking Original Kent cigarettes, *unless* Wanda proved that Bill's mesothelioma was proximately caused by exposure to asbestos through smoking Original Kent cigarettes *after* August, 1954, rather than sometime between August, 1953 (when he began smoking them), and August, 1954 (when he quit working for Lorillard); and 4) condensed Wanda's two claims of negligence and strict liability against H & V and Lorillard into only one claim of strict liability against each entity.

Wanda takes issue with each of these four points. We will address them in turn below.

A. Omission of liability on the part of H & V based upon Bill's alleged exposure to asbestos in the smoke he breathed through the Original Kent cigarettes.

Wanda's only argument in this regard appears on the ninth page of her ten-page reply brief:

> Wanda alleged H & V was responsible for causing Bill's disease from the asbestos in the Kent filter and from the asbestos filter material, which he breathed at Lorillard's plant. Over Wanda's objection, the Trial Court's strict liability instruction led the jury to believe it could only hold H & V responsible for Bill's exposure to H & V's asbestos from his plant exposure, but not from smoking Kent cigarettes. It is highly prejudicial to preclude the jury from considering an entire theory of a plaintiff's case.

By way of background, the circuit court drafted the jury instructions in this matter, but extensively discussed the jury instructions with the parties over the course of a number of hearings and the jury instructions went through several revisions to incorporate the parties' suggestions. On January 25, 2012, after the circuit court had read the finalized instructions to the jury, after Lorillard had completed its closing argument, and after the jury had briefly retired while H & V prepared to give its closing argument, Wanda raised an objection and the following discussion ensued:

> COUNSEL: Your honor, I noticed the, as your honor read the instructions and I didn't want to bring it up at the time, but your honor's instruction number two as it relates to Hollingsworth and Vose's duty, I'm sure this was an oversight on your honor. If, you limit it to their liability only to Lorillard's Louisville factory. Uh, and this would be part "b" of instruction 2(b), if any exposure to the asbestos filter media while working at the defendant, Louisville, Lorillard's Louisville factory. And it should be, it's not limited to just that. I think your honor said on the record, oh, and, uh, on the component parts issue that it relates to either the factory exposure or the smoking exposure.
>
> THE COURT: Well, actually, what I had thought I had said with respect to component manufacturing was that

> as I read that, um, *Worldwide* case, both things go to the jury as to strict liability for the product that they made and when they try to go beyond that, with that component manufacturer for what I would perceive would be this finished product kind of exposure they said factually that didn't apply. Here, if the jury believes that the, um, smoking was a factor, I think that they're there through Lorillard. I was just trying to find out very clearly where they draw the line. Now, that's the way I have had it from the get-go in the instructions since draft one, so there's really nothing I can do about it now. So it's, I understand what you're saying, but—
>
> COUNSEL: But here's the problem. You denied directed verdict as it relates to H & V's liability for the smoking component of it. And so, this instruction doesn't cover that at all, so, uh, the jury could be confused or misled to believe, uh, that H & V has no liability for the smoking, so—
>
> THE COURT: I don't recall, frankly, this coming up until now, and it's in there the way it's in there and I'm sorry but that's the way it's got to stand.
>
> COUNSEL: Okay. Note our objection.
>
> THE COURT: So noted.

The "Worldwide case" referred to by the circuit court is *Worldwide Equipment, Inc. v. Mullins*, 11 S.W.3d 50 (Ky. App. 1999). Generally speaking, it discusses the circumstances under which a "component parts" manufacturer may or may not be held liable to the end-user of a finished product. From the circuit court's reliance upon *Worldwide*, the circuit court apparently came to regard H & V as a "component parts manufacturer" when it drafted its instructions exempting H & V from liability for Bill's alleged exposure to asbestos in the smoke he breathed through the Original Kent cigarettes.

This discussion and the jury instructions themselves are, from our review of the record, the only indications of why the circuit court decided to exempt H & V from liability in this manner and the record is unclear whether the circuit court regarded its decision as a directed verdict or as a drafting error caught too late. In either event, if Wanda wished to appeal the circuit court's decision, she was required to raise the issue and support her contention of error with an argument in her *appellate brief*. *See* CR[2] 76.12(4)(c)(iii) and (v). As noted, however, Wanda instead raised this argument for the first time on the second-to-last page of her *reply brief*. As a result, H & V's appellate brief, which it tailored to address Wanda's appellate brief, contains no corresponding argument defending the merits of the circuit court's decision, and had no reason to do so.

"[A] reviewing court will generally confine itself to errors pointed out in the briefs," and "[a]n appellant's failure to discuss particular errors in his brief is the same as if no brief at all had been filed on those issues. Consequently, the trial court's determination of those issues not briefed upon appeal is ordinarily affirmed." *Milby v. Mears*, 580 S.W.2d 724, 727 (Ky. App. 1979) (internal citations omitted). Moreover, "[a] reply brief is not a device for raising new issues which are essential to the success of the appeal." *Id*. at 728; *see also* CR 76.12(4)(e). Accordingly, and in light of the fact that Wanda's failure to brief this

[2] Kentucky Rules of Civil Procedure.

issue gave H & V no reason to defend the merits of the circuit court's decision,[3] we deem this issue unpreserved and will not address it.

B. Omission of liability on the part of Lorillard based upon Bill's alleged exposure to asbestos in the air he breathed at Lorillard's plant in Louisville while employed there for a year beginning in August, 1953.

The circuit court recognized that Bill's alleged exposure to asbestos in the air he breathed at Lorillard's plant in Louisville would have occurred within the course and scope of his employment with Lorillard. Therefore, the circuit court granted a directed verdict in favor of Lorillard in this respect based upon KRS[4] 342.690. Under KRS 342.690(1), an employee's recovery in tort for a work-related injury against his employer is limited to those benefits available under the Workers' Compensation Act. This exclusive remedy provision effectively bars all personal injury claims asserted by an employee against his employer.

Wanda asserts that the circuit court erred in applying KRS 342.690 to dismiss this aspect of her claim against Lorillard. Her argument is that because Kentucky's Workers' Compensation Act would have prohibited Bill from filing a workers' compensation claim against Lorillard regarding his mesothelioma *before* he had even been diagnosed with mesothelioma,[5] she must be allowed to proceed

[3] The *Milby* court nevertheless addressed the issue raised in the appellant's reply brief after finding that the appellee's brief "thoroughly argued the merits of the issue[.]" *Id*. at 728. As noted, that is not the case here.

[4] Kentucky Revised Statutes.

[5] Specifically, two provisions within the Act would have prohibited any workers' compensation claim against Lorillard in this context. The first is KRS 342.316(1)(a), which limits an employee with an occupational disease (such as mesothelioma) to filing a claim against the employer who last exposed the employee "to the hazard of the occupational disease." Here, Bill alleged that his last occupational exposure occurred while he worked for Ford Motor Company from 1978 until

with a civil action against Bill's former employer, Lorillard, under Kentucky's constitutional jural rights doctrine, which protects citizens from the legislative abrogation of common-law claims. *See generally*, Thomas P. Lewis, *Jural Rights under Kentucky's Constitution: Realities Grounded in Myth*, 80 Ky. L.J. 953 (1991-92) (explaining and critiquing Kentucky's constitutional jural rights doctrine). We are unpersuaded, however, because the Supreme Court of Kentucky has already rejected a similar argument. In *Shamrock Coal Co. v. Maricle*, 5 S.W.3d 130, 134 (Ky. 1999), the Court stated that "the fact that a remedy for a work-related injury is unavailable under the Workers' Compensation Act does not authorize bringing a civil action for damages" and that such a situation does not violate the jural rights doctrine. Because Bill voluntarily accepted[6] Workers' Compensation coverage during his employment with Lorillard, along with its no-fault benefits, he cannot now escape its statute of repose and exclusive remedy provisions. A worker must either accept or reject Workers' Compensation Act coverage in its entirety and not just those portions which inure to his benefit.

2002.

The second is the applicable statute of repose. Prior to 1986, KRS 342.316 contained a five-year period applicable to occupational diseases, running from the last date of injurious exposure (*see, e.g., William A. Pope Co. v. Howard*, 851 S.W.2d 460 (Ky. 1993)). Subsequently, KRS 342.316 was amended to contain a 20-year period, and it continues to contain this provision (*see* KRS 342.316(4)(a)). In either event, because Bill's last injurious exposure to asbestos while working for Lorillard occurred in 1954, the applicable statute of repose contained in KRS 342.316 would have prohibited Bill from filing a workers' compensation claim against Lorillard.

[6] As a matter of law, a worker who fails to affirmatively reject coverage under KRS Chapter 342 is deemed to have accepted it. *Adkins v. R & S Body Co.*, 58 S.W.3d 428, 430 (Ky. 2001); *see also* KRS 342.395(1). This rule has been in effect since 1952—prior to when Bill commenced his employment with Lorillard—and it therefore applies to Bill. *See Wells v. Jefferson County*, 255 S.W.2d 462 (Ky. 1953).

Therefore, the circuit court did not err in this regard.

C. Omission of liability on the part of Lorillard based upon Bill's alleged exposure to asbestos through smoking Original Kent cigarettes, unless Wanda proved that Bill's mesothelioma was proximately caused by exposure to asbestos through smoking Original Kent cigarettes after August, 1954.

The circuit court held that the exclusive remedy provision of the Workers' Compensation Act also exempted Lorillard from any liability relating to Bill's alleged exposure to asbestos and resulting mesothelioma through smoking Original Kent cigarettes between August, 1953, and August, 1954, and it granted a partial directed verdict in favor of Lorillard to that effect. In doing so, the circuit court reasoned that the exclusive remedy provision applied because 1) Lorillard was Bill's employer at that time; 2) Bill testified that he smoked Original Kent cigarettes as a result of receiving the cigarettes for free as a benefit of his employment; 3) Bill testified that he would not have smoked Original Kents if he had not been employed by Lorillard; and 4) Kentucky has not adopted the "dual capacity" doctrine.

Before we proceed, the circuit court's latter point regarding the "dual capacity" doctrine warrants further explanation. As stated in *Borman v. Interlake, Inc.*, 623 S.W.2d 912, 913 (Ky. App. 1981), upon which the circuit court's holding largely relied,

> Under this doctrine, *an employer normally shielded from tort liability by the exclusive remedy principle* may become liable in tort to his own employee if he occupies, in addition to his capacity as employer, a second capacity

> that confers on him obligations independent of those imposed on him as employer.

(quoting 2A, Larson, Law of Workmen's Compensation, § 72.80 (1976) at 14-112) (emphasis added). *Borman* also states in no uncertain terms that Kentucky does not recognize the "dual capacity" doctrine:

> The provisions of the Kentucky Workers' Compensation Act prohibit the application of the dual capacity doctrine. KRS 342.690 states that "… *the liability of such employer* … shall be exclusive and in place of all *other* liability of such employer to the employee, …" KRS 342.700 concerning third party liability, uses the language liability "in some person other than the employer." We believe this language evinces an intent to maintain the exclusivity of remedy principle intact.

623 S.W.2d at 913 (emphasis added).

As an aside, *Borman* concerned a wrongful death claim against an entity that was both the decedent's employer and the manufacturer of the steel product that caused the decedent's death. The circumstances of the employee's death indisputably gave rise to the employer's liability under the Act. And, the *Borman* court ultimately determined that even if Kentucky had adopted the dual capacity doctrine, the doctrine would not apply under the circumstances presented in that case because:

> As stated in Larson, there must be *new* duties and obligations on the part of the employer to give rise to *another* distinct legal persona who may be *separately liable*. In the present case, Borman has not raised any *additional duty* which Interlake owed the decedent distinguishable from its *duty to provide him with safe working conditions, equipment and materials*. The use of

> the banding material was an *integral part of the decedent's employment*.

Id. (emphasis added).

Here, the circuit court held that Kentucky's refusal to adopt the "dual capacity" doctrine precluded Wanda from suing Lorillard in tort for Bill's alleged exposure to asbestos and consequent mesothelioma through smoking Original Kent cigarettes. What the emphasized language in *Borman* makes clear, though, is that even if Kentucky had adopted the "dual capacity" doctrine, the doctrine itself is derivative in nature: it can only be applied to "an employer normally shielded from tort liability by the exclusive remedy principle" of workers' compensation. *Id*. Stated differently, if the "exclusive remedy provision" of workers' compensation would *not* have otherwise applied to Lorillard in the context of this particular claim, the "dual capacity" doctrine is irrelevant; neither it, nor the exclusive remedy provision, would have precluded Bill from suing Lorillard in tort.

This, in turn, leads back to the central assumption of the circuit court's decision, *i.e.*, that Lorillard was entitled to the "exclusive remedy" protections of Kentucky's Workers' Compensation Act because 1) Lorillard was Bill's employer while he smoked Original Kents between August, 1953, and August, 1954; 2) Bill testified that he smoked Original Kent cigarettes as a result of receiving them for free as a benefit of his employment; and 3) Bill testified that he would not have smoked Original Kents if he had not been employed by Lorillard.

However, the "exclusive remedy" protection only applies to injuries and diseases that are covered by Kentucky's Workers' Compensation Act, and the Act does not provide coverage for an injury or disease merely because the injury occurs or disease arises contemporaneously with employment. Rather, the injury or disease in question must arise "out of and in the course of employment," and must therefore be considered "work-related" or "occupational." *See* KRS 342.0011(1) and (2); *see also Sowders v. Mason & Dixon Lines, Inc.*, 579 S.W.2d 380, 382 (Ky. App. 1979) (stating that for purposes of Workmen's Compensation Act, the "employer is not liable for symptomatic, even possibly disabling, pain arising from diseased condition which is not causally attributable to work performance or working conditions[]"). The General Assembly has specified that a disease will be deemed to arise "out of and in the course of employment" and thus "occupational" if:

> [T]here is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is performed and the occupational disease, and which can be seen to have followed as a natural incident to the work as a result of the exposure occasioned by the nature of the employment and which can be fairly traced to the employment as the proximate cause. The occupational disease shall be incidental to the character of the business and not independent of the relationship of employer and employee. An occupational disease need not have been foreseen or expected but, after its contraction, it must appear to be related to a risk connected with the employment and to have flowed from that source as a rational consequence[.]

KRS 342.0011(3).

Conversely, Larson gives two examples of when an injury involving an employee should not be considered to have arisen "out of and in the course of employment:"

> Suppose plaintiff is a clerk in defendant's store. On a day when she is off work, she goes into the store to buy a dress, and is hit in the eye by a hanger as a result of the sales clerk's negligence. Obviously she can sue the store and the co-employee. Or, suppose a nurse who works for the defendant hospital happens to be involved in a weekend accident while driving past the hospital, and is rushed to hospital's emergency room, where the alleged malpractice occurs. Here again, no one would contend that her suit is barred.[7]

Arthur Larson & Lex K. Larson, Larson's Workers' Compensation Law, § 113.08 (2007) (internal footnotes omitted).

---

[7] *Wymer v. JH Properties, Inc.*, 50 S.W.3d 195, 197-98 (Ky. 2001), takes this latter point further:

> In this case, there were two distinct injuries. The work related injury occurred in 1993 when Wymer suffered an injury to her shoulder as a result of a patient kicking her when coming out of anesthesia. The second injury occurred during physical therapy in 1994 when the therapist tore the deltoid muscle from her shoulder. The medical malpractice injury was not in the course and scope of her employment. This case is factually different from *Borman*, [623 S.W.2d 912]. *See also* KRS 342.0011; *Rogers v. Vermont American Corp*., Ky.App., 936 S.W.2d 775 (1997).
>
> When she was first injured, Wymer chose her own doctor and accepted the recommendation of that physician for a surgical treatment. Later, her physician referred her to physical therapy at Jewish Hospital in Shelbyville, which was the closest physical therapy available. Jewish Hospital did not select any of the physicians involved, nor did it require her to have physical therapy in Shelbyville. The medical negligence claimed by Wymer does not attempt to sue Jewish Hospital in a dual capacity but rather for a separate and distinct incident which occurred to her. Wymer made her own choice of physician and therapist and her employer had no input in these decisions.
>
> . . . The facts in this case are clearly distinguishable from *Borman* and that case does not provide the authority to prevent the negligence claim by Wymer.

Accordingly, the determinative question for the purpose of this part of Wanda's appeal is whether Bill's mesothelioma was legally "caused" by work conditions at Lorillard's plant, or whether Bill's work at Lorillard's plant was merely the stage upon which his disease occurred or arose so that his disability was only coincidental with it, rather than legally caused by it. *Wyatt v. Fed. Materials Co.*, 457 S.W.2d 479, 481 (Ky. 1970).

In that regard, while Lorillard gave Bill Original Kent cigarettes and allowed Bill to smoke them while working, it did not pay him to smoke. Nothing of record demonstrates that smoking Original Kent cigarettes at work or at any other time (including when he was *not* at work) between August, 1953, and August, 1954, was required of Bill by Lorillard or constituted any part of Bill's work-related duties.[8] Therefore, "contracting mesothelioma from smoking Original Kent cigarettes" cannot be said to bear any relationship to a risk connected with Bill's employment with Lorillard, and, thus, to have flowed from his employment as a rational consequence. KRS 342.0011(3).

Nevertheless, in support of the circuit court's directed verdict, Lorillard reasons that its decisions to supply Bill with cigarettes and to allow him to smoke them on the job entitled it to the exclusive remedy provision of the Act because these things fell within the following rule stated in *Jefferson County Stone Co. v. Bettler*, 304 Ky. 87, 199 S.W.2d 986, 988 (1947):

[8] As further noted below, our discussion in this vein is limited to a disease caused by smoking. We express no opinion regarding injuries arising out of accidents involving smoking.

> It is a firmly established rule that acts necessary to the comfort and convenience of an employee on his job, though such acts are strictly personal to the employee and are not acts of service to the employer, yet such acts are considered incidental to the employment, and therefore accidents arising from the performance of such acts are compensable.

(citing *Codell Const. Co. v. Neal*, 258 Ky. 603, 80 S.W.2d 530 (1935)).

As this quotation indicates, *Bettler* and *Neal* both involved situations in which an employee was on his employer's premises during his working hours and was injured or killed in an *accident*. *See Bettler*, 199 S.W.2d at 989; *Neal*, 80 S.W.2d at 533. Both cases acknowledged the potential compensability, under the Act, of an injury or death that results from an accident that occurs on an employer's premises during the employee's working hours, even if the accident in question occurs during what could be characterized as a break.[9] Indeed, *Neal* cites

[9] *See Bettler*, 199 S.W.2d at 988:

> [T]his accident could legally be considered to have arisen in the course of Bettler's employment if it has been demonstrated that the practical necessities of such employment required Bettler to live in this cottage. . . . And so it seems that even though [the deceased employee's] election to live in this cottage, which was either a part of appellant's premises or was adjacent thereto, may be considered to have been a strictly personal choice, yet it was a thing of comfort and convenience to himself while he was serving as maintenance man and general custodian and while he was on call at all hours. Therefore, this accident and death arose, we think, in the course of the employment.

See also Neal, 80 S.W.2d at 532:

> Acts of ministration by a servant to himself, such as quenching his thirst, relieving his hunger, protecting himself from excessive cold, performance of which while at work are reasonably necessary to his health and comfort, are incidents to his employment and acts of service therein within the Workmen's Compensation Acts, though they are only indirectly conducive to the purpose of the employment. Consequently no break in the employment is caused by the mere fact that the Workman is ministering to his personal comforts or necessities, as by warming himself, or seeking shelter, or by leaving his work to relieve nature, or to procure drink, refreshments, food, or fresh air, or to rest in the shade. (Internal citations

with approval a situation in which "an employee lit a cigarette and caught fire while using an inflammable paint remover, and compensation was allowed." *Id*. (citing *State Treasurer v. Ulysses Apartments*, 232 App. Div. 393, 250 N.Y.S. 190 (1931)).

However, Wanda's claim against Lorillard had nothing to do with an *injury* that arose out of an *accident involving* smoking at work. Her claim asserted that Bill contracted a *disease* as the *result of* smoking. And, irrespective of who manufactured or gave him the cigarettes he smoked, or whether those cigarettes could have been considered a fringe benefit of his job with Lorillard, Kentucky's Workers' Compensation Act generally does not recognize any disease or any part of a disease caused by smoking as "occupational." To the contrary, smoking is often cited by employers as a *defense* to liability for paying workers' compensation benefits relating to claims of occupational disease. *See, e.g., Whittaker v. Wagner*, 898 S.W.2d 492, 494 (Ky. 1995); *Thompson v. Fischer Packing Co.,*883 S.W.2d 509, 511 (Ky. App. 1994) ("[T]he ALJ's carve-out for the noncompensable disability due to cigarette smoking is supported by substantial evidence."); *American Bakeries Co. v. Hatzell*, 771 S.W.2d 333, 334 (Ky. 1989) (Holding that employee's angina pectoris condition was not covered under the Act because the medical proof demonstrated it was caused by "[f]actors such as smoking, high blood fats, physical inactivity, obesity and family history").

---

omitted.)

In short, the law does not support the circuit court's decision to apply the exclusive remedy provision of Kentucky's Workers' Compensation Act to this aspect of Bill's claim against Lorillard.

Both Associate Judges VanMeter and Lambert agree that this merely qualifies as harmless error and does not warrant reversing and remanding for a new trial. Accordingly, Judge VanMeter's separate opinion, joined by Judge Lambert, is the majority opinion on this issue. Consequently, the circuit court is affirmed. The Presiding Judge disagrees with the separate opinion. The view expressed herein is therefore a dissenting view and not the decision of this Court.

Respectfully, I disagree with the separate opinion authored by Judge VanMeter because I believe that Lorillard's additional argument that the circuit court's decision merely constituted "harmless error" per CR 61.01 is unpersuasive. As stated in *Osborne v. Keeney*, 399 S.W.3d 1, 13 (Ky. 2012),

> [I]t is a rule of longstanding and frequent repetition that erroneous instructions to the jury are presumed to be prejudicial. We recently affirmed our intention to return and adhere to the presumption of prejudice inherent in an erroneous instruction. This presumption is rebuttable, but the party asserting the error is harmless bears the burden of affirmatively showing that no prejudice resulted from the error. In order to show no prejudice resulted from the error, it must be proven there was no reasonable possibility the erroneous jury instruction affected the verdict.

(Internal footnotes and quotations omitted.)

Here, I believe it is reasonably possible that the jurors could have believed Bill was exposed to asbestos as a result of smoking Original Kent

cigarettes from August, 1953, to August, 1954. Lorillard's directed verdict covering that time period was based solely upon the exclusive remedy provision of the Workers' Compensation Act, not the sufficiency of the evidence. Accordingly, I would reverse the circuit court's judgment in favor of Lorillard and remand for further and consistent proceedings; nonetheless, this is not the majority view on this issue.

D. The circuit court's decision to condense Wanda's two claims of negligence and strict liability against H & V and Lorillard into only one claim of strict liability against each entity.

In her brief, the entirety of Wanda's argument in this regard is as follows:

> In *Clark v. Hauck Mfg. Co*.[, 910 S.W.2d 247, 251 (Ky. 1995)], the Supreme Court held,
>
> > The duty of ordinary care embraces such questions as the duty of the manufacturer to review design, and if he knew or should have known that his design was defective, to make an effort to notify the purchasers of his equipment of these findings subsequent to the sale of a product. . .
> >
> > Our review of the evidence in the record convinces us that it **was reversible error not to give an instruction on both strict liability and ordinary care**. The evidence supported such a request for separate instructions. (Emphasis added).
>
> Wanda introduced substantial evidence demonstrating Appellees knew or should have known their asbestos products could cause Bill to suffer a deadly disease. Indeed, the trial court did not make a finding to the

contrary. Though it acknowledged *Clark, supra*, is binding authority under Kentucky law, it refused to give the negligence instruction because it believed it was subsumed by the strict liability instruction, stating it believed the Kentucky Supreme Court was wrong in requiring both instructions.

The Kentucky Supreme Court has held,

> More importantly however, SCR 1.040(5) binds the trial courts to follow established precedents. . . judicial consistency must be observed in order to maintain a responsible and efficient court system. [*Greene v. Commonwealth*, 197 S.W.3d 76, 83 (Ky. 2006)].

The Supreme Court has further held,

> While this Court would be loath to discourage scholarship and thoughtful application of the law, we remain mindful of SCR 1.040(5) which requires the trial courts of this Commonwealth to follow applicable precedents of the Supreme Court or where there are no such precedents, those established in the opinions of the Court of Appeals. Where this Court or the Court of Appeals has spoken to a particular issue, trial courts are not at liberty to embrace the contrary decisions from other jurisdictions even though they may believe them to be preferable. [*Commonwealth v. Wirth*, 936 S.W.2d 78, 82-83 (Ky. 1996).]

[The Court of Appeals] must reverse the trial court's judgment based upon its erroneous omission of a negligence instruction. Moreover, this Court should send a message to the trial courts that binding precedents must not be ignored and to prevent future courts from rejecting binding precedent in favor of their interpretation of what the law ought to be or may be in the future. Our judicial system simply cannot operate this way. Accordingly,

> Wanda respectfully requests the Court reverse the trial court's judgment and order the trial court to instruct the jury on negligence on retrial.

To summarize, Wanda contends that the circuit court erroneously subsumed her respective claims of negligence against Lorillard and H & V into her respective claims of strict liability against Lorillard and H & V. We disagree.

As she has framed it, Wanda's precise argument has been thoroughly addressed in three unpublished cases of this Court: *Lane v. Deere & Co.*, No. 2001-CA-001895-MR, 2003 WL 1923518 (Ky. App., March 21, 2003); *Cardinal Indus. Insulation Co., Inc. v. Norris*, Nos. 2004-CA-000525-MR, 2004-CA-000575-MR, 2004-CA-000645-MR, 2009 WL 562614 (Ky. App., March 6, 2009); and *Shea v. Bombardier Recreational Prods., Inc.*, No. 2011–CA–000999–MR, 2012 WL 4839527 (Ky. App., October 12, 2012). Our analysis of Wanda's argument therefore borrows much from the reasoning and language of these cases.[10]

To begin, strict liability allows a plaintiff to recover in several ways, such as a theory of defective design, a theory of defective manufacture, or a theory of a failure to warn of danger. *Worldwide Equip., Inc.*, 11 S.W.3d at 55 (citation omitted). Under any theory of strict liability, the plaintiff must establish causation. *Holbrook v. Rose*, 458 S.W.2d 155, 157 (Ky. 1970). Indeed, if a defendant had a duty to warn, the issues to be resolved are "whether an adequate warning was

[10] Under CR 76.28(4)(c), citation to unpublished Kentucky appellate decisions rendered after January 1, 2003 is permitted under narrow circumstances. We cite these cases merely to reflect continuity in our jurisprudence.

given and, if not, whether the failure to give it proximately caused the injury." *Post v. Am. Cleaning Equip. Corp.*, 437 S.W.2d 516, 522 (Ky. 1968).

In the case at bar, Wanda simply makes a general argument that the circuit court erred because it did not give negligence instructions. With respect to her claims of negligence, which can only be fairly characterized as claims of negligent design and negligent failure to warn, we find those claims were subsumed by the strict liability instruction to the jury. We acknowledge Wanda's argument that she was entitled to have her theory of the case submitted to the jury, *Clark*, 910 S.W.2d at 250; however, redundant instructions are unnecessary. *Reynolds v. Commonwealth*, 257 S.W.2d 514, 516 (Ky. 1953).

Negligence and strict liability theories of recovery overlap to the degree that, in either instance, the plaintiff must prove the product was defective and the legal cause of the injury. *See Tipton v. Michelin Tire Co.*, 101 F.3d 1145, 1150 (6th Cir. 1996) (holding that under Kentucky law, theories of negligence or strict liability both require that a jury first find the product was defective); *Holbrook*, 458 S.W.2d at 157 (holding that whether the action involves negligent design, negligent failure to adequately warn, or the sale of a defective product that is unreasonably dangerous because of an inherent defect or inadequate warning, in every instance, the product must be a legal cause of the harm). Under a claim of negligence, a plaintiff must prove a defendant's duty, breach of that duty, and a causal connection between the breach and injury to plaintiff. *Lewis v. B & R Corp.*, 56 S.W.3d 432, 436–37 (Ky. App. 2001) (citations omitted). Strict liability

may be imposed on a manufacturer of a product if that product is in a defective condition to make it unreasonably dangerous to its user. *Worldwide Equip., Inc.*, 11 S.W.3d at 55 (citing Restatement (Second) of Torts § 402A (1965)). The fact remains that, under certain circumstances, distinct causes of action may arise under either a negligence theory or strict liability theory of recovery since negligence claims focus on the conduct of the actor, and strict liability claims focus on the condition of the product. *Montgomery Elevator Co. v. McCullough*, 676 S.W.2d 776, 780 (Ky. 1984).

With respect to the negligent design instruction, the following has been stated:

> We think it 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 Mfg., Inc., 502 S.W.2d 66, 69–70 (Ky. 1973). It follows that if a manufacturer has placed a defective product that is unreasonably dangerous in the market, it has violated its duty under a negligence standard and may be found strictly liable. *See Nichols v. Union Underwear Co*., 602 S.W.2d 429, 433 (Ky. 1980) (holding the fact finder in a design defect case must decide whether the manufacturer acted prudently, *i.e.*, whether the design was defective condition). In light of this, the respective strict liability instructions against Lorillard and H & V each took into consideration any evidence presented with respect to negligent

design—specifically, Lorillard's liability for the design of the cigarette, and H & V's liability for the design of the filter media.[11]

Additionally, we are persuaded that Wanda's claim of negligent failure to warn was adequately represented in the strict liability instructions. The instructions clearly stated that Lorillard had a duty to provide adequate warnings regarding its cigarettes and provided for Lorillard's liability if the cigarettes were unreasonably dangerous and Lorillard failed to provide reasonable notice or warning of that danger which was a substantial factor in Bill's occupational disease. Likewise, the instructions clearly stated that H & V had a duty to provide adequate warnings regarding its filter media and provided for H & V's liability if the filter media was unreasonably dangerous and H & V failed to provide reasonable notice or warning of that danger which was a substantial factor in Bill's occupational disease. Because these instructions took into account the elements of negligence, a separate negligence instruction against either entity regarding a failure to warn would have been redundant with the strict liability instruction. Accordingly, we find no error in the circuit court's decision to subsume Wanda's respective claims of negligence into her respective claims of strict liability.

II. EVIDENTIARY ISSUES

Wanda asserts that the circuit court abused its discretion in several respects in deciding to admit or exclude certain evidence, and we address her

[11] As noted previously, Wanda's general argument, as it appears above, does not raise the specific issue of whether the circuit court erred in exempting H & V from liability from Bill's alleged asbestos exposure through smoking Lorillard's micronite-filtered cigarettes.

contentions below. Our standard for reviewing a trial court's ruling admitting or excluding evidence is limited to determining whether the trial court abused its discretion. *Goodyear Tire & Rubber Co. v. Thompson*, 11 S.W.3d 575, 577 (Ky. 2000). The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles. *Id*. at 581 (citing *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999)).

A. Exclusion of evidence regarding other Lorillard employees who have also contracted mesothelioma.

At trial, and for the purpose of proving the element of causation, Wanda sought to demonstrate that other individuals who had worked at Lorillard's Louisville plant had also contracted mesothelioma. To do so, she sought to introduce the following into evidence: 1) a list identifying 34 workers who had developed mesothelioma; 2) testimony from Frank Sipes (one of Bill's former co-workers) indicating that he knew of other Lorillard workers who had developed asbestos-related diseases, and that he himself had been diagnosed with asbestosis; 3) testimony from Dr. Samuel Hammar, one of Wanda's experts, that he had reviewed the above-referenced list identifying the 34 Lorillard workers who had developed mesothelioma, along with their death certificates and durations of employment at the Lorillard plant, and had concluded based solely upon that information that exposure to asbestos at Lorillard's plant was a substantial factor in causing each of the 34 cases of mesothelioma; and 4) a published scientific article, written by electron microscopist Ronald Dodson, discussing two other workers

from Lorillard's plant who had eventually developed mesothelioma. The circuit court reviewed this evidence and, in an order of December 29, 2011, found in relevant part as follows:

> Finally, the parties discussed broadly the admissibility of evidence of others [sic] persons having contracted mesothelioma who had worked at the Lorrillard plant making Kents with the micronite filter. The Court believes a necessary compromise would inform the jury by admonition there are such persons but would not state a number or any other details. The alternatives are untenable. To [sic] complete bar to mentioning of these other persons could lead to the misperception that Mr. McGuire was only [sic] worker at the plant who got mesothelioma, which is not the case. Conversely, to allow detailed discussion of these other putative victims would greatly expand the scope of the trial. Moreover, it would be difficult if not impossible to fully assess the degree, if any, to which each person's exposure at Lorillard was responsible for their illness.

Thereafter, and in lieu of allowing the introduction of this evidence at trial, the circuit court read the following admonition to the jury:

> You may wonder if anyone else working in the Lorillard factory making the Kent cigarettes with asbestos-containing filters also contracted malignant mesothelioma. The answer is that Mr. McGuire was not the only person who worked there who was later diagnosed with mesothelioma. Conversely, there have been employees who have worked there during the relevant years who have not developed mesothelioma. However, it would unduly complicate this trial to present to you evidence of how many, what their asbestos exposures were, or other details of their disease. You will, therefore, hear no further evidence on this issue during the trial aside from Mr. Dodson's discussion of his tissue digestion analysis from another individual he understood had worked at Lorillard. You may choose to take this information into consideration only in your

> deliberations of whether Mr. McGuire's claimed exposure to asbestos at the Lorillard plant was a substantial factor in causing his mesothelioma. You may not use this for any other purpose. You may not speculate about the circumstances or claims of other employees who have developed mesothelioma or take them into consideration in deciding whether to award damages, should you reach that point.

From the substance of the circuit court's order and admonition, the circuit court excluded the four items of evidence offered by Wanda primarily upon two grounds: 1) Wanda had failed to lay a proper foundation for introducing this evidence by demonstrating that any of the other workers mentioned in this evidence were either similarly situated to Bill, or that their employment with Lorillard was a substantial factor in causing their individual cases of mesothelioma; and 2) this evidence would involve numerous collateral inquiries that would lead to delay and jury confusion unacceptable under KRE[12] 403.[13] Wanda asserts that the circuit court abused its discretion in excluding this evidence. However, we agree with both of the grounds relied upon by the circuit court for excluding this evidence.

As noted, Wanda's admitted purpose behind introducing this evidence was to prove *causation*. Specifically, Wanda asserted that her allusions to these instances of mesothelioma among other former Lorillard workers would be capable

[12] Kentucky Rules of Evidence.

[13] KRE 403 provides "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of undue prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, or needless presentation of cumulative evidence."

of proving that Bill's mesothelioma was in fact caused by his employment at Lorillard. Wanda also asserted that these instances qualified as admissible evidence of causation because they fell within the following rule stated in *Montgomery Elevator Co.*, 676 S.W.2d at 783: "evidence of the occurrence or nonoccurrence of other accidents or injuries under substantially similar circumstances is admissible when relevant to . . . the existence or causative role of a dangerous condition, or a party's notice of such a condition." (citing *Harris v. Thompson*, 497 S.W.2d 422, 429 (Ky. 1973)).

Wanda overlooks, however, the sentence immediately following the foregoing quotation: "[a]lthough, strictly speaking, a manufacturer is presumed to know all of the inherent characteristics of its product including its dangerous propensities, the first element expressed in *Harris*, '*the existence or causative role of a dangerous condition,' is generally accepted as a foundation of relevancy for such evidence in products liability cases*." *Id*. (internal citations omitted; emphasis added). Stated differently, before this type of "other accidents or injuries" evidence may be deemed relevant and admissible as any kind of evidence, it must be *proven* that the "other accidents or injuries" were in fact caused by the dangerous condition at issue.[14] This is simply another way of stating the more

[14] None of the cases cited by Wanda relating to this issue dispenses with the requirement of laying a causative foundation in this context; in each case, the rule was either followed or was not at issue. In *Montgomery Elevator Co.*, for example, this type of evidence was allowed because it was not only undisputed that the product at issue (an escalator) caused the plaintiff's injuries (*i.e.*, his foot was caught between the step and skirt of the escalator), the manufacturer also *admitted* that the same escalators, or escalators similar in design, had caused substantially the same injury. *Id*. at 783. In *Harris*, 497 S.W.2d at 429, even though "there was no real issue as to whether the patch of ice on an otherwise dry highway constituted a dangerous condition, or whether that condition was a causative factor in the accident," evidence of other accidents

general rule that every tort defendant is entitled to have a causative link proven between its specific tortious acts and the plaintiff's injuries, and that allegations of causation are not proof of causation. *Estes v. Gibson*, 257 S.W.2d 604, 607 (Ky. 1953) (absent connection between specific act and injury, no legal liability exists); *Educ. Training Sys., Inc. v. Monroe Guar. Ins. Co.*, 129 S.W.3d 850, 853 (Ky. App. 2003) (pleadings are not evidence).

Here, while these other individuals who worked at Lorillard at varying times between 1952 and 1956 may have eventually contracted mesothelioma, the level of their individual exposures to asbestos at Lorillard's plant or anywhere else is unknown, as is the specific cause of their individual diseases. In the instant matter, Lorillard and H & V contested causation—not only regarding Bill's disease, but also regarding each of the other instances of disease offered as evidence. Thus, unless proven, Wanda's claim that Bill contracted mesothelioma

---

involving the same patch of ice was nevertheless inadmissible on the narrow issue of negligence, and not "substantially similar," "[w]ithout any way to prove or to judge whether another person who did or did not have an accident at the same place and under the same circumstances was himself an ordinarily prudent person, or was above or below average in that respect"). These instances were nevertheless properly admitted as rebuttal evidence because the plaintiffs in *Harris* "opened the book" to it by introducing evidence indicating that several individuals got by the ice patch without accident. *Id*. at 430. And, in *CSX Transp., Inc. v. Moody*, 313 S.W.3d 72 (Ky. 2010), the court's decision to admit into evidence an expert's study referencing multiple co-workers of a plaintiff and their similar claims of injury due to alleged exposure to toxic solvents was deemed not to be grounds for reversing a plaintiff's verdict—not because it was a proper form of evidence, but because the defendant, CSX, had failed to object to the study on the ground of substantial similarity. *Id*. at 82.

CSX also objected to evidence of two of the plaintiff's co-workers' claims of exposure to and injuries resulting from using its toxic solvents, but its objection was overruled. In this vein, CSX's objection did not contest that the co-workers in question were exposed to or injured by CSX's solvents, or contest the degree of their exposure and symptoms; rather, CSX's objection focused only upon whether the plaintiff had adequately demonstrated that his own exposure and symptoms were substantially similar to those of the two co-workers in question. *Id*. at 81.

at Lorillard's plant could not be considered evidence that any other individual contracted mesothelioma at Lorillard's plant. Likewise, unless proven, the claims of any other individual to the same effect could not be considered evidence that Bill contracted mesothelioma at Lorillard's plant.

Even if a foundation of relevance could be established for admitting this evidence, establishing such a foundation for it by adjudicating the specific facts of each incident would, as suggested by the circuit court in its ruling, entail numerous collateral inquiries, lead to delay and jury confusion, and would be misleading on the dispositive issues. *See* KRE 403. We believe the admonition given by the circuit court was a fair and equitable solution. Moreover, as Lorillard summarizes in its brief, the circuit court did not altogether bar Wanda from introducing this type of evidence over the course of the four-week trial in this matter:

> [T]he trial court did allow the jury to hear, over Lorillard's objection, about other Lorillard workers who allegedly became ill with mesothelioma. . . . Thus, Appellant's expert Ronald Dodson was allowed to testify that he had conducted a fiber burden analysis of another Lorillard worker who worked in the plug room, as had Mr. McGuire, and that Dr. Dodson found crocidolite asbestos in that person's lung tissue, just as he found in Mr. McGuire's fiber burden analysis. Dr. Dodson was further permitted to tell the jury that it is rare to find only corcidolite asbestos fibers in lung tissue, and thus, the jury could have inferred that asbestos exposure at Lorillard caused the other worker's mesothelioma, as well as Mr. McGuire's mesothelioma. In addition, Appellant's expert pathologist, Dr. Samuel Hammar, testified about multiple mesotheliomas and that it was

very unusual to have multiple occurrences of this rare disease from the same jobsite.

In light of the above, we find that the circuit court did not abuse its discretion as it relates to this issue.

B. Exclusion of Elise Comproni's deposition testimony.

In October 1952, Elise Comproni was working in his first year of employment as a junior engineering aide with the Massachusetts Department of Labor and Industries, Division of Occupational Hygiene. That month, he and his supervisor, Harold Bavley, visited the H & V plant in Massachusetts, took air samples for asbestos and reported their findings. In relevant part, their October 27, 1952 Report provided that "the maximum allowable concentration for respirable asbestos dust in the air is given as 5 million particles per cubic foot of air;" the "concentration of the dust" in H & V's plant was "not excessive;" that the dustiest part of the H & V plant was in the area of a "picker-blending machine;" and that "the majority of the particles are large fibers and are not believed to be pathologically significant. If the respiratory protection is not worn the dust causes irritation of the nose and throat." In closing, the Report recommended, among other items, that "[a] medical control program should be instituted. Each employee in this operation should be given a physical examination including an X-ray of the chest. The examination and X-ray should be repeated at least annually."[15]

[15] Comproni's deposition testimony only generally explains why this last recommendation was made: "Well, as I said before, we're not in the business of educating plant managers. We mentioned or we explained in the very beginning that we wanted a chest x-ray program annually to detect any respiratory effects from being exposed to asbestos dust."

In 1991, Comproni was deposed in another suit against Lorillard and H & V. Wanda sought to introduce part of his deposition testimony in her case-in-chief to demonstrate that, as of Comproni's visit to the H & V plant in October, 1952, H & V knew that asbestos could cause asbestosis and lung cancer. The following deposition testimony is at issue:

> Q: While you were at the plant, did you explain to H & V Specialties why you were there?
>
> COMPRONI: Oh, yes, of course.
>
> Q: What did you tell them?
>
> COMPRONI: We told them we were here to take air samples for asbestos dust which is hazardous to the workers.
>
> Q: At that point in time back in the 1950s, what diseases were you concerned about with respect to asbestos exposure?
>
> COMPRONI: Asbestosis and lung cancer were known effects from exposure to asbestos. Subsequently I believe mesothelioma was considered—the only cause of mesothelioma was exposure to asbestos dust.
>
> OPPOSING COUNSEL: Objection. Move to strike, non-responsive to the question and beyond this witness's expertise.
>
> Q: And in the course did you have the knowledge—how did you acquire your information about asbestosis and lung cancer?
>
> COMPRONI: The Division of Occupational Hygiene has reams of information and it was up to us to be knowledgeable about these hazards when we went out to make an evaluation, and my supervisor was certain that I knew what the hazard was.

Q: And did you explain to the people at Hollingsworth and Vose—strike that question. Did you explain to the people at H & V Specialties about these hazards?

OPPOSING COUNSEL: Objection.

COMPRONI: Well, we didn't make it a point to spend a lot of time educating them on the hazards of asbestos, but we certainly pointed out that asbestos dust exposure is hazardous.

Q: Did this seem to be any surprise to them?

OPPOSING COUNSEL: Objection.

COMPRONI: No, I don't believe they were surprised at all. They were knowledgeable about the effects of asbestos.

Q: What leads you to—

OPPOSING COUNSEL: Move to strike that answer as it relates to the state of mind of the person other than the testifying witness and it's therefore speculative.

Q: What leads you to say that, sir?

COMPRONI: They had been dealing with asbestos previously and they were told that by our inspector certainly before we arrived and—

OPPOSING COUNSEL: Objection.

OTHER OPPOSING COUNSEL: Objection.

ANOTHER OPPOSING COUNSEL: Objection, hearsay.

COMPRONI: And upon our arrival they were cognizant of the fact that they had a hazardous material.

> OPPOSING COUNSEL: Objection, move to strike. It's apparent your success in working with the witness, however I think you need to lay a proper foundation first and you must not dispense with those formalities. I believe Mr. Comproni is not only testifying about information knowledgeable to him at the time, but information which he has learned since. Certainly if he knew this knowledge at the time I suspect his actions would have been different.

The circuit court allowed Wanda to enter Comproni's 1952 Report into evidence, but excluded Comproni's deposition. Wanda asserts that the circuit court abused its discretion in excluding Comproni's deposition. We disagree.

The reasons underpinning the circuit court's ultimate decision to exclude Comproni's testimony largely track the objections of the opposing counsel noted above. Essentially, the circuit court found that while Comproni had generally indicated that he discussed the "hazards" of asbestos with H & V, nothing in his testimony, aside from his own speculation and reliance upon hearsay, indicated that H & V knew anything beyond the general statement that asbestos could be hazardous. Moreover, to the extent that this testimony conveys that H & V knew that asbestos was capable of causing asbestosis, it was irrelevant. No dispute exists in this matter that H & V knew, as of 1952, that long-term occupational exposure to raw asbestos at high levels could cause asbestosis in some individuals. We agree with the circuit court's assessment of this evidence. And, because speculation, conjecture, irrelevant evidence and exceptionless hearsay are generally inadmissible, the circuit court did not abuse its discretion in excluding it. *See, e.g.*, *O'Bryan v. Cave*, 202 S.W.3d 585, 588 (Ky. 2006) (stating

that "speculation and supposition are insufficient to justify a submission of a case to the jury, and . . . the question should be taken from the jury when the evidence is so unsatisfactory as to require a resort to surmise and speculation." (citing *Chesapeake & Ohio Ry. Co. v. Yates*, 239 S.W.2d 953, 955 (Ky. 1951)); *Humana of Kentucky, Inc. v. Seitz*, 796 S.W.2d 1, 3 (Ky. 1990) (holding that "'[b]elief' is not evidence and does not create an issue of material fact."); KRE 802 and 402.

C. Exclusion of Richard MacHenry's deposition testimony.

Wanda argues that the circuit court abused its discretion in excluding from evidence five pages of a 1995 deposition given by Richard MacHenry. By way of background, Richard MacHenry, a chemist and textile engineer for American Viscose, had discussions in 1954 with Dr. H. B. Parmele, Lorillard's director of research, about the possible replacement of asbestos in the micronite filter material with an organic, non-asbestos product. The relevant portion of MacHenry's testimony, which Wanda contends the circuit court erroneously excluded, is as follows:

> Q: Did Dr. Parmele tell you why [Lorillard was] interested in substituting [the asbestos] fibers?
>
> MacHENRY: Yes.
>
> Q: What did he tell you?
>
> MacHENRY: He said that even though the fibers were securely anchored in the micronite filter, there was always a possibility that somebody would claim that they had inhaled some asbestos from smoking Kent cigarettes.

. . .

Q: Mr. MacHenry, why was that significant, did Doctor Parmele tell you why that was significant?

OPPOSING COUNSEL: Objection.

Q: You can answer.

MacHENRY: Just a minute, I would like to add that he said that—he told me there was no evidence that they were released. This was just a possibility. What was the question?

Q: Yes, did Doctor Parmele tell you why he was concerned that asbestos might be released from the filter?

OPPOSING COUNSEL: Objection to form.

MacHENRY: I gather that he was afraid of lawsuits.

Q: What exactly did he tell you? What is your memory of your conversation with Doctor Parmele concerning the substitution of microfibers for asbestos in the Kent cigarette?

MacHENRY: Just that they were anxious to substitute an organic fiber for a mineral fiber, and of course maintain the same efficiency and draw.

. . .

Q: Well, what, if anything, did Doctor Parmele say to you about asbestos, if he said anything, concerning whether or not it was dangerous?

OPPOSING COUNSEL: Object, leading.

MacHENRY: We didn't discuss the danger.

Q: What, if anything, did Doctor Parmele tell you was the motivation for Lorillard to remove asbestos from their micronite filter, why did they want to take it out?

. . .

> MacHENRY: Just that they thought an organic fiber would be safer.

In her brief, Wanda puts forth the following argument as to why the circuit court abused its discretion in excluding the above testimony:

> MacHenry confirmed Lorillard knew the asbestos in its filter was harmful and had valid concerns it could be subject to lawsuits. The trial court excluded his testimony because it believed concern over lawsuits is not the same as knowing its product was hazardous. This ruling makes little sense. There was no reason for Lorillard to fear being sued if it did not know asbestos in its filter posed a health risk.
>
> . . .
>
> MacHenry's testimony was relevant to prove Lorillard knew the asbestos in its filter posed a health threat to both smokers and people who worked in its plant. The jury could certainly infer Parmele's concern about lawsuits and finding asbestos alternatives was because he knew the asbestos in Kent filters was dangerous.

Lorillard, for its part, acknowledges that MacHenry testified that Dr. Parmele stated Lorillard wanted to switch to organic fibers because it would be "safer," and because of the "possibility that somebody would claim that they had inhaled some asbestos from smoking Kent cigarettes" and would therefore file a lawsuit. However, Lorillard also points out that MacHenry testified Dr. Parmele and he never talked about the dangers of asbestos, and that Dr. Parmele had told him that there was no evidence that fibers had ever been released from smoking Original Kent cigarettes. Moreover, Lorillard asserts that being "afraid of

lawsuits" regarding its product was not the equivalent of knowing or believing that its product was harmful; and that in light of the entirety of MacHenry's testimony on this point, Dr. Parmele's statement that "an organic fiber would be safer," as related by MacHenry, was too vague to be probative and was unduly prejudicial.

The circuit court's decision to exclude this evidence largely rested upon the grounds urged by Lorillard. And, it is difficult to say whether the inferences Wanda sought to have the jury draw from this testimony would have been permissible or merely the product of speculation and conjecture. On the one hand, it could perhaps be said to indicate that Dr. Parmele either was not completely truthful when he said that there was no evidence that asbestos fibers were released from smoking through the micronite filters, or that he did not put full faith in the lack of such evidence. On the other hand, however, none of the above testimony demonstrates that 1) any asbestos fibers had ever been released as the result of smoking through the micronite filter; 2) Dr. Parmele or Lorillard clearly knew or had any reason to know anything to the contrary; or 3) what, if anything, Dr. Parmele or Lorillard believed would have happened if any smoker had inhaled asbestos as a result of smoking through the micronite filter. In light of the above and the deference we must accord to a trial court's evidentiary rulings under the abuse of discretion standard, *see Miller v. Eldridge*, 146 S.W.3d 909, 917 (Ky. 2004), we cannot find that the circuit court's decision to exclude this evidence presents any ground for reversible error.

D. Admission of depositions pursuant to the "predecessor in interest" exception of KRE 804(b)(1).

At trial, Lorillard and H & V were allowed to introduce prior deposition testimony of three witnesses as part of their respective cases in chief. The first deponent was M.S. Block, Lorillard's former director of engineering. The second was Dr. Harold Knudson, a former H & V employee who played a key role in the development of the material used to make the micronite filter. The third was Dr. Melvin First, a former Harvard professor who had been a practicing industrial hygienist since the 1950s. Notably, all three witnesses were deceased, and all three had been called upon as witnesses by Lorillard and H & V in prior litigation involving the micronite filter.

The circuit court's basis for admitting this testimony was KRE 804(b)(1), which provides:

> (b) Hearsay exceptions. The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:
>
> > (1) Former testimony. Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.

On appeal, Wanda argues that as a matter of law KRE 804(b)(1) did not supply a basis for admitting Block's, Knudson's, or First's deposition

testimony into evidence. The upshot of her argument is that this exception to the rule against hearsay does not apply because neither she nor a "predecessor in interest" 1) was a party to the proceedings in which these depositions were taken; 2) had notice of those proceedings; and 3) had opportunity to cross-examine these witnesses. Clearly, Wanda and Bill were not parties to any prior proceedings so the resolution of this issue depends on whether they have a "predecessor in interest" within the meaning of the rule.

We are not aware of any Kentucky case that has adequately defined what a "predecessor in interest" is under KRE 804(b)(1), and the parties have not brought any such case to our attention. Lorillard and H & V cite federal case law as authority for admitting this deposition testimony, and the circuit court relied upon federal case law in its decision to allow it. We will do the same. Our evidence rules were modeled closely upon the corresponding federal rules, and so we find it helpful to consider how the federal courts have viewed this matter. *Childers v. Commonwealth*, 332 S.W.3d 64, 69 (Ky. 2010).

Three decisions from the Sixth Circuit Court of Appeals are persuasive in this regard. Incidentally, all three were asbestos cases and all three, inasmuch as FRE[16] 804(b)(1) was concerned, dealt with an asbestos company's attempts to exclude from evidence the deposition testimony of Dr. Kenneth Wallace Smith, the deceased medical director of Johns-Manville Corporation. The

[16] Federal Rules of Evidence.

first of these cases is *Clay v. Johns-Manville Sales Corp.*, 722 F.2d 1289, 1294-95 (6th Cir. 1983), which analyzed much of the legislative history of FRE 804(b)(1):

> To ascertain the meaning of "predecessor in interest," an examination of legislative history is necessary. As originally proposed by the Supreme Court, Rule 804(b)(1) would have admitted prior testimony of an unavailable witness if the party against whom it is offered or a person "with a motive and interest" similar to him had an opportunity to examine that witness. H.R.Rep. No. 650, 93d Cong., 1st Sess. 15 (1973), *reprinted in* 1974 U.S.CODE CONG. & AD.NEWS 7051, 7088. The House of Representatives substituted the current "predecessor in interest" language. The House Committee on the Judiciary offered the following explanation for the alteration:
>
> > The Committee considered that it is generally unfair to impose upon the party against whom the hearsay evidence is being offered responsibility for the manner in which the witness was previously handled by another party. The sole exception to this, in the Committee's view, is when a party's predecessor in interest in a civil action or proceeding had an opportunity and similar motive to examine the witness. The Committee amended the Rule to reflect these policy determinations.
>
> H.R.Rep. No. 650, U.S.CODE CONG. & ADMIN.NEWS 1974, p. 7088, *supra*.
>
> Although the Senate accepted the change proposed by the House, the Senate Committee on the Judiciary made the following observation about the import of the House actions:
>
> > Former testimony.-Rule 804(b)(1) as submitted by the Court allowed prior testimony of an unavailable witness to be admissible if the party against whom it is offered or a person "with motive and interest similar" to his had an opportunity to examine the witness.

> The House amended the rule to apply only to a party's predecessor in interest. Although the committee recognizes considerable merit to the rule submitted by the Supreme Court, a position which has been advocated by many scholars and judges, we have concluded that the difference between the two versions is not great and we accept the House amendment.

S.Rep. No. 1277, 93d Cong., 2d Sess. 28 (1974), *reprinted in* 1974 U.S.CODE CONG. & AD.NEWS 7051, 7074.

We join the Third Circuit in agreeing with the Senate Committee that the difference between the ultimate revision and the Rule, as originally proposed, is "not great." *Lloyd v. American Export Lines, Inc.*, 580 F.2d 1179, 1185 (3d Cir.), *cert. denied*, 439 U.S. 969, 99 S.Ct. 461, 58 L.Ed.2d 428 (1978). Accordingly, we adopt the position taken by the *Lloyd* court which it expressed in the following language:

> While we do not endorse an extravagant interpretation of who or what constitutes a "predecessor in interest," we prefer one that is realistically generous over one that is formalistically grudging. We believe that what has been described as "the practical and expedient view" expresses the congressional intention: "if it appears that in the former suit a party having a like motive to cross-examine about the same matters as the present party would have, was accorded an adequate opportunity for such examination, the testimony may be received against the present party." Under these circumstances, the previous party having like motive to develop the testimony about the same material facts is, in the final analysis, a predecessor in interest to the present party.

Id. at 1187.

As an aside, the court in *Clay* went on to hold that the Smith deposition should have been admitted in that case even though defendant Raybestos had not been present in the litigation in which the deposition was taken. The court stated that "[o]ur examination of the record submitted in this case satisfies us that defendants in [the other litigation] had a similar motive in confronting Dr. Smith's testimony, both in terms of appropriate objections and searching cross-examination, to that which Raybestos has in the current litigation. *Id*. at 1295.

The second of these cases is *Murphy v. Owens-Illinois, Inc.*, 779 F.2d 340 (6th Cir. 1985). *Murphy* recognized the continuing viability of the Court's earlier *Clay* holding with regard to FRE 804(b)(1). *Murphy* also characterized *Clay* as having collapsed the two criteria of FRE 804(b)(1) into one test, *i.e.*, whether the party in the other proceedings had an opportunity and similar motive to develop the testimony by cross-examination. *Id*. at 343. However, the *Murphy* court nevertheless excluded the same deposition of Dr. Smith at issue in *Clay*. This was in part because even if the company that the deposition was offered against in *Murphy* had qualified as a "predecessor in interest" under FRE 804(b)(1) and *Clay*, the admissibility of Dr. Smith's deposition was still subject to the balancing test of FRE 403 to determine whether its relevance was outweighed by its prejudicial effect; and, the Court found that the deposition was unduly prejudicial. *Id*. at 344.

The third of these cases is *Dykes v. Raymark Indus., Inc.*, 801 F.2d 810 (6th Cir. 1986). In addition to reaffirming the prior holdings of *Clay* and *Murphy*, *Dykes* also touched upon several additional aspects of FRE 804(b)(1), including the burden upon the party objecting to the introduction of evidence through that exception. While acknowledging the potential prejudice that can accrue to a party against whom a deposition is introduced which the party never had an opportunity to adequately refute, the Court nevertheless held:

> Under such circumstances, we think it is incumbent upon counsel for the [party] when objecting to the admissibility of such proof to explain as clearly as possible to the judge precisely why the motive and opportunity of the defendants in the first case was not adequate to develop the cross-examination which the instant defendant would have presented to the witness. Thus, we would have been much more impressed with the [party's] objections had they articulated before the trial court in the first instance, and later before us, precisely what lines of questioning they would have pursued.

Id. at 817.

With the above in mind, "one of the objectives of the drafters of the Kentucky Rules of Evidence was to achieve uniformity with federal rules to the extent possible and to depart only for good reasons." *Monroe v. Commonwealth*, 244 S.W.3d 69, 76 (Ky. 2008) (citing *Gerlaugh v. Commonwealth*, 156 S.W.3d 747 (Ky. 2005)). We acknowledge that the *Lloyd* test and its broad interpretation of "predecessor in interest" under FRE 804(b)(1) has not been universally accepted. *See* Lawrence, *The Admissibility of Former Testimony Under Rule*

804(b)(1): Defining A Predecessor In Interest, 42 U.Miami L.Rev. 975 (1988). However, the *Lloyd* interpretation has been adopted by federal and state courts in several circuits, including the Sixth Circuit. *See, e.g., Clay*, *Murphy*, and *Dykes*; *New England Mut. Life Ins. Co. v. Anderson*, 888 F.2d 646, 651 (10th Cir.1989); *Athridge v. Aetna Cas. & Sur. Co.*, 474 F.Supp.2d 102, 115–16 (D.D.C. 2007); *In re Screws Antitrust Litig.*, 526 F.Supp. 1316 (D.C. Mass.1981); *Rich v. Kaiser Gypsum Co*., 103 So.3d 903 (Fla. App. 2012); *White Pine Ranches v. Osguthorpe*, 731 P.2d 1076, 1079 (Utah 1986). Because we see no good reason to depart from the holdings of *Lloyd* and its progeny, we will therefore apply these holdings to our own interpretation of KRE 804(b)(1).

Accordingly, whether Wanda was a party to the proceedings in which these depositions were taken, or had notice of those proceedings, or had an opportunity to cross-examine these witnesses is not dispositive of whether the circuit court abused its discretion in admitting this evidence. The controlling inquiries are 1) whether the parties against whom the depositions were offered in the other litigation had a motive similar to Wanda's motive in confronting the deponent's testimony, both in terms of appropriate objections and searching cross-examination; and, if so, 2) whether the probative value of the deposition testimony is substantially outweighed by the danger of undue prejudice.

1. Deposition testimony of M.S. Block.

M.S. Block was responsible for the design and development of the machinery used to manufacture the Original Kent cigarette as well as the

redesigned Kent cigarette that replaced it. Block's deposition testimony focused upon Lorillard's manufacturing of micronite filters, its sales of various Lorillard brands in the 1950s, and his and other Lorillard employees' histories of smoking Kent cigarettes. The prior proceedings in which he was deposed only involved a claim of exposure to asbestos and resulting mesothelioma through smoking Original Kent cigarettes. In total, the jury heard 24 minutes of Block's direct testimony, and 9 minutes of his cross-examination testimony.

Wanda contends that her motive to confront Block was not the same as the plaintiff who examined Block in his deposition. The difference, she argues, is because the plaintiff in those separate proceedings only claimed exposure to asbestos through smoking Original Kent cigarettes, while she was claiming that Bill had been exposed to asbestos through smoking Original Kent cigarettes *and* through his work at Lorillard's plant.

However, inasmuch as her own claim regarding asbestos exposure through smoking is concerned, Wanda fails to differentiate her motive to cross-examine Block from that of the plaintiff who cross-examined Block in the other proceedings. Moreover, only Block's testimony relating to the issue of exposure to asbestos through smoking was admitted; the circuit court prohibited Lorillard from entering into evidence any part of Block's deposition testimony relating to the working conditions at Lorillard's plant after noting that the plaintiff in those other proceedings had no motive to inquire or develop such testimony.[17]

[17] As noted, any testimony given by Block or Knudson with regard to occupational exposure to asbestos was excluded because the plaintiffs in the other litigation had no motive to confront

Wanda also fails to point out any deficiencies in the prior party's cross-examination of Block or any way that the introduction of Block's testimony could have caused her undue prejudice, beyond noting for the first time in her reply brief that she "did not have any opportunity to cross examine Mr. Block concerning his knowledge about Parmele's long history of seeking alternatives to the asbestos filter in Kent cigarettes." Even assuming Wanda articulated this concern to the circuit court, however, we deem it insufficient to demonstrate that the circuit court's decision to admit this limited amount of Block's deposition constituted reversible error.

2. Deposition testimony of Dr. Harold Knudson.

As noted previously, Dr. Harold Knudson was a former H & V employee who played a key role in the development of the material used to make the micronite filter in Original Kent cigarettes. The accuracy of his first-hand account of the development of the filter and why asbestos was used in its design is undisputed, and it is also undisputed that his first-hand account was only available through his deposition testimony given in the other proceedings. As with Block, the prior proceedings in which he was deposed only involved a claim of exposure to asbestos and resulting mesothelioma through smoking Original Kent cigarettes. As with Block, the circuit court only allowed H & V and Lorillard to admit

---

Block or Knudson about that issue. Curiously, Wanda argues in her reply brief that Block's and Knudson's testimony relating to the issue of exposure to asbestos through smoking Original Kent cigarettes should have been excluded *because* she "also could not cross examine [them] concerning any aspect of [their] knowledge concerning inspections at H & V's facility."

portions of Knudson's testimony relating to exposure through smoking Original Kent cigarettes.

Wanda also raises the same general objections to Knudson's testimony as she did with Block. Wanda likewise fails to point out any deficiencies in the prior party's cross-examination of Knudson or any way that the introduction of Knudson's testimony could have caused her undue prejudice, beyond noting for the first time in her reply brief that she "did not have any opportunity to cross examine [Knudson] concerning his knowledge about Parmele's long history of seeking alternatives to the asbestos filter in Kent cigarettes." Thus, for the same reasons stated with regard to the circuit court's decision to allow Block's deposition testimony, we find no error.

3. Deposition testimony of Dr. Melvin First.

When he was deposed in prior litigation involving Lorillard, Dr. Melvin First testified as an expert about industrial hygiene issues, the development of OSHA standards, and the uses of asbestos throughout the 1950s. He also opined that Kent filters did not release asbestos in the normal use of smoking.

On appeal, Wanda does not contend that the prior plaintiff who confronted First had any motive different from her own to examine him. Wanda only raises two objections to the introduction of First's testimony: 1) she "was not able to fully demonstrate to the jury First's obvious bias"; and 2) she was not able to ask him "any questions about Bill McGuire."

As it relates to her first concern, Wanda does not explain what First's "obvious bias" was aside from being a paid expert for Lorillard in several cases. And, to that extent, we find her concern groundless. During trial, Wanda played portions of First's testimony when he admitted to having a relationship with Lorillard spanning 20 years, testifying on behalf of Lorillard on multiple occasions in the same context, and being paid by Lorillard approximately $100,000 for his services. Wanda's second concern is too vague to be considered a point of error because she does not explain what "questions about Bill McGuire" she would have asked First or that First would have been capable of answering. For these reasons, we find no error in the circuit court's decision to allow First's deposition testimony into evidence.

E. Admission of certain exhibits into evidence.

During trial, Lorillard and H & V successfully moved several documents into evidence consisting of the following: copies of articles from trade journals; copies of articles from consumer publications; and copies of letters, memoranda, and reports Lorillard asserted were from its files. These documents were each over twenty years old, were mainly from the early 1950s, and, generally speaking, discussed trends in the asbestos industry in the 1950s and various uses for asbestos.

Wanda's first argument of error with respect to these documents, as put forth in her brief, is as follows:

> KRE 901(a) provides, "[t]he requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." The Supreme Court has held, "Normally, the laying of a foundation or authentication is necessary for the admission of documentary evidence. Ky. R. Evid. 901 states that the requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims. [*Matthews v. Commonwealth*, 163 S.W.3d 11, 22 (Ky. 2005)]. The trial court relieved Appellees of their duty to lay proper foundation for their exhibits. Without any witnesses to authenticate and explain the documents, including the context or their creation, the Appellees' counsel was given unfettered opportunity to tell the jury what they believed the documents meant. Wanda had no ability to refute their unproven assertions other than her counsel arguing an alternative meaning for the documents, which is far less effective than cross examination of a live witness.

From the place in the record at which Wanda asserts she preserved this argument, however, she clearly did not object to any of this evidence on the grounds of "authentication;" she merely asserted at trial that authenticated evidence may only be admitted if it is also demonstrably *relevant*. Her counsel's objection was, in pertinent part, as follows:

> Well, some of the documents [Dr.] First refers to, uh, but some, a lot of them, they don't. I mean, so, they just throw a, you know, twenty or thirty or fifty documents and say "we want to move these into evidence." And, and my objection, number one, is foundation. Even if it's authentic—*I didn't make the authentication objection*—but they gotta have a witness that I can cross-examine. Number two, it's hearsay. I mean, the very fact that, uh, it's authentic, I need to be able to cross-examine somebody, their corporate rep or somebody else and say

> "this document here, nowhere on this document does it say Lorillard ever got this or received this or relied upon this, or made decisions on this." And if otherwise, if they move it into evidence, then they can stand up and argue, and I don't get to cross-examine anybody, they get to stand up and argue, oh, this is the reason why they did this, when there's no testimony to support that whatsoever, and I, I don't have the opportunity to say, "No, that's not the reason why they did that. They got this at a South Dakota library, twenty, thirty, forty years later."

(Emphasis added.)

Wanda's second argument of error in her brief with respect to the admission of these documents also relies upon the foregoing objection and, while somewhat similar to the authentication argument, is based upon the ground of hearsay:

> The trial court relied upon the "ancient document" hearsay exception in admitting exhibits without a sponsoring witness. Its reliance was misplaced. KRE 803(16) provides statements in a document in existence twenty (20) years or more, the authenticity of which is established, are admissible. However, the trial court allowed Appellees to avoid one crucial prerequisite to the admission of an ancient document—the offering party must still lay a foundation for the document. Documents are authentic if (A) Is [sic] in such condition as to create no suspicion concerning its authenticity; (B) Was in a place where it, if authentic, would likely be; and (C) Has been in existence twenty (20) years or more at the time it is offered. [KRE 901(b)(8).] Appellees failed to lay any foundation that the documents introduced were in a place, where if authentic, they would likely be. They failed to provide any evidence concerning the condition of the originals of these documents. Without this important foundation, these exhibits were not admissible. Moreover, many of the documents admitted by the Appellees contained double hearsay. KRE 805 provides

> "[h]earsay included within hearsay is not excluded under the hearsay rule if each part of the combined statements conforms with an exception to the hearsay rule provided by these rules."

As Wanda correctly indicates, KRE 803(16) provides that "[s]tatements in a document in existence twenty (20) years or more the authenticity of which is established" constitute an exception to the general bar against hearsay evidence. However, each of the documents with which Wanda takes issue is indisputably twenty years old or older; Wanda has never made any argument to the contrary. Moreover, Wanda has never objected to the authenticity of these documents; thus, to the extent that the requirements of KRE 901(b)(8) would have otherwise been at issue, they have been waived because they only apply to a determination of authenticity.

Finally, as relates to Wanda's additional statement that "many of the documents admitted by the Appellees contained double hearsay," Wanda fails to specify to which of these "many documents" she objects, the substance of those statements, or how those statements caused her undue prejudice. In short, Wanda's second argument also fails to present any ground for reversible error.

Wanda's third argument of error with respect to the admission of these documents is in relevant part as follows:

> The trial court's impermissible admission of hearsay documents included articles written in magazines and journals which were later permitted to go to the jury during deliberations. Appellees never established their relevance by having a fact witness or an expert witness explain their significance. Their counsel simply read

them into evidence and then argued their significance during their closing arguments.

To the extent that Wanda is arguing that "articles written in magazines and journals" are a species of hearsay evidence that is never permitted to "go to the jury during deliberations," she is incorrect. In *Rehm v. Ford Motor Co.*, 365 S.W.3d 570, 574 (Ky. App. 2011), a panel of this court determined that similar hearsay evidence was admissible (*i.e.*, newspaper articles that also qualified as excepted hearsay pursuant to the "ancient documents" exception of KRE 803(16)).

To the extent that Wanda is arguing that a fact witness's or expert witness's testimony was a necessary prerequisite to admitting these documents into evidence, she is similarly incorrect. To paraphrase *Baylis v. Lourdes Hosp., Inc.*, 805 S.W.2d 122, 123 (Ky. 1991), it has long been recognized that the admission of hearsay statements results in the deprivation of the fundamental right to confront and cross-examine witnesses. Thus, "[t]o deprive a litigant of a right so fundamental . . . , the statements must possess characteristics or have been made under circumstances which substantially eliminate the possibility of error." *Barnes v. Commonwealth*, 794 S.W.2d 165, 167 (Ky. 1990). Because the articles in question satisfied these requirements (*i.e.*, by qualifying as "ancient documents"), extrinsic testimonial evidence was unnecessary to support them. Moreover, Wanda does not argue that any of these documents were inadmissible on the grounds of relevance.

Finally, Wanda asserts that "[t]he bottom line is Appellees' lawyers fabricated meanings about the documents they submitted without giving Wanda an opportunity to cross examine a single witness about them," and "the Appellees' counsel was given unfettered opportunity to tell the jury what they believed the documents meant." Yet, Wanda does not discuss the substance of any particular document that Lorillard or H & V might have "fabricated meanings about," or in what way Lorillard or H & V might have "fabricated meanings about" any particular document, and this court is not responsible for searching the record for support for her contentions. *See, e.g., Monroe v. Cloar*, 439 S.W.2d 73 (Ky. 1969). Moreover, to the extent that the Appellees' counsel could have done so, Wanda acknowledges that her counsel had the opportunity and took the opportunity to argue an alternative meaning for each of the documents in question. In short, we find no reversible error in this regard.

F. Exclusion of certain advertisements from Lorillard.

Wanda's final argument concerns the circuit court's decision to exclude approximately twenty pages of Kent cigarette advertisements which appeared in various publications in the early 1950s and touted the benefits of the micronite filter. In her own words, Wanda's argument is as follows:

> Appellees moved to preclude any evidence of Lorillard's marketing of Kent cigarettes targeted to the public and the medical profession. They argued admission would "infect the trial with extraneous and inflammatory issues," "provoke strong public sentiment" and "in light of today's pervasive anti-tobacco climate, would invoke

> passions of the jury." The trial court agreed and excluded the evidence, also finding Bill did not rely on the advertising materials.
>
> Yet, during trial, Appellees introduced articles from popular, medical and scientific journals, and even teachers' art magazines, nearly all without a sponsoring witness. This gave the jury a false impression Lorillard was forthcoming about the asbestos content in Kents and that it was unaware of the hazards of asbestos. By excluding the advertising materials, the trial court precluded Wanda from presenting the real story. Lorillard repeatedly advertised the "secret ingredient" in its filters, touting it as offering the "greatest health protection in cigarette history", a claim upon which Bill relied.
>
> Wanda was prejudiced by the exclusion of the advertising evidence, which was probative of Lorillard's state of mind and its intent to conceal the hazards it knew Kents posed.

To be clear, the record does not demonstrate that Bill relied upon any of these various advertisements in deciding to smoke Kent cigarettes, and Wanda never asserted any claim against Lorillard or H & V for fraudulent or negligent misrepresentation. In addition to those reasons, however, the basis of the circuit court's decision for excluding this evidence was that it was unacceptable under KRE 403 because it was misleading or would lead to collateral issues. On December 29, 2011, in granting Lorillard's motion in limine in this respect, the circuit court explained in relevant part:

> The problem is that you're not simply saying, it doesn't simply say "buy Kent cigarettes," and is silent about asbestos. It says "these are the healthiest," "these are better than other types." And the problem is, we're going to have to have the jury decide if that's really false or not

> —not is it false because it doesn't warn about asbestos, but is it false because it makes some kind of qualitative comparison about this filter versus another type of filter. And it's just a path we don't need to go down. You will be able to point out to the jury that [Lorillard] never warned that it contained asbestos. You can do that, and accomplish your goal of pointing out they never warned us that they had asbestos in there. You can point out [Bill] saw the label [on the Kent cigarette package] where it said they had the best filters, but it doesn't say that there was asbestos in the filter. If you have an expert who can say, "That's not an adequate warning, they should've told people about asbestos," you can get in that. But we're not going to get into the advertising campaign because we have to, then we're getting into was it accurate or not.

We review the circuit court's evidentiary rulings under a deferential abuse of discretion standard. *Goodyear,* 11 S.W.3d at 577. Upon review, we agree that to the limited extent these advertising materials were relevant to Wanda's negligence claims, the probative value of this material was substantially outweighed by its potential to confuse the issues presented as explained by the circuit court. Moreover, Wanda does not explain how its omission constituted anything other than harmless error; as noted by the circuit court, nothing prevented Wanda from otherwise pointing out that Lorillard marketed its Kent cigarettes without giving any warnings about asbestos being in the filters.

CONCLUSION

In accordance with the majority view of this case, Wanda has identified no instance of reversible error on any issue. Therefore, we AFFIRM.

VANMETER, JUDGE, FILES A SEPARATE OPINION FOR THE MAJORITY REGARDING ISSUE I(C) AND CONCURS IN ALL OTHER RESPECTS.

LAMBERT, JUDGE, JOINS IN THE SEPARATE OPINION AND CONCURS IN ALL OTHER RESPECTS.

VANMETER, JUDGE: Writing for the majority regarding the issue designated above as "I(C)", we agree with Lorillard that the circuit court's decision merely constituted "harmless error." CR 61.01 provides:

> No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, modifying, or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. **The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.**

(emphasis added).

We acknowledge, as stated in *Osborne v. Keeney*, 399 S.W.3d 1, 13 (Ky. 2012), that "erroneous instructions to the jury are presumed to be prejudicial." This presumption is rebuttable, and "the party asserting the error is harmless bears the burden of affirmatively showing that no prejudice resulted from the error. In order to show no prejudice resulted from the error, it must be proven there was no reasonable possibility the erroneous jury instruction affected the verdict." *Id.*

Under the facts of this case, the jury considered both workplace exposure and smoking exposure and found liability for neither. The circuit court granted a partial summary judgment in favor of Lorillard only with respect to Bill's smoking of Original Kent cigarettes from August 1953 to August 1954. The jury considered the liability to someone who smoked asbestos-laden cigarettes after working in the plant that manufactured those cigarettes. The defendants were the manufacturer of the asbestos and the manufacturer of the cigarettes. Specifically, the jury considered liability against Lorillard for two years of smoking Original Kent cigarettes from August 1954 to 1956 and found no liability. The jury considered liability for workplace exposure against H & V and found no liability. No reasonable possibility exists that the erroneous jury instruction affected the verdict. In other words, it is not reasonable to believe that the jury's consideration of three years of smoking Original Kent cigarettes, from August, 1953 to 1956, as opposed to two years, August, 1954 to 1956, as instructed, would have affected the verdict with respect to Lorillard.

Wanda has put forth no basis of reversible error relating to the jury instructions, the circuit court's evidentiary decisions, or the jury's verdict in favor of Lorillard and H & V. We therefore affirm the Jefferson Circuit Court's judgment.

MOORE, JUDGE, DISSENTS FROM THE SEPARATE OPINION AS NOTED IN THE BODY OF THE OPINION.

BRIEF FOR APPELLANT:

Kenneth L. Sales
Joseph D. Satterly
Paul J. Kelley
Louisville, Kentucky

Linda George
Kathy Farinas
Indianapolis, Indiana

ORAL ARGUMENT FOR APPELLANT:

Joseph D. Satterly
Louisville, Kentucky

BRIEF FOR APPELLEE, LORILLARD TOBACCO COMPANY:

David T. Schaefer
Anne K. Guillory
Louisville, Kentucky

James E. Berger
Kansas City, Missouri

Ricardo G. Cedillo
San Antonio, Texas

ORAL ARGUMENT FOR APPELLEE, LORILLARD TOBACCO COMPANY:

James E. Berger
Kansas City, Missouri

BRIEF FOR APPELLEE, HOLLINGSWORTH AND VOSE COMPANY:

Richard W. Edwards
Louisville, Kentucky

Andrew J. McElaney, Jr.
Timothy D. Johnston
Boston, Massachusetts

ORAL ARGUMENT FOR APPELLEE, HOLLINGSWORTH AND VOSE COMPANY:

Richard W. Edwards
Louisville, Kentucky