STATE OF MICHIGAN

COURT OF APPEALS

ROBERT ABBS and VIVIENNE ABBS, JACK H. BOYER, ANTONIO ALFIERI, DAVID ALMERIGI, ERNEST BAKER, ROBERT BALLARD, JOHN BEASLEY, BERNARD BETKE, JAMES BONDY, LARRY BORTON, CHESTER BOYD, PHYLLIS BRADLEY, SHARON CALKINS, ISABEL CALLENDER, NORMAL CARLSON, ORANCES CARTER, MARVIN CARTWRIGHT, WALTER CASE, HOWEVER CLARD, JR., RICHARD CLISH, REED COBB, ANTONIO COITO, JAY COOK, JIM DALPIAZ, ARLEY DANIEL, JOHN DEBOE, PATRICIA DEMICK, JOSEPHINE ELLIS, WILLIAM FERGUSON, VIRGINIA FIFE, LARRY FOSTER, JOHN FOSTER, GRACE FOSTER, PATRICIA FURBY, DOLLIE GOODWIN, VIRGINIA GRACE, RAYMOND GRADELESS, JOSEPH HARBENSKI WILLIAM HARD, CLAYTON HARDMAN, NED HAWKINS, VIRGINIA HEARN, HERMAN HEIDEN, CARL HENNI, RICHARD HERWICK, HAROLD HESS, RONALD HOLCOMB, CECIL HON, WALTER HOTEN, JEAN HOUDE, ORVILLE HOWE, WILLIAM HOWLE, THOMAS JEAN, THOMAS JENEROU, KEITH KINNEY, GLADYS KIRBY, HELEN KISH, STEVE KISH, STEPHEN KOZAN, HENRY LAMBERT, RUSSELL LANCASTER, HOWARD LAPRAIRIE, EUGENE LASHUAY, DANIEL LATORA, BRUCE LAUER, BERT LEE, CHESTER LITTLE, JOHN LITTLE, THOMAS MACKEY, JOHN MARCHESE, FRANK MARECEK, RICHARD MARSHALL, ROY MCELVANY FLORENCE MCGRATH, WILLIAM MCLAUGHLIN, BERNARD MCWILLIAMS, FRANCIS MCWILLIAMS, WILLIS MCWILLIAMS, DEBRA DEWEY, KENNETH MLECZEK, PAUL MORIN, LEON NORRIS, JAMES NOWLAND, RICHARD NOWLAND, EDWARD OLINZOCK, LOUIS ORAVITZ, FREDERICK PARKNOWITZ, BONNIE

UNPUBLISHED
September 20, 1996

LEE PATE, CONSTANCE PECK, DALE PECK, MANUEL

PELAEZ, MARIAN PENNY, JEFFREY PETHKE, MARY PHALEN, THOMAS PICKOTT, JOAN PLOTKOWSKI, JOHN PLOUGH, THOMAS PURCELL, LOIS RHODES, NORMAN RIECKS, STEPHEN SCHAFER, CLARENCE C. ROBERTS, CLARANCE M. ROBERTS, CYNTHIA APPLETON, DANIEL RUELL, KATHY I. CONTOS-NASH, KENNETH SCHULTZ, AVIS SCHWAB, EDWARD SEMENTKOWSKI, DENNIS R. SMITH, ELAINE SOCHACKI, NORMAN STEPHENS, OTTO STONE, DONNA VANDENBOSCH, DELMAR VISSER, DUANE VIZINA, WAYNE VUGTEVEEN, ROBERT WALLACE, CHARLES WILLIAMS, SHEILA WILLIS, JAMES WILLMAN, GERALD WILSON, CLIFFORD WIMMER, HENRY WITKOWSKI, JAMES WOMAC, JESSEY YATES, CHARLES YOUNG, and ROY YOUNG,

Plaintiffs-Appellants,

v

No. 153907, 157639, 159196-159221, 159255-159280, 159282-159307, 159317-159342, 159354-159375

LC No. 86-626949 NP, et al.

OWENS CORNING FIBERGLAS CORP.,

Defendant-Appellee.

Before: Holbrook, Jr., PJ, White and R. A. Benson,* JJ.

PER CURIAM.

Plaintiffs appeal by right the trial court's entry of judgment of no cause of action in defendant's favor in these consolidated asbestos products liability cases. Plaintiffs also appeal the trial court's denial of their motion for judgment notwithstanding the verdict or new trial. We affirm.

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*Circuit Court Judge sitting on the Court of Appeals by assignment.

I

These 128 consolidated cases were brought by persons, and spouses of deceased persons, alleging they were exposed to asbestos and developed asbestos-related diseases as a result of using defendant's insulation product, Kaylo.[1] From 1953 to 1958, Kaylo was manufactured by Owens-Illinois and distributed by defendant Owens Corning Fiberglas (OCF). From 1958 through 1973, OCF both manufactured and distributed Kaylo. It is undisputed that Kaylo carried no warning of any kind until December, 1966.

Plaintiffs pursued their claims on a theory of negligent failure to warn, alleging that OCF failed to warn, and later inadequately warned, Kaylo users of the product's dangers, although it knew or should have known of the dangers.

Trial was bifurcated over plaintiffs' objection; the first phase to determine liability. Proximate cause and damages were left to the subsequent phase. To establish that OCF had actual or constructive knowledge of Kaylo's latent dangers, plaintiffs called four experts, who focused on the known dangers of asbestos as demonstrated in the literature dating back to the 1920s, and otherwise presented evidence of OCF's knowledge of Kaylo's dangers through OCF records and internal documents, as well as its actions. In defense, OCF focused on the distinction between workers involved in the manufacture of asbestos-containing products and those involved with the end product, the literature indicating that a certain level of exposure was safe and that end users fell within that exposure, Kaylo's individual properties,[2] and the reasonableness of OCF's conduct in light of the available information and the conduct of others in the industry.

It is undisputed that it was not until December 1966 that Kaylo carried any type of warning. At that time, the following 2 1/2" x 3" warning was stamped in black ink with a rubber-stamp on one side of cartons in which Kaylo was distributed:

> This product contains asbestos fibers. If dust is created when this product is handled, avoid breathing the dust. If adequate ventilation control is not possible, wear a respirator approved by the United States Bureau of Mines.

In February 1967, pre-printed cartons bearing the same message, both in content and in size, but with red ink, were used for Kaylo's distribution. In 1970, the message was modified to add the words "caution" and "harmful":

> Caution: Product contains asbestos fiber. Inhalation of dust of excessive quantities over long periods of time may be harmful. Avoid breathing the dust. If adequate ventilation is not possible, wear a respirator approved by the United States Bureau of Mines for pneumoconiosis producing dust.

In 1972, the federal government required that warning labels be placed on all products containing asbestos.[3]

The jury was given a special verdict form with four questions. Because of its answer to question two, the jury answered only the first two questions:

> 1. When did the Defendant Owens Corning Fiberglas know, or should have known that an asbestos related injury or disease may be caused from the application, use or removal of Kaylo?
>
> DATE: 1953
>
> 2. Was the Kaylo product defective and unreasonably dangerous as manufactured and marketed by Owens Corning Fiberglas because of a failure by the Defendant to provide a timely and adequate warning to the people exposed to Kaylo after the date you have found in Question 1?
>
> NO (YES OR NO)
>
> If you answer "no", do not answer any further questions; if you answer "yes", go to question no. 3 and 4.
>
> 3. What date should have a reasonable manufacturer of insulation products containing asbestos, under the same or similar circumstances as Owens-Corning Fiberglas warned as to Kaylo?
>
> DATE:_____
>
> 4. Was there a time when the warnings were adequate?
>
> _____(YES OR NO)
>
> If you answered "yes", state the DATE:_____

Following the jury's verdict, OCF moved for entry of judgment of no cause of action, and plaintiffs moved for entry of judgment, to strike question two of the special verdict form, and to proceed to trial on the remaining issues. The trial court denied plaintiffs' motions and granted OCF's motion. Plaintiffs also moved for a judgment notwithstanding the verdict or a new trial based on the verdict being against the great weight of the evidence. The motion was denied.

II

We consider plaintiffs' first two arguments together, as they overlap. Plaintiffs first argue the trial court erred in entering judgment for OCF after the jury found OCF had actual or constructive knowledge of the latent dangers posed by Kaylo in 1953. Plaintiffs argue the trial court should have found as a matter of law that OCF had a duty to warn of Kaylo's latent dangers and that the trial court erred in failing to treat the jury's finding in question one as dispositive of OCF's liability under the circumstance that Kaylo bore no warning until 1966. Plaintiffs also assert that the court erred in failing

to submit to the jury questions concerning whether adequate warnings were given, that the trial court erroneously applied irrelevant legal principles to justify entry of judgment in OCF's defendant's favor, without the jury having considered and passed on the adequacy of the warnings, and that the jury's answer to question two did not determine liability or properly address this issue (while the unanswered questions three and four did), as the question was compound, contained questions of both law and fact, and was couched in strict liability terms, a cause of action not recognized in Michigan.

Secondly and relatedly, plaintiffs argue the jury's answers to questions one and two of the special verdict form are inconsistent and irreconcilable, and the trial court thus erred in denying plaintiffs' motion for new trial.

We first observe that to the extent plaintiffs' arguments on appeal are directed to the form of the verdict, including the questions asked, the order of the questions, and the instructions as to which questions to answer and when to stop, they are not preserved. Questions one and two of the special verdict form were based on a proposed verdict form submitted by plaintiffs.[4] The court suggested the addition of a third question asking if there was a time when the warnings were adequate, so that if the jury concluded that OCF had the requisite knowledge and that Kaylo was unreasonably dangerous due to a failure to warn, the answer to the additional question would provide the end date for OCF's potential liability. The court's suggested interrogatory became question four. Defense counsel then suggested the addition of another question asking "At what time do you believe that a reasonable manufacturer would have warned with regard to Kaylo?" Plaintiff's counsel asked whether the answer was not implicit in number one; whether "the duty doesn't arise when they know or should have known that their products are dangerous." Defense counsel began to respond that one may know of a risk, but that it does not necessarily follow that there is a duty to warn. The court interrupted, and defense counsel then stated that the court's question provides a useful date on one end, but does not provide a date as to the other end regarding, "when did they feel it was reasonable to warn." The court agreed. Plaintiff's counsel did not respond, and voiced no objection to the proposed verdict form.

On appeal, plaintiffs' argument is addressed to the form of question two, and its conflict with question one. Yet, these were the very questions submitted by plaintiffs. A party cannot create error by plan or negligence and then complain of that error on appeal. *Detroit v Larned Assocs* 199 Mich App 36, 38; 501 NW2d 189 (1993). Further, a timely objection would have provided the opportunity to cure any ambiguities or deficiencies in the verdict form. We reject plaintiffs' argument that we should depart from the rules regarding preservation of issues because the errors asserted "involve 'basic and controlling issues' in this case and have caused a grave and 'manifest injustice'... [and because] review is required to clarify a manufacturer's duty to provide adequate, accurate and effective warnings when it has knowledge of a product's latent dangers." This is not simply a case where a party failed to object; here plaintiffs, in effect, created the situation in which they now claim lies error.

We regard as preserved, however, the arguments that the jury's answer to question one is dispositive of the case and that once the jury made this finding a duty to warn arose as a matter of law, and that the jury's answers to questions one and two were inconsistent. In addressing these arguments, we apply the rule that a jury's verdict should be set aside only when it is so logically and legally inconsistent that it cannot be reconciled, *Clark v Seagrave Fire Inc*, 170 Mich App 147, 153; 427

NW2d 913 (1988), quoting *Granger v Fruehauf Corp,* 429 Mich 1, 9; 412 NW2d 199 (1987), and interpret the jury's answers to the questions in that context.

We conclude that while plaintiffs attempt to characterize the dispute as a broad legal one concerning the nature and scope of a manufacturer's duty to warn, the proper focus is on the actual testimony and arguments at trial, and the questions whether the jury's answer to question one in the context of this case was a determination of liability, whether question two was irrelevant in the context of this trial, and whether the answers to questions one and two are inconsistent, given the way the case was actually tried. We conclude, as did the trial court, that all these questions are properly answered in the negative.

In addressing these questions we first acknowledge that plaintiffs presented a strong case and a jury verdict in their favor would have been amply supported by the evidence. Nevertheless, our inquiry focuses on all the evidence at trial and the arguments of both sides, recognizing the jury's right to assess the evidence. As stated above, OCF's approach at trial was to distinguish between workers involved in the manufacture of asbestos-containing products and those involved with the product as end users. OCF conceded that the harmful nature of asbestos was known for decades, but sought to establish that the literature indicated that exposures up to five million particles per cubic foot (mppcf) were acceptable and that end users were subject to exposures within this range. OCF relied heavily on the timing of the Selikoff study, the preliminary findings of which were published in 1964, with the final report being published in December 1965. The Selikoff study refuted earlier reports that exposures below five mppcf were safe, and demonstrated that end users were at a high rate of risk for lung cancer and mesothelioma.

While plaintiffs stressed that none of the literature concluded that end users were not at risk, and there were indications that they were, OCF stressed that none of the literature, until the Selikoff article, established that exposures below five mppcf were harmful. Plaintiffs pointed to OCF documents indicating that OCF was aware of the problems with Kaylo at an early date. OCF argued that the documents were generated by sales personnel, not scientists, and that corporate decisions were being made on the basis of the scientific literature and actual testing, which supported the view that Kaylo was safe for end users. OCF relied on certain testimony of one of plaintiff's experts, Dr Schepers, who had been involved in testing Kaylo during the relevant time period. Schepers testimony could be seen as supporting OCF's position that a reasonable manufacturer could have believed, until Selikoff's article, that exposures less than five mppcf were safe and that the end user's exposure was within that level.

We conclude that the trial court did not err in rejecting plaintiffs' argument that the jury's answer to question one automatically meant that OCF had a duty to warn in 1953. We agree with the trial court that in the context of this case, and when viewed together with the jury's answer to question two, the answer to question one reflected the jury's acknowledgment that there was some indication when OCF began distributing Kaylo that Kaylo might possibly cause injury to end users, although the jury concluded that in light of <u>all</u> the available information, the lack of warnings until 1966 did not render Kaylo unreasonably dangerous. While we agree with plaintiffs that the application of the principle enunciated in *Comstock v General Motors Corp,* 358 Mich 163; 99 NW2d 627 (1959) does not support a conclusion that OCF owed plaintiffs no duty to warn, we conclude that the trial court merely

cited *Comstock* in support of its reasoning, with which we otherwise agree, and did not decide the case on the basis of *Comstock*.

We also reject plaintiffs' arguments that the court erred in failing to permit the jury to rule on the adequacy of the warnings, and that the jury did not consider the adequacy of the warnings. We conclude that the jury's answer to question two was an answer that the lack of warnings before 1966, and the actual warnings after that date, were reasonable under the circumstances. That question three also pertained to the subject does not change our analysis. Had the jury concluded that the warnings were inadequate, question three would have provided a starting point for OCF's liability, i.e., question three would have pinned down when the jury believed that a reasonable manufacturer should have commenced providing warnings under all the circumstances.

As to the form of question two, which plaintiffs characterize on appeal as a strict liability question irrelevant to the negligence inquiry before the jury, we observe that while the question may be read in a vacuum as being compound and containing questions of law and fact, and may, in fact, have been derived from the verdict form in a case involving a strict liability issue, the question was not so understood at trial, and when viewed in the context of this case, there is no reason to conclude that the jury would have interpreted it as anything other than a question directed to the reasonableness of the warnings or lack thereof.

Next, for reasons discussed above, the answers to questions one and two should not be set aside as inconsistent.

III

We next address plaintiffs' argument that the trial court erred in denying their motion for judgment notwithstanding the verdict, and for a new trial based on the great weight of the evidence. We conclude that the court did not err in denying the former request, and did not abuse its discretion in denying the latter.

As discussed above, there was sufficient evidence from which the jury could conclude that Kaylo was not unreasonably dangerous due to a failure to warn. Similarly, the court did not abuse its discretion in concluding that the verdict was not against the great weight of evidence. While plaintiffs made a strong case, OCF's defense was not without force and the jury could have concluded that plaintiffs' case was based on hindsight, while OCF acted reasonably given the circumstances and the quality of information available at the time. As the trial court observed: "However convincing [plaintiffs'] evidence may be, viewing the evidence as a whole tends to lessen the conclusiveness of the evidence focused on by the plaintiffs."

In denying plaintiffs' motion for new trial, the trial court indicated it was aware of the appropriate standard and its discretion in the matter. Further, the court demonstrated that it had reviewed all the testimony and had considered the weight, rather than the sufficiency, of the evidence, and had concluded that the jury's conclusion was not against the great weight of the evidence. We find no grounds for reversal.

Affirmed.

/s/ Donald E. Holbrook, Jr.
/s/ Helene N. White
/s/ Robert A. Benson

[1] Kaylo was a calcium silicate which contained fifteen percent asbestos.

[2] Defendant presented evidence that Kaylo was less dusty than other asbestos containing products and that Kaylo's asbestos fibers were less than twenty microns in length and it was thought that normal body mechanisms would protect the lungs from particles that size.

[3] The required federal warning was described as: "Contains asbestos fibers. Avoid breathing dust. Breathing dust may cause serious bodily harm."

[4] Plaintiffs proposed that the special interrogatories to the jury be:

1. Find from a preponderance of the evidence the date, OWENS-CORNING FIBERGLAS CORPORATION knew or should have known that people exposed to asbestos may be at risk of contracting an asbestos related injury or disease from the application, use or removal of OWENS-CORNING FIBERGLAS CORPORATION'S asbestos containing products.
2. Find from a preponderance of the evidence whether the products of OWENS-CORNING FIBERGLAS CORPORATION were defective as marketed and unreasonably dangerous because of the manufacturer's failure to provide a timely and adequate warning to the people exposed to their asbestos containing insulation products after the date you have found in Question No. 1.