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IN THE SUPREME COURT OF FLORIDA

WILLIAM P. AUBIN

Petitioner,

Case No. SC12-2075

v.

L.T. No. 3D10-1982

UNION CARBIDE CORPORATION,

Respondent.
_____/

RESPONDENT UNION CARBIDE CORPORATION'S ANSWER BRIEF

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STATEMENT OF THE CASE AND FACTS

In the decision below, the Third District, applying §§ 2 and 5 of the Third Restatement of Torts: Products Liability (1997), held that (1) Union Carbide Corporation ("UCC") should have received a directed verdict on Plaintiff William Aubin's design defect claim and (2) a new trial is required based on the trial court's misleading jury instruction on Plaintiff's warning claims. Plaintiff challenges both rulings, arguing that under the Second Restatement of Torts (1965), which he says should have applied, the jury's verdict must be reinstated. UCC will show that the Third District's reversal of the verdict was correct under both Restatements, and that Plaintiff's request that the Court choose between the respective Restatements improperly seeks an advisory opinion, but that if the Court chooses to address the issue, it should adopt §§ 2 and 5 of the Third Restatement.

Statement of the Case

After being diagnosed with peritoneal mesothelioma, Plaintiff filed suit against numerous defendants (R 20-39) alleging that his disease was caused by asbestos in various products. *Id.* The case proceeded to trial against UCC alone. Plaintiff contended that, as a construction supervisor between October 1972 and September 1974, he inhaled asbestos from third parties' drywall joint compounds and texture sprays that contained asbestos originally supplied by UCC. He asserted manufacturing, design, and warning defect theories. R 20-39.

UCC sought directed verdicts on Plaintiff's claims. T 1561-62, 1766-96, 1813-17. The trial court denied those motions. T 1795, 1816-17.

At the charge conference, Plaintiff proffered for the first time a special instruction stating that UCC had "a duty to warn end users of an unreasonable danger in the contemplated use of its products." T 1837-43, 1889-90. Of course, UCC had no way to provide warnings directly to users of third-party manufacturers' products and acknowledged in opening statements that it never warned Plaintiff himself. T 97. UCC's counsel objected and argued that the instruction was thus "game, set, match" in Plaintiff's favor. T 1838.

That turned out to be true. The trial court gave Plaintiff's special instruction, and Plaintiff used it in closing arguments to discredit UCC for not acknowledging that Florida law supposedly required UCC to warn him directly. T 1889-90, 1910-13, 2003-04. The jury found in Plaintiff's favor, assessing $14 million in noneconomic and $191,000 in economic damages. R 1781-84.

On appeal, Plaintiff did not defend his manufacturing defect claim. The Third District held that UCC was entitled to a directed verdict on his design defect claim because, while UCC's processing of asbestos constituted a "design," no evidence showed that such "design," as opposed to asbestos's natural qualities, caused Plaintiff's mesothelioma. The Third District also ordered a new trial based on the misleading duty to warn instruction, which amounted to a directed verdict in

Plaintiff's favor.

Statement of the Facts

Plaintiff claims that from October 1972 to September 1974, while working at a construction site doing inspections, he was exposed to joint compounds and texture sprays designed, manufactured, and sold by Georgia-Pacific, Kaiser Gypsum, U.S. Gypsum, and Premix Marbletite that contained asbestos originally supplied by UCC. T 132-33, 927-28, 933-40, 949-56, 961-62, 1037-38. He claimed that he never wore any kind of protective device and that he did not recall seeing warnings on the products. T 949, 958, 970. He also admitted that had he seen the warning UCC placed on its bags of asbestos after July 1, 1972, he "more than certainly" would have taken precautions to protect himself. T 1003-08, 1264-65.

UCC's Asbestos, Then-Existing Threshold Limits, and Warnings

UCC began mining unique short fiber asbestos in 1963. T 72, 359, 615-16, 619. UCC processed the asbestos, packaged it in bags, and sold it in bulk to manufacturers under the trade name Calidria. T 369-70, 619, 1265. UCC sold its SG-210 asbestos for use in many products, including joint compounds, ceiling sprays, ceiling tiles, mastics, and sealants. P. Exs. 37 (at 30), 51, 52.

UCC issued toxicology reports to customers, government agencies, and others describing what was then known about the dangers of inhaling asbestos. T 356-58, 373-74, 635, 1245-46. For instance, UCC's 1964 "Asbestos Toxicology

Report" acknowledged that workers exposed to high concentrations of asbestos dust "were prone to develop… asbestosis," and that there were reports of "an increase in the incidence of cancerous tumors, especially of the lung, associated with asbestosis." T 632, P. Exs. 5 (at 3), 70, 98. It also stated that "[c]ontrol of asbestos dust exposure is therefore necessary" and recommended practices to reduce dust and monitor for harmful health effects. P. Ex. 5, at 3-4.

In June 1968, UCC placed a warning on its bags of asbestos. T 352, 1220. UCC was the first asbestos supplier to do so. T 1311-12, 1366-67.

As knowledge evolved, UCC continued to update its toxicology reports. The 1969 version, issued years before Plaintiff allegedly was exposed to UCC asbestos, discussed "[a] type of cancer named mesothelioma [that] has been noted to be associated with asbestos exposure in recent years." P. Ex. 68, at 1. The 1969 report also recognized the then-generally accepted view that "a worker will not develop asbestosis if he is exposed to no more than 5 million particles per cubic foot of air, even if this exposure continues for his entire working lifetime." *Id.* The report observed, however, that there were proposals to lower that figure to 2 million particles per cubic foot, and that the Department of Labor had adopted that lower standard for certain public contracts. *Id.* The report also noted that mesothelioma "may occur in individuals with histories of only slight exposures" (*id.*) and recommended the use of respirators where staying within the limits was

"impractical or impossible." *Id.* at 2.

UCC's 1970 asbestos toxicology report explained that while asbestos can be hazardous, it can be used safely as long as reasonable care is exercised. P. Ex. 69, at 2. The report further stated that explicit government specifications controlled what dust exposure levels constituted "safe handling." *Id.*

On June 7, 1972, the Occupational Safety and Health Administration (OSHA) published requirements prescribing that asbestos and certain asbestos-containing products carry the following warning:

CAUTION
Contains Asbestos Fibers
Avoid Creating Dust
Breathing Asbestos Dust May Cause
Serious Bodily Harm

T 244; Def. Ex. A. As of July 1, 1972, UCC placed this new OSHA-prescribed warning on all of its bags of asbestos. T 1264-65, 1311-12, 1368.

In addition, UCC continued to provide customers with then-current health and safety information on asbestos hazards. T 623-24, 1316, 1368-69. UCC maintained a library, including regulations and reports regarding the hazards and safe use of asbestos, that it made available to customers. T 1253; Def. Ex. D, at 1-2; P. Exs. 76, 92 (at 2). UCC encouraged its customers to comply with regulations limiting exposure amounts. *E.g.*, P. Ex. 37.

The 1972 Material Safety and Data Sheet (MSDS) for UCC's asbestos

reflected the 1972 OSHA threshold limits for occupational exposure. P. Ex. 29. The OSHA limits indicated that no mask needed to be worn where the 8-hour time-weighted average occupational exposure did not exceed 5 fibers that were greater than 5 microns in length per milliliter of air. *Id.* at 1-2. Nearly all of UCC's asbestos was less than 5 microns in length. T 561-62.

The 1972 UCC asbestos toxicology report attached numerous articles on asbestos health concerns (P. Ex. 77, at 2-3), including the National Academy of Sciences report entitled "Airborne Asbestos," which specifically warned that inhaling asbestos fibers "can cause disabling fibrosis of the lungs" and that "[e]vidence of a causal association between some but not all exposures to asbestos fibers and diffuse malignant mesotheliomas of the pleura and peritoneum is substantial." P. Ex. 77, at 9.

In 1976 (after Plaintiff's alleged exposure), OSHA lowered the limits for long-term occupational exposure to an 8-hour time-weighted average exposure of no more than 2 fibers, greater than 5 microns in length, per milliliter of air. P. Ex. 59. The 1976 MSDS for UCC's asbestos reflected this change. P. Ex. 32.

The Finished Products & Their Warnings

UCC's customers used asbestos in their products *long before* they began using UCC as a supplier. T 778, 1255. UCC had no involvement in the formulation, packaging, or sale of those products (T 1178, 1283-84), and Plaintiff

does not contend otherwise. Every joint compound manufacturer had its own formulas. T 1269. Finished product manufacturers were well aware of the hazards of asbestos. T 1563-64, 1602, 1619-22.

Once OSHA prescribed warnings for certain products, companies began focusing on whether their particular products would release respirable fibers in excess of the then-established threshold limits. P. Ex. 46. Importantly, the OSHA regulations expressly provided that "***no label is required*** where asbestos fibers have been modified by a bonding agent, coating, binder, or other material so that during any reasonably foreseeable use, handling, storage, disposal, processing, or transportation, no airborne concentrations of asbestos fibers in excess of the exposure limits prescribed . . . will be released." Def. Ex. MM, at 4. Thus, for example, U.S. Gypsum researched the amount of asbestos liberated when its products were sanded, determined that the levels were within the prescribed exposure limits, and decided that, as of August 1972, it would not include warnings on its products. Def. Ex. O.

As finished product manufacturers examined their products with respect to then-current knowledge and regulations, they decided what warnings were appropriate for those particular products. *E.g.*, T 1568-70; Def. Ex. O. UCC did not have the power to determine what warnings its customers used. T 1316, 1337. As knowledge evolved, and as the OSHA regulations took effect, warnings were used.

For instance, in May 1973, Georgia-Pacific placed warnings on its products. T 1611-12; Def. Exs. OO, PP, QQ, RR. Kaiser Gypsum also did so. Def. Exs. Z, AA. At trial, former UCC employee Jack Walsh testified, without specifying customers, products, or time periods, that UCC was aware that its customers were not providing warnings on their joint compounds. T 1317.

In January 1978, federal law banned the use of asbestos in joint compounds and certain other products. P. Ex. 11; T 234. However, asbestos is still legally sold and used in roofing and numerous other materials. T 1679.

The Charge Conference

UCC requested instructions on the component parts doctrine based on the Third Restatement and, alternatively, on the duty to warn and bulk supplier doctrine under the Second Restatement. T 1838-42; 3DCA Supp. R. 30-33. Plaintiff surprised UCC at the charge conference by handing up a proposed special instruction. T 1836-37. It stated:

> An asbestos manufacturer such as Union Carbide has a duty to warn end users of an unreasonable danger in the contemplated use of its products.

T 1889-90. UCC objected that this inaccurately stated the law and would be "game, set, match" in Plaintiff's favor. T 1838. UCC urged that its proposed instructions be given instead or that the court at least supplement Plaintiff's instruction with portions of UCC's instructions. T 1837-42. The trial court gave

Plaintiff's newly proposed instruction and rejected UCC's requests. T 1843-50.

UCC also requested a verdict that would have separately asked the jury about Plaintiff's manufacturing, design, and warning defect theories. T 1861-62; Ct. Ex. 8. Plaintiff objected, and the court denied that request as well. T 1863.

Closing Arguments, Verdict & Judgment

During closing arguments, Plaintiff relied heavily on his surprise instruction that UCC had a duty to warn him. He mocked UCC (and its out of state counsel) for attempting to rely on the warnings it gave to its customers:

> [UCC counsel] talked about this in his opening, that, well, we warned Georgia-Pacific. We didn't have a duty to warn Mr. Aubin. We didn't have a duty to warn people that downstream were going to be using our product. That's not the law in Florida. Maybe that's the law somewhere else, but it's not here. Here it says, an asbestos manufacturer such as Union Carbide Corporation has a duty to warn the end users. Has a duty to warn Mr. Aubin.

T 1909-10. He repeatedly referenced that instruction. T 1912-13, 2003-04.

The jury found in Plaintiff's favor, awarding $14 million in noneconomic and $191,000 in economic damages. R 1781-84. Based on the jury's allocation of fault, and verification that Plaintiff had received $3.1 million in settlements, the trial court entered an amended judgment against UCC for $6,624,150. R 1980.

The Third District Appeal

On appeal, UCC argued it should have received a directed verdict on Plaintiff's manufacturing and design defect claims and that a new trial was

required based on the misleading duty to warn instruction. Plaintiff did not attempt to defend his manufacturing defect claim. The Third District held that UCC was entitled to a directed verdict on design defect under the Second ***and*** Third Restatements because Plaintiff failed to show that any defect in the design of SG-210 caused his harm. The Third District also ordered a new trial, holding that Plaintiff's special duty to warn instruction was erroneous under ***both*** Restatements. *Union Carbide Corp. v. Aubin*, 97 So. 3d 886 (Fla. 3d DCA 2012).

Plaintiff petitioned for review in this Court. He principally argued that the Third District's application of the Third Restatement conflicts with decisions relying on the Second Restatement. This Court granted review.

SUMMARY OF ARGUMENT

Plaintiff and his amici frame this case as a choice between, on the one hand, § 402A of the Second Restatement, which they characterize as "intended to have manufacturers bear the cost of injuries resulting from defects in their products," and, on the other, §§ 2 and 5 of the Third Restatement, which they say seek to "shift more of the product-related accident costs to accident victims" and "absolv[e] manufacturers and suppliers of liability for unreasonably dangerous products." Ini. Br., at 30-31. Plaintiffs also argue that §§ 2 and 5 "represent a radical departure from Florida law and have been rejected by the vast majority of State Supreme Courts to have considered whether to adopt them." *Id.* at 31.

Plaintiff's focus on the supposed differences between the two Restatements is an exercise in misdirection. As he *conceded* in the proceedings below and again in his Initial Brief here, the Third District's decision did not hinge on supposed differences between the Restatements. All the sound and fury about whether the risk/utility test or the consumer expectations test should be applied to a design defect claim, and whether the duty to warn instruction should have been analyzed under §§ 2 and 5 of the Third Restatement or § 388 of the Second Restatement, are simply beside the point.

Rather, this proceeding raises two straightforward issues, neither of which has anything to do with which Restatement applies. The first is whether, assuming that a reasonable jury could have found that UCC's processing of SG-210 constituted a defective design, there was any evidence showing that such processing increased Plaintiff's risk of contracting mesothelioma. As shown in Point I below, the Third District correctly held that Plaintiff presented no such evidence in this case.

The second issue is whether the trial court committed reversible error with respect to Plaintiff's failure to warn claim. As shown in Point II below, the Third District correctly held that (1) under both Restatements, whether a raw material supplier has discharged its duty to an end user of a finished product incorporating the raw material is a factual issue that turns on the reasonableness of the supplier's

conduct under all of the facts and circumstances, and (2) the trial court misled the jury by simply instructing that UCC had a duty to warn Plaintiff without explaining how UCC could discharge that duty without directly warning him.

Putting aside Plaintiff's diversionary discussion concerning the merits of the two Restatements, Plaintiff's argument that the Third District's decision should be reversed relies on two extreme positions that are themselves contrary to well-settled principles of products liability law. First, Plaintiff contends that the decision to remove a mineral with hazardous characteristics from the ground and sell it for a particular purpose is a "design," that the fact that the mineral is inherently hazardous constitutes a "defect," and that the requirement that the defect cause the harm is met if "but for" the decision to mine and sell the mineral, the Plaintiff would not have been injured. Second, Plaintiff argues that because a supplier of an inherently dangerous raw material can never rely on intermediary manufacturers to warn end users about the hazards of finished products containing those materials, it is not error for a court to give an instruction from which a jury could conclude that the supplier had a duty to warn end users directly. Although asbestos is the most litigated product in the history of American law, UCC has found no decision by the highest court of any state that has recognized either of these extraordinary propositions.

In the end, Plaintiff's arguments about the relative merits of the two

Restatements constitute a request for an advisory opinion on issues this Court need not resolve. In Point III below, UCC addresses these matters and shows that §§ 2 and 5 of the Third Restatement are consistent with Florida law as it has evolved since publication of the Second Restatement and with the overwhelming weight of national authority. If the Court addresses such matters, it should adopt §§ 2 and 5.

ARGUMENT

Standard of Review

Plaintiff's points raise questions of law. The Court reviews them *de novo*. *McKenzie Check Advance of Fla., LLC v. Betts*, 112 So. 3d 1176, 1180 (Fla. 2013).

I. THE THIRD DISTRICT CORRECTLY DETERMINED THAT THERE WAS NO EVIDENCE THAT THE "DESIGN" OF SG-210 CAUSED PLAINTIFF'S INJURY UNDER EITHER RESTATEMENT.

A. The Third District Correctly Held, and Plaintiff Agreed Below, That the Standard for Proving Causation Is the Same Under Both Restatements.

UCC argued below that the asbestos it sold as SG-210 was not "designed," but rather, was a naturally occurring mineral. The Third District disagreed, holding that because the raw asbestos that UCC mined was subject to proprietary processing, a jury could have found that SG-210 was a defectively designed product. The court concluded, however, that UCC was entitled to a directed verdict on the design defect claim because there was no evidence that this design—*i.e.*, the processing—made UCC's asbestos more likely to cause Plaintiff's mesothelioma

than would unprocessed asbestos. 97 So. 3d at 897-98; *accord Riggs v. Asbestos Corp. Ltd.*, 304 P. 3d 61, 69 n.11 (Utah Ct. App. 2013) (rejecting plaintiff's claim that UCC's processing could support a design defect claim because plaintiff had "not asserted that this process was conducted defectively or that it somehow made raw asbestos 'unreasonably dangerous' beyond its inherent qualities").

The Third District explained that its holding was "not based on any discrepancy between" the two Restatements because the causation requirement "is identical under the Second Restatement and the Third Restatement." *Id*. at 903 (citing *Liggett Group, Inc. v. Davis*, 973 So. 2d 467, 475 (Fla. 4th DCA 2007)). The Third District's analysis was correct.

Plaintiff argues that the Third District's opinion should be reversed because it improperly applied the Third Restatement when Florida law requires application of the Second Restatement. Ini. Br., at 23-32. He contends that the Third Restatement improperly shifts the costs of unsafe products to consumers and that the Second Restatement is the proper legal framework to analyze design defect claims because it supposedly captures Florida's policy of providing relief to those injured by defective products. *Id.* at 28-32.

Plaintiff's contention that this case hinges on whether the Second or Third Restatement applies is belied by his oft-repeated position in the proceedings below that "[w]hether this Court applies the Second or Third Restatement, the result is the

same." Pl. 3DCA Ans. Br. at 37; *see also id.* at 24, 27, 31. Plaintiff's Initial Brief here effectively concedes the same point, arguing that the Third District correctly concluded that there was evidence from which a jury could find that SG-210 was defectively designed under *both* Restatements. Ini. Br., at 37.

B. In An Attempt To Circumvent The Third District's Causation Holding, Plaintiff Has Abandoned The Design Defect Theory He Argued Below.

Plaintiff argues that the Third District "failed to understand what the intended design [of SG-210] was." Ini. Br., at 35. This argument is puzzling because the Third District accepted the definition of SG-210's design that Plaintiff himself had advanced.

In the proceedings below, Plaintiff conceded that "the Court correctly stated that a product's defective design, rather than its basic, raw, and naturally occurring characteristics, must be shown to cause a plaintiff's harm to establish liability." Pl. 3DCA Mot. for Rehearing, at 8. But he argued that the relevant product was SG-210, not raw asbestos, and that SG-210 was a "designed" product because UCC's marketing materials stated that its processing yielded asbestos with an "unusually high fiber content" and "touted the Calidria product as being designed to go 'twice as far' as other 'commercial grade Asbestos.'" Pl. 3DCA Ans. Br., at 41. Plaintiff also argued that "the evidence established that Carbide's design of SG-210 to present Calidria in a more pure form for use in joint compounds and texture sprays

was more dangerous to Mr. Aubin than Calidria in its raw form and caused Mr. Aubin's mesothelioma." *Id*. at 10. The Third District accepted Plaintiff's description of SG-210's "design," and agreed that his evidence "was sufficient to reach the trier of fact for a determination as to whether SG-210 Calidria was 'designed' within the meaning of section 2." 97 So. 3d at 896 (citing *McConnell v. Union Carbide Corp.*, 937 So. 2d 148, 152 (Fla. 4th DCA 2006)).

In an effort to avoid the problem that processing asbestos did not make it more likely that Plaintiff would contract mesothelioma, he now changes course and argues for a broad new definition of design. He now argues the "intended design" of SG-210 is taking asbestos out of the ground—where it is safe—and processing it for use in products that emit respirable fibers. He then contends that "Mr. Aubin breathed Caldiria fibers as a result of the defective design of SG-210," and that "but for Carbide's design of SG-210, Mr. Aubin never would have been exposed, and, therefore, never would have contracted mesothelioma." Ini. Br., at 39.

To the extent that Plaintiff's argument is that the processing of SG-210 made it more likely that the products in which it was incorporated would emit respirable fibers, the argument fails because there is no evidence that UCC's proprietary processing made joint compounds and sprays any more likely to emit respirable fibers than they would have been if they had incorporated *unprocessed* asbestos. But Plaintiff appears to be arguing a much more expansive theory that (1) the

intent to sell an inherently dangerous raw material for use in particular products constitutes the raw material's "design" and (2) causation can be shown by evidence that the raw material is more dangerous in the stream of commerce than it would be if left undisturbed in the ground and, "but for" the raw material's sale, Plaintiff would not have been harmed.

Under Plaintiff's new theory,[1] raw materials have as many different "designs" as they have uses, and they will *always* be deemed "designed" products, even if they are sold in their pure natural state, so long as they are sold for an "intended use." Ini. Br., at 38. This expansive theory constitutes a radical departure from bedrock principles of products liability law.

C. Plaintiff's Design Defect Theory Contravenes Well-Settled Principles of Florida Products Liability Law and Products Liability Law Nationwide.

The sale of chemicals and other raw materials that have inherently dangerous qualities has been a necessary and commonplace business practice in America since the advent of the industrial revolution. Persons harmed by such products have sought recovery for their injuries in countless judicial proceedings on a variety of legal theories. But no state supreme court decision of which we are

[1] As a matter of basic appellate practice, this new argument is not preserved. Plaintiff did not assert it below. The parties did not litigate it, and the Third District did not consider it. Accordingly, this Court should not consider it for the first time. *See, e.g.*, *Sunset Harbour Condo. Ass'n v. Robbins*, 914 So. 2d 925, 928 (Fla. 2005) (specific argument must be preserved in lower court).

aware has ever held that the intent to sell an inherently dangerous raw material, either for use in unmediated form or for incorporation in the products of others, constitutes a "design."

The only cases of which UCC is aware that have concluded that mining and marketing a raw material constitutes a design are *Arena v. Owens-Corning Fiberglass Corp.*, 63 Cal. App. 4th 1178 (Cal. Ct. App. 1998), and the handful of California intermediate appellate court cases that followed it. *Arena* is an asbestos case, and in the fifteen years since it was decided, not a single court from any other jurisdiction in the country has followed it. Indeed, UCC has searched more than a thousand decisions that have been published since the inception of asbestos litigation more than three decades ago and has been unable to find a single additional case that has ever held that mining and selling asbestos for a particular purpose constitutes a "design." No doubt mindful that *Arena* is an outlier, and distinguishable,[2] Plaintiff does not cite or rely on it in his brief before this Court.

The only case that Plaintiff cites in his discussion of the Third District's

[2] *Arena* and the other California cases are plainly distinguishable because in those cases the seller of raw asbestos had not provided any warnings to its customers. Indeed, in *Garza v. Asbestos Corp. Ltd.*, 161 Cal. App. 4th 651, 661-62 (2008), a case applying *Arena*, the court noted that the seller of a raw material for incorporation in other products would not be liable if it provided adequate warning to its customer because "its responsibility must be absolved at such time as it provides adequate warnings to the distributor who subsequently packages, labels and markets the product." Here, by contrast, there was abundant evidence that UCC provided warnings to its customers.

supposed "incorrect interpretation" of what constitutes SG-210's design is *McConnell*. It is true that the Third District followed *McConnell*'s reasoning in concluding that UCC's *processing* of its raw asbestos could make SG-210 a designed product. But this does not support the propositions that the Third District "failed to understand what the intended design [of SG-210] was" (Ini. Br., at 35), that the intent to sell SG-210 for use in joint compounds and sprays is its design, or that the design is defective if asbestos is more dangerous in the stream of commerce than in the ground. For those extraordinary propositions, Plaintiff cites neither *McConnell* nor any other authority.

To be sure, *McConnell* stated that "the intended use [of Calidria Asbestos]… contemplates the liberation of asbestos in the air where it can be inhaled." 937 So. 2d at 150. But *McConnell* concluded that this fact "was ample evidence to go to the jury on the claim of a defective product without warnings." *Id.* UCC agrees that knowledge of the intended use of a raw material is relevant to the seller's duty to warn. *See, e.g.*, *Tampa Drug Co. v. Wait*, 103 So. 2d 603, 608 (1958) (where the seller was "thoroughly familiar with the uses to which the commodity might be put," it "was charged with the burden of forewarning potential users of the inherently dangerous nature of the commodity"). But no Florida court, and no state supreme court, has ever held that such knowledge constitutes a product's *design*.

There is no authority for Plaintiff's new design defect theory because it

contravenes several fundamental principles of products liability law. The first problem with Plaintiff's theory is that basic raw materials found in nature are not designed products, and thus their design cannot be the cause of a plaintiff's injury. This is, in the first instance, a matter of common sense. By definition, no one "designs" basic raw materials found in nature. Courts and commentators have agreed. *See* Rest. 3d Torts § 5, cmt. c; *Riggs*, 304 P. 3d at 69 (holding that UCC's asbestos "could not be defectively designed or manufactured because it is a raw unadulterated material") (*citing* Rest. 3d Torts § 5, cmt. c, and *Cimino v. Raymark Indus. Inc.*, 151 F.3d 297, 331 (5th Cir. 1998)). Indeed, Plaintiff acknowledged as much in the proceedings below, conceding that "a product's defective design, rather than its basic, raw, and naturally occurring characteristics, must be shown to cause a plaintiff's harm to establish liability." Pl. 3DCA Mot. for Rehearing, at 8. If Plaintiff was harmed, as he now argues, because UCC mined and sold asbestos for use in sprays and joint compounds, he was harmed by its "basic, raw and naturally occurring characteristics," not by a product defect in its "design."

A second problem with Plaintiff's new theory is that it is well settled in Florida and elsewhere that products, including raw materials, are not defective merely because they are inherently dangerous. Rest. 3d Torts § 2, cmt. a ("products are not generically defective because they are dangerous"); Rest. 2d Torts § 402A, cmt. j ("product bearing . . . a warning which is safe for use if it is followed, is not

in [a] defective condition, nor is it unreasonably dangerous"); Owen, The Puzzle of Comment J, 55 Hastings L.J. 1377, 1395 (2004) (comment j was specifically intended to apply to products for which warnings are "the only practical way to reduce a risk, particularly in the case of pharmaceutical drugs and *other chemical and inherently toxic products*") (emphasis added); *Radiation Tech. Inc. v. Ware Constr. Co.*, 445 So. 2d 329, 331 (Fla. 1983) ("Thus, an unsafe product, whether it be characterized as inherently dangerous or unavoidably dangerous, would not necessarily be an unreasonably dangerous product."); *Tampa Drug*, 103 So. 2d at 608 (as to a dangerous "commodity burdened with a latent danger which derives from the very nature of the article itself . . . the liability of the manufacturer or distributor is predicated on a failure to give adequate warning of the inherent danger"); *Cassisi v. Maytag Co.*, 396 So. 2d 1140, 1144 n.4 (Fla. 1st DCA 1981) (when proper warnings are attached to inherently dangerous products, they are not defective under the Second Restatement).

To be sure, these principles do not mean that sellers of intrinsically dangerous products are immune from liability. They do mean, however, that the liability of a seller of inherently dangerous raw materials that are not processed or reconfigured by the seller is governed, not by whether the raw material is defectively *designed*, but by whether the seller has provided adequate *warnings*. *See, e.g.*, *Riggs*, 304 P.3d at 69 (noting that UCC's liability "boils down to whether

Calidria was defective based on the adequacy of the warnings provided"); *Tampa Drug*, 103 So. 2d at 608-09 (liability of a seller of inherently dangerous materials is predicated on failure to warn). These principles do not change merely because the seller knew the purpose for which the inherently dangerous raw material would be used, and Plaintiff cites no authority to the contrary.

A simple example illustrates the point. A person injured while using chlorine-containing household bleach because he had not been warned that exposure to chlorine would cause skin damage might, under existing authority, bring a failure to warn claim against the seller of the bleach and the supplier of the chlorine it contained. But UCC is unaware of any precedent for holding the supplier of the *chlorine* liable on a *design defect* theory simply because the supplier marketed it for use in manufacturing household bleach or because the chlorine was more dangerous in the stream of commerce than in the ground. Indeed, scores of cases involving variations of this fact pattern have been litigated in myriad courts around the country, including in Florida. Those cases have been invariably brought, insofar as we are aware, as failure to warn claims, not design defect claims.[3]

[3] *Shell Oil Co. v. Harrison*, 425 So. 2d 67 (Fla. 1st DCA 1982), *Zunck v. Gulf Oil Corp.*, 224 So. 2d 386 (Fla. 1st DCA 1969), and *Tampa Drug*, for example, all involve claims that plaintiff was injured by exposure to materials with inherently dangerous properties. All alleged failure to warn. None alleged design defect.

D. The Third District Did Not Improperly Reweigh the Evidence.

Plaintiff at one point states that the Third District "improperly applied the law by reweighing the causation evidence." Ini. Br., at 22. But Plaintiff no longer argues there was sufficient evidence to support a finding of causation under the view of SG-210's design defect he argued below: that processed SG-210 was more likely to cause mesothelioma than raw, unprocessed asbestos. His new theory—which attempts to redefine the design of SG-210—does not implicate reweighing the evidence. In fact, none of the evidence Plaintiff now claims the District Court "ignored" provides the missing causal link between the processing of SG-210 and his mesothelioma.

The Third District did not in any way "reweigh" the evidence from trial. It examined the record for competent evidence showing that the "design" of SG-210—UCC's processing of asbestos—made it more likely to cause mesothelioma, and correctly found that none exists.

In sum, Plaintiff invites the Court to adopt a novel design defect theory that he did not argue below, that contravenes well-settled principles of products liability law, and for which there is virtually no authority in Florida or anywhere else. To accept that invitation would radically expand the potential liability of sellers of inherently dangerous raw materials and would wreak havoc with existing commercial expectations. The Court should reject that invitation.

II. UNDER EITHER RESTATEMENT, UCC IS ENTITLED TO A NEW TRIAL BASED ON THE MISLEADING DUTY TO WARN INSTRUCTION GIVEN OVER OBJECTION.

A party is entitled to have the jury instructed on the correct law applicable to the case. *See Special Olympics Fla., Inc. v. Showalter*, 6 So. 3d 662, 667 (Fla. 5th DCA 2009). Once the trial court decides to give an instruction, it should accurately and completely state the law. *Gross v. Lyons*, 721 So. 2d 304, 306 (Fla. 4th DCA 1998). Where instructions given to a jury are reasonably calculated to confuse or mislead the jury, a miscarriage of justice arises and a new trial is required. *Triana v. FI-Shock, Inc.*, 763 So. 2d 454, 458 n.8 (Fla. 3d DCA 2000). The test is not whether the jury was actually misled but ***whether it might reasonably have been misled***. *Gross*, 721 So. 2d at 306. Here, there can be no doubt the jury might reasonably have been misled by Plaintiff's special instruction.

The ultimate issue here is whether the jury was correctly instructed on the duty owed by a seller of raw materials to users of finished products into which those raw materials are subsequently incorporated. Over UCC's objection, the trial court instructed the jury only that "[a]n asbestos manufacturer such as UCC has a duty to warn *end users* of an unreasonable danger in the contemplated use of its products." T 1889-90 (emphasis added). Plaintiff's counsel then relied heavily on the instruction during closing, arguing that it meant that UCC was liable because it did not provide warnings directly to Plaintiff. *See* p. 9, *supra*.

The Third District concluded that the special instruction given by the trial court was "misleading," and "amounted to a directed verdict" in Plaintiff's favor, because it offered no "explanation of *how* the duty to warn could have been discharged by Union Carbide," which had no way to warn Plaintiff directly. 97 So. 3d at 902 (emphasis added). The Third District further held that its "determination that the jury instructions in this case were misleading is based on legal principles that are materially the same under both the Second Restatement and the Third Restatement." *Id.* at 903. As shown below, the Third District was correct in both respects.

A. Under Florida Law and Both Restatements, A Bulk Supplier Of An Inherently Dangerous Raw Material May Discharge Its Duty to Warn If It Acts Reasonably Under All The Circumstances.

The Third District's holding that the trial court failed to properly instruct the jury on the failure to warn claim is clearly correct under longstanding Florida law and both Restatements. Florida courts have long recognized that a bulk supplier of inherently dangerous raw materials may discharge its duty to warn by acting reasonably under *all of the circumstances*, and among all of the circumstances can be the provision of warnings to its own customers.

For example, in *Shell Oil Co. v. Harrison*, 425 So. 2d 67 (Fla. 1st DCA 1982), Shell supplied a soil fumigant that a manufacturer incorporated into a retail lawn treatment. *Id.* at 68. As here, the plaintiffs argued "that Shell, the

manufacturer or distributor of an *inherently dangerous commodity*, had a duty to the *ultimate foreseeable user* to give fair and adequate warning of its dangerous potentialities, including any necessary respirators or protective clothing needed." *Id.* at 69 (emphasis added). But the First District rejected the argument because Shell had taken precautions to advise *its* customer of the relevant hazards:

> Under the facts as detailed above, *did Shell, as the manufacturer and bulk supplier of a dangerous toxic component, have a nondelegable duty to warn ultimate users* of the hazards of commodities containing the toxic component when the commodities were formulated, packaged, labeled, and distributed by others? *We think not*.

Id. at 70 (emphasis added).

In so holding, *Shell Oil* relied on *Zunck v. Gulf Oil Corp.*, 224 So. 2d 386 (Fla. 1st DCA 1969), another decision that rejected a plaintiff's attempt to impose upon a bulk supplier an absolute duty to provide warnings to end-users themselves. As *Shell Oil* explained, *Zunck* establishes that "absent a showing" by the plaintiff that the bulk supplier "had not taken necessary precautions commensurate with the dangers reasonably anticipated under the circumstances," the bulk supplier was "*not responsible for warning the ultimate users*." 425 So. 2d at 69 (emphasis added). Thus, *Shell Oil* held, *Zunck* was "dispositive" because Shell, "as the manufacturer or supplier selling in bulk to one other than an ultimate consumer, took the necessary precautions commensurate with the dangers reasonably anticipated under the circumstances," and "the trial court erred in not

directing a verdict for Shell prior to submission to the jury." *Id.* at 69-70.

Moreover, *Shell Oil* held that the trial court had "*compounded*" its error by "*refus[ing] to give defendant Shell's requested jury instruction* on the duty of a manufacturer or bulk supplier to a manufacturing formulator, to a retailer, and to an ultimate user." *Id.* (emphasis added). As the First District explained, "[*w*]*ithout these instructions on the substantive law, the jury was ill-equipped to determine the duties and responsibilities of Shell to the Harrisons*." *Id.* (emphasis added). Astonishingly, Plaintiff's Initial Brief does not discuss either case, but *Shell Oil* and *Zunck* are on point, and on the issue before this Court—whether Plaintiff's special instruction may have misled the jury on warnings—*Shell Oil* is on all fours.

The Fourth District's decision in *Union Carbide Corp. v. Kavanaugh*, 879 So. 2d 42 (Fla. 4th DCA 2004), is likewise on point. In that case, the plaintiff prevailed at trial and UCC appealed, asserting it was entitled to a directed verdict because it provided adequate warnings to its bulk supply customers, *i.e.*, the manufacturers of the products at issue. *Kavanaugh* recognized that "[i]t is true that the duty to warn *can* be discharged if the supplier passes the necessary information and warnings to manufacturers of the product's dangerous condition," *id.* at 44 (emphasis added and citation omitted), but nevertheless affirmed the judgment, noting that "in certain instances, warnings from a supplier to a manufacturer, alone, are insufficient." *Id.* at 44-45. Citing comment n to § 388 of the Second

Restatement, the Fourth District explained that in determining whether the bulk supplier "exercise[d] reasonable care," the trier-of-fact should consider *all the surrounding circumstances*, *id.*, and that "it was for the jury to determine the adequacy of UCC's warnings to Georgia-Pacific and whether, based on the sufficiency of the warnings given UCC *still* owed Kavanaugh a duty." *Id.* at 45 (emphasis added and citation omitted).

Although the Third District analyzed the duty to warn issue here under § 2(c) of the Third Restatement, it recognized—citing *Kavanaugh* itself—that "the analysis regarding whether a manufacturer like UCC may rely on an intermediary manufacturer to warn end-users is substantially the same under the Second Restatement and the Third Restatement." 97 So. 3d at 901.

Under the Third Restatement, "there is no general rule" and "the warning defect standard focuses on the notion of 'reasonableness' for judging the adequacy of warnings, a malleable notion that is intertwined with the facts and circumstances of each case." *Id.* at 898. And "comment i [to § 2] lists a number of factors for the trier of fact to consider when determining whether a manufacturer such as Union Carbide may rely on an intermediary to warn end-users, and thereby discharge its duty to warn, or conversely, is required to warn end-users directly":

> The standard is one of **reasonableness** in the circumstances. **Among the factors to be considered are the gravity of the risks posed by the product, the likelihood that the intermediary will convey the information to the ultimate user, and the feasibility and**

effectiveness of giving a warning directly to the user.

Id. at 898-99 (quoting Rest. 3d Torts § 2, cmt. i) (emphasis added by Third District). Moreover, this list of factors is not "exhaustive," so that "depending on the facts and circumstances presented in each case, other pertinent factors may be considered when deciding whether a manufacturer has a duty to warn end-users." *Id.* at 899. As the Third District explained, the bottom line is that "under the Third Restatement, the determination as to whether a manufacturer like Union Carbide discharged its duty to warn end-users by adequately warning an intermediary is clearly a question reserved for the trier of fact." *Id.*

The analysis is essentially the same under the Second Restatement. "Florida courts applying the Second Restatement in determining whether a bulk supplier has discharged its duty to warn end-users have relied on a list of factors that is nearly identical to those outlined in the Third Restatement." *Id.* at 900. *See also* Rest. 3d Torts § 2, Reporters' Notes to comment i (comment n to § 388 of the Second Restatement "utilizes the same factors set forth in Comment i in deciding whether a warning should be given directly to third persons"); *Kavanaugh*, 879 So. 2d at 45. And "[l]ike the Third Restatement, Florida courts applying § 388 of the Second Restatement have held that the determination as to whether a bulk supplier may rely on an intermediary to warn end-users is a question reserved for the trier of fact." *Aubin*, 97 So. 3d at 900 (citing *Kavanaugh*, 879 So. 2d at 45). Just as under

the Third Restatement, the issue under the Second Restatement, and under longstanding Florida law, is the "reasonableness" of the supplier's conduct under all the circumstances. *Id.* (citing comment n to § 388).

B. Plaintiff's Rationalizations for the Misleading Failure to Warn Instruction Should Be Rejected.

Plaintiff's Initial Brief suggests at one point that "the law in Florida is that suppliers of products with hidden serious dangers have a duty directly to the end user that cannot be discharged by warnings to intermediary suppliers" (Ini. Br., at 47-48), but Plaintiff also "*agrees* that the question of whether a duty has been discharged is a question of fact" and that "the Fourth District so held in . . . *Kavanaugh*." *Id.* at 46-47 (emphasis added). Likewise, Plaintiff *conceded* below that "[t]he result is the same whether [the] Court applies an analysis under the Second Restatement or the Third," and that "applying the Third Restatement, the relevant factors for consideration are the same as laid out in *Kavanaugh*." Pl. 3DCA Ans. Br. at 49-50. Also, Plaintiff repeatedly *acknowledged* below that "whether a bulk supplier has discharged its duty to an end user is a *question of fact* for the jury based on *the reasonableness of the supplier's conduct under all of the facts and circumstances*." *Id.* at 55 (emphasis added); *see also id.* at 44-45, 48-49, 52.

Notwithstanding his acknowledgment of these principles, Plaintiff offers three arguments in an attempt to justify the trial court's use of his misleading special instruction on the duty to warn. As the following shows, none has merit.

1. Plaintiff's Contention That the "Undisputed" Facts Foreclosed UCC's Argument That It Acted Reasonably Is Meritless.

Plaintiff's principal defense of the use of his misleading special instruction is that UCC supposedly was not entitled to "any instruction regarding ways [it] could have reasonably relied on its intermediaries" because "[t]he record reflects that it is undisputed that ***Carbide knew that its intermediary customers, including GP and Premix, were not including warnings with their final products*** to advise end-users, like Mr. Aubin, of the hidden dangers of exposure to airborne Calidria SG-210 dust generated from the contemplated use of their products." Ini. Br., at 43-44 (emphasis in original) (citing T 1316-17). This argument fails for several reasons.

First, Plaintiff essentially seeks a directed verdict on the issue of the reasonableness of UCC's conduct, but he did not move for a directed verdict in the trial court and would not have been entitled to one if he had. Moreover, Plaintiff's underlying assertion—that "it is *undisputed* that Carbide knew that its intermediary customers, including GP and Premix, were not including warnings with their final products"—is simply incorrect. The principal evidence that Plaintiff cites to support this assertion is a snippet from the trial testimony of Jack Walsh, a UCC

sales representative, that UCC was aware that its customers were not providing warnings on their joint compound products. T 1317. But Walsh was not asked about any specific customer, any specific joint compound product, or any specific time period. *Id.*

Thus, even by itself, Walsh's testimony does not compel the conclusion that, as a matter of law, UCC *knew* that the intermediary manufacturers at issue in *this* case, during the time period at issue in *this* case, were not providing warnings on the joint compounds and ceiling sprays they sold. In his brief below, Plaintiff cited the exact same testimony only for the proposition that "*there was sufficient evidence for the jury to find* that Carbide knew that its customers, including GP and Premix, were not warning their own customers or users of their products." Pl. 3DCA Ans. Br. at 48.[4]

Indeed, there was *other* evidence that would permit the jury to find that Georgia-Pacific and other intermediary manufacturers actually *did* provide warnings with their joint compounds during the period of Plaintiff's alleged exposure. It could hardly be "undisputed" that UCC *knew* that Georgia-Pacific and the other manufacturers were not providing warnings to end-users if they were

[4] Plaintiff also cites P. Exs. 27 and 33 for the proposition UCC knew that "intermediary customers" were not providing warnings. Ini. Br., at 12-13. However, those exhibits concern different manufacturers (Baker Castor Oil Company and Adhesive Engineering, respectively), different time periods, and different finished products.

actually providing them.

Plaintiff further asserts that the Third District "acknowledged" that UCC "'stipulated'" that it knew that the intermediary manufacturers did not place any warnings on their products. Ini. Br., at 44-45. But the Third District was simply mistaken. There is no such stipulation in the record. If there had been such a stipulation, Plaintiff presumably would cite it.

Second, even if the evidence compelled the conclusion that Georgia-Pacific and the other intermediary manufacturers were not providing appropriate warnings during the period when Plaintiff allegedly suffered exposure and that UCC knew it, that would *still* not compel the conclusion that, under all of the facts and circumstances, UCC's conduct was unreasonable as a matter of law. As discussed above, the OSHA regulations requiring warnings on asbestos-containing products were not promulgated until 1972. Even then, the regulations only required warnings on those asbestos-containing products where use would result in release of "airborne concentrations of asbestos fibers in excess of the [prescribed] exposure limits." Def. Ex. MM, at 4.

There was evidence in the record that would permit the jury to find that for some time after the OSHA regulations were issued, joint compound and ceiling spray manufacturers were not including warnings because they believed that use of their products would not generate respirable asbestos fibers in excess of the then-

applicable threshold limits. Given such evidence, the trier-of-fact could find that UCC acted reasonably by warning the intermediary manufacturers about the general hazards of asbestos but relying on the manufacturers—who designed, manufactured, and packaged their finished products, had a duties to do so reasonably, and had far greater knowledge of the finished products they made—to determine whether to include warnings with their particular finished products.

Finally, "the likelihood that the intermediary will convey the information to the ultimate user" is but one factor considered in assessing the reasonableness of the bulk supplier's conduct. *See* Rest. 3d Torts § 2, cmt. i. This is true under both Restatements. *See* Rest. 2d Torts § 388, cmt. n; *Kavanaugh*, 879 So. 2d at 45.

For all of these reasons, the use of Plaintiff's misleading special instruction cannot be justified by the so-called "undisputed" evidence. *See Tampa Drug*, 103 So. 2d at 609 ("[W]e do not agree that in a case such as this where the jury may draw varied inferences from the evidence properly before it that the trial judge should enter into the jury box and become an arbiter of the facts."). Plaintiff was entitled to *argue* that UCC knew the intermediary manufacturers at issue were not providing warnings and thus that UCC's conduct was not reasonable, but UCC was entitled to argue the contrary, and to have the jury instructed "on the duty of a . . . bulk supplier to a manufacturing formulator, to a retailer, and to an ultimate user" so that the jury would be "equipped to determine" (*Shell Oil*, 425 So. 2d at 69)

whether UCC acted reasonably under all the facts and circumstances.

On this point, it remains only to note that it is no answer for Plaintiff to suggest that the special instruction given by the trial court was not erroneous because "the jury in this case was instructed that the duty owed is one of reasonable care." Ini. Br., at 47. As the Third District explained, "while the trial court did instruct the jury regarding the general negligence standard, which theoretically subsumes many of these considerations [*i.e.*, the applicable factors under the Second and Third Restatements and *Kavanaugh*], the instruction to the jury that UCC had a duty to warn end-users effectively foreclosed such considerations, and amounted to a directed verdict" for Plaintiff. 97 So.3d at 902.

2. Plaintiff's Reliance on *Tampa Drug* and *McConnell* Is Misplaced.

Citing this Court's decision in *Tampa Drug* and the Fourth District's decision in *McConnell*, Plaintiff also argues that there is "an absence of Florida law that supports reliance on an intermediary to convey warnings under circumstances like those presented." Ini. Br., at 48. Plaintiff's reliance on both cases is misplaced.

First, *Tampa Drug* does not support Plaintiff's argument because in that case, the dangerous commodity (carbon tetrachloride) was sold by the defendant in the defendant's own packaging and with the warning label prepared by the defendant. Thus, *Tampa Drug* did not address the duty owed by a supplier of a raw

material to end users of finished products made by third parties using the raw material.[5] Moreover, this Court made clear in *Tampa Drug* that "the distributor of an inherently dangerous commodity" is not "an insurer of the safety of the product which he puts in circulation." 103 So. 2d at 608-09. Citing § 388, this Court held that the supplier's "duty simply is to take *reasonable precautions* to supply users with an adequate warning notice that would place them on their guard against the harmful consequences that might result from use of the commodity," and that it was for the jury to decide whether the supplier had satisfied its duty to warn. *Id.* at 608 (emphasis added). The issue here is whether the trial court properly instructed the jury concerning *how* UCC could satisfy its duty to warn so the jury would be equipped to determine whether UCC did so.

Nor does *McConnell* support Plaintiff's contention that the trial court's instruction was correct. Ini. Br., at 45. In *McConnell*, the Fourth District held that the trial court erred by giving the following jury instruction:

> In order to find UCC strictly liable, the Plaintiff must prove that Union Carbide sold a defective product by failing to adequately warn of a particular risk that was known or knowable . . . *and in light of the level of sophistication and knowledge of the danger of Union Carbide's customers, such as Georgia Pacific*.

[5] *Square D Co. v. Hayson*, 621 So. 2d 1373 (Fla. 1st DCA 1993), which Plaintiff also cites, is distinguishable for the same reason. Moreover, *Square D* held that whether the defendant had complied with its duty to warn was a jury question. *Id.* at 1378.

937 So. 2d at 150 (emphasis in original). The Fourth District held that "it is reasonably probable that the jury was misled by the final phrase in Carbide's special instruction quoted above" because it "strongly implies that Georgia-Pacific's specific knowledge regarding the defect, rather than end users like plaintiff McConnell, was the *sole focus* of Florida's strict liability law." *Id.* at 154 (emphasis added). That view, *McConnell* held, citing *Kavanaugh* and § 388, "is not an accurate statement of the law." *Id.*

Plaintiff cites *McConnell*'s statement that "a supplier in the shoes of Carbide may not reasonably rely on an intermediary, no matter how learned it might be deemed." Ini. Br., at 45. But *McConnell* did not hold that UCC was required to provide a warning directly to the plaintiff, or that the plaintiff in that case was entitled to judgment as a matter of law because UCC had not provided a warning directly to him. To the contrary, *McConnell*, expressly relying on *Kavanaugh* and § 388, reversed and remanded for a new trial. 937 So. 2d at 156. Thus, *McConnell* simply disapproved of the *particular* instruction at issue in that case, with its focus *solely on* the intermediary's knowledge. Indeed, the federal court overseeing multi-district asbestos litigation interpreted *McConnell* in precisely this way. *See Faddish v. CBS Corp.*, 2010 WL 4159238, at *5 (E.D. Pa. Oct. 22, 2010) (reading *McConnell* to hold that "juries should be instructed to take into account the balancing test employed by the Second Restatement, and it is not an automatic bar

to liability that an intermediary knew of the hazards of a product").

Indeed, this is the only reasonable reading of *McConnell*. If it were construed as Plaintiff suggests, *i.e.*, as establishing that a supplier of a dangerous raw material "may not reasonably rely on an intermediary" as a matter of law, *McConnell* would conflict with the very case on which it expressly relied—*Kavanaugh*, which held that whether UCC's reliance on the intermediary manufacturer was reasonable was an issue of fact for the jury. Indeed, construed as Plaintiff now suggests, *McConnell* would *also* conflict with this Court's decision in *Tampa Drug* and with *Shell Oil*, *Zunck*, and *both* Restatements.

3. UCC's Requested Instructions Were Not "Legally Improper and Argumentative."

In a last-ditch effort to defend the trial court's instruction, Plaintiff argues that the special instructions requested by UCC "were legally improper and argumentative." Ini. Br., at 49. Whether this argument is correct or not, it was still error for the trial court to give a misleading special instruction.

In any event, Plaintiff's attack on the additional instructions proposed by UCC is meritless. One of UCC's requested special instructions (3DCA Supp. R. 31) tracked, almost verbatim, the language of § 388 itself, which the Fourth District relied on in both *Kavanaugh* and *McConnell*. Another requested instruction (3DCA Supp. R. 33) was based on the "reasonableness" standard and the language of *Shell Oil* and *Zunck*. There was nothing improper about them, and

such instructions would have mitigated the harm caused by Plaintiff's erroneous special instruction.

* * *

In sum, for all the reasons demonstrated above, the Court should approve the Third District's disposition of Plaintiff's design defect and warning claims. If the Court approves only the Third District's holding that Union Carbide is entitled to a new trial based on the misleading duty to warn instruction, then a new trial is nonetheless required because the trial court refused Union Carbide's request to use a special verdict form that would break out Plaintiff's manufacturing, design, and warning theories. T 1861-63; Ct. Ex. 8.

III. IF THE COURT REACHES THE ISSUE, IT SHOULD ADOPT §§ 2 AND 5 OF THE THIRD RESTATEMENT.

Plaintiff urges the Court to use this case as a vehicle to reject §§ 2 and 5 of the Third Restatement. Because the Third District's disposition of the design defect and failure to warn claims should be approved regardless of whether the Second or the Third Restatement applies, Plaintiff is essentially seeking an advisory opinion on the respective merits of the two Restatements. However, UCC respectfully submits that if the Court addresses this issue, it should adopt § 2 and § 5.

A. The Third Restatement Was Not a Partisan Attempt to Skew the Law in Favor of the Business Community.

Not content to debate the merits of §§ 2 and 5, Plaintiff and his amici

suggest that the Court should reject those provisions because the Third Restatement "was not written and advanced by a neutral legal academy as an impartial attempt to ascertain" and describe "the law actually being applied" but "represents an attempt by manufacturers and commercial entities to change five decades of strict liability law to relieve themselves of the burden of paying the costs necessary to make their products safe for the consumers who use them." FCAN Amicus Br., at 12; *see* FJA Amicus Br., at 12 & nn.14-15. These personal attacks on the authors of the Third Restatement are meritless.

Like the Second Restatement, the Third Restatement was published by the American Law Institute ("ALI"), "the leading independent organization in the United States producing scholarly work to clarify, modernize, and otherwise improve the law." *See* http://www.ali.org/index.cfm?fuseaction=about.overview. The "drafting cycle" for any ALI project entails numerous drafts and multiple layers of review by the ALI's "Council," the project's "Advisers," a "Members Consultative Group," and ultimately the ALI's full membership. *See* http://ali.org/index.cfm?fuseaction=projects.drafting. These groups, individually and collectively, include practitioners, judges, and scholars with a broad range of specialties and experiences, and the project's "Advisers" "are selected for their particular knowledge and experience of the subject or the special perspective they are able to provide." *See* http://www.ali.org/index.cfm?fuseaction=projects.

drafting; *see also* http://ali.org/index.cfm?fuseaction=about.officers. "The drafting cycle continues until each segment of the project has been accorded final approval by both the Council and the membership." *Id. See also* Rest. 3d Torts at XVII (Reporters' Preface) (noting that over a "five-year period," the Third Restatement "underwent numerous iterations and drafts," the Advisers "saw and commented on every draft," and the Reporters "benefited from the input of literally hundreds of members of the Institute and interested observers who wrote to us suggesting changes to enhance the work."); *id.* at XVI (Director's Foreword).

During the drafting of the Third Restatement, the ALI's President was Professor Charles Alan Wright and its Director was Professor Geoffrey C. Hazard, Jr. The ALI's Council included, among others, former U.S. Attorney General Nicholas Katzenbach, future U.S. Senator Elizabeth Warren, and numerous state and federal judges. Rest. 3d Torts at III-IV. Moreover, the "Members Consultative Group" for the Third Restatement was comprised of over 200 ALI members and included over thirty state and federal judges as well as prominent plaintiffs' counsel active in the asbestos litigation. *Id.* at VII-XIII.

In light of all this, the notion that the Third Restatement represented a partisan effort to skew the law in favor of the business community defies credulity.

B. Sections 2 and 5 of the Third Restatement Are Not a "Radical Departure from Florida Law," Nor Have They Been Rejected by the "Vast Majority" of States.

Plaintiff also asserts that §§ 2 and 5 "represent a radical departure from Florida law and have been rejected by the vast majority of State Supreme Courts to have considered whether to adopt them." Ini. Br., at 31. Both assertions are false.

Plaintiff's characterization of the Third Restatement in general, and of the risk/utility test in particular, as a "radical departure from" existing law shows both a fundamental misunderstanding of the nature of the Restatements and an extraordinary disregard of the case law, including decisions of this Court. By their nature, all Restatements *restate* the evolving common law. With the benefit of the thousands of cases decided after issuance of the Second Restatement, the Third Restatement filled in areas the Second Restatement had not addressed, and, where the case law in various jurisdictions was in conflict, applied the collective wisdom of a diverse group of judges, scholars and lawyers to select the soundest policies from the best reasoned cases.

The Second Restatement was issued in 1965. At the time, strict liability was a new form of action, embodied in § 402A. This Court adopted that section in *West v. Caterpillar Tractor Co., Inc.*, 336 So. 2d 80 (1976). As the Introduction to the Third Restatement explained, § 402A "had little to say about liability for design defects or for products sold with inadequate warnings" because "[i]n the early

1960s these areas of litigation were in their infancy." Indeed, the Second Restatement acknowledged that it was too early to opine on whether § 402A should apply to certain issues, including claims against sellers of component parts, "in the absence of a sufficient number of cases on the matter to justify a conclusion." Rest. 2d Torts § 402A, Caveat 3 and cmts. p and q.

Over the almost four decades since *West* was decided, Florida products liability law continued to evolve. By the time the Third Restatement was issued in 1998, for example, it was well-settled in Florida, as well as in virtually every other state, that there are three distinct types of product defects: manufacturing, design, and warnings defects. *See, e.g.*, *Ford Motor Co. v. Hill*, 404 So. 2d 1049, 1051 (Fla. 1981); *Cassisi*, 396 So. 2d at 1145; *see also* Ini. Br., at 30. The Second Restatement had not separately identified these three categories. The Third Restatement did so in § 2, not to radically depart from the Second Restatement, but to recognize that the categories had firmly emerged in the case law since its issuance.

In the same way, § 2(b) recognized the risk/utility test because, during the more than thirty years between issuance of the two Restatements, most jurisdictions had adopted it. Indeed, ***this Court*** approved the test almost two decades *before* the Third Restatement was issued. In *Auburn Machine Works Co., Inc. v. Jones*, 366 So. 2d 1167 (Fla. 1979), this Court explained that to determine

whether a product is unreasonably dangerous, "one must: '(balance the) likelihood of harm to be expected from a machine with a given design and the gravity of harm if it happens *against the burden of precaution which would be effective to avoid harm*.'" *Id.* at 1170 (emphasis added) (citing 2 Harper and James, *The Law of Torts* § 28.4 (1956)); *see also Cassisi*, 396 So. 2d at 1145 n. 9 (noting that the risk/utility "balancing approach was implicitly approved" in *Auburn Machine Works*).

In the years since *Auburn Machine Works* was decided, Florida courts have repeatedly recognized the risk/utility test; *see, e.g., Sta-Rite Indus., Inc. v. Levey*, 909 So. 2d 901, 904-05 (Fla. 3d DCA 2004); *Zimmer, Inc. v. Birnbaum*, 758 So. 2d 714, 715 (Fla. 4th DCA 2000); *Hobart Corp. v. Siegle*, 600 So. 2d 503 (Fla. 3d DCA 1992); *Light v. Weldarc Co., Inc.*, 569 So. 2d 1302, 1304 (Fla. 5th DCA 1990); also, PL5 of the Florida standard jury instructions, citing *Cassisi*, has followed it, along with the consumer expectations test, and the trial court instructed the jury on the risk/utility test without objection. Since the issuance of the Third Restatement, three district courts of appeal have followed § 2. *See Agrofollajes, S.A. v. E.I. Du Pont De Nemours & Co.*, 48 So. 3d 976, 996 (Fla. 3d DCA 2010); *Kohler Co. v. Marcotte*, 907 So. 2d 596, 598-99 (Fla. 3d DCA 2005); *Scheman-Gonzalez v. Saber Mfg. Co.*, 816 So. 2d 1133, 1139 (Fla. 4th DCA 2002); *Warren ex rel. Brassell* v. *K-Mart Corp.*, 765 So. 2d 235, 237-38 (Fla. 1st DCA 2002).

In addition, *Auburn Machine Works* applied the risk/utility test in rejecting

the so-called "patent danger rule." 366 So. 2d at 1169-72. That rule relies on the consumer expectations test to bar design defect claims where the danger is obvious or "patent" even where the product "could easily have been designed safer without great expense or effect on the benefits or functions to be served by the product." Prosser and Keeton on The Law of Torts 698 (5th Ed. 1984) ("Prosser and Keeton"). Applying the risk/utility test, *Auburn Machine Works* held that the obviousness of the danger was relevant to whether the defect caused plaintiff's injury but that it was not a bar to establishing a design defect claim. The Third Restatement, unlike the Second Restatement, follows the *Auburn Machine Works* approach, finding that under the risk/utility test, "[t]he fact that the danger is open and obvious . . . does not necessarily preclude a plaintiff from establishing that a reasonable alternative design should have been adopted that would have reduced or prevented the injury to the plaintiff." *See* Rest. 3d Torts § 2(b), cmt. d & Ill. 3.

Nor is Plaintiff correct that "the vast majority of State Supreme Courts" *elsewhere* have rejected the risk/utility test. Ini. Br., at 31. *See Evans v. Lorillard Tobacco Co.*, 990 N.E.2d 997, 1012 (Mass. 2013) ("The vast majority of States have adopted the risk-utility balancing test of the Third Restatement rather than the consumer expectations test of the Second Restatement") (citing *Branham v. Ford Motor Co.*, 701 S.E.2d 5, 15 (S.C. 2010)). As the South Carolina Supreme Court noted in its 2010 decision in *Branham*, "[b]y our count, 35 of the 46 states that

recognize strict products liability utilize some form of risk-utility analysis in their approach to determine whether a product is defectively designed," 701 S.E.2d at 14 n.11, while "States that exclusively employ the consumer expectations test are a decided minority," *id.* at 14-15 (footnotes omitted).

The attacks by Plaintiff and his *amici* on § 5 are likewise groundless. The Third and Fourth Districts have both adopted § 5. *Kohler*, *Scheman-Gonzalez*. Far from being a "radical departure" from existing law (Ini. Br., at 31), the "streamlined and simplified statement of the [component parts] doctrine" in § 5 is "[c]onsistent with the overwhelming weight of authority." *Davis v. Komatsu Am. Indus. Corp.*, 42 S.W.3d 34, 40 (Tenn. 2001). As the Tennessee Supreme Court noted in adopting § 5 in 2001, "our research reveals… that *every court presented with the issue has adopted the component parts doctrine*." *Id.* at 38 (emphasis added). In support of this conclusion, *Davis* cited dozens of cases *predating* the Third Restatement. *Id.* at 38-39.

Finally, the highest courts of at least five states (California, Rhode Island, Tennessee, Texas, and Utah) have expressly adopted § 5, *see O'Neil v. Crane Co.*, 53 Cal. 4th 335, 355 (2012); *Buonanno v. Colmar Belting Co., Inc.*, 733 A.2d 712, 716 (R.I. 1999); *Davis*, 42 S.W.3d at 38-41; *Bostrom Seating, Inc. v. Crane Carrier Co.*, 140 S.W.3d 681, 683 (Tex. 2004); *Gudmundson v. Del Ozone*, 232 P.3d 1059, 1073 (Utah 2010), and the Fifth Circuit has applied § 5 as well, *see*

Cimino, 151 F.3d at 332-35. Notwithstanding Plaintiff's assertion that § 5 has been "rejected by the vast majority of State Supreme Courts to have considered whether to adopt it" (Ini. Br., at 31), to our knowledge, *no* state that has considered the issue has rejected § 5.

For all of these reasons, the Third Restatement constitutes a "radical departure" from existing law only if "existing law" is defined as Florida products liability law as it existed, frozen in time, at the moment *West* adopted § 402A.

C. Sections 2 and 5 Reflect Both the Evolution of Florida Products Liability Law and Sound Policy.

1. Section 2

Plaintiff argues that § 2(b) departs from existing Florida law under the Second Restatement because it rejects the consumer expectations test and requires plaintiffs to show a reasonable alternative design, both in supposed contravention of the Second Restatement as adopted in *West.* But Plaintiff vastly overstates the differences between the Third Restatement and current Florida products liability law by failing to recognize the complexity and flexibility of evolving Florida law and the Third Restatement.

a. Plaintiff Overstates the Differences Between the Third Restatement and Florida Law as it Has Evolved.

Plaintiff suggests that the Court is bound to apply the consumer expectation test as adopted in 1976 in *West* as the sole measure of a design defect claim. This

argument ignores Florida's subsequent acceptance of the risk/utility test, the doubts expressed by Florida courts about the efficacy of the consumer expectations test, the limits courts have placed on its application in subsequent years, and this Court's decisions in *Auburn Machine Works* and *Radiation Technology*.

Well before publication of the Third Restatement, the appropriateness of applying the consumer expectations test to design defect claims had been questioned. In *Cassisi*, for example, the First District recognized that while "[t]he consumer expectation standard" may be "adequate" in *manufacturing* defect cases, "[d]ue to the difficulty in applying [it] to all types of product defects, many thoughtful commentators have suggested that it should be rejected, particularly as to those defects arising from design, in favor of a test that would weigh the utility of the design versus the magnitude of the inherent risk." 396 So. 2d at 1145. *See also, Liggett*, 973 So. 2d at 477 (Warner, J., concurring and citing *Cassisi*.).

Among the thoughtful commentators who have vigorously criticized the consumer expectations test were the authors of the iconic Prosser and Keeton hornbook, who echoed the views of many critics in noting that "[t]he test *can be utilized to explain most any result that a court or jury chooses to reach*." Prosser and Keeton at 699 (emphasis added). Likewise, Dean John Wade, another notable early critic, argued that "[i]n many situations, particularly involving design matters, the consumer would not know what to expect, because he would have no

idea how safe the product could be made." John W. Wade, On the Nature of Strict Tort Liability for Products, 44 Miss. L. J. 825, 829 (1973). To remedy this problem, Dean Wade suggested the use of a seven-factor balancing test that this Court later adopted in *Auburn Machine Works. See* 366 So. 2d at 1170. Similarly, Professor Gary Schwartz criticized the California Supreme Court's adoption of consumer expectations as one of the two independent "prongs" of its design defect test because "[i]n anything resembling a difficult case… the consumer expectations test is unable to stand on its own, and raises the prospect of haphazard, impressionistic jury decision making." Gary T. Schwartz, Foreword: Understanding Products Liability, 67 Cal. L. Rev. 435, 480 (1979).

Moreover, even those Florida courts that have applied the consumer expectations test have recognized that it should not be applied where the consumer could not be expected to have formed expectations about the product's performance. In *Force v. Ford Motor Co.*, 879 So. 2d 103, 110 (Fla. 5th DCA 2004), for example, the Fifth District held that the test could logically be applied to allegedly defective seat belts because seat belts "are familiar products for which consumers' expectations of safety have had an opportunity to develop, and the function which they were designed to perform is well known." But *Force* also concluded "that there may indeed be products that are too complex for a logical application of the consumer expectation standard" and left "the definition of those

products to be sorted out by trial courts." *Id*. *See also Liggett*, 973 So. 2d at 480 (Gross, J., concurring) ("There may be cases where the consumer-expectation test is not suitable for the evaluation of a complex product.") (citing *Force*, 879 So. 2d at 106-07). Indeed, this Court observed three decades ago, in evaluating PL 5, that whether to apply the consumer expectations test or the risk/utility test "will depend on further development of the law on a case by case basis." *In Re Standard Jury Instr.*, 435 So. 2d 782, 783 (Fla. 1983).

The Third Restatement's approach to the consumer expectations test is similar to that taken in these cases. It is not an independent basis to find a design defect. But just as Florida courts have made clear the consumer expectations test is appropriate in some cases but not others, the Third Restatement recognizes that "the nature and strength of consumer expectations regarding the product, including expectations arising from product portrayal and marketing" are among the "broad range of factors [that] may be considered in determining whether an alternative design is reasonable and whether its omission renders a product not reasonably safe." Rest. 3d Torts § 2, cmt. f. *See also id.*, cmt. g ("although consumer expectations do not constitute an independent standard for judging the defectiveness of product designs, they may substantially influence or even be ultimately determinative on risk-utility balancing in judging whether the omission of a proposed alternative design renders the product not reasonably safe").

Plaintiff also overstates differences between the way Florida courts have treated the requirement of a reasonable alternative design and the Third Restatement's approach. As comment b to § 2 makes clear, the definitions of defect in § 2 are "nonexclusive," and a plaintiff may sometimes prevail in a design defect claim under the Third Restatement ***without*** proving the existence of a reasonable alternative design: "[s]ome courts . . ., while recognizing that in most cases involving defective design the plaintiff must prove the availability of a reasonable alternative design, also observe that such proof is not necessary in every case involving design defects." Rest. 3d Torts § 2, cmt. b.

As it happens, this Court's decision in *Auburn Machine Works* anticipated developments in Florida (and national) products liability law. There, this Court approved a flexible, common sense test that harmonizes such differences as there are between the Third Restatement and Florida law. When resolving a design defect claim, the Court described the need to balance:

> (1) the usefulness and desirability of the product, (2) the availability of other and safer products to meet the same need, (3) the likelihood of injury and its probable seriousness, (4) the obviousness of the danger, (5) common knowledge and normal public expectation of the danger (particularly for established products), (6) the avoidability of injury by care in use of the product (including the effect of instructions or warnings), and (7) the ability to eliminate the danger without seriously impairing the usefulness of the product or making it unduly expensive.

366 So. 2d at 1170 (quotation omitted). This test sets forth a useful set of factors courts have taken into consideration in balancing the utility of a product against its

risks. It incorporates elements of the consumer expectations test (in factors 4 and 5) by requiring the jury to consider the common knowledge and normal public expectation of the danger. It recognizes (in factor 7) that the existence of a reasonable alternative design is relevant to the inquiry. But it does not rigidly apply any factor to the exclusion of the others. *See also Radiation Technology*, 445 So. 2d at 331 (enumerating a similar six-factor test).

UCC reiterates that the debate about the relative merits of the two Restatement approaches does not affect the outcome of this case. But UCC notes that the similarities between Florida products liability law today and the conceptual framework set forth in § 2(b) far outweigh the differences. As shown above, in several important areas, § 2(b) has codified principles now well-settled under Florida law, but not addressed in the Second Restatement at all. With regard to the application of the consumer expectations test and the risk/utility test, a comparison of the seminal Florida cases with the Third Restatement approach reveals that both have taken flexible and nuanced positions, and both have recognized that neither test is exclusive. Simply directing the lower courts to apply the existing multi-factor test from *Auburn Machine Works* and *Radiation Technology* would harmonize the various strands of Florida products liability law and end such confusion as may now exist in the district courts about what principles govern under Florida law. Accordingly, if the Court decides to address whether Florida

law should remain fixed as it was when this Court decided *West* in 1976—as Plaintiff suggests—or to adopt § 2 of the Third Restatement as the Third District did, the Court should adopt § 2 with the proviso that it incorporates the multi-factor test set forth in *Auburn Machine Works* and *Radiation Technology*.

b. Even If the Court Chooses to Retain the Consumer Expectations Test as an Independent Basis for Finding a Design Defect, That Test Should Not Apply To Facts Like Those At Issue Here.

As shown above, Florida courts have recognized that the consumer expectations test cannot be applied in every circumstance. The test is particularly ill-suited to determine whether a raw material that is incorporated in other products is defectively designed. In such a case, there is inevitably a significant risk of confusing which product—the raw material or the finished product—and whose expectations—those of the purchaser of the raw material or the user of the finished product—are at issue.

Here, for example, Plaintiff argues that because his expectations of the safety of *joint compounds and texture sprays* were frustrated, *SG-210* was defectively designed. *See* Ini. Br., at 36-37 ("evidence established that Mr. Aubin did not expect that the normal use of GP Ready-Mix compound and Premix Snowflake texture spray would release a product in the air which, if inhaled, was fatal…[and] *accordingly*, there was substantial evidence that the design of SG-210 was defective under the consumer expectations test") (emphasis added). But the

product at issue here is SG-210, not joint compounds and texture sprays.

Moreover, while the manufacturers who purchased SG-210 could be said to have expectations about its performance, Plaintiff was unaware the finished products at issue even contained asbestos. T 1002-03. He was therefore incapable of forming expectations about the performance and safety of the asbestos itself. The inherent difficulty of ascertaining consumer expectations that so troubles the critics of the consumer expectations test becomes an impossibility when consumers have not formed any expectations at all about the product actually at issue. Accordingly, it would be inappropriate to find *SG-210* defectively designed based on the expectations of the user of the finished product that contained it.

2. Section 5

Section 5(a) provides that a seller of a defective component may be liable under any of the three defect theories if, at the time it sells a component part, the part is defective and the defect causes the harm. Section 5 expressly incorporates the criteria for finding product defects contained in § 2. Section 5(b) provides that the seller of a raw material or a component part may be liable, even if the component part is not defective, if the seller "substantially participates in the integration of the component into the design of the [finished] product," "the integration of the component causes the [finished] product to be defective," and "the defect in the [finished] product causes the harm."

Plaintiff's rhetoric about a "radical departure" from Florida law aside, his Initial Brief sets forth only one concrete objection to the policies underlying § 5: that it supposedly "provides that a supplier of a component product is not required to warn the ultimate consumers of dangers associated with its products." Ini. Br., at 31, citing § 5, cmt. b, Ill. 4.[6] But comment b addresses the duty of a supplier of a component part that is *not defective* at the time it leaves the seller's custody. Section 2 makes clear that a product may be deemed defective when it leaves the seller's custody because of a warning defect, and as the Third District recognized, the scope of the duty to warn owed by sellers of component parts under comment i to § 2 is essentially the same as under comment n to § 388 of the Second Restatement. *Aubin*, 97 So. 3d at 900-01; *see also* Section II-A, *supra*. Accordingly, § 5 does *not* stand for the proposition that sellers of component parts have no duty to warn ultimate consumers.

Section 5 does specifically articulate three principles governing the liability of component part suppliers that are not directly addressed by the Second Restatement. First, § 5 expands the liability of component part suppliers by providing in § 5(b) that a seller may be liable even if the component part is not

[6] Illustration 4 stands for the proposition that a seller of a non-defective part has no duty to warn a sophisticated purchaser about dangers of which the purchaser is already aware. Under Florida law, the sophistication of the user is a factor in determining whether the seller's warning is adequate, but not the sole factor. *Aubin*, 97 So. 3d at 899; *McConnell*, 937 So. 2d at 154.

defective when it leaves the seller's hands if the seller participates in integrating the component part in a final product and the integration both causes the finished product to be defective and the defect causes plaintiff's harm. Plaintiff argued in the proceedings below that this provision expanded the liability of raw material sellers (Pl. 3DCA Ans. Br. at 29-30), and he raises no objection to this aspect of § 5 in his Initial Brief in this Court.

Second, comment c to § 5 makes clear that "a basic raw material such as sand, gravel or kerosene cannot be defectively designed." While the Third District recognized that the *processing* of a raw material may render a raw material a designed product, comment c is a correct statement of the law.

Third, comment c makes clear that "[i]nappropriate decisions regarding the use of 'basic raw materials' are not attributable to the supplier of the raw materials but rather to the fabricator that puts them to improper use," that "[t]he manufacturer of the integrated product has a significant comparative advantage regarding selection of materials to be used," and that the raw material supplier should not be required "to develop expertise regarding a multitude of different end-products and to investigate the actual use of raw materials by manufacturers over whom the supplier has no control." Rest. 3d Torts § 5, cmt. c. These are not novel concepts dreamed up by those responsible for the Third Restatement; rather, as the Tennessee Supreme Court noted in *Davis*, "*every court presented with the issue*

has adopted the component parts doctrine." 42 S.W.3d at 40 (emphasis added).

Thus, in *Davis*, for example, the Court declined to impose a duty that would "force" component part suppliers "to guarantee the safety of other manufacturers'" finished products and "to retain an expert in every finished product manufacturer's line of business and second-guess the finished product manufacturer whenever any of its employees received any information about any potential problems." *Id.* (citing *Crossfield v. Quality Control Equip. Co., Inc.*, 1 F.3d 701, 704 (8th Cir.1993), and *Kealoha v. E .I. Du Pont de Nemours & Co.*, 844 F. Supp. 590, 594 (D.Haw. 1994), *aff'd*, 82 F.3d 894 (9th Cir.1996) (internal quotation marks omitted)). Similarly, in *Childress v. Gresen Mfg. Co.*, 888 F.2d 45, 49 (6th Cir. 1989), the Sixth Circuit rejected the argument that "a manufacturer of a component part with knowledge of the final design of the completed product is responsible for the safety of the final product if the component part becomes potentially dangerous in its ultimate use." While the Second Restatement did not expressly address these principles, they have been codified in an orderly way by the Third Restatement.

Contrary to Plaintiff's mischaracterization of § 5, it does not relieve sellers of raw materials of their duty under § 2, comment i, to third persons who may be injured by exposure to those materials. Section 5 simply makes clear that the duty to act reasonably under § 2 does not include a duty to participate in the integration of the raw material into the final product.

UCC acknowledges section 5 cannot be reconciled with dicta in *McConnell* appearing to suggest that a seller of raw materials may have a duty to contract with manufacturers that incorporate those materials into finished products. That is because if a raw material supplier has such a duty, then the seller will have no choice but to participate in the integration of the material in the finished products, including to monitor how the raw material is used in finished products and to decide what warnings are appropriate for those finished products. Indeed, a supplier of raw materials would be required to make independent judgments about the warnings necessary to ensure safe use of those products or to refuse to supply the raw material if its judgment differs from that of its customers concerning the need for warnings on the finished products. Outside of *McConnell*, UCC is aware of no case even suggesting so expansive a duty on suppliers of raw materials.

Accordingly, a jury might find that UCC was liable to Plaintiff because its conduct, despite the warnings it provided to its customers, was not reasonable under all the circumstances of the case. But SG-210 was sold to many different customers for use, among other things, in sprays, joint compounds, ceiling tile, mastics, and sealants. P. Exs. 37 (at 30), 51, 52. Each of those products is manufactured in different ways, has different designs and characteristics, and implicates different warning issues. Plaintiff concedes that certain asbestos-containing products do not release respirable asbestos fibers and can be safely

used. Ini. Br., at 35-36. The fact that UCC did not monitor the ways its customers were using SG-210 in the various products in which it was incorporated or seek to require its customers to provide particular warnings with their finished products—*i.e.*, did not participate in the integration of SG-210 into the finished products—is not evidence that UCC acted unreasonably under § 2.

Were this Court to adopt the extraordinarily broad duty suggested by Plaintiff, it would disrupt existing commercial expectations and impose a new duty under Florida law that no other state imposes. Indeed, this Court has long made clear that "the distributor of an inherently dangerous commodity" is not "an insurer of the safety of the product which he puts in circulation," *Tampa Drug Co.*, 103 So. 2d at 608-09. Plaintiff's approach, however, would turn suppliers of inherently dangerous raw materials into insurers not just "of the safety of the product" that *they* "put[] in circulation," but of the use of those raw materials by third party manufacturers and the decisions those third party manufacturers make in designing and marketing *their finished products*. Adopting § 5 and the sound policies that animate it would preclude such a result.

In short, § 5 of the Third Restatement (together with § 2, which it incorporates), imposes reasonable burdens on suppliers of raw materials or other component parts without unrealistically making them liable for the design and/or warning choices of third parties who incorporate those materials into finished

products. UCC reiterates that the Third District's decision does not hinge on whether this Court adopts either § 2 or § 5. However, if the Court chooses to address the merits of the two Restatements, it should adopt both § 2 and § 5 because they create a comprehensive products liability system with fair and objective criteria for courts and juries to use in assessing a raw material supplier's liability for injury caused by a defective finished product.

CONCLUSION

For all of the foregoing reasons, the Court should approve the Third District's decisions that UCC was entitled to judgment as a matter of law on Plaintiff's design defect claim and that a new trial is required because Plaintiff's special duty to warn instruction was misleading and amounted to a directed verdict.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on October 16, 2013, a true copy of the foregoing has been served via e-mail on:

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing brief complies with the font and typeface requirements set forth in Florida Rule of Appellate Procedure 9.210(a)(2).

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