THE SUPREME COURT OF FLORIDA

William P. Aubin,

Petitioner,

v.

UNION CARBIDE CORPORATION,

Respondent.

_______________________________/

Case No. SC12-2075

L.T. Case No. 3D10-1982

RESPONDENT'S BRIEF ON JURISDICTION

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TABLE OF CONTENTS

TABLE OF CITATIONS ii

STATEMENT OF THE CASE AND FACTS 1

SUMMARY OF ARGUMENT 4

ARGUMENT 5

I. THERE IS NO CONFLICT IN THIS CASE REGARDING WHETHER THE SECOND OR THIRD RESTATEMENT APPLIES 5

II. THERE IS NO CONFLICT WITH *MCCONNELL* OVER A "LEARNED INTERMEDIARY" INSTRUCTION 7

III. THERE IS NO CONFLICT WITH *COX* REGARDING REWEIGHING EVIDENCE ON APPEAL 9

CONCLUSION 10

CERTIFICATE OF SERVICE 11

CERTIFICATE OF COMPLIANCE 12

TABLE OF CITATIONS

CASES **PAGE**

Cox v. St. Joseph's Hospital,
71 So. 3d 795 (Fla. 2001) 9, 10

Force v. Ford Motor Co.,
879 So. 2d 103 (Fla. 5th DCA 2004) 5

Gilchrist Timber Co. v. ITT Rayonier, Inc.,
696 So. 2d 334 (Fla. 1997) 6

Gooding v. Univ. Hosp. Buildings, Inc.,
445 So. 2d 1015 (Fla. 1984) 10

Gonzalez v. Metro. Dade County Pub. Health Trust,
651 So. 2d 673 (Fla. 1995) 6

Kohler Co. v. Marcotte,
902 So. 2d 596 (Fla. 3d DCA 2005) 7

Liggett Group v. Davis,
973 So. 2d 467 (Fla. 4th DCA 2007) 5

McConnell v. Union Carbide Corp,
937 So. 2d 148 (Fla. 4th DCA 2006) 5, 7, 8, 9

Scheman-Gonzalez v. Saber Manufacturing Co.,
816 So. 2d 1133 (Fla. 4th DCA 2002) 7

Union Carbide Corp. v. Kavanaugh,
879 So. 2d 42 (Fla. 4th DCA 2004) 7

Warren ex rel. Brassell v. K-Mart Corp.,
765 So. 2d 235 (Fla. 1st DCA 2002) 7

West v. Caterpillar Tractor,
336 So. 2d 80 (Fla. 1976) 5

OTHER **PAGE**

Restatement (2d) of Torts (1965) 3, 4, 9

Restatement (2d) of Torts (1965) § 402A 6

Restatement (2d) of Torts (1965) § 388 ....

Restatement (3d) of Torts: Products Liability (1997) 3, 4, 9

Restatement (3d) of Torts: Products Liability(1997) § 5 6

STATEMENT OF THE CASE AND FACTS

Petitioner William Aubin's jurisdictional brief paints an inaccurate picture of this case and asks this Court for an improper advisory opinion on matters that are not at issue and would have no impact on the result below. In declining to certify conflict, the Third District discussed the disconnect between the matters actually at issue and the theoretical issues Aubin now wishes to litigate. The Third District correctly refused to certify conflict, and this Court should now deny review.

The Trial Court Proceedings

Union Carbide mined, processed, and sold raw asbestos in bulk under the Calidria trade name to intermediary companies that manufactured asbestos-containing products. Op. at 3, 8. Aubin claimed he developed mesothelioma from his use of a Georgia-Pacific joint compound containing asbestos supplied by Union Carbide. Op. at 2-3. Aubin sued Union Carbide for his injuries, claiming that its asbestos had a manufacturing or design defect and that Union Carbide supposedly failed to satisfy its duty to warn of the dangers of asbestos. Op. at 8.

At trial, Aubin presented no evidence that any problem occurred in the manufacturing process or that anything in the "design" from Union Carbide's processing caused Aubin's injuries. Op. at 15-16, 20-21. Union Carbide moved for a directed verdict on those claims, but the trial court denied the motion. Op. at 9.

At the charge conference, Aubin requested that an instruction stating, "An

asbestos manufacturer, such as Union Carbide Corporation, has a duty to warn end users of an unreasonable danger in the contemplated use of its products." Op. at 29. Union Carbide objected that, standing alone, the instruction suggested Union Carbide could satisfy its duty to warn only by directly warning Georgia-Pacific's customers. Union Carbide requested instructions explaining how a bulk supplier can discharge its duty by acting with reasonable care. Op. at 30. Instead, the trial court gave only Aubin's instruction. Op. at 30. Doing so amounted to a directed verdict for Aubin because there was no dispute that Union Carbide had not provided warnings about asbestos directly to persons, like Aubin, who used the intermediary customers' finished products. Op. at 31.

Given the misleading instruction, it is no surprise the jury returned a verdict in Aubin's favor. Union Carbide appealed, and the district court reversed.

The Third District's Decision

The district court addressed Aubin's manufacturing defect, design defect, and warning claims. First, as to manufacturing defect, the district court accepted Aubin's concession that he failed to present evidence of a manufacturing defect. Op. at 15-16. Second, as to design defect, the court held that although Union Carbide's processing of its raw asbestos for commercial use constituted a design, Union Carbide was nevertheless entitled to a directed verdict because Aubin presented no evidence that the "**design**" of Union Carbide's asbestos—as opposed

to the dangers inherent in asbestos—caused Aubin's injuries. Op. at 16-21 (emphasis in original). Third, as to duty to warn, the district court held that Aubin's special instruction misled the jury by telling it that Union Carbide had a duty to warn Aubin while failing to explain how that duty could be discharged, as set forth in both the Second and Third Restatements. Op. at 21-31. The district court reversed the judgment and ordered a new trial on duty to warn.

Aubin moved to certify conflict, arguing—as he does here—that the district court's application of the Third Restatement conflicts with decisions applying the Second Restatement. The district court denied the motion through a substituted opinion. It held that the distinction between the Second Restatement's consumer expectations test and the Third Restatement's risk-utility test has nothing to do with the issues in this case, explaining that the "reversal of Aubin's design defect claim is not based on any discrepancy between these two standards." Op. at 33-34. The court explained that Union Carbide was entitled to a directed verdict on the design defect claim under both Restatements because the causation requirement is "identical under the Second Restatement and the Third Restatement." *Id.* The district court also explained that "our 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." Op. at 34-35.

SUMMARY OF ARGUMENT

There is no conflict in this case. Aubin tries to manufacture one, and essentially seeks an improper advisory opinion, by pointing to a conflict at issue in other cases—the distinction between the consumer expectations test and the risk-utility test—that has no connection to this case. The parties never litigated that issue in the lower courts and have no reason to litigate it here because it has nothing to do with the case and the dispositive issue of whether Aubin presented causation evidence on his design defect claim. The causation requirement is identical under both Restatements. This Court does not give advisory opinions.

Similarly, Aubin tries to manufacture a conflict on his duty to warn claim, asserting that the Fourth District follows the Second Restatement and approved a duty to warn instruction that the Third District rejects under the Third Restatement. This misreads the case law and ignores why the district court expressly declined to certify conflict: the duty to warn law is the same—and the instructions here were erroneous and misleading—under both Restatements. Whether a bulk supplier is liable when a third-party manufacturer fails to warn end users of a danger turns on the reasonableness of the supplier's conduct and is a question of fact for the jury. The instruction in this case did not set forth that law. No conflict exists.

Finally, there is no misapplication conflict on the reweighing of evidence. The district court knows it cannot reweigh evidence and did not do so. Aubin

failed to present *any* evidence that any *design* created by Union Carbide's processing of raw asbestos caused his injuries. He does not even attempt to point to such evidence now or to show how the district court misapplied this basic law.

ARGUMENT

I. THERE IS NO CONFLICT IN THIS CASE REGARDING WHETHER THE SECOND OR THIRD RESTATEMENT APPLIES.

Aubin argues that the decision below relied on section 5 of the Restatement (Third) of Torts: Products Liability and thus conflicts with *West v. Caterpillar Tractor, Co.* 336 So. 2d 80 (Fla. 1976), which relied on section 402A of the Restatement (Second) of Torts. Aubin also argues that the decision below conflicts with *Liggett Group v. Davis*, 973 So. 2d 467 (Fla. 4th DCA 2007), *McConnell v. Union Carbide Corp.*, 937 So. 2d 148 (Fla. 4th DCA 2006), and *Force v. Ford Motor Co.*, 879 So. 2d 103 (Fla. 5th DCA 2004), because those decisions declined to follow the Third Restatement's risk-utility test for product defects and instead followed the Second Restatement's consumer expectations test. Aubin distorts this case to search for a conflict and seek review, but there is no conflict here.

Aubin made the same argument to the district court, which acknowledged that a distinction exists between the Second Restatement's consumer expectations test and the Third Restatement's risk-utility test, but which declined to certify conflict, explaining that which Restatement applies had nothing to do with why Aubin's claim failed. As the court stated, Union Carbide is entitled to a directed

verdict on Aubin's design defect claim because he "did not present any evidence showing that SG-210 Calidria's purported design defect—as opposed to its basic, raw, and naturally occurring characteristics—caused his harm," and the causation requirement "is identical under the Second Restatement and the Third Restatement." Op. at 33-34. Likewise, Union Carbide is entitled to a new trial on duty to warn because the trial court's lone instruction was incomplete and misleading under both Restatements, which set forth the same duty to warn test. Op. at 34-35. Which Restatement applies has nothing to do with any of this.

Aubin also argues that "whether the Second or the Third Restatement applies in a products liability case is an extremely important issue." Pet. Br. at 5. That abstract question also has nothing to do with the issues in this case, and it is premised on the false assumption that Restatements are adopted altogether. To the contrary, courts adopt or reject particular provisions in connection with the cases before them. In *West*, for example, the Court adopted the doctrine of strict liability as set forth in section 402A of the Second Restatement. Subsequently, other courts adopted some provisions and rejected others. *See, e.g., Gilchrist Timber Co. v. ITT Rayonier, Inc.*, 696 So. 2d 334, 339 (Fla. 1997) (adopting Second Restatement § 552); *Gonzalez v. Metro. Dade County Pub. Health Trust*, 651 So. 2d 673 (Fla. 1995) (declining to adopt Second Restatement § 868).

Indeed, the Third *and* Fourth Districts have followed section 5 of the Third

Restatement with respect to persons who, like Union Carbide, supply components that others integrate into their own finished products. *Kohler Co. v. Marcotte*, 902 So. 2d 596 (Fla. 3d DCA 2005); *Scheman-Gonzalez v. Saber Manufacturing Co.*, 816 So. 2d 1133 (Fla. 4th DCA 2002); *see also Warren ex rel. Brassell v. K-Mart Corp.*, 765 So. 2d 235 (Fla. 1st DCA 2002) (applying § 2). Likewise, the decision below relied on section 388 of the Second Restatement, and the Fourth District did so as well in *McConnell* and *Union Carbide Corp. v. Kavanaugh*, 879 So. 2d 42 (Fla. 4th DCA 2004). No conflict exists regarding section 5 or section 388.

In the end, Aubin's effort to show a conflict amounts to a request for an advisory opinion from this Court on whether the consumer expectations or risk-utility tests should be applied in other litigation. That issue may be relevant in other cases but it has never been at issue here, at trial or on appeal, and the Constitution's limited authorization for advisory opinions does not apply to civil cases like this one. *See Dep't of Rev. v. Kuhnlein*, 646 So. 2d 717, 721 (Fla. 1994). If the Court is to address any differences between the Restatements, that should occur where the parties have litigated such issues and have some stake in how they will be resolved. There is no conflict, and this Court should deny review.

II. THERE IS NO CONFLICT WITH *MCCONNELL* OVER A "LEARNED INTERMEDIARY" INSTRUCTION.

Aubin next asserts that the decision below conflicts with *McConnell*, arguing that the district court "held that a trial court must instruct the jury that a component

supplier may satisfy its duty to warn end users by relying on a learned intermediary" while *McConnell* rejected a learned intermediary defense. Pet. Br. at 4. But Aubin's argument that the district court's decision requires giving a "learned intermediary" instruction while *McConnell* supposedly rejected the same instruction mischaracterizes what the district courts actually ruled. There is no conflict, as the district court determined, and this Court should deny review.

In *McConnell*, the Fourth District ordered a new trial because the jury was given a "learned intermediary" instruction that told the jury about only a single factor—the intermediary's "level of education and knowledge," 937 So. 2d at 150—and erroneously allowed the intermediary's "learned" status to be dispositive. *McConnell* rejected that approach and held it was error to give an instruction that "strongly implie[d] that Georgia-Pacific's specific knowledge . . . was the *sole focus* of Florida's strict liability law." *Id.* at 154 (emphasis added).

The decision below similarly found that a pure learned intermediary test is ***not*** appropriate because the proper test is whether the bulk supplier acted reasonably under all of the circumstances. Op. at 25-26. The court explained that "[i]n Florida, a variant of the learned intermediary doctrine has been extended outside of the prescription drug context, *although not as a complete defense*." Op. at 25 (emphasis added). Fully consistent with *McConnell*, the district court held that "the intermediary's level of education, knowledge, expertise, and relationship

with the end-users is informative, but not dispositive, on the issue of whether it was reasonable for the manufacturer to rely on that intermediary to relay the warning to end-users." *Id.* The court held that the reasonableness test set forth in both the Second and Third Restatements governs and that the two Restatements are substantively identical on this point. Op. at 26-27, 34-36.

Simply put, *McConnell* held a duty to warn instruction misleading because it suggested that only a single factor—the intermediary's knowledge—could be dispositive, while the decision below held an instruction misleading because it suggested that Union Carbide had a duty to warn end users directly without explaining that the issue is one of reasonableness or mentioning any factor the jury could consider to determine whether Union Carbide discharged its duty. The decision below did not authorize the instruction *McConnell* rejected as incomplete, and *McConnell* did not authorize the instruction that the decision below rejected as incomplete. No conflict exists, and this Court should deny review.

III. THERE IS NO CONFLICT WITH *COX* REGARDING REWEIGHING EVIDENCE ON APPEAL.

Aubin's final argument asserts misapplication conflict with *Cox v. St. Joseph's Hospital*, 71 So. 3d 795 (Fla. 2001), on grounds the district court improperly reweighed Aubin's design defect evidence. No conflict exists. The Third District knows it cannot reweigh evidence and did not do so. It held that under both Restatements, Aubin's *design* defect claim required him to present

evidence the product's asserted *design* caused his injuries and he failed to present such evidence. Instead, Aubin relied entirely on the dangers inherent in asbestos. In the absence of evidence Union Carbide's *design* caused his injuries, Union Carbide was entitled to a directed verdict on the design defect claim. *E.g.*, *Gooding v. Univ. Hosp. Building, Inc.*, 445 So. 2d 1015, 1017 (Fla. 1984) (approving directed verdict in absence of causation evidence; cited with approval in *Cox*). There is no conflict with *Cox* and the Court should deny review.

CONCLUSION

Aubin urges this Court to address "an extremely important issue" that is not at issue at all in this case. He makes much of the purported differences between the two Restatements, but he fails to respond to the district court's conclusion that no difference—including the difference between the consumer expectations and risk-utility standards—has any bearing on this case. The parties have no stake in briefing what would inevitably lead to an improper advisory opinion about how legal principles not relevant here would be applied in unknown future cases involving unknown future facts. The respective merits of particular Restatement provisions should be addressed in a case where the outcome matters to the parties pursuing the appeal. This is not such a case. No conflict exists, and the Court should deny review.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on November 2, 2012, a true copy of the foregoing has been served on James L. Ferraro, Melissa Visconti, and Juan P. Bauta (jlf@ferrarolaw.com, mdv@ferrarolaw.com, jlb@ferrarolaw.com,

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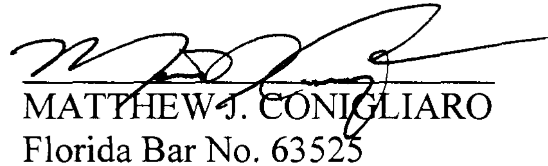

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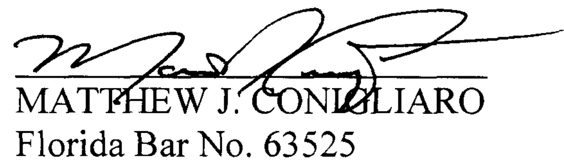
CERTIFICATE OF COMPLIANCE

I hereby certify that the type size and style used throughout this brief is 14-point Times New Roman double-spaced, and that this brief fully complies with the requirements of Florida Rule of Appellate Procedure 9.210(a)(2).



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