SC12-2075

IN THE SUPREME COURT OF FLORIDA

FILED
2012 OCT -1 AM 10:10
BY

WILLIAM P. AUBIN,

Petitioner,

v.

UNION CARBIDE CORPORATION,

Respondent.

Case No. SC12-

L.T. No. 3D10-1982

ON REVIEW FROM THE DISTRICT COURT OF APPEAL THIRD DISTRICT, STATE OF FLORIDA

PETITIONER'S BRIEF ON JURISDICTION

THE FERRARO LAW FIRM, P.A.

James L. Ferraro, Esq.
Florida Bar No. 381659
jlf@ferrarolaw.com
Melissa D. Visonti, Esq.
Florida Bar No. 0068063
mdv@ferrarolaw.com
Juan P. Bauta, Esq.
Florida Bar No. 894060
jpb@ferrarolaw.com
4000 Ponce de Leon Boulevard
Suite 700
Coral Gables, Florida 33146
(Tel): (305) 375-0111
(Fax): (305) 379-6222

Attorneys for Petitioner

TABLE OF CONTENTS

TABLE OF CONTENTS ii

TABLE OF CITATIONS iii

INTRODUCTION AND STATEMENT OF THE CASE AND FACTS 1

SUMMARY OF THE ARGUMENT 4

ARGUMENT 5

I. THIS COURT HAS CONFLICT JURISDICTION. 5

A. The Decision Below Conflicts With Decisions From This Court and From the Fourth and Fifth Districts As To Whether The Second or the Third Restatement Applies.. 5

B. The Decision Below Directly Conflicts With the Fourth District's Decision in *McConnell* As To Whether The Trial Court Was Required To Give The Jury A Learned Intermediary Instruction ...8

C. The Decision Below Conflicts With This Court's Decision in *Cox v. St Josephs Hospital* Regarding Causation and Directed Verdicts. 9

II. THIS COURT SHOULD ACCEPT JURISDICTION. 10

CONCLUSION 10

CERTIFICATE OF SERVICE 11

CERTIFICATE OF COMPLIANCE 12

TABLE OF CITATIONS

CASES

Agrofollajes v. E.I. Du Pont De Nemours & Co., 48 So. 3d 976 (Fla. 3d DCA 2010) 6

Cox v. St. Josephs Hosp., 71 So. 3d 795 (Fla. 2011) 5, 9

Force v. Ford Motor Co., 879 So. 2d 103 (Fla. 5th DCA 2004) 4, 7

Kohler Co. v. Marcotte, 907 So. 2d 596 (Fla. 3d DCA 2005) 3, 6

Liggett Group v. Davis, 973 So. 2d 467 (Fla. 4th DCA 2007) 4, 7

McConnell v. Union Carbide Corp., 937 So. 2d 148 (Fla. 4th DCA 2006) .... *passim*

Union Carbide Corp. v. Aubin, 37 Fla. L. Weekly D2018 (Aug. 22, 2012) (on Motion for Rehearing or Certification) .... *passim*

West v. Caterpillar Tractor Co., Inc., 336 So. 2d 80 (Fla. 1976) 4, 6, 7, 10

OTHER AUTHORITIES

Restatement (Second) of Torts: Products Liability § 402A 7

Restatement (Third) of Torts: Products Liability 1, 4

CONSTITUTIONAL PROVISIONS AND RULES OF COURT

Art. V, § 3(b)(3), Fla. Const 5

Fla. R. App. P. 9.030(a)(2)(A)(iv) 5

INTRODUCTION

Petitioner/Plaintiff, William Aubin, seeks review of the decision of the Third District in *Union Carbide Corp. v. Aubin*, 37 Fla. L. Weekly D2018 (Aug. 22, 2012) (on Motion for Rehearing or Certification) (App. 1). The Third District's decision directly conflicts with decisions from this Court and other district courts on whether the Restatement (Third) of Torts: Products Liability, applies to strict products liability claims in Florida; and, whether, in a products liability action based on a lack of adequate warnings regarding an unreasonably dangerous component, a court must give a learned intermediary instruction. The decision also conflicts with decisions from this Court prohibitting district courts from reweighing evidence on review of the denial of a directed verdict.

STATEMENT OF THE CASE AND FACTS

Calidria SG-210 is produced by Respondent, Union Carbide ("Carbide"), by removing raw chrysotile asbestos from the ground and processing it into a product designed for use in joint compounds and texture sprays. (App.1 at p.3). Carbide marketed and sold Calidria SG-210 asbestos to intermediaries, such as Georgia Pacific ("GP") and Premix Marbletite ("Premix"), to be used as a component in their joint compounds and texture sprays (*Id.* at 3,5). Carbide knew the intended use of joint compounds and texture sprays for which SG-210 was designed created significant dust which liberated carcinogenic asbestos fibers into a respirable form

(*Id* at p.5). Between 1972 and 1974, Mr. Aubin inhaled the dust created from the use of joint compounds and texture sprays containing Calidria SG-210 (*Id.* at pp. 5-6). Unaware of any danger, Mr. Aubin did not protect himself (*Id.* at pp. 6, 8).

In August 2008, Mr. Aubin was diagnosed with malignant peritoneal mesothelioma, a progressive, terminal disease caused by asbestos exposure (*Id.* at p.8). Mr. Aubin presented evidence that Calidria SG-210 and chrysotile asbestos in general, when in a respirable form, can and do cause mesothelioma, as well as other asbestos-related diseases (*Id.* at pp.4-5).

Mr. Aubin's Complaint asserts claims for negligence and strict liability and alleges that the defendants' asbestos and asbestos-containing products caused his mesothelioma (*Id.*). At trial, the parties presented conflicting evidence regarding whether Carbide placed warnings on its packages of Calidria or whether it otherwise adequately warned intermediary manufacturers about the dangers of asbestos (*Id.* at pp.7-8). Mr. Aubin presented evidence that Carbide actively downplayed and concealed the dangers from intermediaries and the public (*Id.*). It was undisputed that Carbide knew its intermediaries were not warning end users and that Carbide did not itself warn end users about the dangers of asbestos (*Id.*).

At trial, Carbide moved for directed verdict on the theory that it, as a component supplier, was not liable to Mr. Aubin under the Third Restatement and the Third District's decision in *Kohler Co. v. Marcotte*, 907 So. 2d 596 (Fla. 3d DCA 2005. (App.1. at p. 9). The motion was denied. The trial court gave several

instructions regarding the duty to warn and reasonableness, including the following instruction: "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." (*Id.*). The jury returned a verdict in favor of Mr. Aubin, awarding damages of $14,191,000 and assessing Carbide's fault at 46.25 percent (*Id.*). After the court entered an amended judgment of $6,624,150 to reflect settlements and the liability of *Fabre* defendants, Carbide appealed (*Id.*).

In its original June 20, 2012, opinion, the Third District reversed and remanded the case for a new trial, holding that the trial court erred in applying the Second Restatement rather than the Third Restatement and, "as a result, erred in denying Union Carbide's motion for directed verdict" as to the design defect claim. (App.2 at p. 10). The Third District also reversed and remanded for a new trial on the basis of the duty to warn jury instruction holding that the court was required to instruct the jury that, despite the unreasonably dangerous product, Carbide could have satisfied its duty to warn by adequately warning and relying on its intermediary manufacturers. (*Id.*).

Petitioner filed a Motion for Rehearing or Certification and requested that the court certify both conflict and questions of great public importance. In its August 22, 2012, opinion, the Third District denied the Motion for Rehearing or Certification but withdrew its June 20th opinion and substituted the August 22nd opinion "to address arguments advanced in [Mr. Aubin's] motion[.]" (App.1 at

p.2). The holdings and the result are the same.

In its decision, the Third District made three rulings, each of which forms a separate basis for conflict. First, it expressly held that the Restatement (Third) of Torts: Products Liability applies to products liability claims in Florida. (App. 1 at pp.11-13). Second, it 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 (*Id.* at pp.31-32). Finally, it held that directed verdict should have been granted to Carbide based upon its reweighing of the causation evidence. (*Id.* at pp.20-21).

SUMMARY OF THE ARGUMENT

This Court has conflict jurisdiction because the decision below conflicts with decisions of this Court and other district courts of appeal in three, independent regards. First, the holding that the Third Restatement applies to products liability actions in Florida directly conflicts with this Court's decision in *West v. Caterpillar Tractor Co., Inc.*, 336 So. 2d 80 (Fla. 1976), as well as the decisions from the Fourth and Fifth Districts in *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). Second, the holding that the trial court must instruct the jury that a supplier of an unreasonably dangerous component may satisfy its duty to warn end users by relying on a learned intermediary directly conflicts with the Fourth District's decision in *McConnell, supra.* Finally, the holding that Carbide is entitled to a

directed verdict based on the court's reweighing of causation evidence conflicts with this Court's decision in *Cox v. St. Josephs Hosp.*, 71 So. 3d 795 (Fla. 2011).

The Court should exercise its discretion to accept jurisdiction because the issue of whether the Second or the Third Restatement applies in a products liability case is an extremely important issue. With its decision, the Third District has unilaterally overruled this Court's precedent. Moreover, the decision below calls into question decisions throughout the State which have been applying the Second Restatement and creates substantial confusion concerning proof in products liability cases in Florida. Given the significant numbers of products liability cases already pending throughout the State, the decision affects thousands of cases.

ARGUMENT

I. THE COURT HAS CONFLICT JURISDICTION

This Court has jurisdiction because the Third District's decision expressly and directly conflicts with a decision of another district court of appeal or this Court, which is sufficient to establish jurisdiction. Art. V, § 3(b)(3), Fla. Const; Fla. R. App. P. 9.030(a)(2)(A)(iv).

A. The Decision Below Conflicts With Decisions From This Court and From the Fourth and Fifth Districts As To Whether The Second or the Third Restatement Applies.

The Third District expressly held that the Third Restatement applies to products liability design defect claims. As it explains, the Third District "adopted the component parts doctrine articulated in Section 5 of the Third Restatement as

the governing law for products liability claims arising out of a defendant's sale of a component part to a manufacturer who then incorporates the component into its own product." (App. 1 at p.11 (*citing Kohler*, 907 So. 2d at 598-99)). The court further explains that it reaffirmed and extended its adoption of the Third Restatement in *Agrofollajes v. E.I. Du Pont De Nemours & Co.*, 48 So. 3d 976 (Fla. 3d DCA 2010), in which it "rejected the Second Restatement's 'consumer expectations' test as an independent basis for finding a design defect[.]" (App.1 at p. 11). The court also expressly disagreed with Mr. Aubin's argument that the Second Restatement applied because this Court had not yet adopted the Third Restatement, finding, instead, that decisions of the district courts of appeal represent the law of Florida until they are overruled by this Court. (App.1 at p.12). Therefore, the court held that because its own decision in *Kohler* has not been overruled by this Court, the legal principles in its own decision are binding in the Third District, regardless of *prior* inconsistent precedent from this Court. (*Id.*).

The Third District's decision, although acknowledging Mr. Aubin's and the trial court's reliance on this Court's decision in *West*, otherwise ignores the case, in which this Court adopted the doctrine of strict liability as stated in § 402A of the Second Restatement. *See* 336 So. 2d at 92. The Third District's adoption of the Third Restatement created a conflict with this Court's precedent in *West*.

The Third District's application of the Third Restatement is also in express and direct conflict with the decisions of other district courts of appeal. In *Davis,*

supra, the Fourth District specifically held that the Second Restatement applies in a strict products liability case. (973 So. 2d at 475-76). In *McConnell, supra*, the Fourth District applied §402A of the Second Restatement and again reiterated, that it would "purposefully forbear from any reliance on the [Third Restatement] and its risk-benefit analysis until the supreme court has recognized it as correctly stating the law of Florida." 937 So. 2d. at 148 n.4. Similarly, in *Force, supra*, the Fifth District specifically held that the Second Restatement and its consumer expectations test apply in products liability actions. 879 So. 2d. at 107.

Respectfully, the Third District's decision in this case cannot be reconciled with the decisions from the Fourth and Fifth Districts, cited above, nor with this Court's decision in *West, supra*. Whereas, in the Fourth and Fifth Districts, a plaintiff may prove strict liability under the Second Restatement, a plaintiff in the Third District must satisfy the Third Restatement and its component parts doctrine. This is precisely the type of decisional conflict for which this Court's discretionary jurisdiction exists, and we respectfully urge this Court to grant review to resolve the conflict on this very wide-reaching and significant issue.

B. The Decision Below Directly Conflicts With the Fourth District's Decision in *McConnell* As To Whether The Trial Court Was Required To Give The Jury A Learned Intermediary Instruction.

The Third District held that the trial court erred because it did not instruct the jury that Carbide could have discharged its duty to warn end users by warning intermediary manufacturers and relying on them to warn end-users. (App. 1 at pp.

30-31). In *McConnell, supra*, the Fourth District held, in a case involving the same defendant, the same intermediary, and the same product, that the trial court erred in instructing the jury that Carbide *could* discharge its duty by warning the intermediary about the dangers of its SG-210 Calidria asbestos. *See McConnell*, 937 So. 2d at 156 ("[W]ith something like undisclosed Calidria Asbestos, whose unknowing use as intended can cause serious injury ... a supplier in the shoes of Carbide may not reasonably rely on an intermediary, no matter how learned it might be deemed.").

The Third District correctly noted that the instruction in this case was "technically accurate" because it was taken directly from the *McConnell* decision, which is on all fours with the instant case. The Third District nevertheless held that the instruction was misleading and entitled Carbide to a new trial in this case. Thus, as it now stands, a plaintiff in a products liability action may be entitled to one instruction in the Fourth District, but if he travels immediately south to the Third District, the same instruction, on almost the exact same facts, is erroneous

The Third District's express holding directly conflicts with the Fourth District's *McConnell* decision. Again, this is exactly the type of direct conflict this Court's discretionary review jurisdiction was intended to embrace.

C. **The Decision Below Conflicts With This Court's Decision in *Cox v. St Josephs Hospital* Regarding Causation and Directed Verdicts.**

Finally, the Third District acknowledged that Mr. Aubin presented evidence, including expert testimony, that chrysotile asbestos in respirable form causes mesothelioma (App.1 at pp.4-5) and that Carbide designed, marketed, and sold Calidria for use in products used by Mr. Aubin that liberate Calidria into respirable form (Id.). The court nevertheless disagreed with the jury's conclusion that the defective design of Calidria caused Mr. Aubin's mesothelioma and reversed the denial of a directed verdict for Carbide as to the strict liability design defect claim.

The court's reweighing of the conflicting causation evidence to direct a verdict for Carbide is in conflict with the decision in *Cox, supra*, in which this Court reversed a Second District decision on the grounds that "the district court impermissibly reweighed the evidence and substituted its own evaluation of the evidence in place of the jury." *Cox*, at 801-802. The opinion below also shows that the Third District misapplied this Court's precedent holding that a directed verdict "is not appropriate in cases where there is conflicting evidence as to causation or the likelihood of causation." *Id.* The Third District's decision creates conflict with this Court's precedent and provides another basis for this Court's jurisdiction.[1]

[1] This Court recently accepted jurisdiction in a personal injury case raising this same basis for conflict in *Friedrich, et ux v. Fetterman and Associates* (Case No. SC11-2188) (Order dated July 24, 2012).

II. THIS COURT SHOULD ACCEPT JURISDICTION.

The issue of whether the Second or Third Restatement applies in products liability cases is extremely important. As demonstrated in the instant case, application of one or the other can dramatically change the course of a trial – resulting, here, in the reversal of a judgment. As it now stands, equally situated plaintiffs will have their cases tried under significantly different rules with different jury instructions depending on whether their lawsuits are filed in the Third District or the Fourth or Fifth Districts. There is no rational reason, either in law or policy, for such disparate treatment of parties in Florida courts.

Indeed, because of the wide-ranging importance of this issue, the Florida Justice Association has already filed a notice of its intention to seek leave to file an amicus brief if jurisdiction is granted.

Does the Second or Third Restatement apply to products liability cases in Florida? Must a jury be instructed on the learned intermediary defense with a deadly component like asbestos? Should the appellate court be permitted to reweigh evidence regarding causation to reverse the denial of a directed verdict? The courts and practitioners in Florida need a definitive answer.

CONCLUSION

For the foregoing reasons, Petitioner respectfully submits that this Court has conflict jurisdiction and should exercise its discretion to grant review of this case.

Respectfully Submitted,

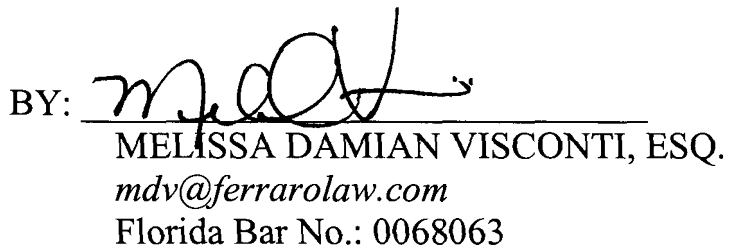
THE FERRARO LAW FIRM
Attorneys for Petitioner
4000 Ponce de Leon Blvd.
Suite 700
Miami, Florida 33146
Telephone: (305) 375-0111
Facsimile: (305) 379-6222
Email: mdv@ferrarolaw.com

By:

James L. Ferraro, Esq.
Florida Bar No. 381659
Melissa D. Visonti, Esq.
Florida Bar No. 0068063
Juan P. Bauta, Esq.
Florida Bar No. 894060

CERTIFICATE OF SERVICE

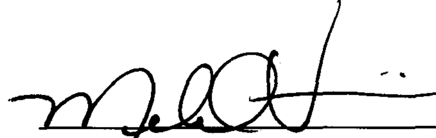
I HEREBY CERTIFY that a true and correct copy of the Petitioner's Brief on Jurisdiction has been served via electronic and United States mail to Matthew Conigliaro, Esq., Carlton Fields, 200 Central Avenue, Suite 2300, St. Petersburg, Florida 33701-4352, and Dean A. Morande, Esq., Carlton Fields, 525 Okeechobee Blvd, Suite 1200, West Palm Beach, Florida 33401 (Attorneys of Record for Union Carbide) on this 1st day of October, 2012.

BY: 

MELISSA DAMIAN VISCONTI, ESQ.
mdv@ferrarolaw.com
Florida Bar No.: 0068063

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the foregoing brief uses Times New Roman 14-point font and complies with the font requirements of Rule 9.210(a)(2), Florida Rules of Appellate Procedure.



Melissa D. Visconti, Esq.