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IN THE SUPREME COURT OF FLORIDA

Case No. SC12-2075

WILLIAM P. AUBIN
Petitioner
v.
UNION CARBIDE CORPORATION
Respondent

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

PETITIONER'S REPLY BRIEF

Respectfully submitted,

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ARGUMENT

Carbide and its *Amicus* attempt to redefine Plaintiff's position as seeking a radical departure from Florida law. In fact, Plaintiff is seeking re-affirmation of the Second Restatement while Carbide and its allies seek a change to the Third Restatement. Carbide further erroneously suggests that there is no functional difference between the current law and the Third Restatement. Despite this interesting position, Carbide still argues for adoption of the Third Restatement.

I. DESPITE *AUBIN*'S HOLDING, CARBIDE CONTINUES TO INSIST THAT ITS PRODUCT IS NOT A DESIGNED PRODUCT.

A. Carbide Cannot Articulate a Rational Explanation for *Aubin*'s Causation Holding, Which Was Clearly an Impermissible Reweighing of the Evidence.

Carbide's flawed response to the court's impermissible re-weighing of causation evidence in *Union Carbide v. Aubin*, 97 So3d 886 (Fla. 3d DCA 2012), creates somewhat of a paradox. This paradox lies in the fact that it disagrees with the *Aubin* finding that its product is defectively designed yet argues that its product is a "raw material." Carbide also argues that the Plaintiff failed to demonstrate that the "processing" of its "un-designable" product made it more dangerous than it otherwise would be.

The *Aubin* court held that while Carbide's asbestos was a defectively designed product, there was no causal connection between the defect and Mr. Aubin's mesothelioma. The *Aubin* court stated:

> In this case, Aubin failed to present any evidence suggesting that the defective design of SG–210 Calidria caused Aubin's harm. While there is record evidence suggesting that the design of SG–210 Calidria caused it to be ***more dangerous*** with respect to the contraction of asbestosis than raw chrysotile asbestos, such evidence is irrelevant to Aubin's design defect claim because Aubin did not contract asbestosis; he contracted mesothelioma.

Id. at 898 (emphasis in original). This holding by the *Aubin* court lacks common sense. The court held that Plaintiff failed to establish a causal link between Calidria asbestos and mesothelioma but did so as to asbestosis. It is illogical to conclude that a design defect is a cause of the less dangerous and rarely fatal disease of asbestosis, but not a cause of the always fatal disease mesothelioma. The **only** difference between the two diseases as to causation is that mesothelioma requires very little exposure whereas asbestosis requires very intense exposure.

The evidence at trial on design defect clearly established that Carbide's product was *specifically designed for use in products that are known to produce substantial amounts of respirable dust*. *See* Ini. Br. at 34. The findings were that the design of SG-210 was defective and unreasonably dangerous because it caused the liberation of respirable Calidria asbestos fibers; Calidria asbestos causes mesothelioma when its fibers are inhaled; and Aubin specifically inhaled respirable Calidria fibers, which caused his mesothelioma. *See id*. at 34-37. There is no rational explanation for the *Aubin* court's decision other than it impermissibly reweighed the evidence to the detriment of the non-moving party. On this basis

alone this Court should reverse *Aubin*.

B. Carbide is Not an Innocent Component Manufacturer.

1. Carbide's Product is Not a Raw Material.

Carbide boldly argues that Plaintiff abandoned his design defect theory in favor of an assault on the innocent "component part" or "raw material" manufacturer. This inaccurate statement merely is designed to reframe the argument before this Court. Carbide and its *Amicus* commit a great deal of argument to discussing the "innocent" component part manufacturer and the "innocent" raw material seller. This is nothing more than an attempt to bait this Court into shifting responsibility from manufacturers to innocent users, which nullifies *West v. Caterpillar*, 336 So.2d 80 (Fla. 1976). Florida law, however, does not target innocent parties for liability.

Plaintiff never has suggested that an innocent component part manufacturer or an innocent raw material seller should be held liable for damages caused by a final product. To be clear, Carbide is **neither** an innocent component manufacturer **nor** a raw material seller. It is Carbide's designed component part that makes the end-product unreasonably dangerous. In other words, but for Carbide's product, the end-products would not pose a danger to Aubin or the consuming public. Similarly, Carbide's designed, processed and manufactured product is not a raw material. As the *Aubin* court agreed, Carbide **designed** its product for a specific use that it knew would put Aubin and the consuming public

at risk of injury and death. *Aubin* at 980-82. Carbide engaged in a strategy of misinformation and denial in order to continue selling its product. *Id.* Carbide knew that its customers were not warning the public and consumers like Aubin about the dangers of Carbide's asbestos product. T.Vol. XII, p.1317, 1337. Carbide ignores these facts and instead paints itself as an innocent victim of an unjust legal system.

Carbide presents inconsistent positions when it reluctantly acknowledges that courts have determined SG-210 to be a **designed** product, while maintaining that its designed product is in fact nothing more than a raw material. Remarkably, Carbide states that the *Aubin* court, in contravention of the Third Restatement, erroneously found that its raw asbestos was a designed product. Ans. Br. at 56. This "raw material" argument, however, was rejected by courts in *Union Carbide v. Kavanaugh*, 879 So.2d 42 (Fla. 4th DCA 2004), *McConnell v. Union Carbide*, 937 So.2d 148 (Fla. 4th DCA 2006), and *Aubin*. The *McConnell* court held:

> From Carbide's own words, Calidria Asbestos was **produced** by its own **proprietary manufacturing process**. . . . In fact, as we have seen, its own marketing touted the product as being designed to go "twice as far" as other "commercial grade Asbestos." There was evidence that the intended use of Carbide's Asbestos . . . involves sanding the joint compound after . . . . Its intended use thus contemplates the liberation of asbestos into the air where it can be inhaled. The fiber bundles in the asbestos are liberated by the sanding, effectively increasing the level of harmful dust ordinarily associated with asbestos.

McConnell at 150 (emphasis in original). Similarly, the *Kavanaugh* court held,

"[Carbide] asserts that, as a bulk supplier, it had no affirmative duty to warn ultimate users of the dangers of asbestos. We disagree." *Kavanaugh* at 44. Finally, the *Aubin* court held, "Carbide sales representative, attributed SG–210's enhanced efficiency to Union Carbide's **carefully designed** asbestos processing regimen, or as Union Carbide called it, its "proprietary manufacturing process". *Aubin* at 890 (emphasis in original).

Carbide recycles this entire argument from Calidria's home state of California, where, as Carbide admits, it repeatedly was rejected. The court in *Arena v. Owens-Corning Fiberglas Corp*, 63 Cal. App. 4th 1178 (Cal. 1st Dist. Ct. App. 1998), and in *Garza v. Asbestos Corp. LTD.*, 161 Cal. App. 4th 651 (Cal. 1st Dist. Ct. App. 2008), rejected the argument that "raw" asbestos could not be defectively designed; that "bulk" material suppliers cannot be liable to end-users of the finished materials; and that the "consumer expectations test" cannot be applied to raw materials like asbestos. *Garza* at 364-65. In *Arena*, the court explained:

> Amicus and ACL use the terms "design defect" in too literal a manner when arguing that asbestos cannot be defectively designed. The term "design defect" . . . relates more to a legal conclusion that a product has deviated in some manner from what is reasonably expected, than it does to a description of a specific mechanical shortcoming or flaw. To the extent that the term "design" merely means a preconceived plan, even **raw asbestos has a design, in that the miner's subjective plan of blasting it out of the ground, pounding and separating the fibers, and marketing them for various uses, constitutes a design.** [W]hen that design violates minimum safety assumptions, it is defective.

Arena at 117-118 (emphasis in original)(citations omitted). California courts have applied this holding to cases involving Carbide Calidria. *See Stewart v. Union Carbide Corp*., 117 Cal.Rptr.3d 791 (Cal. 2d Dist. Ct. App. 2010); *LeSage v. Union Carbide Corp*., 2008 WL 2516478 (Cal.1st DCA 2008).

Undeterred by *Arena, Garza, Stewart, LeSage, Kavanaugh* and *McConnell*, Carbide's argument finally found traction in Utah, which adopted the Third Restatement. *Riggs v. Asbestos Corp., LTD*., 304 P.3d 61, 69 (Utah Ct. App. 2013), stated "[w]e disagree with this 'dangerous equals defective' argument and determine that, regardless of its dangerousness, Union Carbide's product could not be defectively designed or manufactured because it is a raw, unadulterated material.")(Citations and footnote omitted). *Riggs* is the "golden ticket" that Carbide seeks in order to exhume itself from responsibility and liability for its actions in the marketing and sale of its asbestos product. Despite championing the *Aubin* court's statement that regardless of whether the Third or the Second Restatement is applied the result would be the same, Carbide argues that the Third Restatement should replace the Second. In fact, the Second and Third Restatements differ greatly on how "raw materials" are treated. The Second Restatement states:

> If, for example, raw coffee beans are sold to a buyer who roasts and packs them for sale to the ultimate consumer, it cannot be supposed that the seller will be relieved of all liability when the raw beans are contaminated with arsenic, or some other poison. . . . On the other

> hand, the manufacturer of pig iron, which is capable of a wide variety of uses, is not so likely to be held to strict liability when it turns out to be unsuitable for the child's tricycle into which it is finally made by a remote buyer.

Rest. (2d) Torts § 402A, cmt. p. Conversely, the Third Restatement boldly states that "a basic raw material such as sand, gravel, or kerosene cannot be defectively designed." Rest. (3d) Torts § 5, cmt. c. Where the Second Restatement leaves the possibility of liability for raw materials to the facts of the case, the Third Restatement categorically finds it to be a legal impossibility. The Third Restatement's comments to Section 5 provide that the "refusal to impose liability on sellers of non-defective components is expressed in various ways, such as the 'raw material supplier defense' or the 'bulk sales/sophisticated purchaser rule.'" Rest. (3d) Torts § 5, cmt. a. Moreover, "a basic raw material such as sand, gravel, or kerosene cannot be defectively designed [or presumably defectively manufactured]." *Id.* at cmt. c.

This is especially troubling when the Third Restatement in a footnote views "sand" and "gravel" as an equivalent to "kerosene," a highly processed petroleum product. Indeed, the Third Restatement does not consider the "raw-material" manufacturer's marketing and design of a product for a specific but deadly use. For example, under the Third Restatement a kerosene manufacturer could conceivably design and market odorless kerosene for use as a baby bottle cleaner and avoid all liability because it is a "raw material."

Carbide's desire for adoption of the Third Restatement is to free itself from liability for its asbestos product that contained a defect, which it actively concealed from the consuming public. Through the Third Restatement, Carbide and similarly situated manufacturers can avoid liability for the carnage that unreasonably dangerous products may unleash on an unsuspecting public. It is the kerosene, which is a highly refined product, entirely different from sand or gravel, that provides Carbide with the fuel for its smoldering fire.

2. The Undisclosed Expansion of the Third Restatement's "Raw Material" Immunity to the End-Product Manufacturer.

Curiously absent from Carbide and its Amicus' briefing is the true scope of their "raw material" proposition. Carbide believes it should be immune from liability for its asbestos product and apparently so should the end-product manufacturers. Because asbestos is a natural substance no one is responsible for injuries it causes. Carbide's lawyers currently are arguing this position in at least one other pending asbestos case involving an automotive brake manufacturer. An excerpt from Honeywell's pending Motion for Summary Judgment is as follows:

> Plaintiff's design defect argument fails as a matter of law because they challenge the inherent dangers of chrysotile asbestos contained within the brakes at issue. Although Honeywell contends that chrysotile asbestos fibers cannot cause peritoneal mesothelioma, Honeywell did not "design" asbestos. Asbestos is a naturally-occurring substance and the undisputed facts, examined in the light most favorable to Plaintiffs, do not support a "design defect" claim against Honeywell.

See App. A, at 2. In essence, Carbide and its lawyers argue that its unreasonably dangerous and deadly product can be sold to tens-of-thousands of unsuspecting Floridians to whom neither the component manufacturer nor the end-product manufacturer have any liability. Carbide seeks a return to the dark days of *caveat emptor*.

Despite *Aubin*'s holding, Carbide continues to insist that its product is not, and cannot be a designed product while ignoring *Aubin*'s impermissible reweighing of the causation evidence. Based on the *Aubin* court's impermissible reweighing of the evidence alone, this Court should reverse and reinstate the Jury's Verdict. Moreover, *Aubin*'s adoption of the Third Restatement is a clear departure from Florida law despite Carbide's insistence that the Third and Second Restatements are interchangeable. Finally, the true scope of Carbide's interpretation of the "raw material" seller immunity is incompatible with modern jurisprudence. Carbide's invitation to return to the era of *caveat emptor* should be declined.

II. CARBIDE CANNOT DISCHARGE ITS DUTY TO WARN UNDER STRICT LIABILITY.

A. Carbide Knew that its Product was Unreasonably Dangerous for its Intended Use and Failed to Adequately Warn.

Carbide argues that to the extent it had a duty to warn Plaintiff of the dangers associated with its product, it could discharge that duty by warning its

intermediary. Carbide, like the *Aubin* court, chose to reject Florida law and to follow the Third Restatement's abandonment of a strict liability failure to warn claim in favor of a sole cause of action for negligent failure to warn.

The causes of action tried below were negligent failure to warn, strict liability design and manufacturing defect, and strict liability failure to warn. In *Ferayorni v. Hyundai Motor Co.*, 711 So.2d 1167 (Fla. 4th DCA 1998), the court addressed the distinction in the Second Restatement between negligent failure to warn and strict liability failure to warn. The *Ferayorni* court first discussed this Court's decision in *West*, which adopted the doctrine of strict liability and applied it "even though 'the seller has exercised all possible care in the preparation and sale of his product.' " *Id.* at 1170 (citing *West*). In fact, "[the manufacturer] can be found liable even though he was utterly non-negligent. It is thus obvious that strict liability has been placed into a user's arsenal of remedies *as an addition* to the traditional tort remedy of negligence, *not in displacement* of it...." *Id.* at 1171 (emphasis in original)(citations omitted). Moreover, the court held:

> [W]e note that the policy behind strict products liability is to facilitate a plaintiff's recovery where a manufacturer places on the market a potentially dangerous product and thereby "undertakes a certain and special responsibility toward the consuming public who may be injured by it. Strict liability means negligence as a matter of law or negligence *per se*, the effect of which is to remove the burden from the user of proving specific acts of negligence.

Ferayorni at 1172 (citations omitted). The court then correctly adopted the

reasoning in *Anderson v. Owens-Corning Fiberglas Corp.*,810 P.2d 549 (1991):

> [F]ailure to warn in strict liability differs markedly from failure to warn in the negligence context. Negligence law in a failure-to-warn case requires a plaintiff to prove that a manufacturer or distributor did not warn of a particular risk for reasons which fell below the acceptable standard of care . . . . Strict liability is not concerned with the standard of due care or the reasonableness of a manufacturer's conduct. *The rules of strict liability require a plaintiff to prove only that the defendant did not adequately warn of a particular risk that was known or knowable in light of the generally recognized and prevailing best scientific and medical knowledge available at the time of manufacture and distribution.*

Ferayorni at 1172 (emphasis in original).

Because strict liability does not concern itself with due care, the so-called "learned intermediary defense" does not apply. In fact, *West* and its progeny have limited the available defenses to strict liability to comparative fault of others, assumption of the risk, and misuse of the product. *Tri-County Truss Co. v. Leonard*, 467 So.2d 370, 371 (Fla. 4th DCA 1985). Thus, as the *McConnell* court held:

> We have already noted that asbestos is highly dangerous . . . . Comment n [of the Second Restatement] makes clear that with something like undisclosed Calidria Asbestos, whose unknowing use as intended can cause serious injury-where its distributor's burden in disclosing its presence is so easily and cheaply accomplished by indelible labels-a supplier in the shoes of Carbide may not reasonably rely on an intermediary, no matter how learned it might be deemed. Our decision in *Kavanaugh* constitutes a clear holding that the "learned intermediary" exception is not applicable to Calidria Asbestos and Ready-Mix with its hidden measure of asbestos.

Id. at 156. Carbide erroneously relies extensively on *Shell Oil v. Harrison*, 425

So.2d 67 (Fla. 1st DCA 1983), and the pre-*West* decision in *Zunck v. Gulf Oil Corp*., 224 So.2d 386 (Fla. 1st DCA 1969), both of which it **unsuccessfully** relied upon in *Kavanaugh* and *McConnell*. In *Kavanaugh*, the court distinguished the cases and held:

> Unlike *Shell Oil* and *Zunck*, UCC did not fulfill its duty to warn. It provided Georgia-Pacific with limited information which was not communicated to the ultimate users. Because UCC did not take reasonable precautions under the circumstances, its duty to warn did not stop with Georgia-Pacific, but continued to the ultimate user.

Id. at 46.

Finally, Carbide attempts to distance itself from the fact that it knew its intermediaries were not warning the end users. Carbide suggests its Corporate Representative's testimony is either incomplete or misunderstood. Ans. Br. at 31-32. Mr. Walsh's own "Report of Call" on August 12, 1974, however, confirms that Georgia Pacific had not previously been warning end-users. *See* Exhibit 84.

Simply, *Aubin*'s adoption of the Third Restatement does not accurately reflect Florida law, which allows for a cause of action for both strict liability failure to warn and negligent failure to warn.

B. Carbide Erroneously Believes that the Failure to Warn Instruction Misled the Jury.

Carbide argues that one of the "failure to warn" jury instructions misled the Jury, yet there was **no** evidence that the Jury was misled. As an initial matter, Carbide fails to acknowledge that *Aubin* recognized that "Aubin's requested

special instruction is technically accurate . . . ." *Aubin* at 902. The court, however, went on to state "it was, standing alone, misleading because Florida law provides that this duty may be discharged by reasonable reliance on an intermediary." *Id*. This simply ignores the crucial fact that there is no evidence to support Carbide's instruction and no evidence that the Jury **was** misled.

> It is well settled that jury instructions must be examined and considered as a whole together with the evidence . . . a verdict will not be set aside merely because the court failed to give instructions which might have been properly given; to warrant reversal of a judgment for an erroneous instruction, the court must be satisfied that the jury was misled; the refusal to give a proper instruction which would have availed the party nothing is harmless error.

Cruz v. Plasencia, 778 So.2d 458, 461 (Fla. 3d DCA 2001) (citation omitted)(emphasis in original). Here, there was no evidence to support Carbide's learned intermediary defense.

Carbide disingenuously claims it was surprised or ambushed by the presentation of this particular jury instruction without prior warning. In fact, in its brief, it goes to great lengths to manufacture prejudice by stating it would be "game, set, and match." This position ignores the record. The earliest point during a trial in which a party can become aware of its opponent's position is in opening statement. Contrary to Carbide's noise about "game, set, and match," it specifically was put on notice during **opening statement** as follows:

> [W]e are alleging and I think the evidence is going to be that **Carbide failed to warn Mr. Aubin of the dangers. They had a duty to Mr. Aubin. He is the guy using their product.**

T. Vol. I at 36-37. Carbide was unencumbered in the presentation of all relevant evidence concerning the nature of its warnings to all of its intermediaries and their asserted independent knowledge of the dangers of Calidria, and Carbide's contention that it had no further responsibility to Mr. Aubin. Consistent both with Florida law and with Carbide's defense, the trial court instructed the Jury that a seller or supplier in Florida has a duty to warn foreseeable users, which is absolutely correct, **but** that the jury must determine whether Carbide "was negligent . . . by failing to warn the Plaintiff." This instruction properly defined a supplier's duty under Florida law, but left it to the jury to determine, consistent with Carbide's defense, whether it had fulfilled that duty.

C. Carbide Cannot Explain the Jury's Apportionment of Fault among Non-parties.

While Plaintiff disagrees that Carbide could discharge its duty through the intermediaries, the Jury was not persuaded by Carbide's evidence and argument that it adequately warned the intermediaries and that the intermediaries in fact warned Aubin. Indeed, the Jury's verdict spread liability among Carbide and its intermediaries as follows: Carbide 46.25%, Georgia Pacific 8.75%, Kaiser Gypsum 7.5%, Premix-Marbletite 12.5% and U.S. Gypsum 25.0%. Although no one can presume to know what analysis this Jury undertook, the fact that this Jury allocated

the greatest fault on Carbide indicates that the evidence supported a finding that Carbide did not adequately warn its intermediaries. The mere fact that liability was apportioned not only to Carbide, but also to the intermediaries, shows that the Jury considered Carbide's argument that the intermediaries breached their duty. Clearly, the Jury was not misled by the jury instruction, otherwise the intermediaries would have been apportioned no fault.

CONCLUSION

The *Aubin* court improperly reweighed the medical causation evidence and ignored the law of Florida by attempting to apply the Third Restatement, which eliminates strict liability, eliminates the consumer expectation test and requires the risk/utility test. In order to achieve a desired result, the *Aubin* court had to eliminate strict liability, require Third Restatement principles and attempt to insure the desired result by reweighing the medical evidence. If the opinion of the *Aubin* court is adopted we will revert back to the days before *West v. Caterpillar* with no strict liability, no consumer expectations test and a risk utility test requirement. The net result: no responsibility for component part manufacturers who happen to be in the best position to determine dangers; protection for others in the chain of distribution; and the entire risk borne by the innocent end-user.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the Petitioner's Reply Brief has been served via electronic mail to: Matthew Conigliaro, Esq., (mconigliaro@carltonfields.com), and Dean A. Morande, Esq., (dmorande@carltonfields.com), Philip M. Burlington, pmb@flappellatelaw.com, Gary M. Farmer, farmergm@att.net, staffefile@pathtojustice.com, and Larry S. Stewart, lsstewart@stfblaw.com on this 20th day of December, 2013.

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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.

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Juan P. Bauta, II, Esq.