Electronically Filed 06/12/2013 11:44:37 PM ET

RECEIVED, 6/12/2013 23:48:55, Thomas D. Hall, Clerk, Supreme Court

IN THE SUPREME COURT OF FLORIDA

WILLIAM P. AUBIN,

Petitioner,

v. **Case No. SC12-2075**

UNION CARBIDE CORPORATION, **L.T. No. 3D10-1982**

Respondent.

_____/

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

PETITIONER'S INITIAL BRIEF ON THE MERITS

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A NOTE ABOUT CITATIONS AND RECORD REFERENCES

The following references are used in this Initial Brief:

Petitioner/Plaintiff, William Aubin, is referred to as "Mr. Aubin", "Plaintiff", or "Petitioner", but usually as "Mr. Aubin". Respondent/Defendant, Union Carbide Corporation, is referred to as "Carbide", "Defendant," or "Respondent", but usually as "Carbide".

References to the original record on appeal are cited as "R.__:__" followed by the volume and page numbers designated in the record (for example: R.I:1-2). References to the Supplemental Record are cited as "SR" followed by the item number.

Citations to the Trial Transcript are referred to as "T." followed by the appropriate volume number and page number(s): (T. Vol. ___, p. ___).

Citations to Trial Exhibits are referred to as "Ex.", preceded by the appropriate designation as to which party entered the exhibit and followed by the appropriate exhibit number: (Pl. Ex.___).

Filings in the Third District Court of Appeal are referred to by date and name because the index and any pagination of those papers has not yet been prepared and, pursuant to this Court's order of April 18, 2013, are not due to be filed until after the deadline for serving this Brief. They are also included in the Appendix to this Initial Brief.

References to Petitioner's Appendix, which accompanies this Initial Brief and includes key papers from the Record on Appeal, as well as the subsequent rulings filed in the Third District, will be by the symbol “App. ___” followed by the tab and page number (for example: App. 1, 1).

All emphasis in this Initial Brief is that of the scrivener, except as otherwise indicated.

INTRODUCTION

Petitioner/Plaintiff, William Aubin, seeks review of the decision in *Union Carbide Corp. v. Aubin*, 97 So. 3d 886 (Fla. 3d DCA 2012) (App. 1), in which the Third District overturned a jury verdict in favor of Mr. Aubin.

Petitioner, Mr. Aubin, has peritoneal mesothelioma, an incurable, fatal disease caused by his exposure to Union Carbide's asbestos product, "Calidria SG-210". The evidence at trial established that the defective design of Calidria SG-210 and the lack of adequate warnings about the risks of exposure to it caused Mr. Aubin's injury. A jury found Carbide strictly liable and negligent and apportioned fault among it and various end-product manufacturers. The trial court then entered final judgment for Mr. Aubin.

Ignoring this Court's precedent, the Third District reversed and held that the trial court had erroneously applied the Restatement (Second) of Torts: Products Liability to the strict liability claims, in violation of the Third District's adoption of the Restatement (Third) of Torts: Products Liability. Based on its application of Sections 2 and 5 of the Restatement (Third) and its own reweighing of the evidence, the Third District reversed for entry of a directed verdict on the strict liability design defect claim, despite acknowledging that Mr. Aubin had presented evidence that Calidria SG-210 was defectively designed and that exposure to the product had caused Mr. Aubin's mesothelioma. The Third District also reversed for a new trial on the failure to warn claims. Applying Section 5 of the Restatement (Third), the Third District held that the jury should have been instructed that Carbide could have discharged its duty to warn by

relying on intermediary end-product manufacturers, despite acknowledging Carbide's admission that it knew those intermediaries were not warning end users.

The Third District's decision openly ignores this Court's precedent and 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 instruct the jury that the component supplier can discharge its duty to warn end users by relying on its intermediary customers to give warnings. The decision also conflicts with decisions from this Court prohibitting district courts from reweighing causation evidence on review of the denial of a directed verdict. As demonstrated below, the Third District's decision was contrary to Florida law and should be quashed and the judgment for Mr. Aubin reinstated.

STATEMENT OF THE CASE AND FACTS

In August 2008, William Aubin was diagnosed with malignant peritoneal mesothelioma, a form of cancer of the lining of the abdomen (T. Vol. VIII, p. 966; Vol. X, p.1078). Mesothelioma is a signal malignancy, meaning asbestos exposure is the only known cause in the United States (T. Vol. V, p.525; Vol. X, p.1147). Mesothelioma is a latent disease and can develop twenty or more years after exposure to asbestos, as it did in Mr. Aubin's case (T.Vol.V, p. 490-507). Unfortunately, it is an invariably fatal disease with no treatment or cure (T. Vol. X, p. 1087; XIII, p.1436).

The product at issue is Calidria SG-210. As explained below, Carbide manufactured Calidria SG-210 by processing raw chrysotile asbestos according to its own design specifications. Carbide designed Calidria SG-210 specifically for use in joint compounds and texture sprays, the uses of which create substantial amounts of respirable dust. Carbide knew this and knew that the inhalation of Calidria SG-210 fibers in dust can cause fatal diseases, including mesothelioma, yet Carbide took no measures to ensure that end users received warnings about these deadly hazards. Mr.Aubin breathed the dust generated from the use of joint compounds and ceiling sprays which contained Calidria SG-210 at the jobsite where he worked nearly every day for two years between 1972 and 1974, and, as a result, he developed mesothelioma.

The Evidence At Trial.

A. The Defective Design of Carbide's Calidria SG-210 Caused Mr. Aubin's Injury.

1. The Evidence At Trial Established That Inhalation of Calidria Asbestos Fibers Causes Mesothelioma.

The evidence at trial established that all types of asbestos fibers, including chysotile[1], cause mesothelioma (T.Vol. V., p.565-566, 574-75; Vol. XIII, p. 1422). The evidence also established that Carbide's Calidria asbestos is chrysotile asbestos and that, when inhaled or ingested, Calidria asbestos causes mesothelioma. Specifically, Dr. Arnold Brody, a PhD in cell biology and pathology, testified that, when inhaled, Calidria, which is chrysotile, causes asbestos disease, including mesothelioma (Tr. Vol. V, p.548-49, 580, 588). Dr.

[1] Of the two major mineral forms of asbestos, Chrysotile, which is a Serpentine form, makes up 95% of commercially used asbestos in the U.S. (T.Vol. V, p.508).

Eugene Mark, a board certified professor of pathology at Harvard University, explained that Calidria must be inhaled or ingested to cause disease and that, when in a respirable form, Calidria causes mesothelioma (T. Vol. VIII, p.1422-24, 1443-44, 1498). Dr. Mark testified, within a reasonable degree of medical certainty, that Mr. Aubin's exposure to Calidria SG-210 through his work with and around joint compounds and texture sprays containing Calidria SG-210 caused his mesothelioma (*Id*. at 1427-1434).

Although Carbide presented Dr. Victor Roggli to testify that chrysotile exposure does not cause peritoneal mesothelioma, he acknowledged that others in the medical and scientific communities disagree with him, as do all U.S. Government health agencies (T.Vol. X, p.1110-1111, 1145-1148). Carbide's own documents and studies recognize that Calidria (chrysotile) exposure can cause mesothelioma. (*See* Pl.Ex. 6-8 and 16).

All of the expert witnesses at trial agreed that asbestos is a mineral which, if left in the ground, undisturbed and in its raw, natural state, presents little risk of harm (*E.g*., T.Vol. XIII, p. 1443-1444). All of the experts also agreed that asbestos of any kind, including chrysotile (Calidria), must get into the body through inhalation or ingestion to cause disease, including mesothelioma (T.Vol. V, p.548; Vol. X, p.1103-05[2]; Vol. XIII, p. 1443-44, 1498). The equation is simple: if asbestos fibers do not enter the lungs, then they will not cause disease. In other words, asbestos only presents a danger to human health when it is removed from its natural state and incorporated into products which release its deadly fibers into respirable dust.

2. The Evidence At Trial Established That Carbide's Calidria SG-210 Asbestos Product Was Designed Specifically For Uses Known To Liberate Respirable Asbestos-Laden Dust.

Calidria SG-210 is a product made up of chrysotile asbestos processed by Carbide according to Carbide's design specifications. Specifically, Carbide mined raw chrysotile asbestos from the Coalinga deposit in California and marketed it under the trade name "Calidria" (T.Vol. XI, p.1237-40; Pl.Ex. 43, 51, 52). Using its "proprietary manufacturing process", Carbide milled and processed its Calidria (chrysotile) asbestos to different design specifications, known as "grades" (*Id*.). Carbide's corporate representative, Jack Walsh, explained that Carbide had three asbestos product lines, or grades, and numerous products or formulas in each grade (*Id*.).

SG-210 ("standard grade") was a Carbide asbestos product specifically designed and sold for use in joint compound and texture sprays (*Id*. at 1241-42; Pl. Ex. 51 & 52). According to Walsh and Carbide's marketing materials, SG-210 was a 99% pure asbestos product "designed to go twice as far" as other asbestos products (*Id*.). SG-210 was designed to make joint compound and texture sprays more absorbent and easier to apply (*Id*.; Vol.III, p.253). It is now beyond argument that Calidria SG-210 was a deliberately "designed" product (although Carbide continues to argue otherwise).

When used as intended, joint compounds require hand-sanding, which produces tremendous amounts of fine, respirable dust (*See* T. Vol. II, p.128-135, Vol. XI, p.1222-

[2] Dr. Roggli agreed that asbestos must be inhaled to cause disease, although it is his unique opinion that Calidria asbestos does not cause mesothelioma.

23; Vol. IX, p. 947-57, 970-72; XIII, p.1421-22). Likewise, ceiling texture sprays (commonly known as "popcorn ceiling" spray) are applied by spraying them onto ceilings, creating a fine mist. The products then require scraping and cleaning, which also create significant amounts of fine, respirable dust. (*See* T. Vol. II, p.130-13; Vol. IV, p. 386-87; Vol. IX, p. 952-57). Jack Walsh testified that he and the Calidria salesforce knew that the end products for which they sold SG-210 would be sanded and scraped and that these processes produce dust (T. Vol. XI, p. 1280-81, 1299, 1317).

Thus, Carbide's design and marketing of SG-210 specifically for use in joint compounds and ceiling sprays, which Carbide knew would create respirable asbestos dust, created a danger to end-users which would not have existed but for that design.

3. Mr. Aubin Breathed Respirable Calidria Asbestos Fibers Through The Use of GP Ready Mix Joint Compound and Premix Marbletite Snowflake Texture Spray Containing Calidria SG-210.

Carbide designed, marketed and sold Calidria SG-210 to intermediary customers, such as Georgia Pacific ("GP") and Premix Marbletite ("Premix"), to be used as a component in their joint compounds and texture sprays (T. Vol. III, p.265-68; Vol.VI, p.621; Vol. XI, p.1280-81, 1299-1300, 1325-32). The evidence established that between 1972 and 1974, GP *Ready-Mix* and Premix *Snowflake* contained Calidria SG-210 (*Id*.).

Between 1972 and 1974, Mr. Aubin supervised the construction of approximately 70 homes in the Desoto Lakes development in Sarasota, Florida (T. Vol. IX, p.933-38, 961). He was on the jobsite almost every day. He walked into all of the homes at all stages of construction (T.Vol. II, p.138; *Id*.).

Mr. Aubin hung and finished drywall in the homes and routinely cleaned up after the subcontractors finished sanding the walls and spraying the ceilings (T. Vol. II, p.138, Vol. IX, p. 937-57). He testified that the homes were very dusty, especially from the drywall sanding and finishing and the ceiling spraying and scraping (*Id*.). The dust was very fine, like talcum powder, and any movement in areas where it accumulated would cause it to puff up in a light cloud (*Id*.). Mr. Aubin breathed that dust regularly and recalled its chalky taste (T.Vol. IX, p.949-50, 970-71). Unaware of any danger, neither Mr. Aubin nor any subcontractors working at Desoto Lakes wore protective gear, such as dust masks or respirators, when working in the homes (Vol. II, p.131; *Id*.).

Mr. Aubin recalled the brand names of the joint compounds used as GP and Kaiser (T. Vol. IX, p.952-57, 969-70). He recalled the 5-gallon buckets the joint compound came in and that he never saw a warning of any kind on them (*Id*. at p.958, 1006-07). The drywall subcontractor for Desoto Lakes, Nelson Yoder, purchased the joint compounds and ceiling texture sprays used at Desoto Lakes and identified by manufacturer the various types they used (T. Vol. II, p.153; Vol. IX, p.939, 952). Specifically, he identified, among others, GP *Ready-Mix* joint compound, which he said made up about 35% of the joint compounds used at the site, and he identified Premix *Snowflake* as the ceiling spray used about 50% of the time (T. Vol. II, p.124). Mr. Yoder confirmed the dusty atmosphere in the homes created by the use of the joint compounds and ceiling sprays and that he never wore or knew to wear protection (*Id*. at p.128-132).

Thus, as the result of Carbide's design of SG-210 for use in joint compounds and

texture sprays, Mr. Aubin was exposed to and breathed airborne, Calidria-laden dust.

4. Mr. Aubin's Exposure To Airborne Calidria Asbestos Fibers Through The Intended Use of Calidria SG-210 Caused His Mesothelioma.

Dr. Mark testified within a reasonable degree of medical certainty that Mr. Aubin's exposure to SG-210 in dust created through his work with and around joint compounds and texture sprays at Desoto Lakes was a substantial contributing cause of his mesothelioma (Vol. XIII, p.1427-34).

B. Carbide Failed To Adequately Warn of The Dangers Associated With Exposure To Its Calidria SG-210 Asbestos Product.

1. The Evidence At Trial Established That Carbide Knew of The Dangers of Exposure to Its Calidria Asbestos But Concealed That Information From Its Customers.

Carbide has known about the health hazards of asbestos, including the causation of terminal diseases and death, since the 1930s and 40s, and well before it began selling Calidria products to GP and Premix (T.Vol. III, p. 297-300; Vol. IV, p.342; Def.Ex. G, H). In the 1960s, Carbide had substantial knowledge that asbestos could cause serious and fatal diseases (*see, e.g., id.*; Pl.Ex.8 (the "Sayers Report", discussed below)), but it concealed this information from its customers, such as GP and Premix, and from the ultimate consumers of its products, like Mr. Aubin (T.Vol.II, p.197; Vol.III, p.305-307; Vol.XI, p.1284; Vol.XII, p.1340, 1345). Indeed, Carbide blatantly held information back from its own personnel. (*See,e.g.,* Pl.Ex.4 (July 1963 letter from Carbide's medical director cautioning that information should not be readily available to plant personnel)).

In 1965, Carbide's then director of toxicology, Dr. Carl Dernehl, adopted a theory

(later totally discredited) that workers could safely work a lifetime with Calidria if dust particles were kept at levels lower than a 5 million particles per cubic foot ("PPCF") threshold limit value ("TLV"). Dr. Dernehl's "safe TLV" story was disseminated in Carbide's 1965 Asbestos Toxicology Report (Pl.Ex.5). In 1965, Carbide directed its asbestos sales force to use the Report to respond to questions from customers "[i]n order to counteract any serious problems or worries before they get out of hand." (*Id*.).

In July 1966, Carbide commissioned a study by the Mellon Institute (a Carbide affiliate (*see* T.Vol.III, p.300; Pl.Ex.21)) on the effects of asbestos fibers on animals. The Mellon Study demonstrated that *short* fibers (like Calidria) caused the *most severe* reaction – *more severe* fibrotic lesions in the visceral organs of rats (Pl.Ex.6 (emphasis added)). At that point, if not before, Carbide knew that its short-fiber TLV story was a farce, yet Carbide continued to encourage sales personnel to distinguish Calidria from bad press about asbestos by using the 1965 Toxicology Report (*See* Pl.Ex.15).

In late 1967, Dr. I.C. Sayers, of Carbide's United Kingdom toxicology department, prepared a 19-page report: "Asbestos as a Health Hazard in the United Kingdom" (Pl.Ex.8). The "Sayers Report" pointed out that the public was increasingly aware of the health risks associated with Carbide's Calidria; that Dr. Dernehl's "safe" TLV story "is now no longer held to be true by a number of informed people"; that there were 500 documented cases of lung cancer and mesothelioma in the United Kingdom caused by exposure to asbestos dust; that mesothelioma "is the most disturbing of the three diseases attributable to asbestos…"; ***that even a brief exposure can produce***

mesothelioma after a long latency period; that cases have occurred in the United States, Candada, and Britain in which ***people exposed only to chrysotile have developed mesothelioma***; that laboratory tests indicated that asbestos was a powerful carcinogen; and that ***all forms of asbestos, including chrysotile, produce mesothelial tumors*** (*Id*. (emphasis added)). Dr. Sayers warned, "[W]e are not entitled under any circumstances to state that ***our material*** [Calidria] is not a health hazard" and that Carbide had a duty to warn customers about the hazards (*Id*. (emphasis added)).

Dr. Dernehl wrote to Carbide's Medical Director in June of 1967 that the Sayers Report was "reasonably accurate"; that based on the 1966 Mellon injection study, **Calidria might be *more hazardous* than long-fiber asbestos**; and, that ***a 5-million PPCF TLV for Calidria was not acceptable for the prevention of mesothelioma*** (Pl.Ex.7 (emphasis added)). Indeed, he said a limit of ***one million PPCF for Calidria might not be safe for the prevention of mesothelioma*** (*Id*. (emphasis added)). Later, in a March 1970, memo, Dr. Dernehl stated that with respect to the development of mesothelioma, "[**i]t would be prudent to assume that Calidria Asbestos will behave like other asbestos**…" and that "the same precautions to avoid breathing asbestos dust must be observed whether the dust be from Calidria Asbestos or from standard long fiber form" (Pl. Ex.21) (emphasis added).

Despite Dr. Sayers' clear admonition of the dangers of Calidria and Dr. Dernehl's acknowledgement of it, Carbide continued to perpetuate the myth (as it does today) that Calidria is not as dangerous as other asbestos. *See, e.g.* Pl. Ex.19 (January 1968 Carbide memo); Pl. Ex.26 (May 1969 Carbide letter to customer) (both state no connection has been

shown between chrysotile asbestos and asbestosis or mesothelioma). Carbide failed to provide updated or accurate information to its customers, as reflected in a November 1971 Carbide report of a meeting with customer Glidden-Durkee which indicates that the customer had been given only the outdated 1965 Asbestos Toxicology Report, despite the clear advances in contrary knowledge since that Report had been issued. (Pl.Ex.28). Clearly, Carbide had developed a wealth of alarming information about the dangers of Calidria before that 1971 meeting, yet it concealed that information from its customers.

Tellingly, in June 1972, after the Mellon Study and Sayers Report, Carbide issued a memo to Calidria sales personnel directing them to use high pressure sales tactics to mislead and divert Calidria customers with aggressive sales tactics designed to make the customers feel their fears of asbestos are "irrational" (Pl. Ex. 23). Meanwhile, salesman Jack Walsh conceded that while he had a long list of documents "available" for customers, he only brought a few of those to meetings with customers, including: Material Safety Data Sheets that do not even indicate that asbestos is a hazard (*see* Pl. Ex. 29); the statement of Dr. George Wright to the Department of Labor explaining that the data concerning the hazards of asbestos exposure is inconclusive (*see* Pl.Ex. 74); and the OSHA regulations (*see* Pl.Ex. 71) (T.Vol. XI, p. 1254; Vol. XII, p.1336-41). He explained that other information about asbestos was "available" to customers if they had "specific questions" (*Id*.). He did not use or provide toxicology reports, and he had never even seen the 1967 Sayers Report or the Mellon reports while employed (*Id*.).

Notably, GP corporate representative Howard Schutte testified that none of the

documents Carbide claims to have made available to its customers was found in GP's archived documents, although GP made a concerted effort to store and maintain all documents it had received concerning asbestos (T.Vol. VI, p. 688).

Not only did Carbide salesmen not provide customers with sufficient information about the risks of Calidria, but Mr. Walsh admitted that he regularly told customers that no one at Carbide's plant ever got sick from exposure to Calidria (*Id*. at p. 1337-40). Carbide's failure to provide adequate information to customers worked in concert with the sales strategy of downplaying the risks of Calidria exposure. *See* Pl.Ex. 36 (1971 Report of Call to GP in which Carbide salesman states that he attempted to place GP's concern over asbestos toxicology into "proper perspective"); Pl.Ex. 47 (1973 Report of Call to GP in which Carbide salesman states he convinced GP representative that asbestos could be used safely); Pl.Ex. 58 (1975 Report of Call to GP in which Jack Walsh indicates he advised the GP representative that they should tell any concerned contractors that they could eliminate the risks of asbestos by wet sanding the products).

2. Carbide Was Aware That Its Intermediary Customers Were Not Warning Their Customers and End-Users of The Dangers.

As a result of Carbide's misinformation, Carbide's customers were not including warnings with their end products, and Carbide knew this. For example, an April 1971 Memo shows that after meeting with a Carbide salesman, the customer decided not to use a warning label on its end product (Pl. Ex. 27). Similarly, in a 1976 Customer Call Report, the Carbide salesman reports that customer pointed out that Carbide's bags do not have a label warning that the bags contain a known carcinogen and that Carbide and

the customer were going to "get nailed for failure to fully inform prospective users" and that "the fact that we know that [asbestos] is a human carcinogen and failed to advise customers, could weigh heavily against us in any litigation." (Pl. Ex.33).

Most telling is salesman Jack Walsh's testimony that ***Carbide knew that its intermediary customers were not including warnings on their products*** about the dangers of exposure to airborne Calidria SG-210 (Tr.Vol. XII, p.1317, 1337). This is not surprising given the above evidence that Walsh and the Calidria salesforce were out convincing customers that Calidria was safe.

3. There Was Conflicting Evidence Regarding Whether Carbide Labeled Its Own Product Regarding the Dangers of Exposure.

GP corporate representative Howard Schutte, who was at GP Plant Manager during the relevant time period, testified that neither he nor any other former GP employees he asked recalls seeing any warning labels on Calidria product bags during the relevant time period. (T.Vol. VII, p.779, 789). Carbide did present evidence that between 1968 and 1972, Carbide placed the following warning on Calidria packages: "Warning, breathing dust may be harmful. Do not breathe dust" (Pl.Ex.20; T.Vol. IV, p.347, 352; Vol. XI, p. 1220). Even if it used this label, it was inadequate. Dr. Dernehl characterized this label as "mild" (T.Vol. IV, p.347, 352). In a March 1969 letter, one Carbide executive explained the warning as "the most innocuous thing we could devise" and that it "merely reminds people to follow good practices." (Pl.Ex. 25).

Between 1972 and 1985, OSHA required, and Carbide claims to have utilized, the following minimum warning: "Caution. Contains asbestos fibers. Avoid creating dust.

Breathing asbestos may cause serious bodily harm" [3] (Def. Ex.A). There is no evidence that anyone ever saw this label, and it certainly was not effective enough to cause end product manufacturers to include warnings on their products. Thus, the purported use of this label proved to be inadequate. Notably, Carbide's labeling committee *rejected* the idea of placing a warning about cancer on the label (T.Vol.IV, p. 347-53).

Importantly, it was undisputed at trial that Carbide did not itself make any effort to place (nor did it attempt to require its intermediary customers to place) warning labels on end-products containing its Calidria SG-210. (*See* T. Vol. VII, p.789-790; Vol. XI, p. 1284, 1316, 1337). The evidence also established that there were no labels on the end products at issue in this case (T.Vol. II, p.135, 171, 175-77).

4. Mr. Aubin Was Never Warned And Was Unaware Of The Dangers of Exposure to Calidria SG-210 Before His Exposure.

Not surprisingly, as a result of Carbide's misinformation campaign and failure to adequately warn its intermediary customers and its failure to ensure that end-users received warnings, Mr. Aubin did not receive warnings about the dangers of exposure to Carbide's Calidria SG-210 (T.Vol. XI, p. 958, 1002-04). Therefore, Mr. Aubin did not know to and did not protect himself from exposure to Calidria-laden dust generated from the normal and intended use of the joint compounds and ceiling sprays (*Id*.).

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[3] As the jury was instructed, compliance with OSHA standards does not diminish or satisfy as a matter of law the common law duty to warn of the dangers of asbestos products. *See* Jury Instructions (R.Vol. IX, p. 1787-1812); *see also Loznicka v. Flexitallic Gasket Co., Inc*., 489 So.2d 1229 (Fla. 1st DCA 1986); *Jimenez v. Gulf & Western Manufacturing Co*., 458 So.2d 58 (Fla 3rd DCA 1984).

C. The Trial And Post-Trial Motions.

On November 6, 2008, Mr. Aubin filed an asbestos action in Miami-Dade County Circuit Court against Carbide and other manufacturers and distributors of asbestos and asbestos-containing products (R.Vol. I, pp.20-39). Mr. Aubin brought negligence and strict liability claims against Carbide for the sale of a defective product and failure to adequately warn of the hazards of its asbestos product, alleging Mr. Aubin contracted mesothelioma as the result of his exposure Carbide's Calidria SG-210 (*Id*.).

1. The Duty To Warn Jury Instruction.

The trial was held in May 2010. As explained above, at trial, Carbide conceded that it did not warn or attempt to warn end-users of end products containing its Calidria SG-210. Carbide also conceded that it made no effort to require its intermediary customers to use warning labels about the dangers. Most importantly, Carbide admitted that it knew that its end-users, such as GP and Premix, were not warning end users about the dangers of exposure to Calidria SG-210-laden dust through the use of the products. Instead, as set out below, Carbide chose to proceed with the theory that it discharged its duty to warn by warning its intermediary customers and relying on them to warn end-users (*see* T.Vol. I, p. 91-93; Vol. XV, p. 1768-70, 1814).

Mr. Aubin argued that pursuant to the Fourth District's recent decision in *McConnell v. Union Carbide Corp*., 937 So. 2d 148 (Fla. 4th DCA 2006),[4] Carbide

[4] As explained below, the *McConnell* case is on all fours with Mr. Aubin's case. In *McConnell*, the Fourth District held that it was error to give an instruction informing the jury that it should consider the skill and knowledge of Carbide's intermediary customers in determining whether Carbide had satisfied its duty to warn and explained

could not rely on its intermediary customers to discharge its duty to warn of the hidden dangers of exposure to its Calidria asbestos product – especially in light of evidence that Carbide knew that those intermediary customers were not warning their own customers/end-users (*see* T.Vol. XV, p. 1814-1818). Based on the *McConnell* decision and in response to Carbide's argument that, under the Third Restatement, it discharged its duty by warning its intermediary customers, Mr. Aubin requested a jury instruction that Carbide's duty to warn was to end-users who would be exposed to their dangerous products (T.Vol. XVI, p. 1836-37). The trial court gave 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." (T.Vol. XVII, p.1889-90).

At the close of the evidence, Carbide moved for directed verdict, arguing, *inter alia*, that there was no evidence of a design defect because the unreasonably dangerous nature of its product was not the result of any "design" by Carbide but, rather, was the result of the inherent characteristics of asbestos; that under the Restatement (Third) of Torts, Products Liability and the Third District's decision in *Kohler*[5], Carbide had discharged its duty to warn by warning its intermediary customers; and that there was insufficient evidence that Carbide's product caused Mr. Aubin's injury because there was insufficient evidence that the products used by or around Mr. Aubin contained its

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that Carbide "may not reasonably rely on an intermediary, no matter how learned it might be deemed." *Id*. at 156 (citing *Union Carbide Corp. v. Kavanaugh*, 879 So.2d 42 (Fla. 4th DCA 2004)).

[5] *Kohler v. Marcotte*, 907 So.2d 596 (Fla. 3d DCA 2005).

Calidria SG-210 (*see* T.Vol. XV, p.1766-95). Notably, Carbide made did not argue that there was a lack of evidence that the alleged defects or unreasonably dangerous nature of its Calidria SG-210 caused Mr. Aubin's injury (*Id*. at 1795). The motion was denied.

2. The Verdict.

The two-week trial ended on May 19, 2010, and the jury returned a verdict in favor of Mr. Aubin, awarding damages of $14,191,000 (T. Vol. XVIII, p.2044-46; R.Vol.IX, pp.1781-84). In their verdict, the jury apportioned 46.25% of the fault to Carbide and more than 50% of the fault to intermediary suppliers of the asbestos-containing end-products used by and around Mr. Aubin. (*Id*.).

Carbide moved for Judgment in Accordance with Defendant's Prior Motion for Directed Verdict or, in the Alternative, for a New Trial (S.R.49). In their post-trial Motion, Carbide argued: (1) that Mr. Aubin had not shown that he had been exposed to their product; (2) that the court had erred in applying the Second Restatement instead of the Third; (3) that there was no evidence of a design defect with its product; (4) that under the Third Restatement, Carbide had no duty to warn end-users of the dangers of its product; and (5) that Carbide could rely on its intermediaries to give warnings, even when there was no evidence that the intermediaries were doing so (*Id*.).

The court denied the Motion (R.Vol.X, p.1979), and on July 12, 2010, entered an Amended Final Judgment in the amount of $6,624,150, to reflect the apportionment of fault among the various asbestos-containing product manufacturers. (R.Vol.X, p.1980).

D. Carbide's Appeal and The Third District's Decisions.

On appeal, Carbide presented two issues. First, Carbide argued that the trial court erred in denying its motion for directed verdict or alternative motion for new trial on the grounds that it failed to follow the Third District's decision in *Kohler*, *supra*, and Sections 2 and 5 of the Restatement (Third) of Torts: Products Liability (the Restatement (Third) of Torts: Products Liability is referred to herein as "the Third Restatement"). Carbide argued that, as a component supplier, it could not be liable to Mr. Aubin, an end-user of products into which its component was integrated, because Mr. Aubin did not establish that Carbide's asbestos product was "defective", as defined in § 2 of the Third Restatement on the grounds that Carbide did nothing "*to design asbestos to be more harmful than it naturally is*, let alone that any such 'design' caused Aubin's injuries." (App. 6 at 28). Carbide's argument focused on their claim that their product was not a "designed" product but was, instead, simply a raw material. Nor could it be liable based on a warning defect because, according to Carbide, it had discharged its duty by warning its intermediary customers and relying on them to warn end-users like Mr. Aubin. (*Id*. at 33). Carbide also argued that Mr. Aubin had failed to show that any warning defect by Carbide caused his harm. (*Id*.)

Second, Carbide argued that a new trial was required on the grounds that, according to Carbide, the court's jury instruction regarding Carbide's duty to warn the end user was misleading and confusing because it suggested to the jury that Carbide had a duty to provide warnings directly to Mr. Aubin himself. (*Id*. at p.40).

In its original opinion, issued on June 20, 2012, the Third District reversed and remanded the case for a new trial, holding that the trial court erred in applying the Restatement (Second) of Torts: Products Liability (hereinafter referred to as "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) (emphasis added). According to the Third District, the evidence established that Carbide's Calidria SG-210 is a "designed" product, and Mr. Aubin had presented sufficient evidence to present a jury question as to whether the design of SG-210 was "defective" under the Third Restatement's risk-utility test because SG-210 was "manifestly unreasonable" due to the high degree of risk as compared with the relatively low social utility of the product. However, the Third District held that directed verdict was nevertheless warranted because Mr. Aubin "failed to present any evidence suggesting that the defective design of SG-210 Calidria caused [his] harm." (App. 2 at 16, 20.) As the Court further explained, its holding was based on its view of the record that Mr. Aubin "failed to present any evidence suggesting that SG-210 Calidria is more dangerous than raw chrysotile with respect to the contraction of mesothelioma." (*Id*.).

The Third District also reversed and remanded for a new trial on the basis of the duty to warn jury instruction. Again relying on the Third Restatement, the court held that the trial court was required to instruct the jury that, despite the unreasonably dangerous product, Carbide could have discharged its duty to warn by adequately warning and relying on its intermediary manufacturers. (*Id*. at p.31).

Mr. Aubin filed a Motion for Rehearing or Certification, requesting that the court certify both conflict and questions of great public importance. (App.3). (Respondent's Response to the Motion is included at App.4). 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 District Court explained that its application of the Third Restatement had no bearing on the result in the case and artfully "tweaked" its new opinion, apparently to avoid any basis for review by this Court. Otherwise, the holdings and the result are the same.

In his Brief on Jurisdiction, Petitioner raised three issues as bases for conflict jurisdiction in this Court: (1) the holding that the Restatement (Third) of Torts: Products Liability applies to products liability claims in Florida; (2) the holding that the trial court must instruct the jury that Carbide may discharge its duty to warn by relying on intermediaries, despite evidence that it knew the intermediaries were not giving warnings; and, (3) the holding that directed verdict should have been granted to Carbide based upon the court's improper reweighing of the causation evidence (*Id*. at 20-21).

This Court accepted jurisdiction by Order dated April 18, 2013.

SUMMARY OF THE ARGUMENT

This Court has conflict jurisdiction because the decision below directly 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 discharge its duty to warn end users by relying on an intermediary under the circumstances presented 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 Hospital*, 71 So. 3d 795 (Fla. 2011).

The Third District ignored the precedent of this Court in *West*, *supra*, in reversing the trial court for applying the Second Restatement. The District Court had a duty to adhere to this Court's precedent and to affirm the trial court and then to certify the question of whether the Court should recede from *West* and adopt the Third Restatement. The Third District ignored this procedure and, instead, attempted to overrule this Court's precedent without certifying the conflict.

Moreover, no basis has been shown for receding from this Court's precedent and thirty-seven years of products liability litigation applying Section 402A of the Second Restatement. No argument can been made that the Second Restatement has become unworkable. Conversely, the dramatic overhaul of product liability law embodied in

Sections 2 and 5 of the Third Restatement would work an injustice to those who have relied on Florida law based on the fair distribution of responsibility for product defects under the Second Restatement. This Court should not recede from *West* or the Second Restatement, and the Third District's decision doing so should be quashed.

The Third District also improperly applied the law by reweighing the causation evidence and reversing the trial court's denial of directed verdict. The District Court acknowledged but disregarded substantial evidence concerning the nature of the design defect in the case, as well as the evidence of causation. The District Court could only have reached its decision that directed verdict was warranted by giving no weight to the trial court's findings and ignoring the well-established standard governing review of the denial of directed verdict – that the facts and inferences therefrom must be viewed in the light most favorable to the non-movant. The Third District's decision reversing the denial of directed verdict on the strict liability design defect claim should be quashed.

Finally, there is simply no basis in law or fact for the District Court's holding that the trial court was required to instruct the jury that Carbide could discharge its duty to warn end users by relying on its intermediary customers when it was undisputed that Carbide knew that its intermediary customers were not warning end users. Such an instruction would have been inapposite in light of the fact that Carbide could not have reasonably relied on its intermediaries to warn when Carbide already knew they were not doing so. The District Court's holding reversing the judgment as to the duty to warn claims should therefore be quashed and the judgment for Mr. Aubin reinstated.

ARGUMENT

This Court should quash the District Court's decision because all three of its dispositive legal conclusions are fatally flawed: (1) the Restatement (Third) of Torts: Products Liability is not the law in Florida governing strict liability, and the Third District does not have the authority to simply ignore this Court's precedent adopting the Restatement (Second); (2) Mr. Aubin did present substantial, competent evidence that the defective design of Calidria SG-210 caused his mesothelioma; and (3) the trial court was not required to instruct the jury that Carbide could rely on its intermediary customers to discharge its duty to warn under the circumstances in this case.

I. THE THIRD DISTRICT IGNORED THIS COURT'S PRECEDENT BY RULING THAT PETITIONER'S CLAIMS ARE GOVERNED BY THE RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY.

Standard of Review: The standard of review governing decisions concerning the correct law to be applied is *de novo*. *Execu-Tech Bus. Sys. v. New Oji Paper Co.*, 752 So. 2d 582 (Fla. 2000); *Armstrong v. Harris*, 773 So. 2d 7 (Fla. 2000).

A. The Third District Ignored This Court's Precedent By Reversing The Trial Court For Applying The Second Restatement.

The trial court followed this Court's precedent and applied the Second Restatement to Mr. Aubin's strict liability claims. The District Court held that the trial court erred in determining that these claims are governed by the Second Restatement. (App. 1 at p. 10). In so holding, the court ignored this Court's precedent in *West, supra*, in which this Court adopted strict liability "as laid out in Restatement (Second) of Torts s 402A." *Id*. at 87. If not altogether ignoring this Court's precedent, the Third District has improperly attempted

to overrule it by holding that the Third Restatement is the law. "In so doing, the District Court has exceeded its authority." *Hoffman v. Jones*, 280 So. 2d 431, 433 (Fla. 1973).

1. *The Third District Improperly Held That The Restatement (Third) Torts: Products Liability Is The Law In Florida*.

The Second Restatement was issued by the American Law Institute ("ALI") in 1965 and adopted by this Court in 1976 in *West, supra*. *West* and the Second Restatement have uniformly been followed by the courts of this State ever since. *See Force*, 879 So.2d at 107 (following the Second Restatement and pointing out that the Third Restatement has not yet been adopted in Florida.);[6] *McConnell*, 937 So. 2d at n.4 (stating that the court would "purposefully forbear from any reliance on the RESTATEMENT (THIRD) OF TORTS and its risk-benefit analysis until the supreme court has recognized it as correctly stating the law of Florida."); *Davis*, 973 So. 2d 467[7]. *See also In re Standard Jury Instructions in Civil Cases* – Report No. 09-10 (Products Liablity), Case No. SC09-1264 (May 17, 2012), in which this Court retains the current strict liability design defect (PL5) instruction, which is based on Section 402A Second Restatement and *McConnell*.

The overriding premise underlying the Third District's decision is that the trial court "erred in: determining that [Mr.] Aubin's claims are governed by the Second Restatement

[6] The *Force* court also held that it was error for the trial court to give an instruction which limited the plaintiff to only the risk-utility test for product defect, and that the plaintiff was instead entitled to submit his case to the jury under both the risk-utility and the consumer expectation tests. *Id*. at 110.

[7] This Court declined to exercise certiorari jurisdiction to review the decision in *Davis,* in which the Fourth District certified the question of whether Florida should adopt the Third Restatement for design defect cases as one of great public importance. *See Liggett Group v. Davis*, 973 So.2d 684 (Fla. 2008).

rather than the Third Restatement[.]"[8] (App. 1 at p.10). As the District Court stated, "[S]ince Aubin's claims against Union Carbide stem from Union Carbide's sale of a component part, SG-210 Calidria, to intermediary manufacturers who incorporated the asbestos into their joint compounds and texture sprays, they are governed by the Third Restatement." (*Id*. at 12-13). Thereafter, each of the court's holdings is based on an application of the Third Restatement and comments thereto.

The District Court's application of the Third Restatement ignores this Court's precedent. Instead, the District Court stated that its own precedent in *Kohler, supra*, "represent[s] the law of Florida" because it had not been overruled by this Court.[9] (App.1, p.12, citing *Stanfill v. State*, 384 So. 2d 141 (Fla. 1980). Equally problematic is the District Court's failure to acknowledge the conflict between its decision again adopting the Third Restatement and the Fourth District's decision in *McConnell, supra,* declining to do so

[8] The Third District made an effort to write its August 22nd Opinion to avoid review in this Court. Not only did the court altogether ignore the clear conflict between its decision and the directly contrary decisions from the Fourth and Fifth Districts regarding the adoption of the Third Restatement, but, on rehearing, the court made other artful changes to the wording of its decision so as to avoid the appearance of conflict. Specifically, in its original June 20, 2012, Opinion, the Third District originally wrote: "The trial court erred in determining that Aubin's claims are governed by the Second Restatement rather than the Third Restatement ***and, as a result,*** erred in denying Union Carbide's motion for a directed verdict with respect to Aubin's design defect claim." (App. 2 at p.10). In its August 22nd Opinion on rehearing, the Third District removed the words "and as a result" and, instead, listed the denial of directed verdict as a separate error. (App.1 at p. 10). Similarly, in introducing its discussion of its holding that the Third Restatement should apply, the Third District originally wrote: "Several of Union Carbide's contentions on appeal ***turn on whether the trial court applied the correct law*** to the facts adduced in the litigation below." (App. 2 at p.10). In its decision on rehearing, the court removed this statement altogether, again attempting to remove the appearance that the conflict had any effect on the court's holding.

[9] Notably, the Third District did not certify the issue in *Kohler*, and this Court, denied discretionary review.

under nearly identical facts, despite Petitioner's request. As this Court explained in *Gilliam v. Stewart*, 291 So. 2d 593 (Fla. 1974), when a District Court decides that this Court should recede from its precedent, the proper procedure is to adhere to the former precedent and then certify the decision to this Court. 291 So. 2d at 594.

The District Court did not follow the proper procedure, and its holding held that the Third Restatement is the law in Florida is improper and should be quashed.

2. The Trial Court Properly Followed This Court's Precedent and Applied The Restatement (Second) of Torts: Products Liability.

In *Hoffman*, *supra*, this Court warned, "To allow a District Court of Appeal to overrule controlling precedent of this Court would be to create chaos and uncertainty in the judicial forum, particularly at the trial level." 280 So. 2d at 434. The Court's concern has become a reality in the strict liability context, where trial courts in the Third District are bound to follow the Third Restatement and are, for example, prohibited from giving a consumer expectations instruction, while courts in the Fourth and Fifth Districts are bound to follow the Second Restatement and may instruct the jury under consumer expectations.[10]

The trial court in the instant case was in the tenuous position of having to decide between following the precedent of this Court, as it is bound to do (*see State v. Lott*, 286

[10] Indeed, the same appellate counsel involved in the instant case are appellate counsel of record in two pending appeals involving exposure to Calidria SG-210, one of which is pending in the Third District and one of which is pending in the Fourth District. *See Font v. Union Carbide Corp*., Case No. 3D11-3270, and *Union Carbide Corp. v. Garrison*, 4D12-4. (Copies of the Initial Briefs are included in the Appendix hereto at Tab 5). In the *Font* case, plaintiff appeals the trial court's failure instruct the jury under the Second Restatement's consumer expectations test for design defect, whereas in the *Garrison* case, the defendant argues that the trial court erred in failing to apply the Third Restatement.

So. 2d 565, 566 (Fla. 1973)), or that of the Third District, which it is also bound to do. *See State v. Hayes*, 333 So. 2d 51, 53 (Fla. 1977). The trial court decided to follow the precedent of this Court. The trial court's decision was proper, given that it was based not only on controlling precedent from this Court but also on the recent decision from the Fourth District in *McConnell v. Union Carbide Corp.*, 937 So.2d 148 (Fla. 4th DCA 2006), which was on all fours with the facts and circumstances in this case and in which the Fourth District stated that the Second Restatement applies to strict liability claims in Florida. Thus, although the Third District had previously applied the Third Restatement in *Kohler v. Marcotte*, 907 So.2d 596 (Fla. 3d DCA 2005), the facts in that case, unlike the *McConnell* case, were distinguishable. Thus, the trial court properly followed this Court's precedent and applied the Second Restatement to Mr. Aubin's strict liability claims.

The Third District's holding that the trial court had erred for doing so is erroneous, and its decision reversing the judgment below on that basis should be quashed.

B. The Third District Failed to Follow Proper Procedure By Attempting To Overrule This Court's Precedent and Failing to Certify Its Decision.

The Third District has unilaterally adopted the Third Restatement as the law in Florida governing strict products liability, [11] effectively attempting to overrule this Court's precedent in *West* and to recede from its holding that the Second Restatement applies.

As this Court admonished in *United States Steel Corporation v. Save Sand Key, Inc.*, 303 So. 2d 9 (Fla. 1974), "[I]t is not the province of the District Court of Appeal to recede

from decisions of this Court." *Id*. at 11, *citing Hoffman, supra,* and *Gilliam, supra*. Instead, only this Court may overrule its own decisions. *Gilliam*, 291 So. 2d at 594. When a District Court decides that this Court should recede from its precedent, the proper procedure is to adhere to the former precedent and then certify the decision to this Court. *Gilliam*, 291 So. 2d at 594; *U.S. Steel Corp. v. Save Sand Key*, 303 So. 2d 9, 11 (Fla. 1974).

The Third District did not adhere to this Court's precedent, and it did not certify the issue to this Court in the instant case (nor, for that matter in its prior decisions in *Kohler, supra*, and *Agrofollajes, supra*, adopting the Third Restatement. Thus, the Third District failed to follow the proper procedure and, in so doing, exceeded its authority.

C. The Third District's Failure to Properly Certify the Question Notwithstanding, This Court Should Not Adopt The Third Restatement.

The Third District is the first and only court in this State to adopt the Third Restatement, in contravention of this Court's precedent in *West, supra*. There is no demonstrable basis for doing so, and no need or justification for such a "total overhaul" of Florida product liability law, which is based on the Second Restatement, has been shown. *See Rest. (Third) Torts: Prod. Lia.*, Intro. (acknowledging that the Third Restatement represents a "total overhaul" of the Second Restatement).

1. *In West, This Court Adopted Strict Liability As Laid Out In the Restatement (Second) of Torts: Products Liability.*

Strict liability, as laid out in Section 402A of the Second Restatement, is the law

[11] The Third District so held in *Kohler, supra,* the instant case, and *Agrofollajes v. E.I. Du Pont De Nemours & Co.*, 48 So.3d 976 (Fla. 3d DCA 2010), which was decided after the trial in this case but before the Third District's decision in the instant case.

in Florida. The major purpose of Section 402A was to eliminate privity, so that any person injured by a defective product could directly sue the manufacturer and members of the chain of distribution. *See* Rest. 3rd Torts: Prod. Lia., Intro. This Court recognized the spirit and purpose of this Section and concluded that, "[t]he obligation of the manufacturer must become what in justice it ought to be - an enterprise liability." *West*, 336 So. 2d at 92. This Court went on to state:

> The cost of injuries or damages, either to persons or property, resulting from defective products, should be borne by the makers of the products who put them in the channels of trade, rather than by injured or damaged persons who are ordinarily powerless to protect themselves. We therefore hold that a manufacturer is strictly liable in tort when an article he places on the market, knowing that it is to be used without inspection for defects, proves to have a defect that causes injury to a human being. *Id*.

Section 402A imposes liability for injury caused by a product that is "in a defective condition unreasonably dangerous to the user or consumer." Comment i to Section 402A applies strict liability by imposing liability for products that are "dangerous to an extent beyond which would be contemplated by the ordinary consumer." This is commonly known as the "consumer expectations test."

As set forth above, Florida courts have uniformly applied Section 402A and the Second Restatement in strict product liability cases for thirty-seven years, since this Court's decision in *West*. Nothing has changed to warrant an overhaul of that precedent.

2. *The Restatement (Third) of Torts: Products Liability Is Contrary To This State's History of Consumer Protection and Fair Apportionment of Fault.*

In May 1997, the ALI completed the Restatement (Third) of Torts: Products Liability § 5, titled: "Liability of Commercial Seller or Distributor of Product

Components for Harm Caused by Products Into Which Components Are Integrated." This Section provides that the seller of a product component is subject to liability for harm caused by a product into which the component is integrated if:

> (a) The component is defective in itself, as defined in this Chapter, and the defect causes the harm…

Rest. 3rd Torts: Prod. Lia. § 5. Product defects, as used in this Section, are defined in § 2 of the Third Restatement. Like the Second Restatement, a product may be defective under this provision due to a manufacturing defect, a design defect, or a defect due to inadequate instructions or warnings. Rest. 3rd Torts: Prod. Lia. § 2.

One of the most controversial provisions of Section 2 is the definition of design defect in Section 2(b), which requires that a plaintiff prove "that the foreseeable risks of harm posed by the product could have been reduced or avoided by the adoption of a reasonable alternative design by the seller or other distributor, or a predecessor in the commercial chain of distribution, and the omission of the alternative design renders the product not reasonably safe". *Id*. This is commonly known as the "risk-utility" test. Under Section 2 of the Third Restatement, the consumer expectations test would no longer be a basis for establishing a design defect, thereby eliminating thirty-seven years of product liability law in Florida, despite the lack of any basis to believe that the legal justifications for the test have changed or are no longer working.

Contrary to the spirit of Section 402A, which was intended to have manufacturers bear the costs of injuries resulting from defects in their products, Comment a to Section 2 of the Third Restatement reflects the intent to shift more of the product-related

accident costs to accident victims, in the interest of "efficiency" and the avoidance of excessively sacrificing product features or higher prices. Similarly, the comments to Section 5 provide ample bases for absolving manufacturers and suppliers of liability for unreasonably dangerous products. For example, Comment b, Illustration 4 (relied on by Carbide below), provides that a supplier of a component product is not required to warn the ultimate consumers of dangers associated with its products. *See* § 5, cmt b, Ill. 4.

As demonstrated in more detail in the Amicus Brief of the Florida Justice Association, Sections 2 and 5 of the Third Restatement 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.[12] Like the majority of States, this Court should not radically alter products liability law in this State by adopting these provisions of the Third Restatement. To do so would create a fundamentally unfair system where, in many if not most cases, the theory of design defect will be eliminated. Adopting Sections 2 and 5 would create a playing field that is severely slanted in favor of manufacturers and would deny Florida consumers rights under product liability law that have protected them for over 30 years. *See Halliday v. Sturm, Ruger & Co*., 792 A. 2d

[12] To date, it appears that the only State courts to have adopted Section 2 of the Third Restatement are Texas, Tennessee and Utah. *See Timpte Industries Inc. v. Gish*., 286 SW 3d 386 (Tex. 2009) (noting that Texas follows § 402A but applies a risk-utility test for design defect); *Ray v. Bic Corp*., 925 S.W. 2d 527 (Tenn. 1996); *Riggs v. Asbestos Corp. Ltd.*, -- P.3d --, 2013 WL 1339799 (Utah App. 2013) (adopting Sections 2 and 5); *Scott v. Dutton-Lainson Co.*, 774 N.W.2d 501 (Iowa 2009). More than thirty State courts appear to have adopted the Second Restatement and have either declined to adopt these provisions of the Third Restatement or have not considered doing so. *See* Richard E. Kay, *American Law of Product Liability* 3d Treatise, Part 5, Ch. 16 (May 2013) (for a comprehensive list of states that have adopted and follow §402A).

1145, 1155 (Md. 2002) (noting that the Third Restatement "has attracted considerable criticism and has been viewed by many as a retrogression, as returning to negligence concepts and placing a very difficult burden on plaintiffs" and represents "an unwanted ascendancy of corporate interests under the guise of tort reform.").

3. There Is No Justification For Overruling West and Adopting The Restatement (Third) of Torts: Products Liability.

Although the Third District has receded from this Court's precedent and adopted the Third Restatement, the court gives no justification for why it or this Court should do so. This Court has stated that it will not overrule its own precedent without first considering several questions: "(1) Has the prior decision proved unworkable due to reliance on an impractical legal 'fiction'? (2) Can the rule of law announced in the decision be reversed without serious injustice to those who have relied on it and without serious disruption in the stability of the law? (3) have the factual premises underlying the decision changed so drastically as to leave the decision's central holding utterly without legal justification?" *No. Fla. Women's Health and Couns. Svcs v. State*, 866 So. 2d 612, 637 (Fla. 2003). "The presumption in favor of *stare decisis* is strong…" *Id.*

These questions do not justify overruling *West*. First, there has been no argument made that Section 402A has in any sense proved "unworkable". Second, as explained above, the extent of reliance on *West* and the Second Restatement for the last thirty-seven years has unquestionably been great as Florida consumers have counted on the protections afforded by it. And, third, no premise of fact has changed in the intervening years so as to render *West*'s holding or the adoption of Section 402A utterly without

legal justification. Given the lack of any need for such a drastic change of Florida law, coupled with the controversy surrounding Sections 2 and 5 of the Third Restatement, this Court should not needlessly cast aside this State's existing jurisprudence and adopt the new standards set forth therein.

Accordingly, the Third District's decision adopting the Third Restatement should be quashed, and this Court should reject the invitation to adopt the Third Restatement.

II. PETITIONER PRESENTED SUBSTANTIAL COMPETENT EVIDENCE THAT THE DEFECTIVE DESIGN OF CALIDRIA SG-210 CAUSED HIS MESOTHELIOMA, AND THE REVERSAL OF THE DENIAL OF DIRECTED VERDICT WAS BASED ON THE IMPROPER REWEIGHING OF EVIDENCE.

Standard of Review: The standard of review of a trial court's ruling on a motion for directed verdict is *de novo*. *Martinolich v. Golden Leaf Management, Inc*., 786 So. 2d 613 (Fla. 3d DCA 2001). When reviewing the denial of a motion for directed verdict, the court must give the benefit of all reasonable inferences to the nonmoving party and in favor of submitting the question to the jury. *Owens v. Publix Supermarkets*, 802 So. 2d 315, 329 (Fla. 2001). A motion for directed verdict should only be granted where there is no evidence from which a reasonable jury could find for the non-moving party. *Id*.

Contrary to the district court's holding, Mr. Aubin presented substantial, competent evidence supporting the jury's finding that the defective design of Calidria SG-210 caused his mesothelioma. The District Court incorrectly interpreted the nature of the defect of Calidria SG-210 and impermissibly reweighed the causation evidence, without giving the benefit of reasonable inferences to Mr. Aubin, in deciding that

Carbide was entitled to a directed verdict on the strict liability design defect claim.

A. *The Evidence Established That Calidria SG-210 Was Defective And That The Defects Caused Mr. Aubin's Injury*.

A plaintiff in a strict liability case must prove (1) that the product is defective; and (2) that the defect caused the injury. *West*, 336 So. 2d at 86-87; *Davis*, 973 So. 2d at 475; Fla. Std. Jury Instr. (Civil) PL. A product is "defective" if it is unreasonably dangerous to the user. *Id*.; *McConnell*, 937 So. 2d at 152; Rest. (2d) Torts, §402A. A product may be defective and unreasonably dangerous if it falls into one of three categories: (1) manufacturing defect; (2) design defect; or (3) failure to warn. *Davis*, 973 So. 2d at 475; *Ferayorni v. Hyundai*, 711 So. 2d 1167 (Fla. 4th DCA 1998); *see also* Rest. 3rd (Torts) §2.

Substantial evidence in this case unquestionably supports Mr. Aubin's claims that the defective design of Carbide's SG-210 caused his mesothelioma. Therefore, directed verdict as to the strict liability claims was properly denied by the trial court.

1. *Calidria SG-210 Was Specifically Designed For Use In Products Which Are Known To Produce Substantial Amounts Of Respirable Dust*.

Carbide's primary argument on appeal regarding the strict liability design defect claim was that its asbestos product was not a "designed" product. *See* App. 6 at p. 28. Carbide's argument focused on raw Calidria asbestos, in general, whereas the product at issue in this case is Calidria SG-210, which is a designed product.

The Third District correctly held that Calidria SG-210 is a designed product, citing Carbide's "carefully designed asbestos processing regime." App.1 at p.17; *see* Pl. Ex. 43. The District Court's holding on this point is consistent with the Fourth District's decision

in *McConnell*, 937 So. 2d at 148 ("To be sure, Carbide's argument that the Calidria Asbestos substance it sold to Georgia-Pacific was merely 'raw material' is utterly betrayed by its own marketing literature. Calidria Asbestos had an 'intended design' by Carbide."). However, although the District Court acknowledged the process used in reaching the intended design of SG-210, it failed to understand what the intended design was.

As set forth in the Statement of Facts, Calidria SG-210, unlike raw asbestos, was specifically designed, manufactured, and sold for use in joint compounds and texture sprays, whereas Carbide designed and produced other Calidria products for specifications suited for other applications. (*See* T.Vol. XI, p.1237-42; Pl.Ex. 43, 51, 52). Carbide was aware that the joint compound and texture spray products for which it designed SG-210 would produce respirable dust (T. Vol. XI, p. 1280-81, 1299-1300, 1317). As Carbide conceded in its Initial Brief in the District Court, Calidria, like all asbestos, becomes dangerous and causes disease only when in a respirable form. (App.6 at p.7; *See* T.Vol. V, p.548; Vol. X, p.1103-05; Vol. XIII, p. 1443). Thus, not only was SG-210 a designed product, but it was designed to be more dangerous than asbestos in its natural state, because it was designed for use in products that would liberate asbestos fibers in respirable dust.

2. *Calidria (Chrysotile) Asbestos Causes Mesothelioma When Its Fibers Are Inhaled.*

As set forth above, Mr. Aubin presented substantial evidence establishing that exposure to respirable Calidria fibers causes mesothelioma (T. Vol. V, p.548-49, 580, 588; T. Vol. XIII, p.1422-34, 1443-44; Pl. Ex. 6, 7, 8, 16), whereas Calidria left undisturbed in its natural state and Calidria products designed for uses that do not

release respirable fibers are safe (*see Id*.; Vol. X, p. 1103-05). The District Court inexplicably ignored the substantial evidence concerning the propensity of Calidria (chrysotile) to cause mesothelioma when in a respirable form

3. The Design Of SG-210 Was Defective And Unreasonably Dangerous Because It Caused The Liberation Of Respirable Calidria (Chrysotile) Asbestos Fibers.

Under the Second Restatement's consumer expectations test, "[A] product is defectively designed if the plaintiff is able to demonstrate that the product did not perform as safely as an ordinary consumer would expect when used in the intended or reasonably foreseeable manner." *See McConnell*, 937 So. 2d at 151 (quoting *Force*, 879 So. 2d at 108); *Davis* at 474-75; *see also* Rest. (2d) Torts §402A, Cmt i.

Although the District Court refused to recognize the consumer expectations test as a basis for design defect, the evidence at trial established that SG-210 did not perform as safely as an ordinary consumer would expect when used as intended. Specifically, the evidence showed that when SG-210 was used as intended, the product was liberated into respirable dust created from routine sanding and sweeping of the joint compound and spraying and scraping of the texture spray (*See* T. Vol. II, p.128-135; Vol. IV, p. 386-87; Vol. IX, p. 947-57, 970-72; XIII, p.1421-22). The evidence also showed that exposure to Calidria fibers in respirable dust causes mesothelioma. (T. Vol. V, p.548-49, 580, 588; T. Vol. VIII, p.1422-24, 1427-1434, 1443-44, 1498; Pl. Ex. 6, 7, 8, 16).

Further, the evidence established that Mr. Aubin did not expect that the normal use of GP *Ready-Mix* joint compound and Premix *Snowflake* texture spray would release a product into the air which, if inhaled, was fatal (*See* Tr.Vol. IX, pp. 949, 958, 970, 1002-

03). Carbide presented no evidence that the ordinary consumer, like Mr. Aubin, was aware of the dangers of exposure to SG-210. Based on the evidence, a reasonable jury could find that ordinary consumers would not have expected that the use of joint compound and texture spray containing SG-210 could be fatal. Accordingly, there was substantial evidence that the design of SG-210 was defective under the consumer expectations test.

The District Court did find that the design of SG-210 was defective under the Third Restatement's risk-utility test, finding that although no evidence of a reasonable alternative design was presented, there was sufficient evidence to find SG-210 defective under the risk-utility test because the design was "manifestly unreasonable" (App. 1 at p.18., citing Rest. 3rd §5, cmt e). The District Court found that the evidence established that the risk of injury and death from exposure to SG-210 in joint compounds is significant[13] whereas the utility of SG-210 was simply that it made end products easier to work with. (*Id*.).

As the District Court held, there was sufficient evidence for a jury to find that the design of Calidria SG-210 was unreasonably dangerous and defective.

4. *Petitioner Inhaled Respirable Calidria (Chrysotile) Fibers Which Caused Him To Develop Mesothelioma*.

Having shown that Carbide's SG-210 is defective and unreasonably dangerous due to its design, the only other issue on Mr. Aubin's strict liability design defect claim was whether the evidence showed that such defect caused Mr. Aubin's mesothelioma. The District Court erroneously determined, based on its own reweighing of the evidence

[13] Although the court did acknowledge the serious risks of injury and death, the court made clear that it believed that the only evidence of a risk of injury was with regard to the disease asbestosis, as opposed to mesothelioma. *See* App. 1 at p.20.

in the case, that Mr. Aubin "failed to present any evidence suggesting that the defective design of SG-210 Calidria caused [his] harm." App. 1 at 20. The court's conclusion was based on its flawed interpretation of what it was that made the design of SG-210 defective and what the evidence showed regarding the causation of mesothelioma.

a. Carbide's Design of SG-210 For Use In Joint Compound And Ceiling Spray Made It More Dangerous Than Raw Chrysotile Naturally Is.

The District Court explained, "[Mr.] Aubin failed to present any evidence suggesting that the purported design defect of SG-210 Calidria made it more dangerous than raw chrysotile asbestos with respect to the causation of mesothelioma." *Id*. The court further elaborated, "[Mr.] Aubin pointed to nothing other than the dangerous propensities of basic, raw chrysotile asbestos as the source of his harm." *Id*. However, the court ignored substantial evidence in the record that SG-210, unlike raw asbestos, was specifically designed to be incorporated into end products whose intended use would release deadly Calidria fibers into a respirable form, which Mr. Aubin breathed (T. Vol. II, p.128-135; Vol.III, p.253; Vol. IV, p. 386-87; Vol. IX, p. 947-57, 970-72; Vol.XI, p.1239-42, 1280-81, 1299-1300; XIII, p.1421; Pl. Ex. 51, 52). The District Court inexplicably ignored the substantial evidence concerning the propensity of Calidria to cause mesothelioma when in a respirable form, as well as the evidence that it does not cause mesothelioma when left in its raw form or when used for a purpose that does not create dust. When Carbide designed and marketed SG-210 specifically for a use that contemplated and actually did release respirable Calidria fibers, Carbide made the product far more dangerous than "raw", undisturbed asbestos naturally is.

b. Mr. Aubin Breathed Calidria Fibers As The Result Of The Defective Design of Calidria SG-210.

Mr. Aubin and his subcontractor explained that they used the GP *Ready-Mix* and Premix *Snowflake* products at the Desoto Lakes jobsite and that the use of the products created substantial amounts of dust, which Mr. Aubin breathed. (T. Vol. II, p.153, Vol. IX, p.939, 952-58, 969-70, 1006-07). The evidence established that when Mr. Aubin used GP *Ready-Mix* and Premix *Snowflake*, they contained Calidria SG-210 (T. Vol. III, p.265-68; Vol.VI, p.621; Vol. XI, p.1280-81, 1299-1300, 1325-32). Thus, Mr. Aubin was exposed to respirable Calidria fibers through his use of products containing Calidria SG-210 and for which SG-210 was specifically designed. As Dr. Mark testified within a reasonable degree of medical certainty, Mr. Aubin's exposure to airborne Calidria SG-210 dust through his work with and around GP *Ready-Mix* and Premix *Snowflake* was a substantial contributing cause of his mesothelioma. (T.Vol. XIII, p.1427-34).

Therefore, contrary to the District Court's conclusion, there was substantial evidence that the defective design of Calidria SG-210 caused Mr. Aubin's injury – especially when the evidence is viewed in a light most favorable to Mr. Aubin. Indeed, the evidence established that but for Carbide's design of SG-210, Mr. Aubin never would have been exposed and, therefore, never would have contracted mesothelioma.

On a challenge of the denial of a directed verdict motion, the issue is whether there was *any* evidence from which a jury could reasonably conclude that the defective design of SG-210 caused Mr. Aubin's mesothelioma. *See Owens, supra; Davis*, 973 So. 2d at 474. The issue of causation is a question of fact (which the jury in this case

determined in Mr. Aubin's favor). *See Scheman-Gonzalez*, 816 So. 2d at 1140 (the question of proximate cause in a strict liability case is for the jury) (relying on *Brito v. County of Palm Beach*, 753 So. 2d 109, 113 (Fla. 4th DCA 1998)); *Brown v. Glade and Grove Supply, Inc*., 647 So. 2d 1033 (Fla. 4th DCA 1994). The District Court's decision simply cannot be reconciled with the record in this case, nor with the standard governing review of the denial of a directed verdict motion.

Mr. Aubin presented more than enough evidence to create an issue of fact concerning the causal connection between the defective design of SG-210 and his injury. Therefore, the issue was properly submitted to the jury, and the District Court's decision reversing the denial of Carbide's motion for directed verdict should be quashed.

B. The District Court's Decision Conflicts With This Court's Decisions Establishing The Standard Governing Directed Verdicts and Prohibiting District Courts From Reweighing Evidence.

The District Court's decision misapplies the standard governing motions for directed verdicts as set forth in controlling decisions from this Court. *See, e.g. Cox*, 71 So. 3d at 799-801; *Owens, supra; Gooding v. Univ. Hosp. Bldg., Inc.*, 445 So. 2d 1015, 1020 (Fla. 1984). These decisions hold that a plaintiff establishes causation by presenting any evidence, viewed in the light most favorable to a plaintiff, that the defendant's conduct caused the injuries. *Cox*, 71 So. 3d at 799-801; *Gooding*, 445 So. 2d at 1020.

In *Cox*, this Court quashed a Second District decision that misapplied the directed verdict standard the same way the Third District's decision did here. The district court in *Cox* had "impermissibly reweighed the testimony presented by the plaintiff's expert

witness" on whether the medical malpractice caused the injuries. 71 So. 3d at 796. This directly conflicted with *Gooding*, which holds that as long as the plaintiff's expert testifies that the defendant's conduct "more likely than not" caused the injury, the resolution of conflicting expert testimony "is a matter for the jury, not a matter for the appellate court to resolve as a matter of law." *Cox*, 71 So. 3d at 801. This Court in *Cox* reiterated the operative test – a directed verdict "is not appropriate in cases where there is conflicting evidence as to the causation or the likelihood of causation." *Id*. "If the plaintiff has presented evidence that could support a finding that the defendant more likely than not caused the injury, a directed verdict is improper." *Id*.

Here, as explained in detail above, Mr. Aubin presented substantial evidence that exposure to respirable Calidria fibers causes mesothelioma; that Carbide designed SG-210 to be used in products which would cause the liberation of significant amounts of Calidria-laden dust; that Mr. Aubin was exposed to Calidria-laden dust from products containing Calidria SG-210 and for which SG-210 was specifically designed; and that Mr. Aubin has mesothelioma. Mr. Aubin's expert testified, within a reasonable degree of medical certainty, that Mr. Aubin's exposure to Calidria SG-210 through his work with and around joint compounds and texture sprays containing Calidria SG-210 caused his mesothelioma (T. Vol. VIII, p.1422-24, 1427-1434, 1443-44, 1498).

The failure to consider the foregoing evidence, as a whole, conflicts with the well-settled principle that if any evidence supports a verdict for the plaintiff, a directed verdict cannot be granted. *See, e.g., Cox*, 71 So. 3d at 799-801; *Owens*, 802 So. 2d at 329-30;

Gooding, 445 So. 2d at 1020. Accordingly, this Court should quash the decision of the Third District and reinstate the final judgment for Mr. Aubin.

III. CARBIDE WAS NOT ENTITLED TO A JURY INSTRUCTION THAT IT COULD HAVE DISCHARGED ITS DUTY TO WARN BY RELYING ON ITS INTERMEDIARY CUSTOMERS UNDER THE FACTS PRESENTED.

Standard of Review: The standard of review of decisions to give or withhold a jury instruction or as to errors regarding jury instructions is abuse of discretion. *Goldschmidt v. Holman*, 571 So. 2d 422, 425 (Fla. 1990).

There is simply no basis in logic or fact for the District Court's decision reversing the judgment below on the basis of the duty to warn jury instruction in this case. The trial court's decision was reasonable, based on undisputed facts, and resulted in no prejudice to Carbide. There was no abuse of discretion, and reversal was not warranted.

The trial court read the following special instruction to the jury in this case: "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." (T.Vol. XVII, p. 1889-90). Despite acknowledging that it is an accurate statement of the law, the District Court held that the instruction was misleading "because Florida law provides that this duty may be discharged by reasonable reliance on an intermediary." App. 1 at p.30. Therefore, the District Court further held that the trial court was required to also "inform the jury that Union Carbide could have discharged its duty by adequately warning the intermediary manufacturers and ***reasonably*** relying on them to warn end-users" (*Id*. at p.31 (emphasis added)), and that, in the absence of such an instruction, the

instruction that Carbide had a duty to warn end users was misleading and required reversal (*Id*.). The District Court's holding cannot be reconciled with the undisputed fact that Carbide knew that its intermediary customers were not warning end users.

Logic dictates that Carbide could not have "reasonably" relied on its intermediary customers to warn end users when Carbide knew that, in fact, they were not doing so. Therefore, any instruction regarding ways Carbide could have reasonably relied on its intermediaries is effectively moot because, under no circumstances could Carbide's reliance on its intermediaries to convey warnings have been "reasonable" on the facts in this case. As such, Carbide can show no prejudice resulting from the trial court's decision to withhold the additional instruction, as required to warrant reversal.

A. The District Court Ignored The Applicable Standard of Review.

The District Court appears to have ignored the circumstances in which the trial court's decision was made and, with that, appears to have ignored the applicable standard of review. This Court has described the applicable standard as follows:

> Decisions regarding jury instructions are within the sound discretion of the trial court ***and should not be disturbed on appeal absent a prejudicial error***. Prejudicial error requiring a reversal of judgment or a new trial occurs only where "the error complained of has resulted in a miscarriage of justice." §59.041, Fla. Stat. (1989). A "miscarriage of justice" arises where instructions are "reasonably calculated to confuse or mislead" the jury.

Goldschmidt, 571 So. 2d at 425 (emphasis added), citing *Florida Power & Light Co. v. McCollum*, 140 So. 2d 569 (Fla. 1962). Under the circumstances in this case, there was no "reasonable possibility that the jury could have been misled by the failure to give the instruction." *Id.* at 425. Rather, in light of the undisputed evidence showing that Carbide

could not have reasonably relied on its intermediaries to warn end users (because it knew that they were not doing so), the evidence did not support an additional instruction regarding ways in which Carbide might have discharged its duty by warning intermediaries. Thus, there was no prejudicial error and no abuse of discretion shown.

B. The Decision To Withhold Additional Instructions Was Reasonable.

Several considerations support the reasonableness of the trial court's decision: (1) the trial court's decision was supported by the facts; (2) the trial court's decision was supported by the law; (3) Carbide's proposed instructions were not an accurate statement of the law; (4) a component supplier cannot discharge its duty to warn by relying on intermediaries when it knows its intermediaries are not conveying warnings; and (5) the record reflects that the jury was not misled by the instructions as given.

1. *The Undisputed Facts Establish That The Intermediary Customers Were Not Warning End Users*.

The 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 (*See* T.Vol. XII, p.1316-17). It is also undisputed that ***Carbide made no effort to directly warn end-users or to require its intermediaries to do so*** (*Id* at p. 1284, 1316). The District Court acknowledged this: "Union Carbide stipulated that the intermediary manufacturers did not place any warnings on their products, Union Carbide knew that the intermediary manufacturers did not place any warnings on their products, and Union

Carbide itself did not directly warn end-users about the dangers of asbestos." (App. 1 at p. 8). Thus, Carbide could not have "reasonably" relied on its intermediaries to warn, knowing that, in fact, they were not doing so, and, therefore, there was no need for an instruction concerning how they could have "reasonably" relied.

2. *Respondent Was Not Entitled To A Jury Instruction That It Could Discharge Its Duty to Warn End Users By Relying On Intermediaries*.

The trial court's decision to give the duty to warn instruction and to withhold any instruction regarding factors to consider in determining the reasonableness of reliance on intermediaries to warn were based on the Fourth District's decision in *McConnell*, *supra*. The *McConnell* case involved a plaintiff who had been injured by exposure to the exact same Carbide asbestos product in the exact same GP *Ready-Mix* product. In *McConnell*, the trial court instructed the jury that in determining whether Carbide had satisfied its duty to warn, it should consider the level of education and knowledge of Carbide's customers, such as GP, regarding the danger. Relying on Section 388 of the Second Restatement, the Fourth District held that it was error for the trial court to give such an instruction under the circumstances and explained:

> When –as here– the risk is very great, [] ***the supplier of a product like Calidria Asbestos may not rely on its intermediaries to give warning***. This is especially true when the burden involved in giving the warning is not unduly burdensome… [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***. 937 So.2d at 156 (emphasis added).

After considering the Fourth District's clear holding under nearly identical circumstances that Carbide's duty extended to its end-users and that it could not rely on

its intermediaries to satisfy its duty to warn, the trial court elected not to give an instruction regarding ways Carbide could have reasonably relied on its intermediaries to warn in this case (T.Vol. XVI, p. 1843-44). In light of the *McConnell* decision, which is on all fours with the facts in this case, the trial court was well within its discretion in declining to give the additional instructions.[14] It cannot be said that no reasonable person would agree with the trial court's decision. *See Canakaris v Canakaris*, 382 So. 2d 1197 (Fla. 1980) ("If reasonable men could differ as to the propriety of the action taken by the trial court, then it cannot be said that the trial court abused its discretion."). Therefore, no abuse of discretion can be shown.

The District Court also stated that its decision was based on the premise that the question of whether a defendant has discharged its duty is a question for the trier of fact (*Id*. at p.31). Petitioner agrees that the question of whether a duty has been discharged is a question of fact, and the Fourth District so held in *Union Carbide Corp. v.*

[14] The Third District suggests that its decision that Carbide was entitled to an instruction that it could have discharged its duty by warning its intermediary was based on the Fourth District's decision in *Kavanaugh, supra*. However, the court's interpretation of the Fourth District's precedent is flawed. The *Kavanaugh* decision was before the Fourth District on review of the trial court's denial of Carbide's motion for directed verdict on the plaintiff's failure to warn claim on grounds that Carbide *owed no duty* to the plaintiff, an end-user of Calidria SG-210 in GP joint compound. The Fourth District held that the trial court correctly denied the directed verdict, stating: "[Carbide] contends that it satisfied its duty to warn by informing Georgia Pacific of the hazards of asbestos. It asserts that as a bulk supplier it had no affirmative duty to warn ultimate users of the dangers of asbestos. We disagree." 879 So. 2d at 44. The *Kavanaugh* holding is consistent with the Fourth District's later holding in *McConnell*, in which the Fourth District reviewed a jury instruction on the issue. Remarkably, the Third District states that it believes that the Fourth District's reading in *McConnell* of its own precedent in *Kavanaugh* was "flawed" (App. 1, p. 32, n.6).

Kavanaugh, 879 So.2d 42 (Fla. 4th DCA 2004). The jury in this case was instructed that the duty owed is one of reasonable care (T. Vol. XVII, p. 1888-89). However, in the absence of any evidence that Carbide could have reasonably relied on its intermediaries to convey warnings, there was no reasonable possibility that the jury could have found that Carbide had discharged its duty based on such reliance. Therefore, the jury could not have been misled by the failure to further explain how Carbide could have discharged its duty by reasonable reliance on its intermediaries.

Morevoer, as detailed in the Statement of Facts, Mr. Aubin presented substantial evidence of the hidden dangers of Calidria SG-210 (much of the same evidence that presented in the *McConnell* case). With this in mind, the determination that Carbide had a duty to warn Mr. Aubin, the end-user, is also consistent with precedent from this Court and other district courts of appeal in Florida. *See Tampa Drug Co. v. Wait,* 103 So. 2d 603, 608 (Fla. 1958) ("It is with regard to this type of product [products with hidden death-dealing potentialities] that the law imposes upon the distributor ***a duty to the using public***") (emphasis added); *see also Square D. Co. v. Hayson*, 621 So. 2d 1373 (Fla. 1st DCA 1993) ("When the manufacturer of an article involving an inherently dangerous intrumentality (which includes electricity) places that product in the stream of commerce, the manufacturer assumes the duty of conveying to those who might use the product a fair and adequate warning of its dangerous potentialities.").

Although the Third District states in its opinion that "Florida law provides that this duty may be discharged by reasonable reliance on an intermediary" (App. 1 at p.

30), the court provides no indication of what Florida law it is referring to. To the contrary, there appears to be an absence of Florida law that supports reliance on an intermediary to convey warnings under circumstances like those presented – that is, circumstances involving a highly dangerous, deadly product and the failure to even attempt to ensure that warnings reached the end user. Instead, 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. *See McConnell, supra; Tampa Drug, supra*. Therefore, the trial judge did not abuse his discretion in declining to give such an instruction, especially where the facts do not support such an instruction.

3. *Respondent's Proposed Instructions Were Improper and Argumentative.*

Carbide did not even propose instructions that satisfied the Third District's requirements. The District Court held that Carbide was entitled to an instruction explaining that Carbide could have discharged its duty by adequately warning its intermediary customers and by reasonably relying on them to warn end-users (App. 1 at p. 31). The District Court explained the relevant factors in determining whether Carbide could have relied on its intermediaries to include the gravity of the risk 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 (*Id*. at p. 23, citing Rest. 3rd (Torts) Pro. Lia., §2, cmt. i). The court also held that the intermediaries' level of knowledge, education, and expertise are relevant (*Id*. at p. 24).

Carbide proposed three special instructions regarding the duty to warn (SR 30-

32). *See* App. 7. A reading of Carbide's proposed instructions reflects that none sets forth the factors laid out by the District Court and, as such, none would have satisfied the court's requirement. Instead, Carbide's proposed instructions were legally improper and argumentative. In order to claim error for the failure to instruct, a party must "request a proper instruction.'" *Redwing Carriers v. Urton*, 207 So. 2d 273 (Fla. 1968). Proposed instructions which are too argumentative are improper. *See Fla. E. Coast Rwy v. McKinney*, 227 So. 2d 99, 104 (Fla. 1st DCA 1969).

Thus, even if the Third District was correct and an additional instruction was warranted, Carbide could not claim error because it did not request a proper instruction.

4. A Component Supplier Cannot Discharge Its Duty To Warn By Relying On Intermediaries When It Knows The Intermediaries Are Not Conveying Warnings.

The Third District's decision suggests that a component supplier may discharge its duty to warn merely by warning intermediary customers, regardless of whether the intermediary is conveying warnings to its end users. This is contrary to the law in this State. *See McConnell, supra; but see* Rest. 3rd (Torts) Pro. Lia. § 5, cmt b, Ill. 4.

Moreover, such a rule would be a departure from Florida law, in which the learned intermediary doctrine is not an absolute bar to liability in product liability cases. Florida law supports fair distribution of liability based on fault. Such a bar would be akin to a contributory negligence bar. Florida long ago abandoned such unfairness in favor of comparative negligence rule. *See Hoffman, supra*; §768.81, Fla. Stat. Likewise, this Court should prevent the unfairness of a complete bar to liability of component suppliers without regard to their conduct or the reasonableness of their actions.

5. *The Verdict Itself Reflects The Jury Was Not Misled By The Instructions*.

Finally, it is worth noting that the verdict in this case reflects that the jury was not confused or misled to believe that the responsibility rested entirely with Carbide. Rather, the jury apportioned fault among Carbide and its intermediary customers, GP and Premix, as well as *Fabre* defendants U.S. Gypsum and Kaiser Gypsum (also end product suppliers). The jury attributed most of the responsibility for not adequately warning Mr. Aubin to parties other than Carbide, in that it attributed only 46.25% of the fault to Carbide. More than 50% of the fault was attributed to intermediary customers.

Carbide had a duty to warn end users of the hidden dangers of its unreasonably dangerous component product and should not be absolved of liability even if it did provide warnings to its intermediary customers when it knew that its intermediaries were not warning their end users. The trial court properly refrained from instructing the jury that Carbide could discharge its duty to warn by relying on its intermediaries under the facts in this case, and the jury properly apportioned fault among those in the chain of distribution of Carbide's unreasonably dangerous, defective product.

Accordingly, this Court should quash the Third District's decision reversing for a new trial on the grounds of instructional error and reinstate the judgment in this case.

CONCLUSION

Based upon the above reasons and citations of authority, Petitioner respectfully requests that this Court quash the decision of the Third District Court of Appeal below and reinstate the judgment in favor of Mr. Aubin.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the Petitioner's Initial Brief on the Merits has been served via electronic mail to Matthew Conigliaro, Esq., (mconigliaro@carltonfields.com), and Dean A. Morande, Esq., (dmorande@carltonfields.com) on this 12th day of June, 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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