

## Products Liability Law Daily Wrap Up, TOP STORY—ASBESTOS—Fla. Sup.: Jury verdict of \$6.6 M reinstated against asbestos supplier, Union Carbide, (Oct. 30, 2015)

By Pamela C. Maloney, J.D.

Holding that the Third District Court of Appeal had erred in applying the Restatement (Third) of Torts' risk-utility test, instead of the Restatement (Second) of Torts' consumer expectations test, to a product liability design defect claim, the Florida Supreme Court reinstated a jury verdict in the amount of \$6,624,150 against Union Carbide, the supplier of asbestos used in joint compounds and ceiling texture sprays used by a construction worker who developed mesothelioma. The court of appeal also erred in merging the Third Restatement's definition of design defect with causation, concluding that the worker had failed to present sufficient evidence that the asbestos supplied by Union Carbide was the cause of his mesothelioma. Finally, the Florida high court determined that although the Third District's holding that the jury could be instructed on the learned intermediary doctrine in asbestos cases was correct, the trial court's refusal to instruct the jury on the defense did not warrant a retrial because the jury instructions, as a whole, were not so misleading as to require a reversal of the verdict (*Aubin v. Union Carbide Corp.*, October 29, 2015, Pariente, B.).

**Background.** William P. Rubin, who worked as a construction supervisor for his father's company, overseeing the construction of a residential development project, was diagnosed with malignant peritoneal mesothelioma—a fatal, incurable form of cancer in the lining of the abdomen. Aubin filed a lawsuit against a number of companies, including Union Carbide, alleging that his disease was caused by exposure to asbestos in drywall joint compounds and ceiling texture sprays designed and manufactured by third parties using asbestos supplied by Union Carbide. Specifically, Aubin alleged that while working at the construction site, he had been exposed to and inhaled respirable dust created by the sanding and sweeping of joint compounds and the spraying of ceiling texture sprays. Aubin also alleged that he did not know that these joint compounds and texture sprays contained asbestos and thus did not know that he was inhaling asbestos fibers.

Following a trial, the jury returned a verdict for Aubin, finding that Union Carbide was liable in part for his damages under theories of both negligence and strict liability defective design and failure to warn. Union Carbide appealed and the Third District Court of Appeal reversed the jury's damage award in the amount of \$6,624,150 on the following grounds: (1) the trial court erred in failing to apply the Third Restatement, which exclusively adopts the "risk utility" test for a design defect claim and imposes on plaintiffs the requirement of proving a reasonable alternative design; (2) the design defect was not a cause of Aubin's damages; and (3) the trial court's jury instructions given by the trial court regarding the failure to warn were misleading because they failed to discuss Union Carbide's learned intermediary defense. Aubin appealed.

**Design defect.** The Florida Supreme Court noted first that in adhering to its own precedent and applying the Third Restatement's risk utility test, which requires proof of a reasonable alternative design, and its component parts doctrine to strict products liability cases, the Third District's decision conflicted with the high court's holding in *West v. Caterpillar Tractor Co.*, 336 So. 2d 80 (Fla. 1976), and with the Fourth District Court of Appeal's decision in *McConnell v. Union Carbide Corp.*, 937 So. 2d 148 (Fla. 4th DCA 2006), both of which applied the Second Restatement to strict products liability cases and utilized the consumer expectations test as an essential part of determining a design defect. In resolving this conflict, the Florida Supreme Court concluded that the Second Restatement's consumer expectations test is more closely aligned with the policy reasons behind Florida's adoption of strict liability in product design cases, which is to place the burden of compensating victims of unreasonably dangerous products on the manufacturers, who are most able to protect against the risk of harm, and not on the consumer injured by the product.

In refusing to adopt the Third Restatement, the Florida high court concurred with the reasoning of several state supreme courts when confronted with the choice of abandoning the Second Restatement in favor of the Third. First, by departing from the consumer expectations test set forth in the Second Restatement and by focusing instead on the foreseeability of the risk of harm, including a cost-benefit analysis, the Third Restatement "blurs the distinction between strict products liability claims and negligence claims." Second, the Third Restatement's

risk utility test imposes a higher burden on consumers to prove a design defect than exists in negligence cases—“the antithesis of adopting strict products liability in the first place.” Third, the Third Restatement places upon consumers the additional burden of proving, with some exceptions, that a reasonable alternative design was available to the manufacturer. According to the Florida high court, a number of courts have criticized this added element of proof emphasizing that it “goes beyond the law” by “urging the adoption of the reasonable alternative design standard and an exclusive risk/utility analysis, notwithstanding that the majority of jurisdictions in this country do not require a reasonable alternative design in strict products liability actions.”

The state high court noted that its conclusion that the Third Restatement’s risk utility test and establishment of a reasonable alternative design mandate are not requirements for finding strict liability, did not preclude a plaintiff from showing that alternative safer designs exist in order to prove his or her case. Nor was a manufacturer precluded from showing that it could not have made the product any safer through reasonable design alternatives.

**Causation.** Turning to the element of causation, the high court explained that both the Second and the Third Restatements apply the general rules of causation, requiring the plaintiff to show that the defect caused the alleged injury or harm. However, the supreme court found that in analyzing causation, the Third District combined the causation element with the Third Restatement’s definition of a design defect by requiring the construction worker to show that Union Carbide’s asbestos was more dangerous than raw asbestos in causing mesothelioma. First, as already discussed, the use of the Third Restatement’s definition of a design defect was contrary to the consumer expectations test, as set forth in the Second Restatement. Second, causation addresses only whether the defect caused the harm. The proper test of causation was not to compare the dangerousness of one product with another unreasonably dangerous product. In this case, the construction worker was required to show that the defective design of Union Carbide’s asbestos directly and in natural and continuous sequence produced or contributed substantially to producing his mesothelioma, so that it can reasonably be said that, but for the defect, the injury would not have occurred. Based on the evidence presented at trial and detailed by the supreme court, the worker met his burden of proof.

**Learned intermediary doctrine.** Lastly, the Florida Supreme Court addressed the question of whether Union Carbide could present the learned intermediary defense to the worker’s failure-to-warn claim to jury and whether the court’s refusal to give Union Carbide’s proposed instruction on that defense warranted the granting of a new trial.

Both the Second and Third Restatements recognize that a manufacturer may be able to rely on an intermediary to relay warnings to the end user, but the critical inquiry is whether the manufacturer was reasonable in relying on the intermediary to fully warn the end user and whether the manufacturer fully warned the intermediary of the dangers in its product. The supreme court agreed with the Third District conclusion that the determination as to whether a bulk supplier, like Union Carbide, could rely on an intermediary to warn end users to discharge the supplier’s duty to warn was a question for the trier of fact, provided the evidence supports that defense and the jury instruction accurately explains the factors for the jury to consider in determining whether the supplier’s reliance was reasonable.

However, the state supreme court found that special jury instructions requested by Union Carbide did not provide an accurate statement of the law as to this defense because they did not clearly address the factors set forth under both Restatements for determining whether reliance on an intermediary to relay warnings to the end user was reasonable. After reviewing the jury instructions as a whole, the supreme court concluded that the instructions given by the trial court on the construction worker’s failure-to-warn claims were not misleading and, thus, there was no basis for finding reversible error based on the trial court’s failure to give Union Carbide’s proposed learned intermediary defense instructions to the jury.

The case is No. SC12-2075.

Attorneys: James Louis Ferraro (The Ferraro Law Firm, P.A.) for William P. Aubin. Matthew John Conigliaro (Carlton Fields, P.A.) for Union Carbide Corp.

Companies: Union Carbide Corp.

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