LAW | REAL ESTATE | FINANCE
DailyBusinessReview.com
An ALM Publication
OCTOBER 30, 2015
DAILY BUSINESS REVIEW

Court Revives $6.6M Asbestos Award Against Union Carbide

by Celia Ampel
campel@alm.com

The Florida Supreme Court reinstated a $6.6 million award Thursday against Union Carbide Corp. in an asbestos case that attracted high-powered amicus briefs and hinged on what attorneys saw as either a pro-consumer or pro-business test.

The court opted for a products liability test that asked whether a product performed as safely as a reasonable consumer would expect.

The U.S. Chamber of Commerce, Pharmaceutical Research and Manufacturers of America and others argued for a strong public policy goal of limiting the duty of upstream manufacturers and suppliers to warn end users, Frank Cruz-Alvarez of Shook, Hardy & Bacon in Miami wrote in an amicus brief.

The Florida Consumer Action Network and the Florida Justice Association, representing plaintiffs lawyers, argued in support of the Miami-Dade Circuit Court verdict.

The Supreme Court majority chose to rely on the second restatement of torts by the American Law Institute in 1965 rather than the third restatement issued in 1997 that sets a higher burden for consumers bringing products liability cases.

"The third restatement keeps a lot of people out of the courtroom unnecessarily," said plaintiffs attorney Jim Ferraro of the Ferraro Law Firm in Miami. "The second restatement allows consumers to have the expectation that a product is going to be safe."

Ferraro's client, former construction supervisor William P. Aubin, won the 2010 judgment in Miami-Dade Circuit Court after his attorneys argued he contracted mesothelioma from asbestos mined by Union Carbide.

The Third District Court of Appeal reversed the decision in 2012, finding the trial court should have used the third restatement test requiring Aubin to show a reasonable alternative design for the product. The court also found the design defect was not a cause of Aubin's damages and the jury instructions on failure to warn claims were misleading.

J. ALBERT DIAZ

Attorney Jim Ferraro said a 1997 products liability test "keeps a lot of people out of the courtroom unnecessarily."

"The Third District's decision creates multiple points of express and direct conflict with decisions of this court and of other district courts of appeal," Florida Supreme Court Justice Barbara

Pariente wrote in a 5-2 opinion.

The high court ruled Florida judges should not rely on the risk utility test used by the Third District because it "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."

The risk utility test comes from the third restatement of torts. The Florida Supreme Court ruled the district court should have relied on the second restatement used by the trial judge, Miami-Dade Circuit Judge Joseph P. Farina, now retired.

The second restatement uses the consumer expectations test, which "considers whether a product is unreasonably dangerous in design because it failed to perform as safely as an ordinary consumer would expect when used as intended or in a reasonably foreseeable manner," according to the Florida Supreme Court opinion.

The high court adopted the consumer expectations test as its standard for strict products liability cases in a 1976 decision in *West v. Caterpillar Tractor*, and the Third District decision in the Aubin case conflicted with that precedent, the justices held.

The second restatement is a sound body of law that stems from scholarly work and protects consumers while giving rights to manufacturers, Ferraro said.

"The third restatement was put together by committees that were put together by all these special-interest groups," he said. "They all lobbied each other, and it's not a pure analysis of the consensus law of torts. It's a special-interest version of the law of torts."

The Supreme Court also found Aubin's attorneys presented sufficient evidence that the product caused his terminal mesothelioma. The high court ruled the Third District had "erroneously merged the third restatement's definition of design defect with causation."

Aubin dealt with joint compounds and texturing sprays that contained SG-210 Calidria asbestos, which Union Carbide produced and sold to companies that made the construction materials Aubin handled. Asbestos claims against other companies were settled before trial.

The high court rejected Union Carbide's argument that it deserved a new trial because the jury instructions didn't address Union Carbide's intermediary defense against the failure to warn claims.

The Third District ruled the jury instruction was flawed because it didn't say the company "could have discharged this duty by adequately warning the intermediary manufacturers and reasonably relying on them to warn end users."

But the justices found the company did not submit proposed jury instructions that accurately discussed the defense, and so the omission did not warrant a reversal of the verdict.

Chief Justice Jorge Labarga and Justices Fred Lewis, Peggy Quince and James Perry concurred.

Justice Ricky Polston dissented, saying he agreed with the Third District that Union Carbide was entitled to a new trial because the failure-to-warn instruction was misleading. Justice Charles Canady concurred.

The pro-business amicus brief argued Aubin's attorneys insisted manufacturers and suppliers "have a duty to do what is typically impossible in the real world: i.e., provide a warning directly to a downstream end user, especially with regard to the risks of using an intermediary's finished product."

That position "is contrary to Florida law and sound public policy," the groups wrote.

Ferraro and Juan Pablo Bauta of the Ferraro Law Firm represented Aubin, who died before the case was resolved by the high court. Ferraro said he was "very pleased" with the decision because it affects plaintiffs in many products liability cases.

"It transcends our case," he said. "If we went to the third restatement, it would be very, very bad for Florida consumers."

Carlton Fields Jorden Burt attorneys Matthew Conigliaro in Tampa and Dean Morande in West Palm Beach represented Union Carbide. The attorneys did not immediately respond to requests for comment.

Celia Ampel can be reached at 305-347-6672.