IN THE SUPREME COURT OF FLORIDA

WILLIAM P. AUBIN,

Petitioner,

v.

UNION CARBIDE CORPORATION,

Respondent.

CASE NO. SC12-2075

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

AMICI CURIAE BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, COALITION FOR LITIGATION JUSTICE, INC., PHARMACEUTICAL RESEARCH AND MANUFACTURERS OF AMERICA, AND AMERICAN CHEMISTRY COUNCIL IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICI CURIAE*

Amici are organizations that represent companies doing business in Florida and their insurers. *Amici* submit this brief to respond to an argument by Petitioner that upstream product manufacturers and suppliers – many of whom are members of *amici* – 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. Petitioner's position is contrary to Florida law and sound public policy.

STATEMENT OF THE CASE

Amici adopt Defendant-Respondent's Statement of the Case to the extent relevant to *amici*'s arguments in this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

The linchpin of Petitioner's argument is that in Florida "suppliers of products with hidden serious dangers have a duty directly to the end user that *cannot* be discharged by warnings to intermediary suppliers." Pet. Br. at 48 (emphasis added). It follows, Petitioner contends, that it was not reversible error for the trial court to instruct the jury that a supplier of a raw material could be liable to end users of finished products in which the raw material has been incorporated unless the raw material supplier *directly* warned the end users. Petitioner is wrong both as a matter of law and policy.

First, it is indisputable that Florida law recognizes many circumstances where a product manufacturer or raw material supplier may discharge its duty to end users of their products and products incorporating their products without directly warning the end user. Petitioner's position is contrary to existing Florida case law and the clear majority rule across the country, as reflected in both the Restatement (Second) of Torts § 388 (1965) and Restatement (Third) of Torts: Products Liability §§ 2, 5 (1998), that a supplier's duty is to act reasonably under all the circumstances of the case. Further, adoption of Petitioner's position would not only unsettle established Florida law with respect to the raw material/ component parts doctrine at issue in this case, but might well erode well-settled law on related doctrines such as the bulk supplier, learned intermediary, and sophisticated purchaser doctrines.

Second, Petitioner's desired holding would undermine the strong public policy rationales for limiting the duty of upstream manufacturers or suppliers to directly warn end users. Typically, as were the facts here, it will be impossible for the upstream seller to warn end users of its customers' products. Even if it were somehow possible for upstream suppliers to warn users of their customers' products, unless these suppliers monitor the way in which their products are integrated in their customers' products, including evaluating the design and warnings of their customers' products, they will be ill-suited to provide direct

warnings to downstream end users of products. Courts have routinely refused to impose such monitoring duties on suppliers, correctly finding that they would be unreasonably burdensome.

ARGUMENT

I. FLORIDA LAW RECOGNIZES DIVERSE CIRCUMSTANCES IN WHICH A MANUFACTURER OR SUPPLIER'S DUTY TO WARN MAY BE DISCHARGED WITHOUT DIRECTLY WARNING END USERS

Florida law recognizes many situations in which an upstream product manufacturer or raw material supplier need not – and, realistically, cannot be expected to – provide a warning directly to a downstream end user. Most relevant to the instant case, both the Restatement (Second) of Torts § 388 and Restatement (Third) of Torts: Products Liability §§ 2 and 5 recognize that upstream suppliers of raw materials or other component parts may discharge their duty to warn end users without a direct warning if the supplier acts reasonably under all the circumstances.[1] This Court and other Florida courts have agreed, and these

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[1] Under Restatement (Second) § 388 cmt n, the trier-of-fact may consider factors such as: (1) the dangerous nature of the product; (2) the form in which the product is used; (3) the intensity and form of the warnings given; (4) the burdens to be imposed by requiring warnings; and (5) the likelihood that the warnings will be adequately communicated to the foreseeable users of the product. Similarly, Restatement (Third) § 2 cmt. i states that the "standard is one of reasonableness in the circumstances." Factors to be considered in this analysis include: (1) the gravity of the risks posed by the product; (2) the likelihood that the intermediary will convey the information to the end user; and (3) the feasibility and effectiveness of giving a warning directly to the end user. *See id.*

decisions cannot be reconciled with Petitioner's extreme theory that an upstream product supplier can *never* discharge its duty to warn downstream users by warning an intermediary. *See* Pet. Br. at 48. Adopting Petitioner's proposed rule would unsettle existing law with respect to the duties of raw material/component parts suppliers, and could open the door to significant erosions by the plaintiffs' bar to other, related product liability doctrines.

A. Under Both the Second and Third Restatements of Torts, Bulk/Raw Material Suppliers Do Not Have a Nondelegable Duty To Warn End Users

Florida courts have analyzed the duties of component parts and raw material suppliers under both the Second and Third Restatements of Torts. *See, e.g., Union Carbide Corp. v. Kavanaugh*, 879 So. 2d 42, 45 (Fla. 4th DCA 2004) (Second Restatement); *McConnell v. Union Carbide Corp.*, 937 So.2d 148, 155-56 (Fla. 4th DCA 2006) (Second Restatement); *Union Carbide Corp. v. Aubin*, 97 So. 3d 886, 898-99 (Fla. 3d DCA 2012) (Third Restatement); *Kohler Co. v. Marcotte*, 907 So. 2d 596, 599-600 (Fla. 3d DCA 2005) (Third Restatement). As the Third District recognized in *Aubin*, and as Petitioner seems to concede in his Brief, the tests are "substantially the same" under both Restatements. *Aubin*, 97 So. 3d at 901; *see also* Pet. Br. at 47. Neither Restatement imposes a duty on raw material/ component parts suppliers to directly warn end users of their customers' products.

Likewise, Florida law does not provide that a raw materials supplier may be liable under a failure to warn claim unless it directly warns end users of products incorporating those materials. For example, in *Shell Oil Co. v. Harrison*, 425 So. 2d 67, 70 (Fla. 1st DCA 1982), the First District Court of Appeal found that a "bulk supplier of a dangerous toxic component" did not "*have a nondelegable duty to warn ultimate users* of the hazards of commodities containing the toxic component when the commodities were formulated, packaged, labeled, and distributed by others." Rather, the court held the bulk supplier satisfied any duty to warn that it owed because it had "taken necessary precautions commensurate with the dangers reasonably anticipated under the circumstances" by providing appropriate warnings to the manufacturer of the finished product. *Id.* at 69-70.

The court further held that the bulk supplier was entitled to a directed verdict, and thus made clear that it had acted "commensurate with the dangers reasonably anticipated under the circumstances" even though it did not directly warn end users. *Id.* at 70. The court also held that the trial court had "compounded" its error by refusing to instruct the jury "on the duty of a manufacturer or bulk supplier to a manufacturing formulator, to a retailer, and to an ultimate user" because "[*w*]*ithout these instructions on the substantive law, the jury was ill-equipped to determine the duties and responsibilities of*" of the bulk supplier to the plaintiffs. *Id.* (emphasis added).

Other Florida courts have found it "true that the duty to warn can be discharged if the supplier passes the necessary information and warnings to manufacturers of the product's dangerous condition." *Kavanaugh*, 879 So. 2d at 44; *see also Zunck v. Gulf Oil Corp.*, 224 So. 2d 386, 387 (Fla. 1st DCA 1969) (manufacturer and wholesale distributor of odorless liquid petroleum owed no duty to warn consumers of odorized product). These cases show that it is incorrect to state, as Petitioner does, that under Florida law, a supplier can *never* discharge its duty to warn an end user by relying on an intermediary and that it must, instead, provide a direct warning.

B. If Adopted By This Court, Petitioner's Proposed Rule May Well Erode Similar,Related Product Liability Doctrines

The core rationale behind Restatement (Second) § 388 and Restatement (Third) §§ 2 and 5 is that liability should not be imposed where the supplier of raw materials has no reasonable means to directly warn end users, does not have control over the finished product manufacturer – who is best suited to decide whether and, if so, how, to warn the end users – and the supplier has acted reasonably under all the circumstances.

These principles animate not only the raw material/component parts doctrine at issue in this case, but underlie, in whole or in part, a number of related doctrines including the learned intermediary, sophisticated purchaser, and bulk supplier

doctrines. All of these doctrines recognize that suppliers and manufacturers of commercial products must sometimes rely on others to communicate warnings, and appreciate that "modern life would be intolerable unless one were permitted to rely to a certain extent on others doing what they normally do, particularly if it is their duty to do so." Restatement (Second) § 388 cmt n; *see also* Restatement (Third) § 5, cmt. a. These doctrines are also recognized by Florida courts. *See, e.g., E.R. Squibb & Sons, Inc. v. Farnes*, 697 So. 2d 825, 827 (Fla. 1997); *Shell Oil*, 425 So. 2d at 70; *Zunck*, 224 So. 2d 386; *Kohler*, 907 So. 2d at 598.

For example, this Court has, on several occasions, recognized the learned intermediary doctrine as part of Florida law. *See Farnes*, 697 So. 2d at 827; *Felix v. Hoffmann-LaRoche, Inc.*, 540 So. 2d 102, 104 (Fla. 1989). The learned intermediary doctrine has traditionally applied in the context of prescription drug warnings. Under the doctrine, a pharmaceutical supplier's duty to warn an end user patient about a drug product's risks is discharged by providing warnings to the patient's physician, the person best situated to advise the patient and determine, in light of the warnings provided by the pharmaceutical supplier, whether and how to prescribe the drug.

Similarly, although the doctrine is not at issue in this case, most states have adopted the sophisticated purchaser doctrine. *See* Victor E. Schwartz & Christopher E. Appel, *Effective Communication of Warnings in the Workplace:*

Avoiding Injuries in Working with Industrial Materials, 73 Mo. L. Rev. 1, 20-22 (2008). Under the sophisticated purchaser doctrine, a supplier need not directly warn, either the intermediate manufacturer of a product incorporating the component or raw material or the end users, if the manufacturer is already aware, by virtue of its sophistication and experience, of the hazards of the raw material. The rationale is that a supplier should not have to warn about known risks.

Although each of these doctrines – the raw materials/component parts supplier doctrine, the bulk supplier doctrine, the sophisticated purchaser doctrine, and the learned intermediary doctrine – arise in, and apply to, different circumstances, each is rooted in the common sense principle that the duty to warn of a product's risks should rest with the party in the "best position" to provide an effective warning. *Id.* at 20. If adopted by this Court, Petitioner's radical theory that a duty to "directly" warn an end user "cannot" be discharged via an intermediary, Pet. Br. at 48, would not only lead to the wrong outcome in this case, but would erode and undermine the well-settled policies underlying these related doctrines.

II. PETITIONER'S DESIRED HOLDING WOULD UNDERMINE THE STRONG PUBLIC POLICY RATIONALES THAT JUSTIFY LIMITING THE DUTY OF UPSTREAM MANUFACTURERS OR SUPPLIERS TO DIRECTLY WARN END USERS

In essence, Petitioner's desired holding would create a Sophie's Choice: manufacturers and suppliers could *stop selling* a product that could injure a third party – hardly a realistic or desirable outcome from a policy perspective – or manufacturers and suppliers could accept the *unreasonably burdensome* duty to monitor and control the infinite ways that their intermediate customers use their products and warn their own customers – a Herculean task that is undesirable from a business perspective, and likely impossible, in any event. Indeed, the established limitations on a manufacturer's or supplier's duty to directly warn end users are well-grounded in public policy considerations – considerations that would be undermined by Petitioner's proposed rule.

As Restatement (Third) § 5 cmt c explains, the raw material supplier and component part doctrines are grounded, in part, on the reality that the imposition of a duty to directly warn end users "would require the seller to develop expertise regarding a multitude of different end-products and to investigate the actual use of raw materials by manufacturers over whom the supplier has no control." Courts that have adopted these doctrines have recognized the extreme hardships that imposing such obligations on upstream businesses would cause. *See, e.g. Hoffman*

v. Houghton Chem. Corp., 751 N.E.2d 848, 857 (Mass. 2001) (describing the imposition of a duty to warn of downstream uses of a supplier's product as "crushingly burdensome").

Petitioner seeks to minimize the policy implications of its absolute liability theory by citing *dicta* in *McConnell* to suggest that sellers of raw materials may contractually bind their customers to place particular warnings on the customers' finished products and to cease selling if the customer does not agree to the seller's position. *See* 937 So. 2d at 156. This conclusion is impossible to reconcile with *Shell Oil*, which imposed no such duty. *See* 425 So. 2d at 69. But more importantly, the *McConnell dicta* completely ignores business reality, and the proposed "contractual solution" would impose the unreasonable burdens that Courts have uniformly refused to impose.

Selling component parts and raw materials, including inherently dangerous raw materials, for incorporation in products manufactured by others is a core activity of American business. Raw material suppliers could contractually bind their customers to provide particular warnings on the customers' finished products *only if* the supplier first put in place procedures for learning *how* its components or raw materials were incorporated in their customers' final products; *whether* the final products were safely designed and could be safely used without warnings; and *whether* the intermediaries were providing any necessary warnings.

This would mean that all raw material suppliers in Florida – and indeed potentially anywhere in the country if the raw material is incorporated in finished products sold or used in Florida – would be expected "to become experts in the infinite number of [conceivable] finished products." *In re TMJ Implants Prod. Liab. Litig.*, 97 F.3d 1050, 1057 (8th Cir. 1996) (recognizing that suppliers "cannot be expected" to develop such expertise). As the Third Restatement of Torts makes clear, "[c]ourts *uniformly* refuse to impose such an onerous duty to warn." Restatement (Third) § 5 cmt. c. (emphasis added).

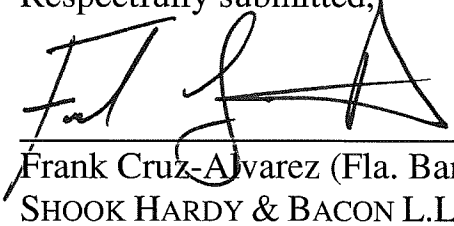
As a matter of sound policy, courts have recognized that manufacturers of finished products are in the best position to warn *their* customers of the hazards, and to instruct in the safe use of their own products. Requiring suppliers to monitor and oversee safety decisions about finished products that incorporate their component parts or other raw materials would impose enormous burdens and additional costs on the sale of such component parts and raw materials. It would create friction between the sellers of the component parts and raw materials and the manufacturers who purchased them. It would disrupt the commercial expectations of sellers and buyers of component parts and raw materials, adding a vast new potential for litigation. Some component parts or other materials suppliers could decide to withdraw from the market rather than face open-ended litigation risks.

The compelling policy reasons for limiting the warning duties of suppliers explain why no state has ever adopted Petitioner's extreme theory that sellers of component parts or other raw materials have rigid duties to warn end users of finished products directly or to monitor finished products and contractually bind their manufacturers to take particular safety measures. These principles are well-embedded in Florida and elsewhere. *See Davis v. Komatsu Am. Indus. Corp.*, 42 S.W.3d 34, 38 (Tenn. 2001) ("[O]ur research reveals... that *every court* presented with the issue has adopted the component parts doctrine.") (emphasis added).

CONCLUSION

For these reasons, *amici curiae* request that the Court affirm the decision below that the trial court's misleading jury instruction requires a new trial.

Respectfully submitted,



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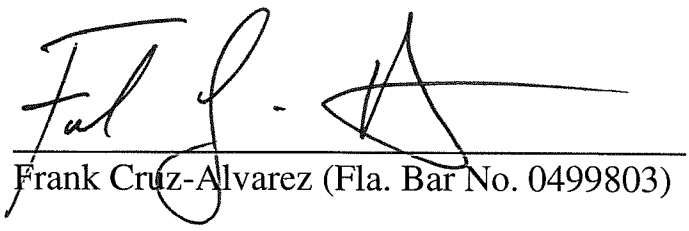
Dated: October 25, 2013

CERTIFICATE OF COMPLIANCE WITH RULE 9.210

I certify the foregoing Brief is submitted in Times New Roman 14-point font and complies with the requirements of Florida Rule of Appellate Procedure Rule 9.210.



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CERTIFICATE OF SERVICE

I certify the foregoing Brief was filed electronically on October 25, 2013, in compliance with the Florida Rules of Administration and has been served via e-mail to the following recipients:

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