# THE WEEK IN TORTS

A Weekly Summary Of The Latest Case Decisions Critical To Those Helping Victims of Negligence

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**FLORIDA LAW WEEKLY**
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**CASES FROM THE WEEK OF OCTOBER 30, 2015**

## SUPREME COURT HOLDS THAT THE "CONSUMER EXPECTATION" TEST FROM THE SECOND RESTATEMENT OF TORTS (AND NOT THE RISK UTILITY TEST FOR THE THIRD) IS THE PROPER WAY TO JUDGE STRICT LIABILITY DESIGN DEFECT IN A PRODUCTS LIABILITY CASE.

*Aubin v. Union Carbide Corp.*, 40 Fla. Law Weekly S596 (Fla. October 29, 2015):

The plaintiff had worked as a construction supervisor in the 1970's. He was exposed to an inhaled dust containing asbestos fibers. In 2008 he was diagnosed with malignant peritoneal mesothelioma; a fatal and incurable form of cancer, found in the lining of the abdomen.

The jury returned a verdict for the plaintiff. The Third District reversed, finding that the trial court should have required plaintiff to produce evidence of an alternative design pursuant to the "risk utility" test set forth in the Third Restatement of torts, and should have also granted the defendant's motion for directed verdict on the design defect claim because of that.

The Florida Supreme Court reversed. It found the Third District erroneously reversed the trial court for applying the Second Restatement instead of the Third Restatement. Looking back to the decision in *West v. Caterpillar Tractor*, the court reminded us that Florida has long imposed strict liability in conformity with the principles set forth in the

Second Restatement, which apply the "consumer expectations test." That test considers whether a product is unreasonably dangerous in design, because it failed to perform as safely as an ordinary consumer would expect when used or intended in a reasonably foreseeable manner.

Despite four decades of law since *West*, the Third District explicitly rejected the consumer expectations test, and concluded that the Third Restatement, which contains the "risk utility" test, was applicable. The "risk utility" test requires the plaintiff to demonstrate 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, and that the omission of the alternative design rendered the product not reasonably safe.

In relying on several other state supreme courts, our supreme court decided to adhere to its precedent using the Second Restatement, and declined to adopt the Third Restatement because of its "markedly different approach to strict products liability."

Additionally, the Third District erroneously ruled that defendant was entitled to a directed verdict on the design defect claim, because it improperly merged the Third Restatement's definition of design defect with causation, which conflated the elements of the two-prongs. Because the causation prong under the Second Restatement and the Third Restatement simply applies general rules of causation, it requires the plaintiff to show that the defect caused the injury or the harm. Because the plaintiff did in fact present sufficient evidence on causation to allow the claim to be considered by the jury, the trial court properly denied Union Carbide's motion for directed verdict.

As for the learned intermediary doctrine, the plaintiff requested a jury instruction to advise that the defendant had a duty to warn the end user, while the defendant asserted that it was entitled to an instruction pertaining to the learned intermediary defense, and asked whether the defendant had fulfilled its duty to warn by warning the intermediaries as to the dangers.

The Second and Third Restatements both 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 the product.

The supreme court did agree with the Third District that the learned intermediary defense is a doctrine that a manufacturer can use to argue to the jury regarding having fulfilled its duty to warn, provided that the evidence supports the defense, and the jury instruction adequately explains the factors for the jury to consider in determining whether the manufacturer's reliance was reasonable.

Generally, the applicable standard jury instructions are presumed correct, and should be given unless instructions are erroneous or inadequate. However, parties are entitled to have the jury instructed on their theories of the case, when the evidence supports the theories. To demonstrate that a trial court erred in failing to give a requested instruction, a party must show that the requested instruction contains an accurate statement of the law, the facts supported the giving of the requested instruction, and the instruction was necessary for the jury to properly resolve the issues in the case. The court must then decide whether the jury instructions may have misled the jury.

Here, the supreme court examined the record and compared the cases, and rejected the defendant's argument that the trial court committed reversible error in failing to instruct the jury that it could discharge its duty to warn by reasonably relying on a learned intermediary.

After reviewing the jury instructions as a whole, the court concluded that they were not misleading. Although special instructions could be fashioned to explain the learned intermediary defense, the absence of it did not render the jury instructions erroneous as a whole. Because the jury was given instructions, and because the defendant failed to provide an accurate instruction on the learned intermediary defense (even though the jury did apportion fault to several of the intermediaries), the court concluded there was no reversible error.

Certainly, the biggest take-away from this case is that our supreme court has held that the "consumer expectations test" from the Second Restatement and **not** the "risk utility" test from the Third Restatement applies to strict liability design defect cases.

**WHERE PLAINTIFF VOLUNTARILY DISMISSED PERSONAL INJURY ACTION WITHOUT PREJUDICE, IMMEDIATELY REFILING, THE TRIAL COURT PROPERLY AWARDED COSTS TO THE DEFENDANT IN THE FIRST ACTION; STILL, CERTAIN COPYING COSTS ARE NOT AUTHORIZED UNDER THE GUIDELINES.**

*Suljic v. Barker*, 40 Fla. Law Weekly D2391 (Fla. 2nd DCA October 21, 2015).

**DISSENT QUESTIONS TRIAL COURT'S DISMISSAL OF WRONGFUL DEATH ACTION FILED AGAINST DEPARTMENT OF CORRECTIONS FOR LACK OF DUTY.**

*Bellinger v. Florida Department of Corrections*, 40 Fla. Law Weekly D2394 (Fla. 3rd DCA October 21, 2015):

The estate of a woman who committed suicide in a county jail sued the Department of Corrections for her wrongful death. The woman died after she was arrested for a violation of her probation. She was not placed in a safety cell at the jail, and committed suicide in her cell by fastening her bedsheet to the air-conditioning vent.

The plaintiff alleged that the probation officers were negligent for failing to inform jail personnel that the decedent had recently attempted suicide, and had been committed under the Baker Act.

While the majority affirmed the dismissal finding there was no duty owed by these probations officers, a dissenting Judge Emas quoted *McCain*, which states that a legal duty arises whenever a human endeavor creates a generalized and foreseeable risk of harming others.

Judge Emas felt the plaintiff should have been able to amend the complaint to assert that the actions of the probation officer, combined with the knowledge of the decedent's recent suicide attempt, did create a foreseeable zone of risk and a legal duty to act reasonably (*i.e.*, to inform jail personnel of the woman's recent suicide attempt and Baker Act) and to take appropriate precautions to protect the decedent from having harmed herself. However, this was the dissent.

**ERR TO AWARD COSTS FOR FEES PAID TO EXPERT WITNESS FOR CLERICAL**

**AND ADMINISTRATIVE TASKS HE PERFORMED.**

*RJ Reynolds v. Clayton*, 40 Fla. Law Weekly D2408 (Fla. 1st DCA October 26, 2015):

The court refused to authorize $3,100 in fees paid to an expert for various clerical and administrative tasks he performed, including time spent printing, organizing and stapling documents. As a general rule, the law does not allow expert witnesses to tax costs for overhead, clerical and administrative expenses.

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