>> ALL RISE.
SUPREME COURT OF FLORIDA IS NOW
IN SESSION.
PLEASE BE SEATED.
>> THE NEXT CASE FOR THE DAY IS
AUBIN V. UNION CARBIDE
CORPORATION.
YOU MAY BEGIN.
>> MAY IT PLEASE THE COURT, I'M
JAMES FORANO FROM THE LAW FIRM
HERE ON BEHALF OF THE
PETITIONER, WILLIAM AUBIN.
I'M ALSO HERE WITH JUAN BAUTA
FROM MY LAW FIRM.
I'LL RESERVE TEN MINUTES FOR
REBUTTAL OR WHATEVER I HAVE LEFT
AFTER MY INITIAL ARGUMENT.
THE ISSUE BEFORE THE COURT IS A
VERY IMPORTANT ISSUE, IT'S
WHETHER WE'RE GOING TO CONTINUE
WITH THE SECOND RESTATEMENT OF
TORTS VIS-A-VIS THE DECISION
FROM 1976, OR ARE WE GOING TO
FOLLOW THE LEAD OF THE THIRD
DISTRICT COURT OF APPEALS WHICH
HAS RECEDED FROM THAT DECISION
AND FOLLOWED THE --
[INAUDIBLE]
>> BUT ISN'T THERE, ON THE ISSUE
OF THE DEFECTIVE WARNING --
>> YES.
>> -- THE JURY INSTRUCTION AS
GIVEN SAID 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.
NOW, IS THAT, THAT INSTRUCTION
APPEARS TO HAVE COME FROM
McCONNELL.
>> YES, IT DOES.
>> DOES IT MATTER FOR THE
PURPOSE OF THE WARNING ISSUE
WHETHER IT'S THE SECOND
RESTATEMENT OR THE THIRD
RESTATEMENT WHEN YOU'RE DEALING
WITH A MANUFACTURER OF A PRODUCT
THAT ISN'T GOING TO REACH THE
END USER IN ITS STATE THAT IT

SELLS TO THE INTERMEDIARY?
>> IT DOES NOT.
THE FACTS UNDER THIS CASE MEET
THE -- MEET BOTH SECOND AND THE
THIRD --
>> OKAY, BECAUSE YOU STARTED ON
THAT.
ISN'T THAT IN THIS CASE SINCE
THEY DID NOT WARN THE END
USERS -- AND, BASICALLY, THAT
WAS CONCEDED -- IS THAT NOT ON
THIS WARNING ISSUE EQUIVALENT TO
DIRECTING A VERDICT OR THE
PLAINTIFF ON WARNING?
>> WELL, WITH ALL DUE RESPECT TO
THE THIRD DISTRICT COURT OF
APPEALS, THEY SAID THAT THAT WAS
CONCEDED, BUT THEY PRESENTED
EVIDENCE OF A WARNING.
A VERY, VERY THIN.
GEORGIA PACIFIC, THE
INTERMEDIARY, TESTIFYING THAT
THEY DID NOT RECEIVE
INFORMATION.
CARBIDE, ON THE OTHER HAND, SAID
THEY DID.
THE THIRD DISTRICT SAID IT WAS
STIPULATED, BUT IT WAS NOT.
AND, IN FACT --
>> ALL RIGHT, SO WAIT.
SO THE STATEMENT THAT THE THIRD
DISTRICT MADE THAT SAID THAT
UNION CARBIDE STIPULATED THAT
THE INTERMEDIARY MANUFACTURERS
DID NOT PLACE ANY WARNINGS IN
THEIR PRODUCTS, THAT UNION
CARBIDE KNEW THE INTERMEDIARY
MANUFACTURER DID NOT PLACE ANY
WARNINGS ON THEIR PRODUCTS, AND
UNION CARBIDE ITSELF DID NOT
DIRECTLY WARN END USERS ABOUT
THE DANGERS, THAT THERE WAS NO
SUCH STIPULATION?
>> THERE WAS NOT, THERE WAS NOT.
THEY'RE WRONG.
>> THEY'RE JUST FLAT OUT
INCORRECT.
>> IT'S NOT A GREAT FACT FOR US,
BUT IT DOESN'T MATTER.
THAT WAS WRONG.

AND I'M SURE COUNSEL WILL BE
FIRST TO SAY IT WHEN THEY GET UP
IN THEIR ARGUMENT, THAT THAT WAS
NOT CORRECT.
>> WELL --
>> IT WAS VERY THIN EVIDENCE.
IF YOU LOOK AT THE RECORD, YOU
CAN ALMOST ASSUME THAT, BECAUSE
PACIFIC SAID THEY DIDN'T GET
ANY.
BUT THEY DID PUT THIS EVIDENCE,
VERY THIN --
>> ANOTHER BASIC QUESTION I HAVE
AND THEN -- THIS WAS A GENERAL
VERDICT FORM.
IF WE WERE TO FIND THAT DESIGN
DEFECT INSTRUCTIONS WERE
APPROPRIATE AND THE COURT, THE
THIRD DISTRICT WAS WRONG IN
FINDING NO CAUSATION --
>> RIGHT.
>> BUT THAT THAT INSTRUCTION MAY
BE INCOMPLETE, MISLEADING AND
INCOMPLETE, APPARENTLY UNION
CARBIDE DID ASK FOR A SPECIAL
VERDICT?
DO YOU AGREE WITH THAT?
BECAUSE IT WAS, AGAIN, NOT CLEAR
IN OUR RECORD.
THE INSTRUCTIONS THAT I HAVE,
THE PROPOSED INSTRUCTIONS HAS A
GENERAL VERDICT FORM, BUT
THERE'S REFERENCE IN THE ANSWER
BRIEF TO AN EXHIBIT THAT LISTS A
PROPOSED SPECIAL VERDICT FORM.
>> IN THIS CASE THE TRIAL COURT
JUDGE FOLLOWED THE THIRD
RESTATEMENT INSTRUCTIONS --
>> NO.
I'M ASKING YOU ABOUT WHETHER
THERE WAS A SPECIAL -- DID UNION
CARBIDE ASK FOR AND WAS
OVERRULED FOR SPECIAL
INTERROGATORY?
>> AS TO LEARNED INTERMEDIARIES,
THAT WAS THE INSTRUCTION WHICH
WAS --
>> NO, NO, NO.
THE VERDICT FORM.
>> YES, YES.

>> OKAY.
YOU HAD THE VERDICT FORM SAYS
WAS THERE A DEFECT IN THE
PRODUCT THAT WAS --
>> RIGHT, RIGHT.
>> THEY DIDN'T DIFFERENTIATE
BETWEEN WARNING AND DESIGN.
>> DID NOT UNDER STRICT
LIABILITY.
>> THEY DIDN'T.
BUT UNION CARBIDE ASKED, DID
THEY -- YES OR NO -- DID THEY
ASK FOR A SPECIAL --
>> THEY DID.
>> OKAY.
SO THE TWO-ISSUE RULE WOULD NOT
APPLY IN THIS CASE.
YOU'RE AGREEING WITH THAT.
>> I AGREE WITH THAT.
>> OKAY.
>> I AGREE WITH THAT.
NOW, WHAT WE HAVE HERE IS WHAT
THE COURT DID REVERSE WAS ON THE
MEDICAL CAUSATION, AND THEY ALSO
REVERSED ON SPECIAL
INTERMEDIARY --
>> NOT ON MEDICAL CAUSATION.
WHAT THEY SAID WAS THAT THE,
THAT THERE WASN'T EVIDENCE
THAT -- THEY SAID IT WAS A
DESIGN PRODUCT AND THAT IT WAS
DANGEROUS, BUT IT WASN'T ANY
MORE DANGEROUS THAN IN ITS
NATURAL STATE AND, THEREFORE,
YOU COULDN'T PROVE THAT THE
DESIGN DEFECT CAUSED THE
ULTIMATE INJURY.
>> WELL, THAT'S, AND THAT'S --
>> THAT'S WHAT THEY SAID.
>> THAT'S WHAT THEY SAID, BUT
THAT'S WRONG.
>> NOT THAT, I MEAN, THEY DIDN'T
SAY THAT THE ASBESTOS DIDN'T
CAUSE THE MESOTHELIOMA, RIGHT?
>> RIGHT.
THEY DID NOT SAY THAT IT DID NOT
CAUSE IT.
THEY ADMITTED THAT IT CAUSED IT,
BUT THEY SAID THERE WAS NOT AN
ADVANCED RISK FROM THE STATE,

AND BECAUSE OF THAT, THEY SAY
YOU SHOULD LOSE.
THAT'S ON PAGE 900.
THAT'S WHEN THEY SAY AUBIN
FAILED TO PRESENT EVIDENCE
SUGGESTING THAT THE DESIGN
DEFECT OF 210 WAS MORE DANGEROUS
IN ITS PURE FORM.
BUT THEN IF YOU GO TO PAGE 902,
THERE'S TWO INCONSISTENCIES.
IT SAYS AS DETAILED BELOW, THERE
WAS SUFFICIENT EVIDENCE
PRESENTED AT TRIAL TO CREATE
FACTUAL QUESTIONS TO BE RESOLVED
BY THE JURY REGARDING WHETHER
CARBIDE WARNED INTERMEDIARY
MANUFACTURERS, WHETHER THE
ALLEGED WARNINGS WERE ADEQUATE
AND THE ACTUAL DEGREE OF
DANGEROUSNESS OF SG210 WITH
RESPECT TO THE CONTRACTION OF
MESOTHELIOMA.
SO THAT'S AN INCONSISTENCY
ITSELF, BECAUSE THERE THEY'RE
SAYING THAT ISSUE SHOULD GO TO
THE JURY.
BUT BACK THERE THEY'RE SAYING
BECAUSE THERE'S NOT ENHANCED
RISK.
AND I'D LIKE TO MENTION UNDER
NOWHERE IN THE THIRD RESTATEMENT
DOES IT REQUIRE AN ENHANCED RISK
FROM THE RAW MATERIAL STATE TO
PROCESSED STATE AT ALL.
IN FACT, THE COMMENTS TO THE
THIRD RESTATEMENT ON RAW
MATERIALS EXPLAINS WHAT IS THE
ISSUE, OKAY, TO THE THIRD
RESTATEMENT DRAFTERS.
IT'S NOT ABOUT ENHANCED RISK.
THAT WAS CREATED IN A BRIEF
BELOW AND ADOPTED BY THE THIRD
DISTRICT WITH ABSOLUTELY NO
SUPPORT WHATSOEVER.
BUT HERE'S WHAT THE RAW MATERIAL
DOES SAY: ON INAPPROPRIATE
DECISIONS REGARDING THE USE OF
SUCH MATERIALS ARE NOT
ATTRIBUTABLE TO THE SUPPLIER OF
RAW MATERIALS, BUT RATHER TO THE

FABRICATOR THAT PUTS THEM INTO
PROPER USE.
THE MANUFACTURER OF THE
INTEGRATED PRODUCT HAS A
SIGNIFICANT COMPARATIVE
ADVANTAGE REGARDING SELECTION OF
MATERIALS TO BE USED.
THAT HAS NOTHING TO DO WITH
ENHANCED RISK, OKAY?
WHAT THEY'RE SAYING THERE IS
THAT THEY BELIEVE THAT THE
PROCESSER IS IN A BETTER
POSITION TO KNOW ABOUT THE
DANGERS WHICH REALLY DOESN'T
MAKE SENSE BECAUSE IF YOU'RE, IF
YOU'RE MINING URANIUM, YOU'RE IN
THE BEST POSITION TO KNOW HOW
DANGEROUS THAT IS.
AND IT ALSO, AND IF YOU'RE
PROVIDING SAFE PRODUCTS, SAFE
COMPONENTS THAT GET FASHIONED
INTO SUCH A WAY INTO A PRODUCT
THAT BECOMES DANGEROUS, THAT'S
ENTIRELY DIFFERENT THAN ASBESTOS
WHICH IS INHERENTLY DANGEROUS ON
ITS OWN.
>> WHY SHOULDN'T THE COMPONENT
PARTS DOCTRINE OUT OF THE THIRD
RESTATEMENT BE USED RATHER THAN
THE END USER SITUATION?
>> YEAH.
WELL, THIS IS WHERE THE THIRD
DISTRICT STARTED THEIR
RESTATEMENT IN --
[INAUDIBLE]
IN 2005.
THAT WAS A MACHINE THAT WAS
PERFECTLY CONSTRUCTED AND COULD
BE USED FOR MULTIPLE PURPOSES.
AND THAT TYPE OF COMPONENT, IT
COULD HAVE BEEN USED FOR A WATER
PUMP OR WHATEVER.
THEY USED IT AS A LAWNMOWER, AND
THEY ADJUSTED AND CHANGED AND
ALTERED IT AND MADE IT
DANGEROUS.
WELL, THEY GOT OFF AND THEY
SHOULD.
JUST LIKE IF YOU HAVE A SAFE
COMPONENT, LIKE IF YOU'RE

REFINING SUGAR, RAW SUGAR, AND
IT GETS PUT INTO A BOMB, YOU
SHOULD DEFINITELY GET OFF THERE,
AND YOU DO UNDER THE SECOND
RESTATEMENT.
HOWEVER, IF YOU'RE SELLING
ASBESTOS -- WHICH IS DANGEROUS
ON ITS FACE, NO IFS, ANDS OR
BUTS -- IN FACT, ASBESTOS IS SO
DANGEROUS, THIS PARTICULAR
PRODUCT IS SO DIFFERENT THAT
1978, IT'S BANNED BY THE
CONSUMER PRODUCT SAFETY
COMMISSION.
SO THERE'S CERTAIN PRODUCTS THAT
ARE SO UNREASONABLY DANGEROUS
THAT THEY HAVE NO GOOD SOCIAL
UTILITY.
EVEN IF YOU WARN, YOU KNOW,
SOMEONE MAY GET HURT ANYWAY,
IT'S GONE.
THIS PRODUCT IS THAT TYPE OF
PRODUCT WE'RE DEALING WITH.
WE'RE NOT DEALING WITH SUGAR
HERE.
WE'RE DEALING WITH SOMETHING
MORE LIKE URANIUM OR SOMETHING
VERY, VERY DANGEROUS.
THAT IS BIG DISTINCTION.
THE SECOND RESTATEMENT TOWARDS
IS WORKING PERFECTLY FINE.
THE DECISION OF THIS COURT, ONE
OF MOST CITED DECISIONS IN
HISTORY, WEST v. CATERPILLAR
IS WORKING FINE.
AND TAMPA v. WADE.
THE THIRD DISTRICT IN KOHLER,
ADOPTS THE THIRD RESTATEMENT.
IN THAT DECISION WORKS PERFECTLY
FINE UNDER THE SECOND
RESTATEMENT.
WE HAVE THE IN 2010, A DUPONT
CASE, THAT WAS REVERSED ON
MULTIPLE GROUNDS FROM
CONSOLIDATION TO STATUTE OF
LIMITATIONS IN A VERY VIVID
OPINION THEY SLIPPED IN THERE
FOLLOWING KOHLER, NOT FOLLOWING
THEMSELVES, NOT THE SUPREME
COURT OF FLORIDA, FOLLOWING

THEMSELVES THERE IS NO CONSUMER
EXPECTATION OF TESTING BECAUSE
THERE IS COMPLEX PRODUCT.
WHAT DOES THAT HAVE TO DO WITH
ANYTHING?
>> THE ANSWER I GUESS TO MY
QUESTION IS, SHOULDN'T BE
COMPONENT PARTS BECAUSE OF WHAT
IT IS.
>> IT'S A RAW MATERIAL.
RAW MATERIAL IS SIMILAR TO
COMPONENT PART.
IT, RAW MATERIAL COULD BE A
COMPONENT PART.
IT'S A COMPONENT OF A PROCESSED
PART.
>> BECAUSE IT IS ASBESTOS IT
WOULDN'T FIT UNDER THAT RULE?
>> COMPONENT PART DOCTRINE.
I THINK THAT --
>> IS THAT WHAT YOU'RE TELLING
ME?
>> I THINK ASBESTOS WOULD BE
CONSIDERED A COMPONENT PART OF
ANOTHER PRODUCT.
IN THIS CASE, IN THIS CASE,
UNIQUE HARM BY PROCESSED
THEMSELVES INTO ANOTHER PRODUCT.
WE'RE NOT DEALING WITH THE RAW
MATERIAL EXCEPTION OF THE THIRD
RESTATEMENT.
EVEN THE THIRD DISTRICT ADMITTED
THAT AS DID THE FOURTH DISTRICT
IN McCONNELL AND CAVANAGH,
WITH THE SAME DEFENDANT AND SAME
SET OF FACTS, SAME SITUATION.
THIS IS NOT A RAW MATERIAL.
WE HAVE TO BE A LITTLE BIT
CAREFUL BECAUSE IT'S A RED
HERRING HERE.
IT IS A, NOT A RAW MATERIAL PER
THE THIRD DISTRICT AND FOURTH
DISTRICT AND McCONNELL AND
CAVANAGH UNDER THE SAME FACTS.
WE'RE DEALING WITH A PROCESSED
PRODUCT.
>> LET ME GO BACK TO THIS.
SO YOU'RE, THE ISSUE ON THE
COMPONENT WOULD GO TO THE KIND
OF, WHAT, WHO'S REQUIRED TO BE

WARNED.
IS THAT CORRECT?
>> THAT'S CORRECT.
>> SO I'M STILL, I'M HUNG UP ON
THIS ISSUE ABOUT THE JURY
INSTRUCTION WHICH I STARTED
WITH, WHICH IS THAT WHY
SHOULDN'T THE INSTRUCTIONS HAVE
HAD AN ADDITIONAL STATEMENT THAT
THEY HAVE A DUTY TO WARN END
PRODUCTS UNLESS THEY CAN
REASONABLY EXPECT THAT THE
INTERMEDIARY WILL WARN --
>> THAT IS NOT A GOOD
INSTRUCTION BECAUSE THAT IS PART
OF THE GENERAL NEGLIGENCE
INSTRUCTION.
IN THIS CASE THEY HAVE AGAIN AN
INCONSISTENCY BECAUSE --
>> AGAIN, IF YOU USE WHAT THE
INSTRUCTION WAS GIVEN, DOESN'T
THAT DIRECT A VERDICT IN FAVOR
OF THE PLAINTIFF?
>> IT, THERE WAS NO, IN FACT THE
INSTRUCTIONS HAS WRITTEN HERE
WERE PRESENTED TO THE JURY BUT
DID NOT A DIRECT A VERDICT IN
FAVOR OF THE PLAINTIFF.
THE JURY LOOKED UNDER FABRE
BRINGING AND THEY APPORTIONED
LIABILITY.
>> I UNDERSTAND WHAT THE JURY
DID.
IF I'M LOOKING AT THE
INSTRUCTION AS A JUROR I MUST
FIND SOME LIABILITY AGAINST
UNION CARBIDE.
I MIGHT FIND LIABILITY AGAINST
INTERMEDIARIES BECAUSE THEY
DIDN'T WARN PROPERLY EITHER.
>> RIGHT.
>> DOESN'T THIS TELL ME UNDER
THE FACTS HERE WHERE WE KNOW
UNION CARBIDE DIDN'T WANT THE
END USER THAT THEY HAVE TO FIND
IN FAVOR OF THE PLAINTIFF AS TO
THAT PART.
>> FACTS ARE THE FACTS.
THAT'S THE RESULT.
THE FACTS ARE UNDER THE JURY

INSTRUCTIONS AND THE FACTS
PRESENTED AT TRIAL THE RESULT IS
A DIRECTED VERDICT.
THAT WOULD --
>> SO YOU WOULD CONCEDE THIS WAS
A DIRECTED VERDICT KIND OF
INSTRUCTION.
>> NO, IT IS NOT.
WHAT THE THIRD DISTRICT SAID
THEY SAID THAT THERE WAS A
STIPULATION.
THERE WAS NOT A STIPULATION.
THERE WAS EVIDENCE PRESENTED AT
TRIAL BY CARBIDE THAT THEY
WARNED.
>> NOW HOW -- AS A PRACTICAL
MATTER, HOW ANY WAY, THIS IS
WHAT -- WHAT WAS YOUR EVIDENCE
AS TO WHAT UNION CARBIDE SHOULD
HAVE DONE REGARDING WARNING THE
END USE OFFICERS.
>> IT'S REALLY SIMPLE.
IN THE INADEQUATE WARNING LIES
THE MOTIVE.
A PROPER WARNING HERE WOULD SAY,
THAT THIS PRODUCT CAUSES DEATH.
DO NOT BREATHE DUST UNDER ANY
CIRCUMSTANCES.
>> IF THEY SAY THAT THEY'RE NOT
THE ONES SELLING IT TO THE END
USER.
IT DOESN'T STAY IN THE ORIGINAL
PACKAGING RIGHT?
DOES IT, WHEN IT GOES FROM BEING
THE PRODUCT THAT UNION CARBIDE
MANUFACTURED AND NO QUESTION
THEY HAD A SPECIAL PROCESS AND
THEY MADE THESE SHORT FIBERS.
WHEN IT GOES TO THE INTERMEDIARY
AND THEY MAKE IT INTO JOINT
COMPOUND IT IS A DIFFERENT
PACKAGE, IS IT NOT.
>> IT IS AND IT IS VERY --
>> IT'S A JOINT COMPOUND.
SO HOW DOES, IF UNION CARBIDE, I
MEAN WHAT YOU'RE SAYING, THE
FIRST THING IS, THEY SHOULDN'T
HAVE BEEN THEY WILL AT ALL.
OKAY, BUT IF THEY'RE SELLING IT,
WHAT WOULD A CAREFUL OR A, WHAT

IS THE MANUFACTURER OF THE
PRODUCT THAT'S NOT GOING
DIRECTLY TO THE END USER, WHAT
DID YOU ALLEGE THEY WERE
SUPPOSED TO DO?
>> HERE IS WHAT THEY SHOULD DO.
THEY SHOULD HAVE A WARNING.
THEY SHOULD TELL THE
INTERMEDIARY THAT THIS SPECIAL
PRODUCT THAT WE MADE FOR YOU TO
PUT INTO YOUR JOINT COMPOUND,
YOU MUST SELL THIS WITH A
WARNING.
YOU CAN NOT ALLOW PEOPLE TO
BREATHE THIS.
YOU MUST REQUIRE A RESPIRATOR.
WITH THE PRODUCT.
>> I MEAN THEY CAN'T, THE JUDGE
TALKED ABOUT THE CONTRACTUAL
OBLIGATIONS.
THAT IS NOT A REALISTIC, IS
THAT?
>> RESPECTFULLY I DISAGREE.
>> IS THAT WHAT YOU SAID, THEY,
IS THAT WHAT YOU SAID TO THE
JURY IN THIS CASE?
>> WELL, MR. BOWDEN DID, BUT IT
WAS, CONTRACTUAL, YOU'RE SELLING
INHERENTLY DANGEROUS MATERIAL
THAT YOU KNOW IS GOING TO GET
SOLD TO THIRD PARTY USERS.
THERE IS NOTHING TO STOP YOU
FROM CONTRACTING, THAT IS WHAT A
REASONABLE CORPORATION WOULD DO
LIKE UNION CARBIDE.
>> THAT IS HOW THEY WARN END USERS?
THEY DON'T ACTUALLY
GIVE THE WARNING DIRECTLY TO THE
END USER?
>> PHYSICALLY IMPOSSIBLE FOR THEM
TO DO THAT, BUT NOT PHYSICALLY
IMPOSSIBLE FOR THEM TO REQUIRE
WHEN THEY SELL UNREASONABLY
DANGEROUS PRODUCT --
>> THEY GAVE, WHAT WARNINGS DID
THEY GIVE THE INTERMEDIARY?
>> IT IS QUESTIONABLE.
GEORGIA PACIFIC SAID THEY DIDN'T
RECEIVE ANY.
UNION CARBIDE SAYS WE GAVE

A WARNING THAT SAID AVOID
BREATHING DUST, CAN CAUSE SERIOUS
BODILY INJURY.
THAT IS WHAT CARBIDE SAID THEY
GAVE.
THERE IS CONFLICTING FACT FOR
THE JURY TO CONSIDER.
THEY SAID THEY FOLLOWED AN OSHA
WARNING PUT OUT IN 1971 AND
THAT'S WHAT CARBIDE SAID THEY
DID.
NOW, NOW THAT WARNING IN OF
ITSELF IS INADEQUATE.
THE ONLY SAFE WAY TO USE THAT
PRODUCT WITH RESPIRATOR.
BUT YOU CAN'T SELL IT THAT WAY.
NO ONE WILL USE IT AND NO ONE
WILL BUY THE PRODUCT IF YOU HAVE
TO USE A RESPIRATOR BECAUSE THEY
WILL USE PRODUCTS THAT DON'T
REQUIRE RESPIRATOR.
IT IS DIFFICULT AND
UNCOMFORTABLE AND SWEATY AND
DIFFICULT TO BREATHE.
IT'S A SALE ISSUE.
IF YOU TELL THE END-USERS YOU
NEED RESPIRATOR, THEY WILL BUY
ASBESTOS-FREE PRODUCTS.
>> SO TOBACCO COMPANIES ARE
REQUIRED TO WARN --
>> TOBACCO COMPANY DO WARN.
>> GROWERS.
PEOPLE WHO GROW THE TOBACCO?
>> OH THE GROWERS?
THE GROWERS, THERE ARE CERTAIN
THINGS THAT ARE SO COMMONLY
KNOWN.
TOBACCO MAY QUALIFY.
IT IS A REASONABLE MAN STANDARD
ON THAT.
AND, IF YOU BELIEVE THAT
EVERYBODY KNOWS TOBACCO IS
DANGEROUS, WHICH IN THIS DAY AND
AGE PEOPLE DO, THE FACT AT THIS
POINT IN TIME PEOPLE ALSO KNOW
ASBESTOS IS DANGEROUS.
BACK THEN IT WASN'T COMMONLY
KNOWN AS IT IS NOW.
BUT I, BUT I, IF IT WAS NOT AS
WELL-KNOWN AS IT IS IT MIGHT BE

DIFFERENT.
IT IS ALL FACTS AND
CIRCUMSTANCES.
IT IS A REASONABLE MAN TEST.
IT IS THE UNDERLYING CONCEPT,
PRECEPT OF TORTS AND THAT WOULD
BE -- SO IN YOUR CASE POSSIBLY
NOT.
THAT'S, IT DEPENDS.
>> LET ME ASK YOU.
I SAID THE REASONABLE PERSON
STANDARD.
ON NEGLIGENCE, THE THEORY ON
NEGLIGENCE WAS ON DUTY TO WARN
ONLY.
>> YES.
>> NOT ON DESIGN.
>> THAT'S CORRECT.
AND YOU CAN HAVE A DUTY, YOU CAN
HAVE A DUTY TO WARN, YOU CAN
HAVE A NEGLIGENCE DUTY TO WARN,
FAILS IN STRICT LIABILITY
WARNING THAT BECOME AS DEFECT IN
THE PRODUCT BECAUSE THE WARNING
ITSELF, IF YOU CONSIDER THE
WARNING ITSELF TO BE PART OF THE
PRODUCT WHICH MOST SCHOLARS SEEM
TO, AND AGREE WITH THAT, THAT
YOU, THAT CAN BE THE DEFECT IN
OF ITSELF EVEN THOUGH YOU
WEREN'T NEGLIGENT.
IF YOU'RE SELLING TO SOMETHING
EXTREMELY DANGEROUS TO A
SOPHISTICATED END USER, THAT YOU
MAY ASSUME WOULD KNOW THE
NEGLIGENCE, MAY BEAT NEGLIGENCE
BUT NOT STRICT LIABILITY.
>> SO YOUR CLAIM AGAIN WAS THAT
THE WARNING THAT THE, THAT UNION
CARBIDE GAVE TO ITS SELLERS
FAILED TO WARN THEM OF THE
DANGERS THAT THEY ALREADY KNEW
OF ASBESTOS WHICH INCLUDED THE
KIND THAT UNION CARBIDE WAS
SELLING TO BE MORE DANGEROUS
THAN OTHER KIND AND THEY WERE
MARKETING IT IN A DIFFERENT WAY.
>> GEORGIA PACIFIC CLAIMED THEY
DIDN'T KNOW.
CARBIDE DID KNOW CLEARLY FROM

THE EVIDENCE AND THE FACT THEY
ATTEMPTED TO WARN ALTHOUGH IT
WAS A FEEBLE ATTEMPT AT BEST.
>> YOU'RE IN REBUTTAL.
>> IT JUST STARTED?
I DIDN'T START MY ARGUMENT.
>> IT'S OKAY.
I JUST WANTED TO WARN YOU.
>> THANK YOU, YOUR HONOR.
I UNDERSTAND.
I WILL QUICKLY GO.
WHAT I WOULD LIKE TO BRING TO
THE COURT'S ATTENTION IS TWO
THINGS.
THE RATIONALE OF THE THIRD
RESTATEMENT.
THE RATIONALE OF THE THIRD
RESTATEMENT SET FORTH IN THE
COMMENTS IT'S ACTUALLY IN
COMMENT A.
AND THE RATIONALE IS DIFFERENT
THAN CONSUMER EXPECTATIONS WHICH
WE, WHICH WE LIVE AND DIE BY IN
FLORIDA RIGHT NOW VIA
CATERPILLAR THERE.
IS NO MORE CONSUMER EXPECTATION
TEST.
IN THE COMMENT IT STATES
TRADEOFFS NEED TO BE CONSIDERED
EARLY WHETHER ACCIDENTS
COSTS ARE MORE FAIRLY AND
EFFICIENTLY BORNE BY ACCIDENT
VICTIMS ON ONE HAND OR ON THE
OTHER HAND BY CONSUMERS
GENERALLY TO A MECHANISM OF
HIGHER PRICES ATTRIBUTABLE TO
LIABILITY COSTS IMPOSED BY
COURTS AND PRODUCT SELLERS.
IT IS NOT PROTECT THE CONSUMER
STANDARD.
IT IS BALANCING, SHOULD WE DUMP
IT ON THE VICTIMS OR SHOULD WE
JUST RAISE PRICES?
MANUFACTURER IS NOT IN THE
EQUATION.
THAT IS NOT FLORIDA.
MOST OF THESE COMPANIES IN FACT,
99% OF THEM ARE NOT FROM THIS
STATE.
THEIR PRODUCTS GET TO THE STATE.

THEY INCREASE OUR MEDICARE
COSTS.
THEY INCREASE OUR INSURANCE
PREMIUMS AND THEY INCREASE OUR
HEALTH CARE COSTS BECAUSE MR.
AUBIN WILL HAVE HUNDRED
OF THOUSANDS OF DOLLARS DUE TO
HIS MESOTHELIOMA.
IT WILL NOT END UP WITH THE
MANUFACTURER, OR VICTIMS, IT IS
ALL OF US.
IT IS VERY, VERY POOR RATIONALE
OF THIRD RESTATEMENT OF TORTS.
WE ALL KNOW LAW MOLDS BEHAVIOR.
DISTRICT LIABILITY IS THE BEST
WAY.
STARTED WITH FOOD.
STARTED WITH FOOD WHERE PEOPLE
WERE GETTING SICK AND EVEN
THOUGH THERE IS NO NEGLIGENCE
YOU WANT EXTREME CARE.
WHEN YOU'RE SELLING UNREASONABLY
DANGEROUS PRODUCTS IN A STRICT
LIABILITY SETTING YOU'RE ALLOWED
TO SELL IT AND GO OUT AND MAKE
MONEY, GO OUT TO MAKE ALL THE
MONEY YOU WANT BUT YOU BETTER BE
EXTREMELY CAREFUL.
NOT ORDINARY CARE LIKE
NEGLIGENCE.
IT IS EXTREME CARE.
THAT IS THE DIFFERENCE IN STRICT
LIABILITY.
THAT'S WHY WE NEED STRICT
LIABILITY TO STAY ON THE BOOKS
THE WAY IT IS IN WEST VERY
CATERPILLAR FROM THIS COURT.
>> YOU EXCEEDED YOUR ARGUMENTS.
IF YOU SUM UP.
YOU'RE OUT OF TIME, I'M SORRY.
>> THERE ARE THREE MAJOR
DISTINCTIONS BETWEEN THE THIRD
AND SECOND RESTATEMENT.
IN THE THIRD RESTATEMENT THERE
IS NO MORE CONSUMER EXPECTATION
TEST.
SO A LOT OF CASES GO BY THE
WAYSIDE.
THERE IS A RAW MATERIAL
EXCEPTION THAT PROTECTS RAW

MATERIALS.
DOES NOT EXIST IN THE SECOND
RESTATEMENT.
AND FINALLY, THERE'S AN ADDED
HURDLE THAT EVEN IF YOU SHOW
THAT A PRODUCT'S DEFECTIVE AND
DANGEROUS AND YOU'RE DAMAGED BY
IT YOU NEED TO SHOW THERE IS
ALTERNATIVE DESIGNS THAT WERE
AVAILABLE OUT THERE WHICH REALLY
SHOULD BE MORE OF AN AFFIRMATIVE
DEFENSE AT BEST.
SO YOU HAVE THREE PITFALLS.
IT IS REALLY NO LONGER STRICT
LIABILITY UNDER THE THIRD
RESTATEMENT.
IT IS SO GUTTED BY THOSE
CONCEPTS YOU REALLY CAN'T CALL
IT STRICT LIABILITY.
I RESERVE THE REST OF REBUTTAL.
>> YOU'RE OUT OF REBUTTAL.
THERE IS NO REBUTTAL.
>> THERE IS NO REBUTTAL.
CAN I ADD -- I'M SORRY.
CAN I HAVE ONE POINT?
I JUST WANT --
>> YOU'RE OUT OF TIME.
THANK YOU FOR YOUR ARGUMENT.
>> OKAY.
>> MAY IT PLEASE THE COURT.
MY NAME IS MATT CONIGLIARO.
WITH ME IS DEAN MIRANDI.
WE'RE HERE ON BEHALF OF THE
RESPONDENT.
THERE ARE TWO ISSUES PRESENTED
TO THIS COURT IN ORDER TO
DETERMINE WHAT THE RESULT SHOULD
BE FOLLOWING THIS PROCEEDING.
THEY CONCERN THE WARNINGS ISSUE
AND THE DESIGN DEFECT ISSUE.
THIRD ISSUE HAS KIND OF CREPT
INTO THE CASE THROUGH THE
BRIEFING AND THE DISCUSSIONS BY
THE AMICI CONCERNING THE
DEFINITION OF WHAT MAKES A
PRODUCT UNREASONABLY DANGEROUS
AND CONSUMER ECONOMICS TASTE
VERSUS RISK UTILITY.
I WOULD LIKE TO TRY TO ADDRESS
ALL THREE OF THOSE POINTS IN MY

DISCUSSION WITH THE COURT TODAY.
>> ON THE THIRD ISSUE ABOUT THE,
OF PROPER TEST, THE STANDARD
INSTRUCTIONS SINCE, FOR SOME
TIME HAS SAID NOT ONLY CONSUMER
EXPECTATION BUT THEN IT SAYS,
AND/OR WHETHER THE RISK, THE
RISK EXCEEDS THE BENEFIT.
THAT WAS IN THE INSTRUCTION
PROPOSED BY UNION CARBIDE AND
IT'S WHAT THE INSTRUCTION WAS
THAT WAS GIVEN.
THAT'S DIFFERENT, IS IT NOT,
THAN THE THIRD RESTATEMENT'S
REASONABLE ALTERNATIVE DESIGN
WHICH REQUIRES THE PLAINTIFF TO
SHOW THAT THE DESIGN, THAT THERE
WAS AN ALTERNATIVE DESIGN?
AND, I GUESS I'M ASKING, ON
THAT, WHERE DID THAT, CAME FROM
SOMETHING BUT IT DIDN'T COME
FROM THE CASE THAT THIS COURT
EVER DECIDED.
THAT IS, THAT THE BENEFIT
EXCEEDS THE RISK.
>> AND I'M GOING TO BEGIN BY
APOLOGIZING.
DOES YOUR HONOR MEAN TO REFER
WHERE THE JURY INSTRUCTION COME
FROM OR WHERE THE RESTATEMENT?
>> WHERE DID THE LAW COME FROM
THAT LED TO THAT JURY
INSTRUCTION?
IT DOESN'T COME FROM WEST.
WHERE DID IT COME FROM.
>> THE STANDARD JURY
INSTRUCTION?
>> YES.
>> WELL IT HAS BEEN AN EVOLUTION
OVER DECADES.
>> THAT'S NOT PART OF THE
CONSUMER EXPECTATION TEST, IS
IT?
>> THE WAY THE LAW HAS EVOLVED
THERE ARE MULTIPLE FACTORS THAT
GOT TAKEN INTO CONSIDERATION TO
DETERMINE WHETHER A PRODUCT IS
UNREASONABLY DANGEROUS.
THERE IS A, SORT OF A EFFORT TO
MAINTAIN THE CONSUMER

EXPECTATIONS SHOULD ALONE BE THE
TEST INDEPENDENT OF THE REST OF
THE FACTORS.
FIRST, WE WOULD SUGGEST THAT THE
COURT IN THIS CASE DOES NOT NEED
TO RESOLVE THAT ISSUE BUT IF THE
COURT CHOOSES TO GO THERE IN
THIS CASE, TWO POINTS WE THINK
ARE EXTREMELY IMPORTANT.
FIRST IS FOR THE COURT TO BE
AWARE THAT PREVIOUSLY THIS COURT
ANSWERED THAT QUESTION AND IT
DID SO TWICE.
IN 1978 AND IN 1983, AUBURN
MACHINE WORKS AND RADIATION
TECHNOLOGY.
THE COURT IN THOSE CASES DEFINE
WHAT MAKES A PRODUCT
UNREASONABLY DANGEROUS AND IT
DID SO BY CITING, WELL,
EXPLAINING THERE IS A BALANCING
TEST OF NUMBER OF FACTORS TO AN
CONSUMER EXPECTATIONS FALLS
WITHIN THAT LIST OF FACTORS.
RISK UTILITY ARGUABLY FALL
WITHIN IN AND THERE ARE
DIFFERENT PERMUTATIONS --
>> AUBURN MACHINE WORKS, WAS
THAT FROM THIS COURT?
>> YES, YOUR HONOR.
>> AND RADIATION TECHNOLOGIES
AND THAT IS WHERE THE
THE DANGERS OF
DESIGN OUTWEIGHS THE BENEFITS --
THAT IS WHAT THE
INSTRUCTION WAS.
THE DEFENDANT REQUESTED THE
STANDARD INSTRUCTION.
THEY DIDN'T REQUEST AN ALTERED
INSTRUCTION THAT INCORPORATES
THE THIRD RESTATEMENT OF TORTS,
DID THEY?
>> THAT'S TRUE, YOUR HONOR.
WE WERE REQUESTING FROM THE
STANDARD INSTRUCTIONS.
THAT WAS NOT AN ISSUE --
>> YOU'RE NOT OBJECTING ON THE
DESIGN INSTRUCTIONS, YOU'RE NOT
OBJECTING TO ANYTHING ON THE
DESIGN INSTRUCTIONS AS GIVEN?

>> NO, YOUR HONOR.
>> AND AS FAR AS, SO THEN, ONLY ISSUE THEN ON THE DESIGN CLAIM IS THE ISSUE THAT THE THIRD DISTRICT THEN SAID, THIS WAS A PRODUCT, IT WAS DANGEROUSLY, IT WAS UNREASONABLY DESIGNED, BUT THEY'RE SAYING THAT THERE WAS NO CAUSATION BECAUSE THERE WAS NO ENHANCED RISK.
NOW YOUR OPPONENT SAYS THIS IDEA OF AN ENHANCED RISK DOESN'T COME FROM ANY, ANY PRODUCTS LIABILITY LAW.
WHAT IS YOUR, WHAT'S YOUR ARGUMENT ON THAT?
>> THEIR THEORY, TO THE EXTENT THEY LITIGATED THIS BELOW, WHEN IT CAME TIME TO ARGUE WHAT THEY SAID THEY HAD A DESIGN DEFECT CLAIM IN THIS CASE BOTH IN THE TRIAL COURT AND THROUGHOUT THE THIRD DCA PROCEEDINGS THEIR ARGUMENT WAS ALWAYS, THIS IS A DESIGNED PRODUCT BECAUSE WE PROCESSED WHAT WAS OTHERWISE A RAW MATERIAL.
THEY ACKNOWLEDGED ASBESTOS COMING OUT OF THE GROUND IS A RAW MATERIAL.
THEY SAID THE PROCESSING MAKES THIS DIFFERENT.
WE AGREE TO A LIMITED EXTENT.
>> WELL YOU'RE ADVERTISING MADE, NOT THAT WE AGREE.
THE ADVERTISING SPECIFICALLY SAYS THAT IT IS A MANUFACTURED SECRET PROCESS OR SOMETHING LIKE THAT THAT IS, HAS THESE SHORT FIBERS AND MAYBES IT 100% IF YOU PUT IN YOUR PRODUCT, YOU WILL GET 100% ASBESTOS, RIGHT?
>> I WANT TO CLARIFY THAT AS A FACTUAL MATTER SO THE COURT APPRECIATES YOUR PERSPECTIVE ON THIS.
WHAT THE MARKETING LITERATURE EXPLAINED, OUR ASBESTOS AS WE SOLD IT WAS ESSENTIALLY A FILLER-FREE PRODUCT.

THAT THE COMPETING ASBESTOS YOU
COULD BUY HAD LOTS OF FILLERS IN
IT.
IF YOU BOUGHT A POUND OF OUR
ASBESTOS AND BOUGHT A POUND OF
OUR ASBESTOS YOU GOT MORE
ASBESTOS IN OURS.
>> YOU GOT MORE DANGEROUS STUFF.
>> WHEN THE MANUFACTURERS OF THE
FINISHED PRODUCTS WOULD CREATE
THEIR PRODUCTS AND THEY'RE THE
ONES WHO DESIGNED THEIR PRODUCTS
WHAT THEY WOULD DO IS LOOK FOR A
CERTAIN AMOUNT MUCH ASBESTOS.
SO OUR MARKETING LITERATURE
EXPLAINED THAT A POUND OF OURS
GOES FARTHER THAN A POUND OF
THEIRS BASICALLY OF THE SHORT
FIBERS WERE NATURAL.
WE DIDN'T CREATE THE SHORT
FIBERS.
THAT IS PART OF WHAT THAT
DEPOSITS, WHAT THIS PARTICULAR
MINE IN CALIFORNIA HAD TO OFFER
AND WHAT MADE IT UNIQUE.
IT WAS SHORT FIBER ASBESTOS,
CHRYSOTILE ASBESTOS AND IT WAS
NOT CONTAMINATED WITH I AM
PURITIES COMMONLY FOUND IN THE
ASBESTOS OTHERWISE FOUND IN THE
MARKET AND THOSE WERE THE THINGS
BEING MARKETED THROUGH THAT
LITERATURE.
WE HAVE ACKNOWLEDGED IF
SOMETHING IN THE PROCESS MADE
THE MATERIAL MORE DANGEROUS THAN
THEY COULD BRING A DESIGN DEFECT
CLAIM BUT THEY HAVE NEVER EVEN
ATTEMPTED TO PROVE THAT.
IN THIS COURT FINALLY THEY HAVE
STOPPED TRYING TO ARGUE THAT
THEY DID.
THEY ARGUED BELOW TO THE TRIAL
COURT THAT THEY DID.
THEY ARGUED MANUFACTURING DEFECT
NO TOO.
WE ARGUED THERE SHOULD BE
DIRECTED VERDICT ON
MANUFACTURING DEFECT.
IT IS NOT PART OF THIS CASE.

THEY FOUGHT WITH US ON
THAT BEFORE THE TRIAL COURT, AND
TRIAL COURT LET IT GO.
IT WENT TO THE JURY ON
MANUFACTURING DEFECT AS WELL.
ON THIS DESIGN CLAIM THEY HAVE
NEVER EVEN TRIED TO PRESENT
EVIDENCE SOMETHING ABOUT THE
PROCESSING MADE IT MORE
DANGEROUS.
IN THE ABSENCE OF THAT, THEY
WOULD BE LEFT SOLELY WITH AN
ARGUMENT THAT THE RAW MATERIAL
WAS DEFECTIVELY DESIGNED.
AND AS I BELIEVE WE'VE SHOWN
THROUGH THE BRIEFS THE CASE LAW
SUPPORTS THE RESTATE CERTAINLY
SUPPORTS, THAT A PURE RAW
MATERIAL ISN'T DESIGNED, IT IS
NOT DEFECTIVELY DESIGNED.
AND THIS COURT IN THE TAMPA DRUG
CASE, LONG AGO EXPLAINED THAT
FOR HAZARDOUS MATERIALS, AND WE
WOULD INCLUDE ASBESTOS MATERIALS
IN THAT, FOR INHERENTLY
DANGEROUS MATERIALS THE
LIABILITY OF THE SELLER TURNS ON
WARNING ISSUES.
THOSE ARE THE PRINCIPLES THAT
GOVERN THIS.
I WANT TO BE CLEAR WE'RE NOT
TRYING TO TAKE ANY SORT OF
EXTREME POSITION.
WE ARE NOT SAYING THERE COULD
EVER BE A DESIGN DEFECT CLAIM.
WE'RE SAYING THERE IS NOT A
DESIGN DEFECT CLAIM IN THIS
CASE.
THEY DIDN'T BRING EVIDENCE
FORWARD TO BRING WHAT THEY WOULD
NEED TO DO TO HAVE THAT TYPE OF
CLAIM.
WE'RE NOT FIGHTING THAT THERE IS
A WARNINGS CLAIM.
WHAT WE'RE ASKING FOR A NEW
TRIAL ON THE WARNINGS CLAIM.
>> WHAT DID YOU SAY ON THE
WARNINGS CLAIM AND I GUESS THEY
CONCEDED YOU DID PRESERVE
REQUESTING A SPECIAL INTERROGATORY

WHAT IS IT YOU ALL HAVE TO GET
A NEW TRIAL ON THAT BASIS HAVE
TO PUT FORTH INSTRUCTIONS THAT
WERE LEGALLY ACCURATE.
SO COULD YOU POINT TO WITHIN
YOUR INSTRUCTIONS THAT WERE
GIVEN, I MEAN THE REQUESTED,
WHICH I'VE GOT, I'M NOT SURE IF
WE HAVE THE WHOLE THING, BUT
STARTS WITH DEFENDANT'S
REQUESTED
INSTRUCTIONS.
WHAT ARE THE ONES YOU SAY ON A
NEW TRIAL SHOULD BE THE
INSTRUCTION THAT YOU REQUESTED
WOULD BE PROPERLY GIVEN?
>> YOUR HONOR, I WANT TO
ANSWER THE SECOND HALF OF YOUR
QUESTION ABSOLUTELY BUT LET ME
FIRST ADDRESS THE FIRST PART OF
IT.
THIS WAS A SPECIAL INSTRUCTION
THAT THEY REQUESTED.
THE PARTIES EXCHANGED
INSTRUCTIONS PRIOR TO TRIAL.
THIS WAS IN THE EVEN PART OF IT.
WE GOT TO THE TRIAL SHORTLY
BEFORE THE END OF THE CASE.
SHORTLY BEFORE THE CLOSING
ARGUMENTS THEY HANDED JUDGE THIS
PARTICULAR INSTRUCTION THAT
UNION CARBIDE HAD A DUTY TO WARN
END-USERS LIKE MR. AUBIN.
COUNSEL IS CORRECT, THE POSITION
IN THE THIRD DISTRICT IS SIMPLY
INACCURATE.
>> WAS THERE ANY STIPULATION?
>> THERE WAS NEVER ANY
STIPULATION.
IF I HAD TO MAKE A GUESS WHAT
WAS THOUGHT ABOUT WE
ACKNOWLEDGED THAT WE NEVER
WARNED MR. AUBIN.
THAT IS THE ACKNOWLEDGEMENT WE
MADE.
FRANKLY THAT'S THE CASE.
WE NEVER DID WARN MR. AUBIN.
IT WAS A SPECIAL REQUESTED
INSTRUCTION BY THE PLAINTIFF.
WE OBJECTED TO THAT SAYING THAT

INSTRUCTION IS MISLEADING.
THAT INSTRUCTION IS INCOME PETE.
WE DIDN'T KNOW IT WAS COMING
UNTIL IT WAS HANDED TO THE
JUDGE.
AT THAT POINT WE DID WHAT WE
COULD DO, WE SAID, YOUR HONOR,
YOU SHOULD NOT GIVE THAT
INSTRUCTION.
THE CASE COULD HAVE GONE FORWARD
WITHOUT THAT INSTRUCTION.
THERE WERE INSTRUCTIONS ON
STRICT LIABILITY.
THERE WERE INSTRUCTIONS ON
NEGLIGENCE.
LIKE MANY CASES TRIED IN THE
PAST THE CASE COULD HAVE GONE TO
THE JURY ON THOSE INSTRUCTIONS.
THIS IS SOMETHING THEY
REQUESTED, AND OUR POINT, OUR
INITIAL POINT WAS, YOUR HONOR,
GAME, SET, MATCH THAT IS
DIRECTED VERDICT FOR THEM.
WE DIDN'T WARN MR. AUBIN.
THAT BORE OUT IN CLOSING
ARGUMENTS WHERE THIS IS THE
PRACTICE THAT OPPOSING COUNSEL
HAS.
THEY'RE VERY SKILLED.
THEY GOT UP IN CLOSING
ARGUMENTS.
THEY PUT THAT INSTRUCTION ON THE
WALL AND POINTED IT TO IT, THE
COURT IS TELLING YOU THAT THE
LAW IS UNION CARBIDE HAD TO WARN
MR. AUBIN.
AT THAT POINT IT WAS OVER.
NOW WHAT WE ALSO TOLD THE TRIAL
COURT AT THAT CHARGE CONFERENCE,
AT A MINIMUM JUDGE, PLEASE GIVE
INSTRUCTIONS WE WOULD GIVE.
ONE POINT --
>> YOUR FIRST ARGUMENT ON A NEW
TRIAL, THAT SHOULD BE OR SHOULD
BE THAT INSTRUCTION SHOULD NOT
BE GIVEN BUT NO ADDITIONAL
INSTRUCTION IS NEEDED ON, FOR
THE STRICT LIABILITY FAILURE TO
WARN?
>> I DON'T MEAN TO SAY THAT, YOUR

HONOR.
>> I MEAN, AGAIN YOU'RE ASKING
FOR A NEW TRIAL.
I MEAN --
>> WE ARE.
>> PRESUMABLY IF WE DO, WE NEED
TO GIVE INSTRUCTION ON WHAT
SHOULD BE, WHAT THE PROPER
INSTRUCTIONS ARE.
>> WELL, AND THE PROPER
INSTRUCTIONS, WELL, I'M SORRY.
LET ME BACK UP FIRST, TO ANSWER
YOUR ORIGINAL QUESTION.
THE INSTRUCTION THAT RELATES
MOST TO THIS ISSUE, THAT WE HAD
PROPOSED IS FOUND IN THE
SUPPLEMENTAL RECORD FROM THE
THIRD DISTRICT.
SR PAGE 32.
IT IS LABELED DEFENSE'S
REQUESTED SPECIAL JURY
INSTRUCTION NUMBER SEVEN AND IT
WAS LABELED AS AN ALTERNATIVE.
IF YOUR HONOR HAS THAT SET IT IS
PAGE 32 OF THAT SET.
AND, WE STATED IN THAT PROPOSED
INSTRUCTION IN CONSIDERING WHAT
CONSTITUTES REASONABLE CARE IN
CONNECTION WITH WILLIAM AUBIN'S
FAILURE TO WARN CLAIM,
CONSIDERATION MAY INCLUDE BUT
NOT LIMITED TO FOLLOWING FACTORS
AND LIST AD SET OF FACTORS WHICH
INCLUDED WARNINGS UNION CARBIDE
PROVIDED TO ITS CUSTOMERS.
WHETHER THE UNION CARBIDE
CUSTOMERS WERE AWARE OF DANGERS.
WHETHER UNION CARBIDE HAD ACCESS
TO THE END USERS AND WHETHER
UNION CARBIDE HAD THE ABILITY TO
REQUIRE ITS CUSTOMERS TO GIVE
SPECIFIC WARNINGS TO THEIR
USERS.
AND WE POINTED TO THAT TO SAY,
AT LEAST GIVE THAT INSTRUCTION,
YOUR HONOR, BECAUSE THAT WILL
GIVE US SOMETHING WE CAN ARGUE
FROM.
THE COURT WOULDN'T GIVE THAT.
>> IN ON A -- IF ON A, I GUESS

IT WAS AFTER THIS TRIAL, BUT WE
ADOPTED FOR USE 403.8, STRICT
LIABILITY, FAILURE TO WARN.
THAT SAYS A PRODUCT'S DEFECTIVE
FROM THE FORESEEABLE RISK OF
HARM FROM THE PRODUCT COULD HAVE
BEEN REDUCED OR' VOIDED BY
PROVIDING REASONABLE
INSTRUCTIONS OR WARNINGS AND
FAILURE TO PROVIDE THESE
INSTRUCTIONS OR WARNINGS MAKES
THE PRODUCT UNREASONABLE AND
DANGEROUS.
WOULDN'T THAT BE ENOUGH TO GIVE?
403.8?
>> RESPECTFULLY I WOULD
DISAGREE, YOUR HONOR.
I THINK THAT --
>> YOU THINK -- SO, A CASE LIKE
THIS NEEDS A SPECIAL INSTRUCTION
NO MATTER WHAT THE, I MEAN, IT
NEEDS A SPECIAL INSTRUCTION?
>> WELL I THINK, IF THEY WANT TO
ARGUE A DUTY RUNNING TO THE END
USER, THEN THE ONLY WAY TO
INSTRUCT ON IT IS THROUGH A
LEGALLY COMPLETE AND APPROPRIATE
INSTRUCTION WHICH THEIRS WAS
NOT, THAT EXPLAINS WHAT THE DUTY
IS AND I WOULD REFER THE COURT
BACK TO THE CAVANAGH DECISION
AND TO COMMENT G FROM SECTION
388 OF THE SECOND RESTATEMENT.
>> HOW ABOUT REFERRING TO
McCONNELL CASE WHERE THE
FOURTH DISTRICT SAID EXACTLY
WHAT THIS INSTRUCTION WAS, THAT
BECAUSE IT'S ASBESTOS IS SO
UNREASONABLY DANGEROUS, THE ONLY
WAY THAT YOU CAN FULFILL YOUR
DUTY IS TO WARN THE END USER?
I MEAN THAT'S WHAT WAS SAID --
SO YOU MENTIONED CAVANAGH, BUT
CAVANAGH IS THEN CITED IN
McDONNELL AND McDONNELL SAYS
PRECISELY THAT DOESN'T IT?
>> I'M GLAD TO TALK ABOUT
McCONNELL.
>> MCCONNELL.
>> WAS SAID BY THE FOURTH IN

McCONNELL, FIRST THEY WERE
DEALING WITH A JURY INSTRUCTION
THAT IN THE VIEW OF THE COURT
COULD HAVE LED THE JURY TO
BELIEVE THAT BY WARNING THE
CUSTOMERS, UNION CARBIDE'S
CUSTOMERS, I GUESS WE CAN CALL
THEM INTERMEDIARIES FOR THESE
PURPOSES, THAT THOSE
MANUFACTURERS, IF WARNED, THAT
THAT COULD BE ENOUGH.
AND IN THE END THAT HOLDING OF
McCONNELL WAS THAT THAT
INSTRUCTION WAS POTENTIALLY
MISLEADING BECAUSE IT COULD HAVE
LET THE JURY BELIEVE THAT A MERE
WARNING TO THE INTERMEDIARY WAS
ENOUGH, WITHOUT CONSIDERING
OTHER FACTS AND CIRCUMSTANCES.
WHAT THE DECISION HELD BELOW AND
CORRECTLY, RELYING ON SECTION
388, RELYING ON SECTION 2,
COMMENT I FROM THE THIRD
RESTATEMENT SAID WAS, THERE ARE
NUMBER ABOUT FACTORS THAT SHOULD
BE TAKEN INTO CONSIDERATION.
THIS IS A REASONABLENESS TEST
AND IT IS BASED ON, AND I SHOULD
EMPHASIZE THIS AS WELL, ONE OF
THE ARGUMENTS PUT FORTH BY THE
OTHER SIDE IS THAT WE KNEW THAT
OUR CUSTOMERS WERE NOT WARNING.
THAT WE DIDN'T WARN OUR
CUSTOMERS, AND THAT WE KNEW THAT
THE ASBESTOS THAT WOULD BE
LIBERATED BY THESE PRODUCTS, THE
END FINISHED PRODUCTS, WAS
HARMFUL AND HAZARDOUS
AND ALL OF THOSE
CONTENTIONS ARE HEAVILY DISPUTED
BY OUR SIDE.
WE BELIEVE WE CERTAINLY PRESENT
EVIDENCE AND MAINTAIN WE DID
WARN OUR CUSTOMERS.
THEY WERE, THESE ARE THE SAME
COMPANIES THAT ARE SUED ALL THE
TIME IN THIS CASE AND EVERY
OTHER ASBESTOS CASE AS BEING LIE
LIABLE AND EXPERTS NO DIFFERENT
FROM UNION CARBIDE.

WHILE WE DID WARN THEM THEY KNEW
ALSO THEY WERE THE ONES THAT WHO
DESIGNED THEIR PRODUCT AND THEY
WERE THE ONES NOT ONLY HAD A
TORT-BASED DUTY TO UNDERSTAND
THEIR PRODUCTS AND THEIR HAZARDS
BUT THEY HAD A LEGAL OBLIGATION
TO UNDERSTAND THEIR PRODUCTS AND
THEIR HAZARDS.
>> AND YOU WERE ABLE TO ARGUE
THAT IN THE TRIAL COURT.
AND AS WAS SAID, THE JURY
APPORTIONED, WITH OVER HALF OF
THE LIABILITY TO THOSE, TO THOSE
CORPORATIONS, RIGHT?
>> YES, YOUR HONOR.
>> OKAY.
SO I'M STILL WONDERING NOW GOING
BACK TO WHERE WE ARE, IF THERE
WERE TO BE A NEW TRIAL, WHAT ARE
YOU SAYING THE INSTRUCTION
SHOULD BE ON THE DUTY TO WARN?
>> THE INSTRUCTION SHOULD BE
CONSISTENT WITH A SORT OF EASY
TO UNDERSTAND VERSION OF SECTION
388.
I POINT THE COURT TO COMMENT G
OF THAT SECTION WHICH
EXPLAINS --
>> 388?
>> 388 OF THE SECOND
RESTATEMENT.
>> OF THE SECOND RESTATEMENT.
>> THAT THE DUTY TO WARN IS OF
DANGERS THAT WERE KNOWN OR
SHOULD BE KNOWN AND THAT THE
STANDARD IS THAT THE CONDUCT
MUST BE REASONABLE IN ATTEMPTING
TO PROVIDE WARNINGS WHEN IT IS
UNDERSTOOD THERE SHOULD BE A
WARNING.
AND THERE ARE A LOT OF FACT
ISSUES CAUGHT UP IN THAT
STATEMENT BUT THE IN END THAT'S
ESSENTIALLY WHAT'S GOING ON HERE
WITH THEIR FAILURE TO WARN
CLAIM.
>> ISN'T THAT WHAT, AND ISN'T
THAT THE SECTION THAT JUDGE
FARMER IN McCONNELL POINTS TO?

HE THEN GOES ON TO SAY, AS
McCONNELL EXPLAINS THE NATURE
OF THE DUTY TO WARN IS GOVERNED
BY THE ACTUAL CHARACTER.
HE THEN SAYS, WHEN IS HE OWES
THE RISK IS VERY GREAT HOWEVER
THE SUPPLIER OF A PRODUCT LIKE
CALIDRIA, THAT IS THE SAME
PRODUCT, MAY NOT RELY ON
INTERMEDIARIES TO GIVE WARNINGS.
THIS IS ESPECIALLY TRUE
INVOLVING THE BURDEN GIVING THE
WARNING IS NOT UNDULY
BURDENSOME.
SO, YOU'RE REALLY, EXCEPT, WHEN
THE, ISN'T THAT WHAT THE FOURTH
DISTRICT ACTUALLY SAYS?
>> YOUR HONOR, MY MOST SINCERE
READING OF THAT LANGUAGE IS THAT
THE COURT WAS ESSENTIALLY MAKING
THE PLAINTIFF'S JURY ARGUMENT TO
SAY, WHAT ARGUMENT WAS
INCONSISTENT WITH THE WAY THAT
THE COURT READ THE JURY
INSTRUCTION IN THAT CASE AND
THEN THE COURT REVERSED BASED ON
THE JURY INSTRUCTION AND SAID
THAT WAS MISLEADING.
I DON'T BELIEVE THAT McCONNELL
WAS ATTEMPTING TO HOLD AS A
MATTER OF FLORIDA LAW THAT
ASBESTOS SUPPLIERS ARE LIABLE IN
EVERY CASE.
>> HE GOES ON, THIS IS WHERE
THERE IS CONFLICT THERE, OUR
DECISION IN CAVANAGH CONSTITUTES
A CLEAR HOLDING WITH, QUOTE,
LEARNED INTERMEDIARY EXCEPTION
IS NOT APPLICABLE TO CALIDRIA ASBESTOS
WITH ITS HIDDEN MEASURE OF --
>> YES, YOUR HONOR, I'M GLAD
YOUR HONOR RED THAT BECAUSE I
THINK IT THERE IS A IMPORTANT
POINT THERE.
ARE LOT OF DIFFERENT DOCTRINES
IS AROUND IN THESE CASES AND
LEARNED INTERMEDIARY IS ONE OF
THEM.
IN THE INTERMEDIARY IS
SOPHISTICATED ENOUGH LIABILITY

IS CUT OFF.
IT IS SINGLE FACTOR ANALYSIS.
THAT IS NOT WHAT WE'RE ASKING
FOR.
THAT IS NOT WHAT WE'RE SAYING
THE LAW IS.
AS THE THIRD DISTRICT EXPLAINED
BELOW IN LOOKING AT 388 AND
SECTION 2 COMMENT I OF THE THIRD
RESTATEMENT, THAT THERE ACE A
SERIES OF FACTORS THAT GET TAKEN
INTO ACCOUNT TO DETERMINE IF THE
CONDUCT, IN OUR CASE, THE
SUPPLIER WAS REASONABLE.
AND THAT'S WHAT WE SAY SHOULD
ULTIMATELY GOING WITH THE JURY.
THE JURY SHOULD BE MADE TO
UNDERSTAND IT'S ABOUT WHETHER
OUR CONDUCT UNDER THE
CIRCUMSTANCES WAS REASONABLE.
>> SO THAT'S, BUT THAT IS NOT
STRICT LIABILITY.
THAT IS NEGLIGENCE.
>> I, IN McCONNELL AND
CAVANAGH THE COURT EXPLAINED
THAT WAS A STRICT LIABILITY
CLAIM THEY WERE CONSTRUING.
SO THE LAW HAS DEVELOPED IN THAT
WAY.
AT SOME POINT THESE CLAIMS
REALLY DO BLUR AND I DON'T WANT
TO BE SORT OF NO TOO ACADEMIC
WITH AN ANSWER BUT YOU THINK IT
IS FAIR TO SAY THAT IS A STRICT
LIABILITY CLAIM.
THE NEGLIGENCE CLAIM ON TOP OF
THAT REALLY WOULD BE TO GET INTO
THESE SPECIFIC DECISION-MAKING
OF THE DEFENDANT AND THAT YOU
DON'T NEED TO DO THAT IN THE
STRICT LIABILITY CONTEXT BUT
THAT'S PROBABLY MORE ACADEMIC
THAN IT OUGHT TO BE IN THIS
SETTING.
IN THE END, WHAT WE'RE ASKING
FOR IS FOR THIS COURT TO AGREE
WITH THE THIRD DISTRICT THAT THE
JURY INSTRUCTION WAS A DIRECTED
VERDICT AGAINST US.
THAT A NEW TRIAL SHOULD BE HELD.

THE CAUSATION WAS NOT
DEMONSTRATED FOR DESIGN DEFECT
SO THE NEW TRIAL SHOULD NOT
INCLUDE DESIGN.
-- MANUFACTURING DEFECT CLAIM
THAT THEY UP UNTIL THE THIRD DCA
WERE INSISTING THEY HAD PROVEN
AND, THAT ON REMAND THE CASE
SHOULD GO FORWARD AS A WARNINGS
CASE.
I WILL ADD THESE CASES ARE TRIED
AS WARNINGS CASES.
THAT IS THE WAY ASBESTOS
LITIGATION TYPICALLY WORKS.
YES, THERE COULD BE A SITUATION
WHERE SOMEBODY CLAIMED THERE WAS
MANUFACTURING DEFECT OR DESIGN
DEFECT.
THAT WOULD BE UNUSUAL CASE WHERE
SOMETHING WOULD HAVE TO BE SORT
OF OUT OF THE ORDINARY THE WAY
THESE CASES ARE HANDLED.
THAT IS NOT THE WAY THIS CASE
WAS HANDLED.
THERE WASN'T ONE BIT OF --
>> YOU'RE OUT OF TIME.
>> I SEE THAT, YOUR HONOR.
I THANK YOU VERY MUCH FOR YOUR TIME.
>> THANK YOU FOR YOUR ARGUMENTS.
COURT IS ADJOURNED.
>> ALL RISE.