ORAL ARGUMENT – 10/30/02
01-0652
HUMBLE SAND & GRAVEL V. GOMEZ

JUNG: The intermediary and sophisticated user doctrines are well established in Texas. This case presents an opportunity to this court to consider how those doctrines work in tandem as applied to a product supplied exclusively for use by industrial employees.

The case is particularly suitable for that inquiry for several reasons. First it involves silica, a product whose risks have been known literally for centuries. With the means of avoidance of those risks known literally for decades. It involves a particularly rich record establishing such widespread knowledge in the abrasive blasting industry. It involves an extensive and detailed regulatory scheme placing duties on employers to warn and protect their workers against those risks. And finally it involves a product supplied exclusively to industrial users.

Now the CA recognized the potential combination of these doctrines. But then subjected that combination to so many artificial and seemingly absolute constraints that it collapsed under the weight of those constraints. We believe this was inappropriate. The Restatement of Torts states that there is no general categorical rule as to when it is permissible for a supplier to rely on an intermediary to warn or protect the ultimate consumer that the test is one of reasonableness under the circumstances.

ENOCH: A lot of the cases that have been cited and looked at seem to depend with - they identify the question, is the duty to warn the employee? They then determine under any different scenarios that there was no duty - not that there wasn't a duty to warn the employee, but the duty had been discharged by the warning to the employer who was reasonably understood to be a conduit for the warning. There appeared to be a couple of cases where judges wrote in terms of - they didn't differentiate between the reasonable conduit of the warning and the failure to warn the employer. But is there a case that - accepting all you have said is true, is there a case out there from any state SC or the US SC that absolves the manufacturer of an admittedly toxic product from giving an adequate warning to the buyer? In this case the employer.

JUNG: The courts that follow the so-called duty approach do exactly that. They say that where there is an intermediary the duty is to give the intermediary such warnings, if any, as may be necessary. And there is no duty to warn the employee. And that would be the Washington case from the 5th circuit was the Sho_____ case. There were several others. That's the so-called duty approach.

O'NEILL: Why is there a duty imposed in those circumstances? What's the reasoning behind that?

JUNG: The reason behind the duty approach?

O'NEILL: The premise, I think is that you have some learned intermediary who is going to evaluate the dangers and there is a very special relationship between the two. And we've recognized that in the physician/patient context because of the question of that relationship just is not present in an employer/employee situation.

JUNG: I think it is in the most important and meaningful ways. First of all, the employer like the physician is under a duty to the employee for the payment. Second, the physician has a unique ability that the drug manufacturer doesn't have to know what that patient's needs are, to know what that patient's both medical needs and informational needs are.

O'NEILL: Exactly. The focus is on the patient, and the patient's well being. And I'm not sure you can say an employer's primary concern is with the safety of their employees. Their primary concern is with the utility of the product.

JUNG: That is true. But the employer has not only general duties to train, warn and protect, but very specific duties, and is charged both by common law and by the OSHA regulations with maintaining a safe workplace. And in the case of abrasive blasting with silica has pages and pages of very detailed information about what he must communicate and what he must do to protect the worker. He has the ability to know how that product is going to be used in his factory. The supplier does not. He has the ability to know the linguistic capability, the educational background, the intelligence level of a particular employee. He has the ability to communicate with that employee, not only through a written warning, but orally through questions and answers, through demonstrations, through practice, through on-going training, and he has the ability to follow through. He can fire the worker if the worker doesn't wear his air-fed hood. cannot.

HANKINSON: What are the limits of the application of the learned intermediary defense in the product's liability context if you say it should be applied there?

JUNG: The limits are this. Under the restatement test and the mixed duty restatement test, it must be reasonable for the supplier to rely on the intermediary to warn or protect the worker. It is not necessarily reasonable in every industry and every product.

HANKINSON: But I'm not quite sure in application what that limit would be. Would an automobile manufacturer then say that the local dealer knows all about the car, and I told them all about it, therefore, I have no responsibility for the product? I understand that that's a test but in application if it applies in that way it seems to me it has very broad application in the product liability context, and I'm not sure what the limits would be.

JUNG: One limit is the dealer does not have a duty above and beyond the duty the manufacturer has to warn his customers. He has the same generalized duty of warning that the manufacturer has.

PHILLIPS: But he would see the customer. He knows them better. He's right there in

the community. He knows if this is in Alaska, or Honduras what the use is going to be.

JUNG: But not in a substantially more detailed way than the manufacturer does. General Motors knows how cars are driven in Alaska in a way different from the way Humble Sand does not know how Spincote operates its blasting facility. How somebody else operates theirs and so on. There is a differential there in the degree of knowledge.

The additional factor is whether it is reasonable to expect that the intermediary will warn and protect. If the testimony were that the automobile dealer industry knows full well and is fully equipped to protect his customers against risk X, then you might have a potential case for application of that doctrine.

HECHT: The dealer is selling to the customer, and already has a duty to warn.

JUNG: Has a generalized duty to warn.

HECHT: But the employer is not selling to the employee.

JUNG: That's correct. But he has a broader duty to warn than the dealer does because the Feds have said so. A broader and more detailed duty. I think that's the key part of it.

ENOCH: Under the duty approach there's this duty to warn at least somebody. In this case it would be the employer. I was looking for a state SC case or a US SC case that said in this circumstance a very knowledgeable employer in this business that there wasn't at least the threshold of - that the manufacturer had no duty to warn to begin with.

JUNG: To warn anyone?

ENOCH: To warn anyone.

JUNG: I am not aware of any case that combines the principle that there is no duty to warn of dangers commonly known by the class of purchasers, and the doctrine that one may rely on an intermediary to warn.

ENOCH: Does the restatement presuppose that Humble has given a warning to Spincote, and that the real issue is whether or not Humble was reasonable in relying on Spincote to convey that warning to the employee, or are you saying that your position, the restatement would say that if I know I'm dealing with Spincote who knows all this stuff, I have no duty to warn Spincote of these dangers and I'm also reasonable in relying on Spincote to do all these warnings anyway?

JUNG: The restatement supposes that the supplier will give the intermediary such warning as is necessary, if any. Then in turn we apply this court's decision in Sauder and say, alright. Was a warning to Spincote necessary? And the answer is yes, but only if the ordinary class

of Spincotes of the world, the abrasive blasting employers would not have the information that the warning would convey. And the evidence was very copious in this record that the abrasive blasting industry knew the things that it has said that Humble should have told them.

ENOCH: Is that a duty question or is that a breach of duty? Is my duty to warn limited by the knowledge already held by the buyer, or is that simply sort of a producing cause notion that I may have failed to warn, but we didn't produce their damages because they already knew?

JUNG: The answer is both. As to the subjective knowledge of the buyer, it is a producing cause question. As to the knowledge of the general class of buyers, this court held in Sauder v. Boyd that if the general class of buyers already has the information, there is simply no duty to warn. So the objective part of the test goes to the duty question. The subjective part of the test goes to the producing cause question.

HANKINSON: Would this same defense apply in the asbestos context?

JUNG: It might or it might not. We don't have the record in this case as to what the asbestos industry knew and when it knew it. However, from what we know generally, the knowledge of the dangers of asbestos is much more recent and much less widespread than the knowledge of the dangers of silica.

HANKINSON: But arguably, if there is evidence in an asbestos case that an asbestos manufacturer knew - I mean given the state of knowledge that a manufacturer may have had at that point in time, why wouldn't that be enough to trigger the learned intermediary defense in terms of being able to pass warnings along to a supplier and rely upon them?

JUNG: If a particular asbestos using industry were shown to have widespread knowledge of the risks that allegedly should be communicated, then that case would be eligible at least for the intermediary sophisticated user defense.

HANKINSON: And so the defense would be an absolute protection to the asbestos manufacturer in that context? If they prevailed on it.

JUNG: It would depend on whether this court said that the reasonableness of the reliance is a duty question for the court or a disputed factual issue, which is a predicate to a duty question as in Union Pacific v. Williams for the jury. But if the latter, then the asbestos supplier would have to convince the jury that it was reasonable for them to rely on this particular asbestos using industry to warn and protect workers.

HANKINSON: And if they did, then they would be off the hook?

JUNG: If they did, then they would be off the hook.

JEFFERSON: You say there is no duty if the general class of buyers knows the risk?

JUNG: That's correct.

JEFFERSON: So the manufacturer would have no obligation then to warn even if the product it's supplying, say company X, if that company is known to be negligent consistently in failing to protect its employees from the risk associated with that product?

JUNG: Known by the seller?

JEFFERSON: Yes. Let's say generally known by the seller. It's just a grossly negligent company.

JUNG: That's an interesting question arising out of Sauder. I don't know how this court would have decided Sauder if the supplier of the O-rings had known in point of fact that Mr. Boyd was not aware of the danger even though the run of the mill user was aware. I would say on the product side that's probably still no duty, because the product is designed and supplied for the global class of users. There might be a different result on the negligence side. I don't think this court has ever faced the question where there is objective knowledge within the industry, but no subjective knowledge on the part of the particular plaintiff or the particular intermediary.

JEFFERSON: Does the Restatement Third change the analysis at all?

JUNG: It really doesn't. It says roughly the same thing in different words. Section 2, I believe it's comment J, echos 388 comment N.

O'NEILL: Can you tell me the public policy adopting it in this context?

JUNG: There are really two public policies.

O'NEILL: Let me premise my question. If it's foreseeable that the product is going to be used by the employee directly, and a warning is pretty easy to do, what is the public policy of absolving the manufacturer based on a presumption that the employer will protect its employees?

JUNG: There are two public policies. First of all, it is not always the case that a warning is feasible even if there is something to place it on.

O'NEILL: Presuming it is. I think you conceded in this case it is.

JUNG: It is and it isn't. Because products in bags get removed from bags. And the evidence shows that Mr. Gomez happened to be charged by his employer with unloading the freight cars, and so he happened to see the bags. But then the bags are dumped into hoppers and nobody ever sees the bags again after that. So my first point is, feasability is not an on or off kind of thing.

It may be partially feasible, but not totally feasible. But beyond that, there are really two public policies. One is so-called information costs. The more warnings you put on something the more you diminish the impact of each and every one of them.

O'NEILL: But you would agree in this case the information cost is negligible? In fact the company did change the warning.

JUNG: We did change the warning. But I'm not sure that the information cost was negligible. Mr. Gomez said that the more detailed warning would have convinced him to quit that job and go into another line of work. Unless we want as a matter of policy for all abrasive blasting workers to quit their jobs, that policy is not fulfilled by putting that warning on it.

O'NEILL: We're talking about feasibility of the warning. Are you saying it would not be feasible to put the more detailed warning in this case? I thought that was pretty much a given that in this case it's not a difficult thing to do, and you in fact did it.

JUNG: We did it in 1993. It would have induced Mr. Gomez to quit his job he says.

O'NEILL: What does that have to do with the feasibility of placing the warning whether he would have or would not have done it?

JUNG: Because the point of the warning is not - we weren't at fault for not conveying a message to quit his job. Because the testimony is that abrasive blasting materials can be used safely with proper protection.

JEFFERSON: You're on kind of shaky grounds there aren't you. The public policy would be - I mean if that information would have induced that, well maybe he should have known that. Maybe we ought to err on the side of requiring more information so that he can make that assessment himself.

JUNG: My point is that to convey the balanced information that needed to be conveyed under the plaintiff's theory of the case would have required more warning even than we gave in the 1993 warning, and would not have been feasible.

OWEN: You're saying you're relying on the intermediary to give him detailed warnings, which I assume would have made him quit his job as well. It doesn't seem consistent.

JUNG: Our premise is that he didn't need to quit his job. The evidence shows that he didn't. He could have used the product safely and we were relying on the intermediary to give him the information that he needed as well as the equipment that he needed and the training he needed to use the product safely. To convey the same kind of information that the intermediary could have conveyed, the balanced message that you can use this product safely but only if you do it the right way would not have been entirely feasible. Yes, we could have put something on the bag, and did.

O'NEILL: You have a couple of reasons you were...

JUNG: The second reason is sort of a law in economic's reason and it's the placing of tort liability on the party best able to preclude the accident. And in this case that was the employer. We have the complication of the worker's compensation system which renders the use of tort liability to incentivize(?) employers problematic. But you still have the instance of nonsubscribing employers. You still have the instance that at least on an industry-wide basis and sometime on an individual employer basis that premiums reflect claim histories, and so placing tort responsibility on the employer.

O'NEILL: What about if the warning to the employer is insufficient?

JUNG: If the warning to the employer is insufficient, then there is liability under any of the tests.

O'NEILL: What about the technical data sheets in this case. Didn't the manufacturer fail to warn that reusing the silica caused additional problems?

JUNG: Yeah, there was no warning about that. But the federal regulations specifically deal with the recycling of used abrasive material and the way that that can be done safely. So if those regulations had been followed that would not have been an issue.

* * * * * * * * * *

RESPONDENT

SUSSMAN: Mr. Jung said that this case involves a particularly rich record, and it does. Because it does, you need to look at the facts of this case not _____. The undisputed facts in this case, and the fact resolved against Humble by the jury are listed on chart A, which I have passed to the court.

The first bullet point says it is well known that many sandblasting companies did not protect their employees and violated OSHA. This was established by studies made throughout the 1970's, and Humble assumed as a manufacturer of the highly dangerous product is considered to be an expert that should have known of these studies. There was testimony by other sandblasting companies in this case that they were aware of these studies.

HECHT: Would it make a difference if there were only a few?

SUSSMAN: Absolutely. They just ignored this fact throughout all their briefing, that you can use an objective standard, any standard you want, but part of the objective standard is that everyone knew that everyone was not taking precautions, was cutting corners, and was likely to violate OSHA.

The second fact. Humble did not fully inform Spincote of the dangers and precautions. Now Humble says that this was disputed, and that the jury did not resolve this dispute. They are just wrong. Question No. 1 does not refer to any specific warning, to any specific person. It could refer to Humble's warnings to Spincote in the material data sheet or the technical fact sheet. Or it could refer to Humble's warnings to Spincote employees on the bags. Or it could refer to both.

This court must construe the answer to question No. 1 in a way to support the verdict, i.e., that the jury found that all warnings given by Humble were inadequate whether given to the intermediary or to the intermediary's employees.

Question 2, which would support the judgment if you threw out the answer to question 1 is a broad negligence question. It doesn't refer to any warning. And the jury's answer to that would support the judgment.

Bullet Point 2. Humble did not know that Spincote was careful. Undisputed. Humble made no effort to find out if Spincote was careful. Undisputed. Spincote made the same mistakes that Humble should have known other employees were making. Undisputed. Use of flint in sandblasting is extremely hazardous. Undisputed. The warning that Humble put on its bags in 1993 was based on information known to _____. In 1982, you're right J. O'Neill, no additional burden of putting a better warning on the bag. And in 1982 warning was inadequate.

PHILLIPS: Let me get the context clear here. You're not arguing that learned intermediary should be restricted to the...

SUSSMAN: Absolutely not.

PHILLIPS: It's fact intensive at least by industry...

SUSSMAN: Yes. I am saying that in a given case even in this industry, even where you have a product sold not in bulk, but in a bag, it might be reasonable for the supplier to rely on the intermediary. Not here. If the supplier here had gone out and checked on the safety programs at Spincote, knew something about Spincote's character...

HECHT: How would you do that?

SUSSMAN: Easy. You say, would you please send me your written instruction manual.

HECHT: And they say no.

SUSSMAN: I'm not going to sell you my product. Or, if I sell you my product, I'm going to write something that you have to agree to post at your place for the benefit of your employees. I mean it would have been easy to find out whether Spincote had a decent safety program. Again, we do not contend nor did the court below hold that these doctrines should never relieve a

manufacturer of flint sold in bags rather than bulk from the duty to warn employees. And the court doesn't have to extend or refuse to extend any doctrines in this case.

PHILLIPS: Humble should have three or four different levels of bag warning to evaluate its purchaser's _____?

SUSSMAN: I think the bag warning should be a single warning, but should be the best warning possible. Because it's no additional cost to use the best warning possible on the bag.

PHILLIPS: But if they don't there might not be liability to some purchasers _____, the users...

SUSSMAN: That's right. That's their choice.

OWEN: So you wouldn't make it a purchaser-by-purchaser inquiry. You would not say, well if the industry as a whole generally follows OSHA regulations and generally conducts their business in a safe manner, Humble would still have to look purchaser-by-purchaser to make sure...

SUSSMAN: I'm not sure. If there was evidence in the record that everyone's following the regulations...

OWEN: Or they are generally following.

SUSSMAN: Generally following. And there were very few - I mean all the sandblasting companies there were very few safety violations on the part of sandblasting companies. That would present a different case. That's not this case.

OWEN: I'm just trying to find out where you are on the spectrum of...

SUSSMAN: I am saying ___ will look at that. Maybe in that case - in this case what makes it - it's so easy to put a different warning on the bag. And what we know because of the principles - everyone agrees that there are two things that control this case. The principles from comment N to the restatement of torts, §388. And I've given you that in Chart B. It's all quoted and highlighted what's important. But we know under the restatement for example that even giving to a third party all the information necessary for its safe use is not always sufficient. If you for example know that the third party is negligent, or you make no effort to find out whether the third party is careful, or is it a question of reasonable assurance. It may be improper to trust the conveyance of the necessary information to a third person on whose character he knows nothing. If the danger is very great, the supplier does not exercise reasonable care by entrusting the communications of a third party even to a person who he has a good reason _____ to be careful.

ENOCH: Do you agree that if a manufacturer of a toxic product sells to a sophisticated buyer, for lack of a better term, the buyer knows as much about the dangers of this product as the

manufacturer does and the buyer is going to be using it in their process with employees, do you agree that the restatement eliminates any duty on the manufacturer's part to warn the buyer?

SUSSMAN: No. It clearly doesn't. It says even if the third person knows all the information necessary - and let me - after this it's even clearer than this court's decision in Alm which followed this, and that's in Chart C, where I've quoted from the court in Alm. A manufacturer may assert the mere presence of an intermediary does not excuse a manufacturer from warning those _____ least could expect. This is the issue in every case. And you've got to consider all these factors. The negligence on the part of the intermediary does not relieve the supplier of responsibility for its failure to warn. And the restatement comment N says that even if you deal with an intermediary who has perfect knowledge, either because he got explicit warnings from the supplier, or because he's just a genius and he's read all the literature, even in that case it may be unreasonable to rely on the intermediary to pass the information on to the employees.

PHILLIPS: Was Alm correctly decided?

SUSSMAN: I think so.

PHILLIPS: It was a bottle cap wasn't it? It was a machine that put bottle caps on.

SUSSMAN: The court considered it as a bulk supplier case. Because it was difficult for the manufacturer of the bottling machine on how are you going to put a warning. So it considers bulk supplier _____. Now if they can't bring themselves within Alm, they certainly cannot bring themselves within a case that involves sale of bags where a warning is very feasible.

HECHT: But this warning that was feasible was "be very careful. This is very dangerous stuff. Follow regs. Don't deviate from that." But it didn't tell them what the reg said, which is wear these kinds of hoods, do this kind of stuff. You couldn't put all of that on a bag.

SUSSMAN: No. You could put on it "this can cause your death." That's what Gomez testified had he known that, he would have quit working as a sandblaster. And they say, well that's not good for the economy to scare everyone off. And I say, that's what the law of products liability should give the user a choice.

HECHT: On the reasonableness argument, the amici say, we just want a rule. Just tell us what the rule is so that we can do it. But don't tell us, Well you'll find out in court someday. What's your response to that? How can we give manufacturers or distributors as much objective guidance in this area as possible?

SUSSMAN: I don't think you can. I think that both the restatement and Alm says, this turns on the facts of a particular case. Just like you can't tell them what negligence is, or not being negligent is. It depends on the facts of the case. And here we have a case where it is undisputed that the intermediary was unsophisticated, subjectively. The head of safety said he didn't really realize

that silicosis causes death until 1986. He said twice a day he would walk through the blast house without any protection at all, which all the experts say is extremely hazardous. That's the manager of their safety program. This was a company the expert said was the worst conditions ever. There were numerous claims that arose from Spincote's operation in Odessa. So we have a company that is subjectively unreliable and unsophisticated.

PHILLIPS: This is the first warning case like this we've had in 5-10 years without any kind of preemption question. But there is none of that. There is no issue that there is an OSHA regulation or some federal requirement that we need to take into account in crafting a common law. Is that right?

SUSSMAN: I think that's right.

ENOCH: If juror question No. 1 doesn't identify who was supposed to get this warning, and just declare that the warning is inadequate, if we conclude that under whatever test we apply the manufacturer is not relieved of giving the warning, they just discharged that duty by reasonably relying on this intermediary - if we conclude that the manufacturer did not give an adequate warning to the employer is that the end of the inquiry? Is there a liability here, or do we still measure it against what the user might have known about it and they should have created the warning?

SUSSMAN: No. I think he almost conceded at the end that if there was evidence - see if the jury had resolved the evidence, if the jury resolved the question, as I say they didn't to special issue question No. 1, whether the warning of Humble to Spincote was adequate or inadequate, if it was inadequate, I think they lose. I think that was the last question put to counsel. I think he kind of has admitted it. If they give an inadequate warning to Spincote, how can they rely on Spincote to give an accurate warning to its employees.

O'NEILL: I would imagine the answer they are going to give when they stand back up is because it's known in the industry. That's my understanding of their categorical...

SUSSMAN; And I would say if they had a better record of what was known in the _____, and the record was clean of all these many violations. Everyone's doing it. Whether out of likeness or lack of knowledge who knows. I mean we don't know exactly why they are doing it. But the evidence in this record that everyone is doing it prevents them from saying, well they all knew the danger. If a manufacturer knows that they all know of the dangers, but many of them are not taking precautions, then I think the restatement, that's a factor that the restatement says can lead a jury to conclude that the warning should be given.

HECHT: But your position today is a little different from the brief.

SUSSMAN: I didn't write the briefs. A lot of the arguments we make in the brief, I am not making today. Intentionally. One of those arguments is, their next big point which is they were entitled to have a jury issue on whether Humble's reliance on Spincote was reasonable. And we of

course cite in our brief the general rule that in determining a duty to warn that's a question of law for the court. But it is true that this court this year in Union Pacific said where there's a disputed fact issue like foreseeability, then a jury ought to resolve that even though it goes to the existence of a duty. And we respond to that in two ways here. One is that the essential facts were not in dispute in this case concerning the adequacy. They simply were not in dispute. But more importantly, in Union Pacific the court said, even if the instruction should have been given and it wasn't, this court should reverse _____ and find it would probably have made a difference. And it did in Union Pacific because as the court pointed out, the judge in that case instructed the jury that foreseeability has nothing to do with the duty or obligations of the defendant.

There was nothing like that in this case. The judge never told the jury you can't consider the reasonableness of Humble's reliance on Spincote. And if you look at the language to question 1, and certainly the negligence question, which doesn't - I mean the negligence question is wide open. The jury under both questions could have considered the reasonableness of the supplier's reliance on the intermediary. And you've got to say they did and it resolved it against them. Even if the instruction should have been normally given in this case it was harmless error not to give it.

O'NEILL: Do you recognize a distinction between a learned intermediary doctrine and the sophisticated user doctrine? My understanding is the learned intermediary doctrine involves different issues, and that the position of Mr. Gomez in this case is the learned intermediary doctrine should never apply in these circumstances and what we're looking at is sophisticated user.

SUSSMAN: I don't really understand the difference. To me it all goes to the same thing. Can you rely on a third party to warn the ultimate user? In some cases you can because they are a physician.

O'NEILL: It strikes me that the learned intermediary focuses on the intermediary. The sophisticated user of the focus is on the user of the product.

SUSSMAN: Okay. I guess that was what happened in the Sauder case. They make a big deal out of the Sauder case, which didn't involve the intermediary doctrine at all. I mean there was no intermediary in Sauder. It was just the boiler maker - the court said you've got to assume that a boiler maker whose train would not work on a refinery tower. And this man was stupid in what he did: removing the cleats and then thinking that the thing would not fall. So you didn't even have an intermediary question in that case. They want to kind of cobble together the sophisticated user doctrine with the learned intermediary and there's no case that I've found that makes that a problem.

They have some evidentiary points about the refusal to admit a petition, which was superseded. Again, that's an abuse of discretion standard, and the court needs to affirm if there were any grounds on which the lower court properly excluded it. We have suggested in our brief that one of the grounds was that it was so highly redacted that it was misleading for a 2 ground, or a three ground.

And another thing we suggest, and I have handed out to you Chart B is a whole other argument that was not included in the brief. It's _____ of the commentators and from the 5th circuit jurisprudence, that basically says in a jurisdiction which allows notice and alternative pleading, you can't punish someone by putting in as an evidentiary admission something they say in one count of their pleading to contradict something they say in another count. And that's why it was proper for this court not to allow them to introduce one page of a 35-page pleading claiming negligence on behalf of one of some 24 third parties that were accused in the whole pleading. It was just misleading.

* * * * * * * * * *

REBUTTAL

JUNG: I am advised that the Oklahoma SC in the DeWayne v. Shell case combined the application of these doctrines by holding that there was no duty on the part of a supplier to warn an employer of what the employer already knew in order to convey adequate information to the employee. So that would be the cobbled together case that Mr. Sussman refers to in which both doctrines have been applied in conjunction with one another.

I'm afraid Mr. Sussman and I must have read a different record in this case. He says that there is no evidence, it was undisputed that there was widespread noncompliance in this industry. Mr. Gomez's witness, former Asst. Sec. of Labor Eula Binghan, testified that she would have expected employers to be knowledgeable regarding the association between abrasive blasting and silicosis, and to advise and train their employees regarding these hazards.

O'NEILL: But was there evidence in the record that employers were not following OSHA regulations regularly? If there is some evidence of that in the record how can we ignore that?

JUNG: No. There was a study that predated the OSHA regulations that indicated that among small and midsize employers, which Spincote was not, there was failure to observe proper precautions. There was also a study from England in the 30's or 40's.

O'NEILL: So you're saying we're not going to find any evidence in this record...

JUNG: Of systematic noncompliance in the industry with OSHA regulations? That's correct. In any event, there was very copious evidence...

O'NEILL: What about specific noncompliance? What about the safety manager walking through the blasting room unprotected?

JUNG: There is evidence that Spincote was noncompliance. Certainly. There is no evidence that Humble knew that. We say that the test is an objective test in any event.

O'NEILL: Isn't it your burden to prove that on an affirmative defense? Isn't this an

affirmative defense?

JUNG: No. I don't believe it is. I believe it is a measure of our duty.

O'NEILL: So you're saying it's the plaintiff's burden then to show that you are not a sophisticated user?

JUNG: That Spincote was not in an industry of sophisticated users.

O'NEILL: So we start with the premise of sophistication in every case?

JUNG: No. When there is an intermediary, then the question is was there a duty to the ultimate user? The duty test would say, no. End of discussion. The restatement and next tests would say there is a duty if it is not reasonable to rely on the intermediary.

HECHT: And you argue for a similar reasonableness test as the restatement sets out and as I hear the respondent say _____.

JUNG: That's correct. And I agree with Mr. Sussman. I don't know of any way to create bright line rules in this area unless the court adopts the duty test and just says if there's an intermediary there is no duty.

HECHT: So the amici's plea for certainty...

JUNG: I'm sympathetic to it.

HECHT: ...it falls on deaf ears on the bar?

JUNG: Not deaf ears, but ears that are frustrated and don't know how to resolve it.

ENOCH: In the duty question. If I'm the employee of Spincote, and I have the injury and I want to sue the supplier of the toxic product, and my claim is a failure to warn, you would say that to attach the manufacturer of the product I have to show that the - if the manufacturer gave an adequate warning to the - I would have to show that the manufacturer did not give an adequate warning to the employer, and I would have to show that the - could I get to the manufacturer by simply showing the manufacturer failed to give an adequate warning to my employer? Could I establish liability by the failure to warn my employer?

JUNG: Generally in cases yes. In this case no.

ENOCH: If I show that there was an inadequate warning, if I just take the evidence in this case and the jury concludes that this warning was not adequate, your argument is, but that's not sufficient because they also have to show that their employer did not otherwise know the information

that they say I had failed to warn the employer about in order to prove that the warning was inadequate.

JUNG: They are two sides of the same coin. Well, yes, they would need to show that the employer didn't already know it or there would be no causation.

ENOCH: You're saying that's a causation question. But you say the duty...

JUNG: If the industry already knew it, then the warning was not inadequate because there was no duty to convey that particular information.

HECHT: What is your answer to the respondent's argument that question 1 covers the adequacy of the warning to Spincote as well?

JUNG: Those were PJC questions. And I think when you look at them, particularly question 1, you will see that they are focused on the adequacy of the warning to Gomez. And to say that the warning was inadequate to Gomez without the jury learning that an adequate warning to Spincote could under the right circumstances satisfy the supplier's duty, is not necessarily a finding that the warning to Spincote was inadequate. The jury could have found the warning to Spincote was adequate, and yet the warning to Gomez not.