Third District Court of Appeal

State of Florida

Opinion filed February 26, 2020.
Not final until disposition of timely filed motion for rehearing.

No. 3D18-1529
Lower Tribunal No. 10-41578

Union Carbide Corporation,
Appellant/Cross-Appellee,

vs.

Paula Font, etc.,
Appellee/Cross-Appellant.

An Appeal from the Circuit Court for Miami-Dade County, Jose M. Rodriguez, Judge.

Carlton Fields, P.A., and Matthew J. Conigliaro (Tampa) and Ryan S. Cobbs (West Palm Beach), for appellant/cross-appellee.

The Ferraro Law Firm, P.A., and Mathew D. Gutierrez and Juan P. Bauta, II, for appellee/cross-appellant.

Before SALTER, LINDSEY and HENDON, JJ.

SALTER, J.

Union Carbide Corporation ("Union Carbide") appeals a final judgment and jury verdict entered in favor of Paula Font ("Ms. Font"), plaintiff below and personal representative of the estate of her late father, Luis Torres ("Mr. Torres"). Ms. Font cross-appeals the trial court's rulings allowing the jury to apportion liability to non-party Johns Manville Corporation ("Johns Manville") as a Fabre[1] defendant.[2] The underlying circuit court case is based on Ms. Font's wrongful death case for damages allegedly caused by Mr. Torres's exposure to asbestos-containing building materials manufactured by Union Carbide, resulting in his death from mesothelioma.

In its appeal, Union Carbide raises three allegedly-reversible errors. For the reasons explained below, we find two of those issues meritorious, and we reverse the final judgment against Union Carbide, remanding for a third jury trial.[3]

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[1] Fabre v. Marin, 623 So. 2d 1182 (Fla. 1993).

[2] The jury's verdict assigned percentages of fault to non-parties Johns Manville (ten percent), Georgia-Pacific LLC (thirty-five percent) and Mr. Torres's son, David Torres (fifteen percent). These percentages, when applied to reduce the jury's verdict on total damages ($6,935,000.00), reduced the award to Ms. Font to $2,774,000.00, plus statutory interest from the date of the jury's verdict.

[3] The claims were first filed in 2009 as a personal injury case by Mr. Torres. Following his death in September 2009 from mesothelioma, Ms. Font filed her wrongful death case in 2010. A 2011 trial culminated in a defense verdict and judgment, and this Court affirmed. Font v. Union Carbide Corp., 118 So. 3d 1005 (Fla. 3d DCA 2013), citing Union Carbide Corp. v. Aubin, 97 So. 3d 886 (Fla. 3d DCA 2012). The Florida Supreme Court granted review of Aubin and ultimately quashed both in Aubin v. Union Carbide Corp., 177 So. 3d 489 (Fla. 2015), and Font v. Union Carbide Corp., 41 Fla. L. Weekly S113 (Fla. 2016). On remand, we reversed the defense judgment in favor of Union Carbide in Ms. Font's case and

Union Carbide's Appeal: The Claims of Reversible Error

Union Carbide's appeal seeks reversal for these three reasons:

1. The trial court denied Union Carbide's motion for judgment as a matter of law on the issue of causation. This issue is reviewed de novo, and a directed verdict would only be appropriate if the trial court, viewing Ms. Font's evidence in the light most favorable to her, determined that no reasonable jury could render a verdict in her favor and against Union Carbide. See Competitive Softball Promotions, Inc. v. Ayub, 245 So. 3d 893, 895 (Fla. 3d DCA 2018) ("We review a trial court's ruling on a motion for a directed verdict de novo, and we must evaluate the evidence in the light most favorable to the nonmoving party."); Blake v. Hi-Lu Corp., 781 So. 2d 1122, 1123-24 (Fla. 3d DCA 2001).

We reject Union Carbide's argument on this point, as Ms. Font's evidence, including the presentation of her expert witnesses, Dr. Brody and Dr. Finkelstein, provided competent, substantial evidence sufficient to support a prima facie case and the denial of Union Carbide's motion for a judgment as a matter of law. Northrop Grumman Sys. Corp. v. Britt, 241 So. 3d 208, 213 (Fla. 3d DCA 2017).

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remanded it for a second jury trial limited to her strict liability claims. Font v. Union Carbide Corp., 199 So. 3d 323 (Fla. 3d DCA 2016). In that second jury trial, Ms. Font prevailed as to liability and the apportioned damages; this appeal and cross-appeal followed.

2. The trial court abused its discretion in excluding from evidence seven affidavits (the "Excluded Affidavits") signed by Mr. Torres under oath in 2009, only fifteen days before his death, in support of his claims of exposure to asbestos-containing products manufactured or distributed by non-party entities. Those entities, and three others for which similar affidavits were admitted into evidence (the "Admitted Affidavits"), created and administered asbestos settlement trusts as part of their bankruptcies, from which allowed claims could be paid.[4]

The trial court's evidentiary rulings are reviewed for an abuse of discretion. Greenwald v. Eisinger, Brown, Lewis & Frankel, P.A., 118 So. 3d 867, 871 (Fla. 3d DCA 2013). The trial court's interpretation of the evidence code, however, is reviewed de novo. L.L. v. State, 189 So. 3d 252, 255 (Fla. 3d DCA 2016).

Each of the Excluded Affidavits: (a) included a claim by Mr. Torres that he was exposed to asbestos-containing material and breathed air containing particles of dust arising from such materials, (b) identified specific products manufactured or distributed by the named non-party entity, and the years during which that entity manufactured or distributed the products, and (c) included an attachment referenced in the affidavit captioned "Work History/Exposure Sheet," listing the pertinent

[4] The Excluded Affidavits executed by Mr. Torres were for claims involving asbestos-containing products used by Mr. Torres from Combustion Engineering, Armstrong World Industries, DII Industries, Kaiser Aluminum, National Gypsum, United States Gypsum, and Harbison Walker. The Admitted Affidavits related to claims by Mr. Torres against Fibreboard, Babcock & Wilcox, and Owens-Corning.

jobsites, locations, and years of work, designating where and when Mr. Torres used the asbestos-containing materials and products. In the first jury trial of Ms. Font's claims (culminating in a verdict for Union Carbide), the Excluded Affidavits were admitted into evidence.

In the second jury trial presently under consideration, each of the Excluded Affidavits was offered against the representative of Mr. Torres, who concededly executed the document under oath and as a legal claim against a non-party manufacturer or distributor. Those legal claims identified products of the non-party, which exposed Mr. Torres to asbestos-containing materials and particles of dust arising from those materials at specific work locations and for specified intervals of time. Subject only to a relevance objection, the Excluded Affidavits are admissions within a specific exception, section 90.803(18), to the hearsay rule, section 90.802, Florida Statutes (2018). Collectively, the Excluded Affidavits identify some fifty alleged asbestos-containing products claimed by Mr. Torres to have exposed him to asbestos-containing materials and particles of dust arising from those materials.

Ms. Font's objection to the admissibility of the Excluded Affidavits (and the jury's consideration of them) was based on a purported failure by Union Carbide to provide evidence of causation implicating those exposures in Mr. Torres's disease and death. The trial court ultimately allowed the Admitted Affidavits because they related to products manufactured or distributed by three Fabre defendants, and it

sustained the objection as to the Excluded Affidavits because no expert witness for either side provided opinion testimony establishing those seven entities' involvement and fault in Mr. Torres's disease and death.

That analysis pertains to a defendant's burden relating to its affirmative defense seeking an apportionment of fault to a non-party under Fabre and the addition of that non-party to the verdict form. However, "[t]o present an 'empty chair' defense, the defendant need only answer the complaint with a general denial and argue to the jury that the injury was due to the negligence of a non-party to the suit." Vila v. Philip Morris USA Inc., 215 So. 3d 82, 85 (Fla. 3d DCA 2016).

The Excluded Affidavits represent Mr. Torres's own claim that the seven entities and their identifiable products exposed him to asbestos-containing materials and dust. They are directly relevant to Union Carbide's claims that non-parties were responsible, whether entirely or in part, for Mr. Torres's cumulative exposure and his contraction of mesothelioma.

The ruling under review is not limited (as Ms. Font contends) to whether the seven non-party entities identified in the Excluded Affidavits should have been added to the verdict form as additional Fabre defendants. Rather, we must consider whether the refusal to admit the Excluded Affidavits as evidence of alternative causes was harmless error. We conclude that this error was not harmless, reviewed in light of the civil harmless error standard, Special v. West Boca Medical Center,

160 So. 3d 1251, 1256 (Fla. 2014): "[T]he beneficiary of the error has the burden to prove that the error complained of did not contribute to the verdict. Alternatively stated, the beneficiary of the error must prove that there is no reasonable possibility that the error contributed to the verdict."

The First District reached the same result in a similar case. In R.J. Reynolds Tobacco Co. v. Mack, 92 So. 3d 244, 248 (Fla. 1st DCA 2012), the defendant argued that "the trial court erred in excluding its alternative causation evidence on the basis that [the defendant's expert witness] was unable to testify that the alternative causes were more likely than not the cause of the decedent's laryngeal cancer." The appellate court concluded that the trial court "improperly shifted the burden of proof as to causation" to the defendant and reversed. Id. at 248.

As a result, we are constrained to reverse the final judgment and remand the case for a new (third) trial.

3. Union Carbide's third claim of reversible error is based on the trial court's disallowance of a particular term in a jury instruction regarding the "learned intermediary" defense. Where an instruction is alleged to be deficient as an accurate statement of law, our review is de novo. Chacon v. Philip Morris USA, Inc., 254 So. 3d 1172, 1175 (Fla. 3d DCA 2018). "A party is entitled to have the jury instructed on the theory of its case when the evidence supports that theory." Aubin v. Union Carbide Corp., 177 So. 3d 489, 517 (Fla. 2015).

Union Carbide objected to the trial court's use of an instruction, which addressed Ms. Font's "failure to warn" claim and the learned intermediary defense to such a claim. The pertinent part of the instruction given was:

> In the duty to warn the end user, Union Carbide can rely on an intermediary manufacturer to relay warnings to users of the intermediary manufacturer's products, provided that reliance is reasonable, based on the following nonexclusive factors: the gravity of the risks posed by the product, the likelihood that the intermediary will convey the information to the ultimate end user, the feasibility and effectiveness of directly warning the end user, and whether the manufacturer fully warned the intermediary of the dangers in its product.
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> The issue is whether Union Carbide was reasonable in relying on the intermediary to fully warn the end user and whether Union Carbide warned the intermediary of the dangers in its product.
>
> The standard is what any reasonable asbestos supplier would have done in like circumstances to warn of the danger of its product.

Union Carbide contends that the proper instruction (after Aubin) requires a clear statement to the jury that a manufacturer's reasonable reliance on an intermediary manufacturer "discharges" or "fulfills" the manufacturer's duty to warn. Aubin holds that "the learned intermediary defense is a doctrine that a manufacturer can use to argue to the jury that its duty to warn was fulfilled . . . ." 177 So. 3d at 516. There was evidence to support the learned intermediary defense, and the instruction as given correctly explains the factors to be considered by the jury in determining whether Union Carbide reasonably relied on an intermediary.

This issue boils down to a question of whether it was error for the trial court to refuse to accept Union Carbide's proposed instructions with the additional phrase, "Union Carbide can fulfill its duty to warn . . . ."[5] The argument is persuasive that a juror might not think "reasonable reliance" on an intermediary, without more, to be a complete defense. In evaluating whether this alleged error warrants reversal, "the appellate court must assess whether the instruction reasonably might have misled the jury." Aubin, 177 So. 3d at 517.

In the present case, we conclude that Union Carbide is correct. It requested an instruction with specific language allowing a juror to understand the significance of a "reasonable reliance" finding pertaining to an intermediary manufacturer and Union Carbide's duty to warn. We find the refusal to include the term used by the Florida Supreme Court in Aubin, that Union Carbide's duty to warn was "fulfilled" or "discharged" if it reasonably relied on an intermediary manufacturer (supplementing the language of the instruction actually given), also requires reversal of the final judgment.

The Cross-Appeal

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[5] Union Carbide also suggests that an instruction on the learned intermediary defense would be sufficient if it used the word "discharge" instead of "fulfill," since both words signify a complete bar to liability for a failure to warn regarding products from that intermediary.

In the cross-appeal, the single issue is whether the trial court committed reversible error in denying Ms. Font's motions for directed verdict and for judgment notwithstanding the verdict regarding Johns Manville's designation as a non-party Fabre defendant on the verdict form. Under the standard of review applicable to such motions (as detailed previously in this opinion), Dr. Finkelstein's testimony and the formulas for Ready Mix (showing that Johns Manville's asbestos-containing material was used in the product during the same years Union Carbide's material was used and Mr. Torres was using Ready Mix joint compound) provided competent, substantial evidence sufficient to withstand Ms. Font's motions. We affirm those rulings on the record before us.

Conclusion

The final judgment below is reversed, and the case is remanded to the trial court for a new trial. We reject Union Carbide's contentions regarding causation and Ms. Font's contentions (in the cross-appeal) regarding Johns Manville's designation as a Fabre defendant on the verdict form.

Reversed and remanded.