IN THE SUPREME COURT OF TEXAS

NO. 01-0652

HUMBLE SAND & GRAVEL, INC., PETITIONER

v.

RAYMOND GOMEZ, ET AL., RESPONDENTS

ON PETITION FOR REVIEW FROM THE
COURT OF APPEALS FOR THE SIXTH DISTRICT OF TEXAS

Argued on October 30, 2002

JUSTICE O'NEILL, joined by JUSTICE SCHNEIDER, dissenting.

The Court acknowledges that (1) silica flint, when used as a blasting agent, is a dangerous and potentially fatal substance, (2) employees in the blasting industry did not know about health hazards caused by its use and the need to properly protect against them, (3) industry employers did know but "neglected safety *despite* their knowledge," ___ S.W.3d at ___, (4) the burden on Humble to provide an adequate warning on 100-pound bags of silica flint was "inconsequential or nonexistent," *id.* at ___, and (5) "Gomez would have escaped injury had Humble's bags borne an adequate warning label." *Id*. at ___. Despite these compelling and undisputed facts, the Court concludes that, as a matter of law, Humble had no duty to warn potential users of its product's dangers if it can demonstrate that, industry-wide, (1) some/most/all (it's unclear from the Court's

opinion) operators used bulk-supplied rather than bagged flint, (2) any warning given would not have reached some/most/all (it's unclear) blasting workers, and/or (3) some/most/all (it's unclear) blasting workers would have disregarded the warning.

Conflating duty and causation, and combining select elements of different exceptions to a product supplier's general duty to warn, the Court concludes that this case should be retried to allow Humble to prove that it owed no duty to workers like Raymond Gomez. If I were Humble, I would surely appreciate the second chance – but I wouldn't have a clue what to do. *See Golden Eagle Archery, Inc. v. Jackson*, 116 S.W.3d 757, 776 (Tex. 2003) (O'NEILL, J., concurring). For example, is proof that two out of four employees working around silica flint would disregard an adequate warning sufficient to negate the general duty to warn? Does the relevant inquiry concern only abrasive blasters, or all employees who work in blasting facilities and are exposed to silica dust? If only thirty-five percent of blasting businesses provide safe working conditions, is the duty to warn discharged? If only twenty percent of the silica flint used in the industry is supplied in bags, are bag-suppliers relieved of a duty to warn? Is the "industry" to which the Court refers national, state or regional? Not to mention the inherent difficulty of obtaining and presenting the type of fact-intensive proof that the Court describes, the Court's analysis raises these and myriad other questions that will likely prove to be problematic, at best, if not unanswerable.

The Court professes to find support for its approach in the Restatement (Second) of Torts, but the Restatement factors clearly compel the opposite result. The Court's improper application of the sophisticated-user doctrine in this case establishes a dangerous precedent that severely

undermines worker safety. While I agree that the sophisticated-user doctrine has merit and should apply in appropriate circumstances, this is not one of them. Accordingly, I dissent.

I

In *Alm v. Aluminum Co. of America*, we discussed several fundamental principles that guide our analysis in cases involving a manufacturer's duty to warn users of product dangers. 717 S.W.2d 588 (Tex. 1986). The Court subverts that analysis by ignoring its fundamental premise: a product manufacturer has a duty to inform users of potential hazards associated with the product. *Id*. at 591. Exceptions to this general rule do exist. We recognized in *Alm* that a manufacturer may depend on an intermediary to communicate a warning to the ultimate user in certain situations. *Id*. But the mere presence of an intermediary does not excuse the manufacturer from warning those whom it should reasonably expect to be endangered by its product's use. *Id*. "The issue in every case is whether the original manufacturer has a reasonable assurance that its warning will reach those endangered by the use of its product." *Id*. (citations omitted).

In *Alm*, these principles helped frame our discussion of two specific exceptions to the general rule that a product manufacturer has a duty to warn users. *Id*. at 591-92. One, the so-called "bulk-supplier" exception, recognizes the difficulties inherent in warning ultimate consumers of possible dangers when a manufacturer supplies a product in bulk with no package of its own on which to place warnings. *Id*. at 592. We recognized that, in some circumstances, a supplier could depend on an intermediary to communicate a warning to the ultimate user. *Id*. at 591. We analogized Alcoa, the designer and manufacturer of a capping system for soft-drink bottles, to a bulk supplier because it "ha[d] no package of its own on which to place a warning and no control, except by contractual

requirements, over the final package labeling which reaches consumers." *Id*. at 592. Thus, it was difficult for Alcoa to directly warn consumers of the hazard of bottle cap blow off. *Id*. We stated that Alcoa "should be able to satisfy its duty to warn consumers by proving that its intermediary was adequately trained and warned, familiar with the propensities of the product, and capable of passing on a warning." *Id*. But we also warned that if Alcoa failed to adequately warn and train the purchaser of its product, or if the purchaser was incapable of passing on the received warning, "Alcoa would not have discharged its duty to the ultimate consumer." *Id*. The adequacy of Alcoa's warning to its intermediary, we stated, was a question of fact for the jury. *Id*.

We also recognized cases that had applied the learned-intermediary doctrine. *Id*. at 591 (citing *Cooper v. Bowser*, 610 S.W.2d 825, 830-31 (Tex. Civ. App.–Tyler 1980, no writ), and *Gravis v. Parke-Davis and Co.*, 502 S.W.2d 863, 870 (Tex. Civ. App.–Corpus Christi 1973, writ ref'd n.r.e.)). Under that doctrine, "when a drug manufacturer properly warns a prescribing physician of the dangerous propensities of its product, the manufacturer is excused from warning each patient who receives the drug." *Id*. However, we warned that "even in these circumstances, when the warning to the intermediary is inadequate or misleading, the manufacturer remains liable for injuries sustained by the ultimate user." *Id*. at 592 (citing *Bristol-Myers Co. v. Gonzales*, 561 S.W.2d 801 (Tex. 1978), and *Crocker v. Winthrop Labs., Div. of Sterling Drug, Inc.*, 514 S.W.2d 429 (Tex. 1974)).

In the past, then, when the Court has seen fit to recognize exceptions to the general rule that manufacturers have a duty to warn potential users of dangers involved in its product's use, those exceptions have been narrowly tailored to situations where (1) the manufacturer would have

difficulty in providing a warning itself, and (2) "its intermediary was adequately trained and warned, familiar with the propensities of the product, and capable of passing on a warning." *Id*.

The sophisticated-user exception has been recognized as being similar in nature to both the bulk-supplier and learned-intermediary exceptions, with all three doctrines finding support in the Restatement (Second) of Torts. *See In re Silicone Gel Breast Implants Prods. Liab. Litig.*, 887 F. Supp. 1463, 1466-67 (N.D. Ala. 1995); *Whitehead v. The Dycho Co*., 775 S.W.2d 593, 597 (Tenn. 1989); Ausness, *Learned Intermediaries and Sophisticated Users: Encouraging the Use of Intermediaries to Transmit Product Safety Information*, 46 SYRACUSE L. REV. 1185, 1195, 1216-17 (1996). In applying the sophisticated-user doctrine for the first time, one would expect the Court to recognize that the exception is limited in scope, much like the bulk-supplier and learned-intermediary doctrines. As applied by the Court today, however, the sophisticated-user exception swallows the rule, absolving manufacturers of the duty to warn even when the product is admittedly dangerous and the manufacturer could easily provide an effective warning.

II

The Court goes out of its way to excuse Humble's failure to adequately advise potential users of its product's dangers, despite the fact that Humble had no difficulty placing a warning on its bags, provided bad information to Spincote in its Technical Fact Sheet, and sold to a purchaser that the record demonstrates did not fully appreciate the dangers involved in the product's use. This reasoning is directly contrary to the principles we recognized in *Alm* and the factors described in section 388 of the Restatement, which the Court purports to follow. Correctly applying our own precedent and the Restatement factors to the circumstances presented in this case leads to only one

inescapable conclusion – that Humble is not entitled to the sophisticated-user doctrine's protections. *See* RESTATEMENT (SECOND) OF TORTS § 388 cmt. n (1965).

The Restatement articulates several factors to be weighed in deciding whether a manufacturer may invoke the sophisticated-user doctrine. Those factors are designed to strike a careful balance between promoting worker safety and protecting responsible manufacturers. They include:

> (1) the dangerous condition of the product; (2) the purpose for which the product is used; (3) the form of any warnings given; (4) the reliability of the third party as a conduit of necessary information about the product; (5) the magnitude of the risk involved; and (6) the burdens imposed on the [supplier] by requiring that [it] directly warn all users.

See, e.g., *Willis v. Raymark Indus., Inc.*, 905 F.2d 793, 796-97 (4th Cir. 1990); *Smith v. Walter C. Best, Inc.*, 927 F.2d 736, 739-40 (3d Cir. 1990); *Eagle-Picher Indus., Inc. v. Balbos*, 604 A.2d 445, 464 (Md. 1992). Each of these factors weighs powerfully against applying the sophisticated-user doctrine in this case.

A. The dangerous condition of the product/the purpose for which the product is used

Although silica flint is not dangerous when delivered in bags, the only purpose for which the flint is used – sandblasting – renders it highly dangerous. Without specific safety controls, the risk of inhaling silica dust is extremely high. Consistent exposure to silica dust will likely lead to silicosis, a potentially fatal disease. These factors weigh against applying the sophisticated-user doctrine in this case.

B. The form of any warnings given

The jury found, and Humble does not contest, that the warning Humble placed on its bags during most of Gomez's sandblasting career was inadequate. Beginning in 1993, before Gomez stopped working as a sandblaster in 1994, Humble placed on its bags a much clearer warning that highlighted the dangers of inhaling silica dust. The information in the newer warning was available before Gomez ever worked at Spincote. The form of the later warning was no different than the earlier one; only its substance differed. This factor weighs against application of the sophisticated-user doctrine.

C. The magnitude of the risk involved

The dangers silica dust poses to workers like Raymond Gomez cannot be overstated. The silica that Humble sold was intended for sandblasting. Silica is extremely dangerous as a sandblasting agent; the dust becomes so fine that it cannot be seen with the naked eye. If reused, as Humble recommended, the product breaks down further and becomes even more dangerous. Inhalation of this fine dust can lead to silicosis, an incurable disease that permanently scars the lungs and reduces the body's ability to take in air. Once inhaled, the dust cannot be removed. Individuals with silicosis face not only limited occupational prospects, but also a significantly shortened life span. The grave health risks posed by silica dust weigh against relieving Humble of the duty to warn likely users of the dangers inherent in silica's use.

D. The burdens imposed on the supplier by requiring that all users be directly warned

Requiring Humble to place an adequate warning on its 100-pound bags of silica flint would not be burdensome; indeed, Humble was already placing a warning on its bags in 1983 and has

continued to do so. That more information was necessary to make the warning adequate does not make it burdensome. The much more thorough warning that Humble later placed on its bags is slightly longer than the original warning and considerably more informative, requiring nothing more to produce than additional ink.

The Court acknowledges that the burden on a supplier of bagged flint to warn "is either inconsequential or nonexistent," but expresses concern that the warning might not actually reach blasting workers and might be ineffectual if it did. ___ S.W.3d at ___. But application of this factor does not turn on the burden a manufacturer would face if it were required to warn every possible party affected by the product. Comment l to section 388 of the Restatement (Second) of Torts makes clear that "[t]he supplier's duty is to exercise *reasonable* care to inform those for whose use the article is supplied of dangers which are peculiarly within his knowledge." RESTATEMENT (SECOND) OF TORTS § 388 cmt. l (1965) (emphasis added). If the burden this factor contemplates was to ensure that warnings would be read by every possible person using the product, as the Court posits, suppliers would routinely be relieved of any duty to place warnings on packaged goods. While Humble might be able to argue under different circumstances that its warning would not likely reach most users, the facts here belie any such concern. In this case, Gomez routinely handled Humble's bags and actually read Humble's inadequate warning. And Gomez was exactly the type of worker who would be expected to handle Humble's product and see its warning. Spincote even requested that Humble include a Spanish version of the warning placed on its bags, indicating that Spincote believed the warning would reach its employees and that they would heed it. Clearly, this factor weighs against applying the sophisticated-user doctrine in this case.

E. Reliability of the third party as a conduit of necessary information

The Court proceeds from the premise that the sandblasting industry has known the dangers involved in silica's use since the early 1930s. While this may be generally true, much of the evidence regarding industry knowledge indicates that the extent of the danger was not widely appreciated. Ken Gray, vice president and head of safety at Spincote, regularly walked through the blast house without respiratory protection, exposing himself to fine silica dust. Gray testified that he initially believed that silica was a "nuisance dust" and was continually learning about the dangers of silica. He had not even heard the term "silicosis" until 1986, when a former employee contracted the disease. Gray also acknowledged that when he arrived at Spincote in 1981, the danger of silica was not fully understood.

Other testimony revealed significant safety problems in the decade prior to Gomez's employment at Spincote. The former president of a different sandblasting company testified that overexposure to sand was "absolutely widespread" during the 1970s due to a lack of appreciation for the dangers silica posed. Studies of the sandblasting industry commissioned by the National Institute for Occupational Safety and Health during the early 1970s showed that there was "very little knowledge, especially in the medium to smaller size companies on what kind of respiratory equipment should be used and how it should be used." Another study indicated "that the persons responsible for selecting abrasive blasting respiratory . . . equipment are none too informed nor interested in the subject. Their concern is with abrasive blasting per se and not with safety measures." While these studies predate Gomez's tenure at Spincote, they demonstrate that even though the dangers of silica had been documented some forty years earlier, the sandblasting industry

still did not fully appreciate the dangers that silica dust created. If "[t]he average firm safety man . . . seems unaware of the problems of respirable dust," ___ S.W.3d at ___, as the Court recites, how can it be conclusively presumed that the "industry" knew?

The Court's citation to other cases involving sophisticated users of silica flint is unpersuasive. Those cases involved *bulk* silica shipments to foundry facilities. *Bergfeld v. Unimin Corp.*, 319 F.3d 350 (8th Cir. 2003); *Smith*, 927 F.2d at 738; *Goodbar v. Whitehead Bros.*, 591 F. Supp. 552 (W.D. Va. 1984). In *Goodbar*, the court found that the intermediary foundry possessed extensive knowledge of the dangers of silica. *Goodbar*, 591 F. Supp. at 562. The foundry's vice president had been a member of the American Foundrymen's Society, which had discussed problems with dust collection in the foundry setting and passed along information about the dangers of silica to other members. *Id*. The court noted that, as early as the 1930s, many foundries had begun silicosis control programs, which included medical reviews, information distribution, x-rays of high-risk employees, and monitoring of silica dust concentrations. *Id*. Finally, the court cited a health study done at the foundry that demonstrated a "full comprehension" of the dangers of silica dust. *Id*. at 563. *Bergfeld* and *Smith* involved similar facts. *Bergfeld*, 319 F.3d at 354 ("Bergfeld concedes that Deere possessed the kind of generalized industry knowledge described in *Goodbar* and *Smith*."); *Smith*, 927 F.2d at 740 n.3 ("*Goodbar* involved facts virtually identical to those alleged here."). Nothing in the record suggests that Spincote's knowledge, or the knowledge of the sandblasting industry generally, was even remotely like the knowledge that the intermediary foundries in the cited cases possessed. To the contrary, the record in this case suggests that the industry as a whole has been more concerned with product utility than worker safety. Even

Humble's counsel acknowledged during oral argument that the industry had a powerful disincentive to adequately warn because a proper warning might lead "all abrasive blasting workers to quit their jobs."

In addition, a central focus of the sophisticated-user doctrine is the reasonableness of the supplier's reliance on its intermediary's knowledge. Humble took no steps to determine Spincote's level of knowledge concerning silica's dangers. Instead, Humble sent Spincote a Technical Fact Sheet and a Material Safety Data Sheet that contained inaccurate and misleading information about silica flint and the dangers associated with its use. The Data Sheet stated that respiratory disease could result from years of exposure to silica, when in fact silicosis can begin after a few months of exposure. The Data Sheet also recommended using air-fed hoods as a means of eye protection, even though the hoods are necessary to keep silica dust out of workers' lungs. Finally, the Fact Sheet recommended reusing silica flint without noting that reuse made the product more dangerous by creating finer silica dust particles.

The Court brushes aside concerns about Humble's misinformation, concluding that objective industry-wide knowledge of silica's dangers renders the inadequacies of Humble's warning immaterial. But under the Restatement, Humble's failure to provide accurate information to Spincote weighs against a determination that Humble was reasonable in relying on Spincote as a knowledgeable user of silica flint. *See Balbos*, 604 A.2d at 464 ("Under the Restatement view a court focuses on the conduct of the *supplier* of the dangerous product, not on the conduct of the intermediary."). The Court gives suppliers the benefit of the doubt, even though the Restatement imposes a higher degree of responsibility:

> [I]t may be improper to . . . trust the conveyance of the necessary information of the actual character of a highly dangerous article to a third person of whose character [the supplier] knows nothing. It may well be that [the supplier] should take the risk that this information may not be communicated, unless he exercises reasonable care to ascertain the character of the third person, or unless from previous experience with him or from the excellence of his reputation the supplier has positive reason to believe that he is careful. In addition to this, if the danger involved in the ignorant use of a particular chattel is very great, it may be that the supplier does not exercise reasonable care in entrusting the communication of the necessary information even to a person whom he has good reason to believe to be careful.

RESTATEMENT (SECOND) OF TORTS § 388 cmt. n (1965).

It escapes me how a supplier's reliance on an intermediary can be reasonable when, as the Court states, "the record establishes that [operators] routinely neglected safety measures and did not warn employees." ___ S.W.3d at ___. The Court's contorted reasoning goes something like this: employers should protect their employees (but clearly don't), OSHA regulations require them to (though the regulations are pervasively ignored), therefore suppliers should be able to (but actually can't) rely on employers to adequately warn of dangers inherent in the product's use. I simply cannot conclude that Humble reasonably relied on Spincote's knowledge, or on the industry's knowledge in general, to warn those endangered by its product, particularly when the information that Humble provided was inaccurate.

The Court's opinion is also troubling in other respects. For example, the Court's emphasis on the likelihood of a warning reaching end users imports causation into the duty analysis. And what role, if any, the common-knowledge doctrine plays in the proposed analysis is confusing. The Court likens employers' general knowledge of silica's risks to the common knowledge that drinking alcohol can lead to intoxication, *Joseph E. Seagram & Sons, Inc. v. McGuire*, 814 S.W.2d 385, 388

(Tex. 1991), smoking cigarettes can cause lung cancer, *Am. Tobacco Co. v. Grinnell*, 951 S.W.2d 420, 428 (Tex. 1997), and standing on an open scaffolding can result in a fall, *Sauder Custom Fabrication, Inc. v. Boyd*, 967 S.W.2d 349, 351 (Tex. 1998), each widely known or obvious dangers that have excused product suppliers from warning in other contexts. But the record demonstrates that common knowledge of the potentially fatal effects of breathing silica dust is far different. If the industry's knowledge of silica's dangers was actually as specific and well-developed as the Court recites, then employers like Spincote should be truly alarmed. They will likely face gross-negligence liability for failing to adequately protect their workers and lose the protection from punitive damages that the Workers Compensation Act affords. *See* TEX. LAB. CODE § 408.001(b). I do not believe that the magnitude of the risk that silica dust poses is "'so patently obvious and so well known to the community generally, that there can be no question or dispute concerning [its] existence.'" *Grinnell*, 951 S.W.2d at 427 (quoting *Brune v. Brown Forman Corp.*, 758 S.W.2d 827, 830-31 (Tex. App.–Corpus Christi 1988, writ denied)).

My sense is that the Court's abandonment of fundamental products-liability principles is an attempt to judicially cabin widespread and oft-abused mass-tort claims that have arisen from latent workplace injuries caused by substances like silica and asbestos. The systemic impact of cases involving exposure to asbestos, for example, has created what has been termed "an asbestos-litigation crisis":

> [This] is a tale of danger known in the 1930s, exposure inflicted upon millions of Americans in the 1940s and 1950s, injuries that began to take their toll in the 1960s, and a flood of lawsuits beginning in the 1970s. On the basis of past and current filing data, and because of a latency period that may last as long as 40 years for some asbestos related diseases, a continuing stream of claims can be expected. The final

> toll of asbestos related injuries is unknown. Predictions have been made of 200,000 asbestos disease deaths before the year 2000 and as many as 265,000 by the year 2015.
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> The most objectionable aspects of asbestos litigation can be briefly summarized: dockets in both federal and state courts continue to grow; long delays are routine; trials are too long; the same issues are litigated over and over; transaction costs exceed the victims' recovery by nearly two to one; exhaustion of assets threatens and distorts the process; and future claimants may lose altogether.

Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 598 (1997) (alteration in original) (quoting REPORT OF THE JUDICIAL CONFERENCE AD HOC COMMITTEE ON ASBESTOS LITIGATION 2-3 (Mar. 1991)); *see also Ortiz v. Fibreboard*, 527 U.S. 815, 822 (1999); HOUSE RESEARCH ORG., ASBESTOS LITIGATION: AN INACTIVE DOCKET PROPOSAL (Apr. 2, 2004), *available at* http://www.capitol.state.tx.us/hrofr/focus/asbestos78-16.pdf (accessed on Sept. 16, 2004). But as the United States Supreme Court has recognized, the solution to these problems is legislative, not judicial. *See Amchem*, 521 U.S. at 598. If the Court were to confine itself to its proper role, it would avoid the distortion of jurisprudence that will flow from today's decision.

III

Breathtaking in scope, the Court's decision today ventures where no court has gone before, adopting confusing and legally immaterial evidentiary proof requirements to re-examine whether a duty that we have long recognized exists in the first instance. Because the Court has misinterpreted and misapplied the sophisticated-user doctrine in this case, I respectfully dissent.

Harriet O'Neill
Justice

OPINION DELIVERED: September 17, 2004