IN THE SUPREME COURT OF MISSISSIPPI

NO. 2010-CA-00924-SCT

MISSISSIPPI VALLEY SILICA COMPANY, INC.

v.

RUTHA EASTMAN AS ADMINISTRATRIX OF THE ESTATE OF ROBERT EASTMAN, II

DATE OF JUDGMENT:	04/13/2010
TRIAL JUDGE:	HON. ISADORE W. PATRICK, JR.
COURT FROM WHICH APPEALED:	WARREN COUNTY CIRCUIT COURT
ATTORNEYS FOR APPELLANT:	CHARLES G. COPELAND LAURIE R. WILLIAMS ANDY LOWRY JOHN D. COSMICH MICHAEL D. SIMMONS LAKEYSHA GREER ISAAC
ATTORNEYS FOR APPELLEE:	JOHN T. GIVENS TIMOTHY W. PORTER PATRICK C. MALOUF R. ALLEN SMITH, JR.
NATURE OF THE CASE:	CIVIL - PERSONAL INJURY
DISPOSITION:	REVERSED AND REMANDED - 07/19/2012
MOTION FOR REHEARING FILED:	
MANDATE ISSUED:	

BEFORE DICKINSON, P.J., RANDOLPH AND PIERCE, JJ.

DICKINSON, PRESIDING JUSTICE, FOR THE COURT:

¶1. In this lawsuit, Robert Eastman claims Mississippi Valley Silica Company, Inc. ("MVS") – the company that supplied sand to his employer, Marathon LeTourneau – failed to warn him of the dangers posed by sandblasting. At trial, MVS requested a sophisticated-user/learned-intermediary jury instruction. Although the requested instruction was an incomplete statement of the law, the trial judge refused the instruction for an erroneous

reason and failed to instruct the jury properly on the submitted defense. The jury returned a verdict for Eastman, and MVS timely appealed, raising eight issues, including the trial judge's refusal to grant the sophisticated-user jury instruction. We find this issue dispositive, and we reverse and remand for a new trial.

FACTS

¶2. For twenty-eight years, Robert Eastman worked as a sandblaster at LeTourneau, a shipbuilder in Vicksburg, Mississippi. LeTourneau supplied silica sand it purchased from MVS to Eastman, who used it daily. Toward the end of his career, Eastman was diagnosed with lung disease and silicosis.

¶3. Eastman sued MVS under Mississippi's products-liability statute,[1] alleging that MVS' product was defective for failure to contain adequate warnings or instructions.[2] MVS answered, asserting many affirmative defenses, including the provisions of Section 11-1-63 and the sophisticated-user doctrine.

¶4. At trial, Dr. Edward Karnes testified that in 1938, and again in 1959, national safety standards were published that required sandblasters to wear air-fed hoods. Dr. Ronald Gots testified that the dangers of sandblasting were known and published in the 1920s and 30s, and that legislation was passed in 1959 – four years before Eastman began sandblasting – that required sandblasters in certain professions to wear air-fed hoods. Dr. Gots concluded that,

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[1]Miss. Code Ann. § 11-1-63 (Rev. 2002).

[2]Miss. Code Ann. § 11-1-63 (a)(i)2 (Rev. 2002).

given the information provided to Le Tourneau, it "had to know" of the dangers posed by sandblasting. Additionally, LeTourneau's former president testified he had known since 1972 that sandblasting may cause silicosis.

¶5. MVS requested a sophisticated-user jury instruction, which the trial judge refused for two reasons. First, he stated the term "sophisticated user" was not defined and would "confuse" the jury. Second, he could recall no direct testimony that Eastman's employer knew or should have known of the dangers associated with sandblasting.

¶6. The jury found MVS sixty percent at fault, and awarded Eastman $3 million in punitive damages; $1.6 million in economic damages; and $3 million in noneconomic damages, for a total award of $7.6 million. But because MVS was insolvent, the trial judge reduced the punitive-damages award to zero. Then, after applying Mississippi's statutory damages cap,[3] he reduced the noneconomic damages to $1 million. After the jury rendered the verdict, but before the trial judge entered final judgment, Eastman died. Later, the trial judge entered a final judgment for Eastman, the deceased.

¶7. On appeal, MVS raises the following eight issues: (1) Eastman's estate was not properly substituted; (2) the trial judge erred by refusing to give MVS' sophisticated-user jury instruction; (3) the verdict form did not allow the jury to allocate fault under Mississippi Code Section 85-5-7; (4) the fault allocated to MVS was against the overwhelming weight of the evidence; (5) because Eastman had died, damages for future medical costs and future

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[3] Miss. Code Ann. § 11-1-60(2) (Supp. 2011).

pain and suffering should not have been awarded; (6) the trial judge erred by allocating fault to MVS before applying the damages cap; (7) the issues raised amounted to cumulative error; and (8) a remittitur was proper. MVS also moved to strike the brief Eastman (the deceased) filed in this Court, arguing that, because Eastman's estate has not been substituted, the party who had filed the brief did not exist.

¶8. We find that the circuit judge abused his discretion by denying, rather than reforming, MVS' proposed "sophisticated-user" instruction. Because we reverse and remand for a new trial, we decline to address the remaining issues.

ANALYSIS

¶9. The issue we find dispositive is the trial judge's failure to instruct the jury on the sophisticated-user defense. Because our standard of review of that issue is critical to our decision, we first turn to our considerable precedent that addresses a trial judge's ultimate responsibility to instruct the jury properly.

> **When a party submits an improperly worded jury instruction that raises a central issue in the case, and that is supported by credible evidence, it is the trial judge's ultimate responsibility to make sure the instruction is reformed properly.**

¶10. Several of our cases provide familiar principles of law concerning jury instructions. When read together, the instructions must inform the jury sufficiently of the applicable law.[4] A party is entitled to have instructions given that are supported by sufficient, credible

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[4]***Barrett v. Parker***, 757 So. 2d 182,187 (Miss. 2000) (quoting ***Starcher v. Byrne***, 687 So. 2d 737, 742 (Miss. 1997)).

evidence[5] and that accurately state the law of the case.[6] Defendants are entitled to instructions presenting their theory of the case, and we have reversed judgments where circuit judges have "eviscerated the defense . . . by denying the defendants' theory instructions . . . which compromised the defendants' right to a fair and impartial trial.[7]

¶11. But another principle, ingrained in our law, places upon the trial judge the ultimate duty to instruct the jury properly. Our precedent on the issue was addressed succinctly in ***Byrd v. McGill***, in which the trial judge refused to give a flawed jury instruction on the law of negligence per se.[8] This Court reversed, stating:

> The result of the refusal of instruction P-6, coupled with the failure of anyone to substitute a more suitable instruction, was that the jury entered their deliberations unaware that there was such a thing as negligence per se. Much less, did they know that it had any bearing on the case.[9]

¶12. In reaching its conclusion, the ***McGill*** Court reviewed several prior decisions, including ***Newell v. State***, which stated:

> On occasion juries have been left uninstructed due to the oversight, omission or ineptness of attorneys. . . . Regardless of the reason, the fact remains that

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[5]***Adkins v. Sanders***, 871 So. 2d 732 (Miss. 2004); ***Nunnally v. R.J. Reynolds Tobacco Co.***, 869 So. 2d 373 (Miss. 2004) (a trial judge may refuse an instruction if it lacks a proper foundation in evidence); ***Reese v. Summers***, 792 So. 2d 992 (Miss. 2001) (both parties have the right to embody their theories of the case in the jury instructions provided there is testimony to support it).

[6]***Richardson v. Norfolk Southern Ry. Co.***, 923 So. 2d 1002, 1010 (Miss. 2006).

[7]***Blake v. Clein***, 903 So. 2d 710, 719-20 (Miss. 2005).

[8] ***Byrd v. McGill***, 478 So. 2d 302, 303 (Miss. 1985).

[9] ***Id***. at 305.

> juries are at times left groping blindly, though honestly, for the law of the case to aid them in arriving at a verdict.[10]

¶13. The Court then turned to ***Thomas v. State***, in which this Court

> emphasized that where an instruction relates to a central feature of the case and where there is no other instruction before the court which treats the matter, it is error to refuse an instruction on the grounds that "it has been inartfully drawn."[11]

¶14. Finally, the ***McGill*** Court, drawing on the wisdom of ***Harper v. State***, stated "unequivocally" that

> where under the evidence a party is entitled to have the jury instructed regarding a particular issue and where the party requests an instruction which for whatever reason is inadequate in form or content, the trial judge has the responsibility either to reform and correct the proffered instruction himself or to advise counsel on the record of the perceived deficiencies therein and to afford counsel a reasonable opportunity to prepare a new corrected instruction. When the trial judge fails in this duty and where the proffered instruction relates to a central issue in the case which is not covered by any other instruction given to the jury, we will reverse.[12]

¶15. The dissent incorrectly concludes that our opinion today "unwisely imposes a duty upon the trial court to reform the jury instruction to make it conform with Mississippi law." But that duty was imposed long ago by this Court's majorities in ***McGill***, ***Newell***, ***Thomas***,

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[10] ***Newell v. State***, 308 So. 2d 71, 74 (Miss. 1975).

[11] ***McGill***, 478 So. 2d at 305 (quoting ***Thomas v. State***, 278 So. 2d 469, 472 (Miss. 1973)); *See also* ***Lee v. State***, 469 So. 2d 1225 (Miss. 1985); ***Rainer v. State***, 473 So. 2d 172 (Miss. 1985); ***Mease v. State***, 539 So. 2d 1324, 1335 (Miss. 1989).

[12] ***McGill***, 478 So. 2d at 305 (Miss. 1985) (citing ***Harper v. State***, 478 So. 2d 1017, 1018 (Miss. 1985)).

and ***Harper*** and applied as recently in 2001 in ***McKee v. State***[13] – and none of these cases has been overruled, modified, or abrogated. In fairness, the dissent is less about whether we are today imposing a new duty, and more about the dissent's view that we should overrule ***McGill***, ***Newell***, ***Thomas***, ***Harper*** and their considerable progeny[14] on this issue. We decline to do so.

¶16. We do agree with the dissent that a trial court may – and, in fact, should – refuse to give jury instructions that incorrectly state the law. But that does not diminish the principle that, where the point of law is a central issue not covered elsewhere in the instructions, the ultimate responsibility to instruct the jury properly falls squarely upon the trial judge, who

> has the responsibility either to reform and correct the proffered instruction himself or to advise counsel on the record of the perceived deficiencies therein and to afford counsel a reasonable opportunity to prepare a new corrected instruction.[15]

¶17. So, today, we are not imposing a new duty on trial judges, but rather, we are merely following nearly a half-century of precedent that clearly defines the trial judge's duty. And

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[13] ***McKee v. State***, 791 So. 2d 804, 809 (Miss. 2001) (quoting ***Harper***, 478 So. 2d at 1018).

[14] ***Wilson v. State***, 639 So. 2d 1326, 1330 (Miss. 1994); ***Simpson v. State***, 553 So. 2d 37, 39 (Miss. 1989); ***Mease v. State***, 539 So. 2d 1324, 1335 (Miss. 1989) (noting the rule applies in civil cases as well); ***Peterson v. State***, 518 So. 2d 632, 637-38 (Miss. 1987); ***Clark v. Whiten***, 508 So. 2d 1105, 1109 n.2 (Miss. 1987); ***Guilbeau v. State***, 502 So. 2d 639, 642 (Miss. 1987); ***Harper v. State***, 478 So. 2d at 1018; ***Lee v. State***, 469 So. 2d 1225, 1232 (Miss. 1985); ***McGill***, 478 So. 2d at 305; ***Rainer v. State***, 473 So. 2d at 174; ***Newell,*** 308 So. 2d at 74-5; ***Thomas v. State***, 278 So. 2d 472-73.

[15] ***McGill***, 478 So. 2d at 305 (*citing* ***Harper***, 478 So. 2d at 1018).

according to that precedent, where a trial judge fails in that duty, "we will reverse."[16] Indeed, our own Court of Appeals has recognized and applied the rule we follow today. In ***Cleveland v. State*** – joined fully by members of the dissent when they served on that court– the Court of Appeals stated that

> the law of this State is quite clear that the trial court may not refuse to instruct the jury on a properly raised defense strictly because the requested instruction is not properly drafted. Rather, it is the duty of the court in that situation to amend the instruction to conform to the applicable law.[17]

¶18. As they did in ***Cleveland***, the members of the dissent continue now to recognize the trial judge's duty to reform inaccurate instructions in criminal cases, but they hold the view that there should be no such duty in civil cases. We cannot agree that a trial judge's duty to instruct the jury properly may change from case to case, whether civil or criminal.

¶19. Our opinion today should not be read as requiring trial judges to rummage through the law books to discover what jury instructions might apply to the case. In ***Conner v. State***, even though "[t]he defense tendered no instruction defining simple murder,"[18] it argued on appeal that the trial court

> was duty-bound not only to revise technically flawed instructions but also to advise defense counsel that a definitional instruction would also have to be submitted and then provide an opportunity to prepare such an instruction.[19]

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[16] ***McGill***, 478 So. 2d at 305 (citing ***Harper***, 478 So. 2d at 1018).

[17] ***Cleveland v. State***, 801 So. 2d 812, 815 (Miss. Ct. App. 2001).

[18] ***Conner v. State***, 632 So. 2d 1239, 1254 (Miss. 1993).

[19] ***Id***.

¶20. Rejecting the argument, this Court stated that "[t]he case law does not impose upon a trial court a duty to instruct the jury *sua sponte*; nor is a court required to suggest instructions in addition to those which the parties tender."[20] Our opinion today is not in conflict with ***Conner***.

¶21. The rule is as simple as it is appropriate: When a party submits a jury instruction on an important issue not covered in the other instructions, it is the trial court's ultimate duty to instruct the jury properly. Having again set forth the rule and the law applicable to the trial judge's duty with respect to jury instructions, we now turn to the case before us.

MVS properly raised the sophisticated-user defense, but it submitted an inaccurate instruction that should have been reformed by the trial judge.

¶22. Mississippi recognizes both a statutory and the common-law "sophisticated-user" defense. We will address both.

"Sophisticated-user doctrine" at common law

¶23. First, it is worth noting that courts and litigants often use the terms "learned intermediary" and "sophisticated user" interchangeably. According to one commentator:

> The sophisticated user defense relieves a seller of liability for failing to warn a subsequent user of dangers or defects of which the user is already aware. The defense is applied in two situations: (1) where the injured ultimate user is aware of the hazards presented by the product; (2) where an intermediate purchaser is knowledgeable, but the injured end user is ignorant.[21]

[20] ***Id***.

[21] Kenneth M. Willner, *Failures to Warn and the Sophisticated User Defense*, 74 Va. L. Rev. 579, 587 (April 1988).

¶24. Although the latter situation is properly labeled the "learned-intermediary" defense, the context and facts of a particular case will dictate which label is appropriate, regardless of the label actually used. The commentator goes on to explain why the defense can relieve a manufacturer of liability:

> The common law sophisticated user defense developed in the context of industrial users and employer-employee relationships . . . . The relationship between employer and employee probably provided the basis for the defense. As a general rule, an employer has a duty to maintain a safe workplace for its employees, including maintenance of safe equipment and warning of any dangers present in the workplace.[22]

¶25. While the common-law defense is uniformly recognized, states have not always agreed on the correct application.[23] This Court addressed the common-law defense in ***Swan v. I.P., Inc.***,[24] in which a manufacturer supplied polyurethane foam to a contractor, who applied it to the roof of a school. A teacher sued the manufacturer and others, alleging the foam's fumes injured her. The trial court granted summary judgment to the manufacturer

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[22] ***Id***. at 592-93.

[23] *Compare* ***Goodbar v. Whitehead Bros***., 591 F. Supp. 552 (D.C. Va. 1984) (Under Virginia law, "if the danger related to the particular product is clearly known to the purchaser/employer, then there will be no obligation to warn placed upon the supplier."), *with* ***Hoffman v. Houghton Chem. Corp.***, 751 N.E.2d 848, 630 (Mass. 2001) (Under Massachusetts law, "the sophisticated user defense protects a supplier from liability for failure to warn when the end user knows or reasonably should know of a product's dangers."), *and* ***Gray v. Badger Mining Corp***., 676 N.W. 2d 268, 277-78 (Minn. 2004) (noting that the defense applies when either situation is met: "(1) the end user's employer already has a full range of knowledge of the dangers, equal to that of the supplier; or (2) the supplier makes the employer knowledgeable by providing adequate warnings and safety instructions to the employer.").

[24] ***Swan v. I.P., Inc.***, 613 So. 2d 846 (Miss. 1993).

> based on the "learned intermediary" defense to products liability actions which provides that a manufacturer's duty to warn may be discharged by providing information to a third person upon whom it can reasonably rely to communicate the information to the ultimate users of the product or those who will be exposed to its hazardous effects.[25]

¶26. This Court stated that the "learned-intermediary defense does not relieve the manufacturer of its duty to warn . . . unless the manufacturer's reliance on the intermediary is reasonable." And because material issues of fact existed as to that question, this Court reversed.[26]

¶27. We now turn to MVS' proposed instruction, which stated:

> If the purchaser of silica [LeTourneau] knew or should have known the dangers that may be associated with silica, then the purchaser is a sophisticated user, and a supplier [MVS] has no duty to warn of those dangers.

¶28. We find no merit in the trial judge's stated reason for refusing the instruction. Indeed, the instruction, itself, defined a sophisticated user (in the context of this case) as one who "knew or should have known the dangers that may be associated with silica." But even if the trial judge had been correct, that is, had the term not been defined, then the trial judge would have been in error for failing to define it for the jury.

¶29. We do find that the instruction was improperly worded, not for the reason stated by the trial judge, but because it failed to include the common-law, reasonable-reliance requirement announced in ***Swan***. And because the trial judge refused the instruction, rather

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[25] ***Id***. at 851 (citing ***Adams v. Union Carbide Corp.***, 737 F. 2d 1453, 1456 (6th Cir. 1984)); Note, *Failures to Warn and the Sophisticated User Defense*, 74 Va. L. Rev. 579 (1988).

[26] ***Swan***, 613 So. 2d at 856.

than reforming it as required by ***Newell***, ***Thomas***, ***Harper***, and ***McGill***, we must reverse and remand for a new trial.

"Sophisticated user" under Mississippi statute

¶30. A few months after this Court handed down ***Swan***, the Mississippi Legislature passed what has come to be known as Mississippi's products-liability statute.[27] While statutes often supersede the common law, the products-liability statute does not. It specifically provides: "Nothing in this section shall be construed to eliminate any common law defense to an action for damages caused by a product."[28]

¶31. One subsection of the products-liability statute codifies the sophisticated-user doctrine by stating in relevant part:

> In any action alleging that a product is defective pursuant to paragraph (a)(i)2 of this section [failure to contain adequate warnings or instructions], the manufacturer or seller shall not be liable if the danger posed by the product is known . . . to the ***user*** . . . of the product . . . .[29]

¶32. Unlike its common-law companion, the statutory defense includes no requirement of reasonable reliance. Instead, all that is required under the statute to shield a seller from liability is that the "user or consumer" knew of the dangers posed by the product. Both parties and the trial court took the position that LeTourneau was the user. In arguing against MVS' proffered sophisticated-user instruction, Eastman's counsel stated

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[27]Miss. Code Ann. § 11-1-63 (Rev. 2002).

[28] Miss. Code Ann. § 11-1-63(h).

[29]Miss. Code Ann. § 11-1-63(e) (emphasis added).

> that a sophisticated user is a legal term as defined under the learned intermediary doctrine, and there has been, as the court said, no testimony with respect to the learned intermediary doctrine and what Mississippi Valley may have done ***to apprise LeTourneau*** of the known hazards.

¶33. The trial judge rejected the instruction, in part, because he could not recall direct testimony that LeTourneau knew of the dangers of silica.

¶34. Section 11-1-63 does not define "user," and this Court has never addressed the issue. One reasonably could say that LeTourneau was the "user" because it ***used*** sand in its business. If so, MVS' proffered instruction was a correct statement of the law[30] and should have been given.

¶35. But one also reasonably could say that, because Eastman ***used*** the sand to do the sandblasting, he was the user. If so, the instruction was flawed and should have been reformed by the trial judge by striking the word "purchaser" and substituting the word "user." And to the extent the trial judge felt the term"sophisticated user" would confuse the jury, his remedy – rather than refusing the instruction – was to provide the jury with a definition sufficient in his judgment to remove the confusion; but he failed to do that here.

¶36. Because we must reverse under the common-law application of the defense; and because neither of the parties briefed or addressed the meaning of "user" as it is used in the statute, we decline to address it here.

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[30]Miss. Code Ann. § 11-1-63(e) (Rev. 2002).

CONCLUSION

¶37. MVS submitted a flawed jury instruction on the sophisticated-user defense, as recognized by Mississippi common law. The trial judge committed reversible error by refusing, rather than reforming, the jury instruction. We therefore reverse the judgment of the circuit court and remand the case for a new trial consistent with this opinion.

¶38. **REVERSED AND REMANDED.**

CARLSON, P.J., RANDOLPH, LAMAR AND PIERCE, JJ., CONCUR. WALLER, C.J., CONCURS IN RESULT ONLY WITH SEPARATE WRITTEN OPINION JOINED IN PART BY RANDOLPH, J. CHANDLER, J., DISSENTS WITH SEPARATE WRITTEN OPINION JOINED BY KITCHENS AND KING, JJ.

WALLER, CHIEF JUSTICE, CONCURRING IN RESULT ONLY:

¶39. I concur with the majority's decision to reverse and remand for a new trial based on the trial court's failure to instruct the jury on the sophisticated-user defense. The judge's stated reasons for refusing the instruction were: 1) that there was no testimony that Letourneau knew or should have known of the dangers associated with silica, and 2) the jury would be confused by the term "sophisticated user" because there was no testimony as to what that term meant. However, as the majority recognizes, Letourneau's former president testified that he knew that sandblasting may cause silicosis. Further, the instruction posed by MVS defined what a sophisticated user was. Accordingly, the judge erred in denying the instructions based on his stated reasons. Because of this error, I concur with the majority in reversing and remanding for a new trial. However, the error by the trial judge was in

refusing the instruction and not in failing to reform the instruction. Accordingly, I concur in result only.

RANDOLPH, J., JOINS THIS OPINION IN PART.

CHANDLER, JUSTICE, DISSENTING:

¶40. The majority rewards MVS' failure to discern the applicable law in Mississippi and to tender a jury instruction correctly stating that law. In accordance with long-established precedent governing jury instructions in civil cases, I would find that MVS' failure to tender a proper jury instruction is fatal to its argument. I respectfully dissent.

¶41. The sophisticated-user instruction proffered by MVS stated:

> If the purchaser of silica [LeTourneau] knew or should have known the dangers that may be associated with silica, then the purchaser is a sophisticated user, and a supplier [MVS] has no duty to warn of those dangers.

The majority argues that this "sophisticated-user" instruction was an attempt to assert the learned-intermediary defense, which this Court recognized in ***Swan v. I.P., Inc.***, 613 So. 2d 846 (Miss. 1993). In ***Swan***, this Court held that the learned-intermediary defense "provides that a manufacturer's duty to warn may be discharged by providing information to a third person upon whom it can reasonably rely to communicate the information to the ultimate users of the product or those who will be exposed to its hazardous effects." ***Swan***, 613 So. 2d at 851.

¶42. The majority's argument is flawed for two reasons. First, the jury instruction was not an attempt to assert the learned-intermediary defense articulated in ***Swan***. The jury instruction did not reference the learned-intermediary defense at all. Reasonable reliance is

an element of the learned-intermediary defense. ***Swan***, 613 So. 2d at 851. The jury instruction omitted that element. By omitting that element, the jury instruction did not invoke the learned-intermediary defense. I would find that the jury instruction was so flawed that it did not function as an attempt to assert the learned-intermediary defense.

¶43. Second, assuming, *arguendo*, that the jury instruction did invoke the learned-intermediary defense, the majority unwisely imposes a duty upon the trial court to reform the jury instruction to make it conform with Mississippi law. The proposition that the trial court must reform an inartfully drawn jury instruction on a central issue in the case not covered by any other instruction is well-established in criminal cases. In ***Byrd v. McGill***, 478 So. 2d 302, 305 (Miss. 1985), this Court imported that principle into the civil arena, stating that, while the "other cited cases arose from criminal cases, there is no good reason for countenancing the evils they condemn merely because they arose in a civil action." ***Id.*** In dissent, Judge Roy Noble Lee disagreed, stating, "I do not believe that the law of this state or decisions of this Court place the onus upon the trial judge to prepare litigants' cases for them." ***Id.*** (Lee, P.J., dissenting).

¶44. Despite ***Byrd***, in numerous, more recent, civil cases, this Court has adhered to the principle that the trial court will not be held in error for refusing a jury instruction that is an incorrect statement of the law. *See*, *e.g.*, ***Dooley v. Byrd***, 64 So. 3d 951, 962 (Miss. 2011); ***Utz v. Running & Rolling Trucking, Inc.***, 32 So. 3d 450, 474 (Miss. 2010); ***Inv. Res. Servs. v. Cato***, 15 So. 3d 412, 423 (Miss. 2009); ***Blake v. Clein***, 903 So. 2d 710, 720 (Miss. 2005); ***DeLaughter v. Lawrence County Hosp.***, 601 So. 2d 818, 823 (Miss. 1992); ***Gregg v. Four***

Squires, Ltd., 498 So. 2d 362, 364 (Miss. 1986). "While a party is entitled to jury instructions that present his theory of the case, this entitlement is limited; the trial court may refuse an instruction which incorrectly states the law, is covered fairly elsewhere in the instructions, or is without foundation in the evidence." ***Young v. Guild***, 7 So. 3d 251, 259 (Miss. 2009). This principle recognizes that the drafting of jury instructions by the parties is a vital part of the adversarial process, in which each party strategically seeks to have his view of the case placed before the jury. Viewed in that light, MVS' jury instruction omitted the element of reasonable reliance, because MVS did not want the jury to consider that element. Indeed, MVS does not argue on appeal that the trial court should have reformed the instruction, but continues to argue that the jury instruction was a correct statement of the law.

¶45. The rule announced by the majority today will place an enormous burden upon trial judges in this state. I use this case as an example. The majority finds that MVS' submission of its incorrect jury instruction triggered a duty for the trial court to reform the instruction. The majority holds that, because MVS did not identify the correct law, the trial court should have researched the issue, crafted a jury instruction with the correct language, and tendered it to MVS for approval. Such a process will be unduly burdensome for a trial judge in the midst of a lengthy civil trial. And this process subverts the adversarial nature of judicial proceedings by placing the onus on the trial court, rather than the parties, to craft the jury instructions.[31] Finally, the rule encourages a litigant to tender incorrect jury instructions in

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[31] The need for the trial court's heightened oversight of the jury instructions in criminal cases is understandable, because, there, the defendant's life or liberty is at stake.

the hope that, if the jury decides against him, he can demand a new trial on appeal, because the trial court should have reformed the instructions. I soundly reject the majority's finding that the trial court should have reformed MVS' jury instruction.

¶46. Moreover, even if MVS had tendered a jury instruction that conformed with the learned-intermediary defense announced in ***Swan***, the instruction should have been denied, because there was no evidence that MVS discharged its duty to warn "by providing information to a third person upon whom it c[ould have] reasonably rel[ied] to communicate the information to the ultimate users of the product or those who will be exposed to its hazardous effects." ***Swan***, 613 So. 2d at 851. "The learned intermediary defense does not relieve the manufacturer of its duty to warn, however, unless the manufacturer's reliance on the intermediary is reasonable." ***Id.*** at 856. In ***Swan***, this Court found that it was disputed whether the manufacturers sent any information or warnings to the intermediary. ***Id.*** Here, there was no showing that MVS relied on LeTourneau to communicate information to end users, or that any reliance on LeTourneau to do so would have been reasonable. Because there was no evidence that MVS provided information to a third party on whom it reasonably could rely to communicate the information to the end user, MVS did not discharge its duty to warn.[32] Therefore, MVS was not entitled to a jury instruction on the learned-intermediary defense.

[32] In its brief, MVS does not argue there was evidence of reasonable reliance; rather, it contends that its sophisticated-user instruction was a correct statement of the law.

¶47. I briefly discuss whether the jury instruction was a correct statement of the law under Mississippi Code Section 11-1-63(e), which states:

> In any action alleging that a product is defective pursuant to paragraph (a)(i)2 of this section, the manufacturer or seller shall not be liable if the danger posed by the product is known or is open and obvious to the *user* or *consumer* of the product, or should have been known or open and obvious to the *user* or *consumer* of the product, taking into account the characteristics of, and the ordinary knowledge common to, the persons who ordinarily use or consume the product.

Miss. Code Ann. § 11-1-63(e) (Rev. 2002). Again, MVS' proffered jury instruction stated: "[i]f the *purchaser* of silica [LeTourneau] knew or should have known the dangers that may be associated with silica, then the *purchaser* is a sophisticated user, and a supplier [MVS] has no duty to warn of those dangers." (Emphasis added.) The plain language of the statute refers to a "user or consumer" of the product, not a "purchaser." Thus, under the clear statutory language, the danger must be known or open and obvious to the user or consumer of the product before the defense applies. And in determining whether the danger posed by the product was known or open and obvious, the fact-finder must take into account the "characteristics of, and ordinary knowledge common to, the persons who ordinarily use or consume the product." Therefore, the knowledge of a third party who purchased the product used or consumed by the plaintiff is immaterial. The plain language of Section 11-1-63(e) indicates it was not crafted to shield the manufacturer from liability if the purchaser knew of the danger, but the actual "user or consumer" of the product had no knowledge of the danger and it was not open and obvious to that person. Rather, the statute clearly focuses on the knowledge of the actual "user or consumer" of the product. I would find the jury

instruction to be an improper statement of the law under Mississippi Code Section 11-1-63(e).

¶48. For these reasons, I respectfully dissent.

KITCHENS AND KING, JJ., JOIN THIS OPINION.