

RECEIVED, 06/06/2017 12:08:32 PM, Clerk, Supreme Court

APPENDIX C – 2

401.21 BURDEN OF PROOF ON MAIN CLAIM

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If the greater weight of the evidence does not support [one or more of] (claimant's) claim[s], your verdict should be for (defendant)(s) [on [that] [those] claim(s)].

[However, if the greater weight of the evidence supports [one or more of] (claimant's) claim[s], then your verdict should be for (claimant) and against (defendant) [on [that] [those] claim(s).]

[However, if the greater weight of the evidence supports (claimant's) claim against one [or] [both] [more] of the defendants, then you should decide and write on the verdict form the percentage of the total negligence of [both] [all] defendants that was attributable to ~~caused by~~ each of them.]

NOTE ON USE FOR 401.21

Use the first paragraph in all cases. If there is an affirmative defense to the claim that is the subject of the instruction, do not use either of the bracketed paragraphs; instead, turn to instruction 401.22. If there is no affirmative defense, use the first or the second bracketed paragraph depending on whether there is one defendant or more than one.

401.23 BURDEN OF PROOF ON DEFENSE ISSUES

If the greater weight of the evidence does not support (defendant's) defense[s] and the greater weight of the evidence does support (claimant's) claim, then [your verdict should be for (claimant) in the total amount of [his] [her] damages] *[you should decide and write on the verdict form what percentage of the total negligence of [both] [all] defendants ~~was caused by each defendant~~; was attributable to each defendant whose negligence you found was a legal cause of loss, injury, or damage to [plaintiff].

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*Use second bracketed alternative above when there is more than one defendant.

If, however, the greater weight of the evidence shows that both (claimant) and [(defendant)] [one or more of (defendants)] were negligent and that the negligence of each contributed as a legal cause of [loss] [injury] [or] [damage] sustained by (claimant), you should decide and write on the verdict form what percentage of the total negligence of [both] [all] parties to this action was attributable to ~~caused by~~ each of them.

Use the following instruction in cases with a comparative negligence defense and an apportionment of a non-party defense:

If, however, the greater weight of the evidence shows that (claimant) and [(defendant)] [one or more of (defendants)] and (identify additional person(s) or entit(y)(ies)) were negligent and that the negligence of each contributed as a legal cause of [loss] [injury] [or] [damage] sustained by (claimant), you should decide and write on the verdict form what percentage of the total negligence of [both] [all] parties to this action and (identify additional person(s) or entit(y)(ies)) was attributable to ~~caused by~~ each of them.

Use the following instruction in cases without a comparative negligence defense but with an apportionment of a non-party defense:

If, however, the greater weight of the evidence shows that [(defendant)] [one or more of (defendants)] and (identify additional person(s) or entit(y)(ies)) were negligent and that the negligence of each contributed as a legal cause of [loss] [injury] [or] [damage] sustained by (claimant), you should decide and write on the verdict form what percentage of the total negligence of [(defendant)] and (identify additional person(s) or entit(y)(ies)) was attributable to ~~caused by~~ each of them.

NOTES ON USE FOR 401.23

1. Preemptive instructions on defense issues. If a preemptive instruction for claimant is appropriate on a defense issue, as when comparative negligence or assumption of risk has been brought to the jury's attention on voir dire or by opening statements or argument and is now to be withdrawn, an instruction in the form of instruction 401.13 should be given immediately following instruction 401.21. If a preemptive instruction for defendant is required on some aspect of a defense, as when, for example, the court holds that any comparative negligence of the

driver will reduce claimant's recovery, a preemptive instruction announcing the ruling should be given immediately after framing the defense issues (instruction 401.22a).

2. Instructions on issues raised by replies to affirmative defenses. Plaintiff bears the burden of proof on issues raised by any replies to affirmative defenses, and instruction 401.23 should be modified as appropriate for those issues.

402.13 BURDEN OF PROOF ON MAIN CLAIM

If the greater weight of the evidence does not support [one or more of] (claimant's) claim(s), then your verdict should be for (defendant)(s) [on [that] [those] claim(s)].

[However, if the greater weight of the evidence supports [one or more of] (claimant's) claim(s), then your verdict should be for (claimant) and against (defendant)(s) [on [that] [those] claim(s).]

[However, if the greater weight of the evidence supports (claimant's) claim against one [or] [both] [more] of the defendants, then you should determine and write on the verdict form what percentage of the total negligence of [both] [all] defendants was attributable to ~~caused by~~ each of them.]

NOTE ON USE FOR 402.13

Use the first paragraph in all cases. If there is an affirmative defense to the claim that is the subject of the charge, do not use either of the bracketed paragraphs; instead, use instruction 402.14. If there is no affirmative defense, use the first or the second bracketed paragraph depending on whether there is one defendant or more than one, then proceed to Damages.

402.15 BURDEN OF PROOF ON DEFENSE ISSUES

If the greater weight of the evidence does not support (defendant's) defense[s] of (describe defense) and the greater weight of the evidence supports (claimant's) claim, then [your verdict should be for (claimant) in the total amount of [his] [her] damages] [you should determine and write on the verdict form what percentage of the total negligence of [both] [all] defendants was attributable to ~~caused by~~ each defendant whose negligence you find was a legal cause of loss, injury, or damage to plaintiff].*

**Use second bracketed alternative above when there is more than one defendant.*

If, however, the greater weight of the evidence shows that both (claimant) and [(defendant)] [one or more of (defendants)] [was] [were] negligent and that the negligence of each contributed as a legal cause of [loss] [injury] [or] [damage] sustained by (claimant), you should decide and write on the verdict form what percentage of the total negligence of [both] [all] parties to this action was attributable to ~~caused by~~ each of them.

Use the following instruction in cases with a comparative negligence defense and an apportionment of a nonparty defense:

[If, however, the greater weight of the evidence shows that (claimant) and [(defendant)] [one or more of (defendants)] and (identify additional person(s) or entit(y)(ies)) were negligent and that the negligence of each contributed as a legal cause of [loss] [injury] [or] [damage] sustained by (claimant), you should decide and write on the verdict form what percentage of the total negligence of [both] [all] parties to this action and (identify additional person(s) or entit(y)(ies)) was attributable to ~~caused by~~ each of them.]

Use the following paragraph in cases without a comparative negligence defense but with an apportionment of nonparty defense:

[If, however, the greater weight of the evidence shows that [(defendant)] [one or more of (defendants)] and (identify additional person(s) or entit(y)(ies)) were negligent and that the negligence of each contributed as a legal cause of [loss] [injury] [or] [damage] sustained by (claimant), you should decide and write on the verdict form what percentage of the total negligence of [(defendant)] and (identify additional person(s) or entit(y)(ies)) was attributable to ~~caused by~~ each of them.]

NOTES ON USE FOR 402.15

1. *Preemptive charges on defense issues.* If a preemptive charge for claimant is appropriate on a defense issue, as when comparative negligence has been brought to the jury's attention on voir dire or by opening statements or argument and is now to be withdrawn, an instruction in the form of 402.8 should be given immediately following instruction 402.13. If a preemptive charge for defendant is required on some aspect of a defense, as when the court holds that comparative negligence will reduce claimant's recovery, a preemptive charge announcing the ruling should be given immediately after framing the applicable defense issue.

2. *Charges on issues raised by replies to affirmative defenses.* Plaintiff bears the burden of proof on issues raised by any replies to affirmative defenses, and instruction 402.15 should be modified as appropriate for those issues.

RE: SJI Civil

Elizabeth Russo to: 'Heather Telfer'

10/20/2014 09:40 AM

Cc: "Irosenbloum@rosenbloumlaw.com"

Hi, Heather –

Based on a more recent suggestion by Louis Rosenbloom, the vast majority of the Negligence Subcommittee is in favor of “apportion to.”

So, the following was the language that was the cause for concern:

[However, if the greater weight of the evidence supports (claimant’s) claim against one [or] [both] [more] of the defendants, then you should decide and write on the verdict form the percentage of the total negligence of [both] [all] defendants that was caused by each of them.]

The following were the three options for alternative language that were considered by the Negligence Subcommittee, with the final head count being 8 in favor of “apportion to,” 2 in favor of “charge to,” 1 in favor of “attribute to,” and two members who did not vote.

[However, if the greater weight of the evidence supports (claimant’s) claim against one [or] [both] [more] of the defendants, then you should decide and write on the verdict form the percentage of the total negligence of [both] [all] defendants that you apportion to each of them.]

[However, if the greater weight of the evidence supports (claimant’s) claim against one [or] [both] [more] of the defendants, then you should decide and write on the verdict form the percentage of the total negligence of [both] [all] defendants that you charge to each of them.]

[However, if the greater weight of the evidence supports (claimant’s) claim against one [or] [both] [more] of the defendants, then you should decide and write on the verdict form the percentage of the total negligence of [both] [all] defendants that you attribute to each of them.]

My thinking is that we report to the full Committee that the majority of the Negligence Subcommittee is in favor of “apportion to,” and recommend that “apportion to” be adopted by the full Committee. If that

recommendation is approved, we can then go make the changes in all of the appropriate places in the Instructions and in the Model Instructions and Verdict Forms. I know where all of those places are because I have been through the exercise before.

Let me know if there is something further that I should do on this issue before the meeting.

Thanks a lot. And thank you for all the great efforts you put into these meetings.

Liz

Elizabeth Russo, Esquire
Russo Appellate Firm, P.A.
6101 SW 76 Street
Miami, Florida 33143
Telephone(305) 666-4660
Facsimile (305) 666-4470

e-mail ekr@russoappeals.com