APPENDIX D

SUPREME COURT COMMITTEE ON

STANDARD JURY INSTRUCTIONS IN CIVIL CASES

MINUTES

Jacksonville, FL
Duval County Courthouse
July 16, 2015 (1:00 p.m. to 5:00 p.m.)
July 17, 2015 (8:30 a.m. to 12:00 p.m.)

Members Present: Joseph Lang, Jr. (Chair); Rebecca Mercier Vargas (Vice Chair); Karen Barnett; Wendy Berger; Steven L. Brannock; Philip Burlington; Jeffrey Cohen; Dedee Costello; James Daniel; Bryan Gowdy; Donald Hinkle; J. Charles Ingram; Joseph Lewis; Matthew Lucas; Elizabeth Metzger; Robert O'Quinn; Daniel Rogers; Louis Rosenbloum; David Sales; Thomas Slater; Peter Wechsler; Laura Whitmore; Charles Wiggins.

Thursday only: Edward LaRose (via phone); Neal Roth (via phone).

Also Present: Nichole Segal (Reporter); Heather Telfer (Bar Staff Liaison).

Members Absent: Brian J. Baggot; James Barton (ex officio); Pedro DeMahy; Thomas Dukes; Gary Fox; Gary Farmer (ex officio); Robert Gross; Justice R. Fred Lewis (Supreme Court Liaison); Lake Lytal; Elizabeth Russo; Cynthia Sass; Richard Suarez.

PRODUCTS SUBCOMMITTEE

Vargas gave the report of the subcommittee (pages 486-526 of the materials). The subcommittee has been looking at the Florida Supreme Court's recent decision in *Coba v. Tricam Indus., Inc.*, 164 So.3d 637 (Fla. 2015). Coba is a products liability case where the jury returned an inconsistent verdict finding that the defendant was negligent in designing the product but there was no design defect. The defendant did not object to the inconsistent verdict before the jury was discharged. The issue was before the court based upon conflict on preservation principles.

In footnote 2 of *Coba* the court observes that "the possibility of an inconsistent verdict in this type of case, where both theories are presented to the jury, is actually referred to in the comments" of the standard jury instructions in products cases. Instruction 403.7, note on use 5 states:

> 5. When strict liability and negligence claims are tried together, to clarify differences between them it may be necessary to add language to the strict liability instructions to the effect that a product is defective if unreasonably dangerous even though the seller has exercised all possible care in the preparation and sale of the product. RESTATEMENT (SECOND) TORTS, § 402A(2)(a). In cases involving claims of both

negligence and defective design, submission of both claims may result in an inconsistent verdict. *See*, *e.g.*, *Consolidated Aluminum Corp. v. Braun*, 447 So.2d 391 (Fla. 4th DCA 1984); *Ashby Division of Consolidated Aluminum Corp. v. Dobkin*, 458 So.2d 335 (Fla. 3d DCA 1984). *See also Moorman v. American Safety Equip.*, 594 So.2d 795 (Fla. 4th DCA 1992); *North American Catamaran Racing Ass'n v. McCollister*, 480 So.2d 669 (Fla. 5th DCA 1985).

The subcommittee suggested adding a citation to *Coba* in Note 5 and deleting the citation to *North American Catamaran*, which was disapproved of by the Court in *Coba*.

The subcommittee thinks that there is still a conflict as to whether an inconsistent verdict is an error, but the citations that are left both say it is error to have an inconsistent verdict. The *Moorman* case is a "see also" because it is not really inconsistent.

The subcommittee received a comment from Farmer who thought that *Coba* resolved the conflict in *Moorman's* favor and now there is no such thing as an inconsistent verdict. However, the rest of the subcommittee disagreed and thinks there is still conflict in the cases.

Subcommittee member Baggot suggested adding language to the Note On Use warning of other possible consequences from an inconsistent verdict. For example, *Coba* recognizes that the trial court may enter a JNOV for the defendant if no view of the evidence supports one of the jury's findings as opposed to the other in the event of an inconsistent verdict. The rest of the subcommittee disagreed. The consensus was that commenting on the sufficiency of the evidence goes beyond the scope of the Note on Use. The Committee will await further development in the cases to resolve the issue of inconsistent verdicts.

Thus, the subcommittee recommended making the following change to Note on Use 5 of Instruction 403.7:

5. When strict liability and negligence claims are tried together, to clarify differences between them it may be necessary to add language to the strict liability instructions to the effect that a product is defective if unreasonably dangerous even though the seller has exercised all possible care in the preparation and sale of the product. RESTATEMENT (SECOND) TORTS, § 402A(2)(a). In cases involving claims of both negligence and defective design, submission of both claims may result in an inconsistent verdict. See, e.g., Consolidated Aluminum Corp. v. Braun, 447 So.2d 391 (Fla. 4th DCA 1984); Ashby Division of Consolidated Aluminum Corp. v. Dobkin, 458 So.2d 335 (Fla. 3d DCA 1984). See also Coba v. Tricam Indus., Inc., 40 FLW S257, S262 n.2 (Fla. May 14, 2015); Moorman v. American Safety Equip., 594 So.2d 795 (Fla. 4th DCA 1992)~~; North American Catamaran Racing Ass'n v. McCollister, 480 So.2d 669 (Fla. 5th DCA 1985)~~.

Rogers asked whether it would be useful to add a parenthetical after *Coba* and *Moorman* to explain the cases. Vargas responded that the subcommittee disagrees about what the *Coba* decision means. Further development in the cases is needed. .

Rosenbloum asked whether the "See also" before *Coba* should be a "Compare." Cohen does not think *Moorman* is inconsistent with other cases. Thus, he did not think "compare" would be appropriate. Whitmore favored keeping "see also."

Wiggins moved, Metzger seconded, and the Committee unanimously agreed to adopt the amendment proposed by the subcommittee.

These proposed changes will be published for comment. If the Committee receives comments, the Committee will review them at the October meeting. If there are no comments, the Committee will file a report in the Florida Supreme Court.

SUPREME COURT COMMITTEE ON

STANDARD JURY INSTRUCTIONS IN CIVIL CASES

MINUTES

Community Room
St. Petersburg College (Downtown Campus)
244 2nd Avenue North
St. Petersburg, Florida 33701

October 22, 2015 (1:00 p.m. to 5:00 p.m.)
October 23, 2015 (8:30 a.m. to 12:00 p.m.)

Members Present: Joseph Lang, Jr. (Chair); Rebecca Mercier Vargas (Vice Chair); Karen Barnett; Wendy Berger; Steven L. Brannock; Jeffrey Cohen; Dedee Costello; Gary Fox; Bryan Gowdy; Donald Hinkle; Robert Gross; Edward LaRose; Joseph Lewis; Matthew Lucas; Lake Lytal; Elizabeth Metzger; Robert O'Quinn; Daniel Rogers; Louis Rosenbloum; David Sales; Cynthia Sass; Thomas Slater; Laura Whitmore.

Thursday only: Philip Burlington; Peter Wechsler (via phone); Charles Wiggins (via phone).

Friday only: Neal Roth; Charles Wiggins (via phone).

Also Present: Nichole Segal (Reporter); Heather Telfer (Bar Staff Liaison).

Members Absent: Brian J. Baggot; James Daniel; Pedro DeMahy; Thomas Dukes; J. Charles Ingram; Elizabeth Russo; Richard Suarez.

Products Liability

Vargas gave the report of the subcommittee. The subcommittee is monitoring the Florida Supreme Court case *Aubin v. Union Carbide Corp*., which was argued in April 2014.

SUPREME COURT COMMITTEE ON

STANDARD JURY INSTRUCTIONS IN CIVIL CASES

MINUTES

Fourth District Court of Appeal
1525 Palm Beach Lakes Boulevard
West Palm Beach, Florida 33401-2399

February 25, 2016 (1:00 p.m. to 5:00 p.m.)
February 26, 2016 (8:30 a.m. to 12:00 p.m.)

Members Present: Rebecca Mercier Vargas (Chair); Laura Whitmore (Vice Chair); Linda H. Babb; Wendy W. Berger; Steven L. Brannock; Beatrice A. Butchko; James Daniel; Jack Day; Thomas E. Dukes, III; Gary D. Fox; Bryan S. Gowdy; Barbara W. Green; Robert M. Gross; Robert M. Klein; Joseph Lewis; Douglas J. McCarron; Elizabeth Metzger; Seth Miles; Donald A. Myers, Jr.; Jason L. Odom; Robert E. O'Quinn; Daniel B. Rogers (in person Thursday; via phone on Friday); David J. Sales; Jonathan B. Trohn; Alan F. Wagner; Peter Wechsler (via phone); Charles T. Wiggins; Melvin B. Wright

Also Present: Nichole Segal (Reporter); Heather Telfer (Bar Staff Liaison)

Members Absent: Brian Baggot; Jeffrey A. Cohen; Matthew C. Lucas; Thomas Slater; Richard J. Suarez

PRODUCTS LIABILITY (pp. 306–340 of the materials)

Wagner gave the report of the subcommittee. The Florida Supreme Court recently issued its decision in *Aubin v. Union Carbide Corp.*, 177 So.3d 489 (Fla. 2015). The court did not agree to the adoption of the Third Restatement. The court reaffirmed its decision in *West v. Caterpillar Tractor Co.*, 336 So.2d 80 (Fla.1976) and held that the consumer expectation test was sufficient to prove product design defect.

The subcommittee met and suggested some changes to the products liability instructions based upon *Aubin*. The Committee discussed the suggested changes.

In *Aubin*, the court stated that it was not directing a change to the jury instructions. The court referred to the risk/utility test as an alternative method of proving a product defect.

The subcommittee could not agree whether the court had eliminated risk/utility or made it an alternative test, which is not a requirement.

Wagner reads *Aubin* to say that the risk/utility test can be a method to establish a design defect. *Aubin* just made clear that there was no need to establish that test. One member questioned

whether this could be a defense. Wagner reads *Aubin* to say yes, the defense can prove the risk/utility test and that there is no reasonable alternative design. This is the classic "comment (K) defense," the unavoidably unsafe product. In that situation, the defense essentially says there is no other way to make this product safer but the benefits still outweigh the risk. Thus, he does not think the risk/utility test is a defense in and of itself, it has to be combined with the determination that there is no reasonable alternative safer way of doing it.

Some members of the subcommittee, including Fox, thought *Aubin* completely eliminated the risk/utility test.

Gowdy explained that a federal district court in Orlando has already made the decision that *Aubin* holds that the plaintiff may proceed under either theory. *See Anderson v. Techtronic Indus. N. Am., Inc.*, Prod. Liab. Rep. (CCH) P 19739 (M.D. Fla. 2015).

The subcommittee provided alternative instructions in the materials.

As to instruction 403.7, the subcommittee recommended including language in Note 1 that "the subcommittee takes no potion on whether the risk/utility test is available as an alternative method of proving product defect," citing *Aubin*.

Gowdy suggested that rather than saying the Committee takes "no position on whether risk/utility is available as an alternative method…" the Committee add language such as "or is a factor." Sales said that if the Committee thinks both tests are viable, we should say that.

Whitmore questioned whether Note 1 was going too far and suggested eliminating the discussion in Note 1. The Committee could just remove "and" from the instruction and cite *Aubin* and let parties make their own decision and argument.

Rogers noted that the only other thing that could be beneficial is noting that in *Aubin*, the court rejected the Third Restatement and accepted the Second. The Committee did not think this was necessary.

The Committee agreed to the following changes to Instruction 403.7:

403.7 STRICT LIABILITY

a. Manufacturing defect

A product is defective because of a manufacturing defect if it is in a condition unreasonably dangerous to [the user] [a person in the vicinity of the product] and the product is expected to and does reach the user or consumer without substantial change affecting that condition.

A product is unreasonably dangerous because of a manufacturing defect if it is different from its intended design and fails to perform as safely as the intended design would have performed.

b. Design defect

A product is defective because of a design defect if it is in a condition unreasonably dangerous to [the user] [a person in the vicinity of the product] and the product is expected to and does reach the user without substantial change affecting that condition.

A product is unreasonably dangerous because of its design if [the product fails to perform as safely as an ordinary consumer would expect when used as intended or when used in a manner reasonably foreseeable by the manufacturer] ~~[and]~~ [or] [the risk of danger in the design outweighs the benefits].

NOTES ON USE FOR 403.7

1. *Consumer Expectations Test; Risk/Benefit Test.* See *Aubin v. Union Carbide Corporation*, 177 So. 3d 489, 512 (Fla. 2015) (Consumer expectations test and risk/benefit test are alternative definitions of design defect.)

~~The risk/benefit test does not apply in cases involving claims of manufacturing defect. See *Cassisi v. Maytag Co.*, 396 So.2d 1140, 1146 (Fla. 1st DCA 1981). Instruction 403.7a retains the definition of manufacturing defect found in former instruction PL 4. The minor changes from the definition found in PL 4 are intended to make this instruction more understandable to jurors without changing its meaning.~~

2. *Foreseeability of injured bystander.* Strict liability applies to all foreseeable bystanders. When the injured person is a bystander, use the language "a person in the vicinity of the product" instead of "the user." Strict liability does not depend on whether the defendant foresaw the particular bystander's presence. See *West v. Caterpillar Tractor Co. Inc.*, 336 So.2d 80, 89 (Fla. 1976) ("Injury to a bystander is often feasible. A restriction of the doctrine to the users and consumers would have to rest on the vestige of the disappearing privity requirement."). See also *Sanchez v. Hussey Seating Co.*, 698 So.2d 1326 (Fla. 1st DCA 1997). When there is an issue regarding whether the presence of bystanders was foreseeable, additional instructions may be needed.

~~3. This instruction retains the consumer expectations test and the risk/benefit test for product defect, both of which previously appeared in PL 5. Florida recognizes the consumer expectations test. See *McConnell v. Union Carbide Corp.*, 937 So.2d 148, 151 n.4 (Fla. 4th DCA 2006); *Force v. Ford Motor Co.*, 879 So.2d 103, 107 (Fla. 5th DCA 2004); *Adams v. G. D. Searle & Co.*, 576 So.2d 728, 733 (Fla. 2d DCA 1991); *Cassisi v. Maytag Co.*, 396 So.2d 1140, 1145–46 (Fla. 1st DCA 1981). Other decisions have relied upon the RESTATEMENT (THIRD) OF TORTS: Products Liability to~~

~~define a product defect. See *Union Carbide Corp. v. Aubin*, 97 So.3d 886 (Fla. 3d DCA 2012); *Agrofollajes, S.A. v. E.I. DuPont de Nemours & Co.*, 48 So.3d 976 (Fla. 3d DCA 2010). One decision held that in a design defect case, the jury should be instructed only on the risk/benefit test and not the consumer expectations test. See *Agrofollajes*, 48 So.3d at 997. Pending further development in the law, the committee takes no position on whether the risk/benefit test is a standard for product defect that should be included in instruction 403.7 or an affirmative defense under instruction 403.18. The risk/benefit instruction is provided in both this instruction and the defense instruction, 403.18, to illustrate how it is used in either case. See Instruction 403.18(b) and the corresponding Note on Use. If a court determines that the risk/benefit test is a test for product defect, the committee takes no position on whether both the consumer expectations and risk/benefit tests should be given alternatively or together. The committee notes, however, that the two-issue rule may be implicated if both tests of design defect are used. *Zimmer Inc. v. Birnbaum*, 758 So.2d 714 (Fla. 4th DCA 2000).~~

~~4. In *Force v. Ford Motor Co.*, 879 So.2d 103, 107 (Fla. 5th DCA 2004), the parties agreed to a risk/benefit instruction based on section 2(b) of the RESTATEMENT (THIRD) OF TORTS, Products Liability. The decision in *Force* did not directly address the correctness of these instructions. As discussed above in note 3, pending further development in the law, the committee takes no position on this issue.~~

~~5~~3. When strict liability and negligence claims are tried together, to clarify differences between them it may be necessary to add language to the strict liability instructions to the effect that a product is defective if unreasonably dangerous even though the seller has exercised all possible care in the preparation and sale of the product. RESTATEMENT (SECOND) TORTS, § 402A(2)(a). In cases involving claims of both negligence and defective design, submission of both claims may result in an inconsistent verdict. See, *e.g.*, *Consolidated Aluminum Corp. v. Braun*, 447 So.2d 391 (Fla. 4th DCA 1984); *Ashby Division of Consolidated Aluminum Corp. v. Dobkin*, 458 So.2d 335 (Fla. 3d DCA 1984). See also *Moorman v. American Safety Equip.*, 594 So.2d 795 (Fla. 4th DCA 1992); *North American Catamaran Racing Ass'n v. McCollister*, 480 So.2d 669 (Fla. 5th DCA 1985).

~~6~~4. In some cases, it may be appropriate to instruct the jury that, in addition to the designer and manufacturer, any distributor, importer, or seller in the chain of distribution is liable for injury caused by a defective product. *Samuel Friedland Family Enterprises v. Amoroso*, 630 So.2d 1067 (Fla. 1994); *Rivera v. Baby Trend, Inc.*, 914 So.2d 1102 (Fla. 4th DCA 2005); *Porter v. Rosenberg*, 650 So.2d 79 (Fla. 4th DCA 1995).

The Committee then discussed the subcommittees suggested changes to Instruction 403.18 regarding defense issues.

The first discussion was about 403.18b. – "Risk/Benefit Defense"

Wagner explained that risk/utility was retained as a defense but only where there was no reasonable alternative design.

Gowdy asked whether *Aubin* ever uses the term "affirmative defense." Wagner noted that *Aubin* says: "The parties may, in proving or defending against such claims, present evidence that a reasonable alternative design existed and argue whether the benefit of the product's design outweighed any risks of injury or death caused by the design." *Aubin*, 177 So.3d at 512.

Sales thought risk/utility is a basis to defend, but is not an affirmative defense.

Gowdy had a problem labeling risk/utility as an affirmative defense. Sales thinks labeling it as a defense puts the burden back on the plaintiff that the Florida Supreme Court took away. Wagner thinks that *Aubin* says that the plaintiff does not have to prove risk/utility, but if the defendant gets into the issue and says there is no other way to make the product, the burden shifts to the plaintiff to counter that defense. Day does not think the burden shifts. Instead, the plaintiff can argue that the defendant has not met its burden of proof as to the defense.

Sales asked whether this instruction is supposed to apply to things other than unavoidably unsafe products. Wagner responded that it was not.

Green asked whether any out-of-state cases talk about whether they treat this as an affirmative defense. Wagner responded that he did not know.

Gowdy thinks this evidence can be used as an affirmative defense and to refute evidence that the product is dangerous.

Sales thinks it is important to point out that this applies only in cases of unavoidably unsafe products, as discussed in comment K of the Second Restatement. *Aubin* can be taken out of this because it is not a comment K case and confuses the issue.

The Committee moved on from the risk/benefit defense to discuss 403.15. The Committee agreed to remove "and" from 403.15e and the Note on Use for 403.15, as follows:

403.15 ISSUES ON MAIN CLAIM

The [next] issues you must decide on (claimant's) **claim against** (defendant) **are:**

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e. Strict Liability — Design Defect:

whether [(the product) **failed to perform as safely as an ordinary consumer would expect when used as intended or in a manner reasonably foreseeable by the manufacturer] ~~[and]~~ [or] [the risk of danger in the design of the product outweighs the benefits of the product] and** (the product) **reached**

(claimant) **without substantial change affecting the condition and, if so, whether that failure was a legal cause of the [loss] [injury] or [damage] to** (claimant, decedent, or person for whose injury claim is made)**.**

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~~NOTE ON USE FOR 403.15~~

~~Instruction 403.15(e) retains the consumer expectations test and the risk/benefit test. The risk/benefit test is not required to prove a design defect. *Aubin v. Union Carbide Corporation*, 97 So.3d 489 (Fla. 2015). Pending further developments in the law, the committee takes no position on whether the risk/utility test is available as an alternative method of proving product defect. See, *Aubin*, 177 So.3d at 512. for product defect, both of which previously appeared in PL 5. See Instruction 403.7(b) and Note on Use 3. Pending further development in the law, the committee takes no position on whether the consumer expectations and risk/benefit tests should be given alternatively or together.~~

The Committee then discussed the learned intermediary defense, which was added by the subcommittee as 403.18f., in light of *Aubin*.

Aubin held that a manufacturer or designer does not have to provide warnings directly to the consumer if it has provided warnings to an intermediary that it reasonably relies upon providing those to the consumer. *Aubin* set out the factors in the second proposed paragraph of letter f.

Wagner said the subcommittee tracked the language of *Aubin*.

Gowdy asked whether the Restatements should be cited where the court noted them in *Aubin.* Wagner responded that the cites to *Aubin* include pincites, which should be sufficient.

The Committee agreed to the following changes to 403.18:

403.18 DEFENSE ISSUES

If, however, the greater weight of the evidence supports [(claimant's) **claim] [one or more of** (claimant's) **claims], then you shall consider the defense[s] raised by** (defendant)**.**

On the [first]* defense, the issue[s] for you to decide [is] [are]:

**The order in which the defenses are listed below is not necessarily the order in which the instruction should be given.*

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b. ~~*Risk/Benefit Defense*~~*Unavoidably Unsafe Product*:

whether, there is no reasonable alternative design for (the product) **and, on balance, the [benefits] [or] [value] of** (the product) **outweigh the risks or danger connected with its use.**

NOTE ON USE FOR 403.18b

~~In a strict liability defective design case, a defendant may be entitled to an affirmative defense based on the risk/benefit test when there is no reasonable alternative design for the product. *Aubin v. Union Carbide Corp.*, 177 So.3d 489, 511 (Fla. 2015);~~ See ~~*Force v. Ford Motor Co.*, 879 So.2d 103, 106 (Fla. 5th DCA 2004); *Adams v. G. D. Searle & Co.*, 576 So.2d 728, 733 (Fla. 2d DCA 1991);~~ RESTATEMENT (SECOND) TORTS, § 402A, comment k (unavoidably unsafe products). ~~*Cassisi v. Maytag Co.*, 396 So.2d 1140, 1145-46 (Fla. 1st DCA 1981). Pending further development in the law, the committee takes no position on whether the risk/benefit test is a standard for product defect that should be included in instruction 403.7 or an affirmative defense under instruction 403.18. The court should not, however, instruct on risk/benefit as both a test of defectiveness under 403.7 and as an affirmative defense under 403.18.~~

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f. Learned Intermediary Defense to Failure to Warn Claims for products supplied through an intermediary

whether (the defendant) **provided reasonable instructions or warnings to** (intermediary) **and reasonably relied upon [it] [him] [her] to provide reasonable instructions or warnings to the user of the product.**

In determining whether (defendant) **reasonably relied on** (intermediary) **to provide reasonable instructions or warnings to users of** (the product)**, you may consider the nature and significance of the risk involved in using the product, the likelihood that** (intermediary) **would convey the instructions or warnings to the user of the product, and the feasibility and effectiveness of** (defendant) **directly warning the user.**

NOTE ON USE FOR 403.18f

See *Aubin v. Union Carbide Corp.*, 177 So.3d 489, 515–16 (Fla. 2015). The list of factors set forth in this instruction is not exclusive and may be modified to fit the facts of the case.

The Committee also agreed to the following changes to Instruction 403.8:

403.8 STRICT LIABILITY FAILURE TO WARN

A product is defective when the foreseeable risks of harm from the product could have been reduced or avoided by providing reasonable instructions or warnings, and the failure to provide those instructions or warnings makes the product unreasonably dangerous.

NOTES ON USE FOR 403.8

1. The following cases recognize strict liability for a failure to warn of defects. *Aubin v. Union Carbide Corp.* 177 So.3d 489 (Fla. 2015)~~*v. Aubin*, 97 So.3d 886, 898 (Fla. 3d DCA 2012)~~; *McConnell v. Union Carbide Corp.*, 937 So.2d 148, 151–52 (Fla. 4th DCA 2006); *Union Carbide Corp. v. Kavanaugh*, 879 So.2d 42, 45 (Fla. 4th DCA 2004); *Scheman-Gonzalez v. Saber Manufacturing Co.*, 816 So.2d 1133 (Fla. 4th DCA 2002); *Ferayorni v. Hyundai Motor Co.*, 711 So.2d 1167 (Fla. 4th DCA 1998).

2. When strict liability and negligent failure to warn claims are tried together, to clarify differences between them it may be necessary to add language to the strict liability instruction to the effect that a product is defective if unreasonably dangerous even though the seller has exercised all possible care in the preparation and sale of the product. RESTATEMENT (SECOND) TORTS, § 402A(2)(a).

Vargas noted that the Committee will need to make similar change to Model Charge 7.

Day moved, Gowdy seconded and the Committee unanimously agreed to making these changes and to having the subcommittee make corresponding changes to the Model Charge.

The subcommittee will make the corresponding changes to the Model Charge as soon as possible so the Instructions and Model Charge can be published before the July meeting. Those will be circulated and voted upon via email.

Vargas explained that the goal will be to publish before the July meeting so any comments can be discussed at that meeting.

SUPREME COURT COMMITTEE ON

STANDARD JURY INSTRUCTIONS IN CIVIL CASES

MINUTES

Carlton Fields
Conference Room MP 1-2, 40th Floor
100 SE 2nd Street, Suite 4200
Miami, Florida 33131-2113

July 14, 2016 (1:00 p.m. to 5:00 p.m.)

Members Present: Rebecca Mercier Vargas (Chair); Laura Whitmore (Vice Chair); Linda H. Babb; Wendy W. Berger; Steven L. Brannock (via phone); Beatrice A. Butchko; Jeffrey A. Cohen; James Daniel (via phone); Jack Day; Gary D. Fox; Bryan S. Gowdy; Barbara W. Green; Robert M. Gross (via phone); Robert M. Klein; Joseph Lewis; Douglas J. McCarron; Seth Miles; Jason L. Odom; Robert E. O'Quinn; Daniel B. Rogers; David J. Sales; Thomas Slater; Jonathan B. Trohn; Alan F. Wagner; Peter Wechsler (via phone); Charles T. Wiggins (via phone); Melvin B. Wright (via phone); Joseph Lang, Jr. (ex officio)

Also Present: Nichole Segal (Reporter); Heather Telfer (Bar Staff Liaison)

Members Absent: Brian Baggot; Thomas E. Dukes, III; Matthew C. Lucas; Elizabeth Metzger; Donald A. Myers, Jr.; Richard J. Suarez

PRODUCTS LIABILITY

Wagner gave the report of the subcommittee (pages 619-43 of the materials). At the last meeting, the Committee approved the changes to the instructions based on the Florida Supreme Court's decision in Aubin v. Union Carbide Corp., 177 So.3d 489 (Fla. 2015). The subcommittee was then tasked with amending the model instructions based upon the new language.

Wagner explained that the first issue that came up was that the unavoidably unsafe instruction was phrased in the present tense, which does not make sense. The subcommittee altered this instruction to put it in the past tense. The subcommittee recommended the following changes:

403.18 DEFENSE ISSUES

If, however, the greater weight of the evidence supports [(claimant's) claim] [one or more of (claimant's) claims], then you shall consider the defense[s] raised by (defendant).

On the [first]* defense, the issue[s] for you to decide [is] [are]:

b. Unavoidably Unsafe Product:

whether, there ~~is~~ was no reasonable alternative design for (the product) when it was placed on the market and, on balance, at that time, the [benefits] [or] [value] of (the product) outweigh the risks or danger connected with its use.

The subcommittee also drafted a new Model Instruction 7. It differs from the prior instruction in that it is a little simpler. The original instruction had a negligent design issue and a strict liability design issue. The subcommittee took out the negligent design issue and made it a strict products liability issue. It still has a negligence component against one of the non-product defendants.

It was originally drafted to have an unavoidably unsafe fact pattern but that made it overly complicated, so the subcommittee removed that and focused on a streamlined products liability charge:

MODEL INSTRUCTION NO. 7

~~**Product liability case; negligence and strict liability claims; comparative negligence defense; aggravation of pre-existing injury**~~

Strict product liability and negligence case; with aggravation of pre-existing injury; and comparative negligence defense

Facts of the hypothetical case:

John Smith claims he was injured when a hay baler being driven by Dilbert Driver struck him. The hay baler suddenly swerved across the road into the path of Smith, who was driving in the opposite direction. At the time, Smith was looking at a group of deer in a field near the road, and therefore took no evasive action to avoid the collision. An examination of the hay baler revealed that a bolt that was part of the steering mechanism was designed in such a way that it could not sustain the speed of highway driving, would loosen over time, weaken, and eventually break. ~~The retailer seller, Sharp Sales Co., prior to selling it to Driver, had not inspected it. The mechanism had broken, making it impossible for Driver to steer the baler. There was evidence that a person could have observed the weakened condition of the steering mechanism had he or she examined it.~~At the time of the accident, Dilbert Driver was operating the hay baler at an unsafe speed when the bolt suddenly broke, making it impossible for Dilbert Driver to steer the hay baler, which crashed into the car being driven by John Smith and injured him as a result. Smith sued Driver, alleging that his operation of the hay baler had been negligent. Smith also sued the manufacturer of the hay baler, Mishap Manufacturing Co., and the retailer seller, Sharp Sales, alleging that the hay baler had been defectively designed ~~and that both defendants had been~~

~~negligent in their inspections of the hay baler. He sought recovery against both the manufacturer and the retailer on claims of (1) negligence and (2) strict liability based on the consumer expectation test.~~ The defendants denied liability, and affirmatively alleged that John Smith had been comparatively negligent. ~~There are also issues of a pre-existing injury.~~The defendants also alleged that some of John Smith's injuries pre-existed the collision with the hay baler and John Smith alleged that his pre-existing condition was aggravated by the collision with the hay baler.

The court's instruction:

The committee assumes that the court will give these instructions as part of the instruction at the beginning of the case and that these instructions will be given again before Final Argument. When given at the beginning of the case, 202.1 will be used in lieu of 403.1 and these instructions will be followed by the applicable portions of 202.2 through 202.5. See Model Instruction No. 1 for a full illustration of an instruction given at the beginning of the case.

[403.1] Members of the jury, you have now heard and received all of the evidence in this case. I am now going to tell you about the rules of law that you must use in reaching your verdict. You will recall at the beginning of the case I told you that if, at the end of the case I decided that different law applies, I would tell you so. These instructions are *the same as* what I gave you at the beginning and it is these rules of law that you must now follow. When I finish telling you about the rules of law, the attorneys will present their final arguments and you will then retire to decide your verdict.

[403.2] The claims and defenses in this case are as follows. John Smith claims that Dilbert Driver was negligent in the operation of the hay baler he was driving which caused him harm. ~~John Smith also claims that Mishap Manufacturing Company, the manufacturer of the hay baler, and Sharp Sales Company, the seller of the hay baler, were negligent — Mishap in designing and inspecting the hay baler, and Sharp in the manner it inspected it before sale — which caused him to be injured by the hay baler. Finally, John Smith also claims that the hay baler designed and manufactured by Mishap and sold by Sharp was defective and that the defect in the hay baler caused him harm.~~ John Smith also claims that the hay baler designed by Mishap Manufacturing Company and sold by Sharp Sales Company was defective and that the defect in the hay baler caused him harm.

***All three defendants* deny these claims and also claim that John Smith was himself negligent in the operation of his vehicle, which caused his harm. Defendants Mishap Manufacturing Company and Sharp Sales Company also claim that the there was no reasonable alternative design for the steering mechanism of the hay baler and that the benefits of the hay baler outweigh the risks or danger connected with its use.**

The parties must prove their claims by the greater weight of the evidence. I will now define some of the terms you will use in deciding this case.

[403.3] "Greater weight of the evidence" means the more persuasive and convincing force and effect of the entire evidence in the case.

~~**[401.4 and 403.9] Negligence is the failure to use reasonable care, which is the care that a reasonably careful person would use under like circumstances.** ***In the case of a designer, manufacturer, seller, importer, distributor, or supplier of a product,*** **it is the care that a reasonably careful designer, manufacturer, seller, importer, distributor, or supplier would use under like circumstances. Negligence is doing something that a reasonably careful designer, manufacturer, seller, importer, distributor, or supplier would not do under like circumstances or failing to do something that a reasonably careful person, designer, manufacturer, seller, importer, distributor, or supplier would do under like circumstances.~~**

[401.4] Negligence is the failure to use reasonable care, which is the care that a reasonably careful person would use under like circumstances. Negligence is doing something that a reasonably careful person would not do under like circumstances or failing to do something that a reasonably careful person would do under like circumstances.

[403.7b] A product is defective because of a design defect if it is in a condition unreasonably dangerous to the user or a person in the vicinity of the product and the product is expected to and does reach the user without substantial change affecting that condition.

A product is unreasonably dangerous because of its design if the product fails to perform as safely as an ordinary consumer would expect when used as intended or when used in a manner reasonably foreseeable by the manufacturer.

[401.12a and 403.12a] Negligence or a defect in a product is a legal cause of loss, injury, or damage if it directly and in natural and continuous sequence produces or contributes substantially to producing such loss, injury, or damage, so that it can reasonably be said that, but for the negligence or defect, the loss, injury, or damage would not have occurred.

[401.12b and 403.12b] In order to be regarded as a legal cause of loss, injury, or damage, negligence or a defect in a product need not be the only cause. Negligence or a defect in a product may be a legal cause of loss, injury, or damage even though it operates in combination with the act of another or some other cause if the negligence or defect contributes substantially to producing such loss, injury, or damage.

[401.18a] The issues you must decide on John Smith's claim against Dilbert Driver are whether Dilbert Driver was negligent in his operation of the hay baler, and, if so, whether that negligence was a legal cause of the loss, injury, or damage to John Smith.

~~**[403.15g] The issues you must decide on John Smith's claim of negligence on the part of Mishap Manufacturing Company, the manufacturer of the hay baler, is whether Mishap Manufacturing Company was negligent in the design of the hay baler or in its inspection of the hay baler after it was built, and, if so, whether that *negligence* was a legal cause of the loss, injury or damage to John Smith.**~~

~~**The issues you must decide on John Smith's claim of negligence on the part of Sharp Sales Company, the seller of the hay baler, are whether Sharp Sales Company was negligent in failing to inspect the hay baler before selling it to John Smith, and, if so, whether that *negligence* was a legal cause of the loss, injury or damage to John Smith.**~~

[403.15e] The issues you must decide on John Smith's claims of defect in the hay baler against Mishap Manufacturing Company, the manufacturer of the hay baler, and Sharp Sales Company, the seller of the hay baler, are whether the hay baler failed to perform as safely as an ordinary consumer would expect when used as intended or in a manner reasonably foreseeable by the manufacturer and the hay baler reached Dilbert Driver without substantial change affecting the condition and, if so, whether that failure was a legal cause of the loss, injury, or damage to John Smith.

[403.17] If the greater weight of the evidence does not support one or more of John Smith's claims then your verdict should be for Dilbert Driver, Mishap Manufacturing Company, and Sharp Sales Company.

[403.18a] If, however, the greater weight of the evidence supports one or more of John Smith's claims *against one or more of the defendants*, then you shall consider the defenses raised by those defendants.

On the first defense, the issue for you to decide is whether John Smith was himself negligent in driving and, if so, whether that negligence was a contributing legal cause of the injury or damage to John Smith.

~~**[403.18d] *On the second defense*, in deciding whether the hay baler was defective because of a design defect, you shall consider the state-of-the-art of scientific and technical knowledge and other circumstances that existed at the time of the hay baler's manufacture, not at the time of the loss, injury or damage.**~~

[403.19] If the greater weight of the evidence does not support the defenses of Dilbert Driver, Mishap Manufacturing Company, and Sharp Sales Company, and the greater weight of the evidence supports one or more of John Smith's claims, then you should decide and write on the verdict form what percentage of the total negligence or responsibility of all defendants was caused by each defendant.

If, however, the greater weight of the evidence shows that both John Smith and one or more of the defendants were negligent or responsible and that the negligence or responsibility of each contributed as a legal cause of loss, injury, or damage sustained by John Smith, you should decide and write on the verdict form what percentage of the total negligence, fault, or responsibility of all parties to this action was caused by each of them.

[501.1b] If your verdict is for Dilbert Driver, Mishap Manufacturing Company, and Sharp Sales Company, you will not consider the matter of damages. But if the greater weight of the evidence supports one or more of John Smith's claims, you should determine and write on the verdict form, in dollars, the total amount of loss, injury, or damage which the greater weight of the evidence shows will fairly and adequately compensate him for his loss, injury, or damage, including any damages that John Smith is reasonably certain to incur or experience in the future. You shall consider the following elements:

[501.2a] Any bodily injury sustained by John Smith and any resulting pain and suffering, disability or physical impairment, disfigurement, mental anguish, inconvenience, or loss of capacity for the enjoyment of life experienced in the past or to be experienced in the future. There is no exact standard for measuring such damage. The amount should be fair and just in the light of the evidence.

[501.2b] The reasonable expense of hospitalization and medical care and treatment necessarily or reasonably obtained by John Smith in the past or to be so obtained in the future.

[501.2c] Any earnings lost in the past and any loss of ability to earn money in the future.

[501.2h] Any damage to John Smith's automobile. The measure of such damage is the reasonable cost of repair, if it was practicable to repair the automobile, with due allowance for any difference between its value immediately before the collision and its value after repair.

You shall also take into consideration any loss to John Smith for towing or storage charges and by being deprived of the use of his automobile during the period reasonably required for its repair.

[501.4] In determining the total amount of damages, you should not make any reduction because of the negligence, if any, of John Smith. The court will enter a judgment based on your verdict and, if you find that John Smith was negligent in any degree, the court in entering judgment will reduce the total amount of damages by the percentage of negligence which you find was caused by John Smith.

The court will also take into account, in entering judgment against any defendant whom you find to have been negligent or responsible, the percentage of that defendant's negligence or responsibility compared to the total negligence or responsibility of all the parties to this action.

[501.5a] If you find that one or more of the defendants caused a bodily injury, and that the injury resulted in an aggravation of an existing disease or physical defect or activation of a latent disease or physical defect, you should attempt to decide what portion of John Smith's condition resulted from the aggravation or activation. If you can make that determination, then you should award only those damages resulting from the aggravation. However, if you cannot make that determination, or if it cannot be said that the condition would have existed apart from the injury, then you should award damages for the entire condition suffered by John Smith.

[501.6] If the greater weight of the evidence shows that John Smith has been permanently injured, you may consider his life expectancy. The mortality tables received in evidence may be considered in determining how long John Smith may be expected to live. Mortality tables are not binding on you but may be considered together with other evidence in the case bearing on John Smith's health, age, and physical condition, before and after the injury, in determining the probable length of his life.

[501.7] Any amount of damages which you allow for future medical expenses or loss of ability to earn money in the future should be reduced to its present money value and only the present money value of these future economic damages should be included in your verdict.

The present money value of future economic damages is the sum of money needed now which, together with what that sum will earn in the future, will compensate John Smith for these losses as they are actually experienced in future years.

[601.1] In deciding this case, it is your duty as jurors to answer certain questions I ask you to answer on a special form, called a verdict form. You must come to an agreement about what your answers will be. Your agreed-upon answers to my questions are called your jury verdict.

The evidence in this case consists of the sworn testimony of the witnesses, all exhibits received in evidence and all facts that were admitted or agreed to by the parties.

In reaching your verdict, you must think about and weigh the testimony and any documents, photographs, or other material that has been received in evidence. You may also consider any facts that were admitted or agreed to by the lawyers. Your job is to determine what the facts are. You may use reason and common sense to reach conclusions. You may draw reasonable inferences from the evidence. But you should not guess about things that were not covered here. And, you must always apply the law as I have explained it to you.

[601.2a] Let me speak briefly about witnesses. In evaluating the believability of any witness and the weight you will give the testimony of any witness, you may properly consider the demeanor of the witness while testifying; the frankness or lack of frankness of the witness; the intelligence of the witness; any interest the witness may have in the outcome of the case; the means and opportunity the witness had to know the facts about which the witness testified; the ability of the witness to remember the matters about which the witness testified; and the reasonableness of the testimony of the witness, considered in the light of all the evidence in the case and in the light of your own experience and common sense.

[601.2b] Some of the testimony before you was in the form of opinions about certain technical subjects. You may accept such opinion testimony, reject it, or give it the weight you think it deserves, considering the knowledge, skill, experience, training, or education of the witness, the reasons given by the witness for the opinion expressed, and all the other evidence in the case.

[601.4] In your deliberations, you will consider and decide three distinct claims. The first is the negligence claim against Dilbert Driver. The second is the negligence claims against Mishap Manufacturing Company and Sharp Sales Company. The third is the product defect claims against Mishap Manufacturing Company and Sharp Sales Company. Although these claims have been tried together, each is separate from the others, and each party is entitled to have you separately consider each claim as it affects that party. Therefore, in your deliberations, you should consider the evidence as it relates to each claim separately, as you would had each claim been tried before you separately.

[601.5] That is the law you must follow in deciding this case. The attorneys for the parties will now present their final arguments. When they are through, I will have a few final instructions about your deliberations.

Following Closing Arguments, the final instructions are given:

[700] Members of the jury, you have now heard all the evidence, my instructions on the law that you must apply in reaching your verdict and the closing arguments of the attorneys. You will shortly retire to the jury room to decide this case. Before you do so, I have a few last instructions for you.

During deliberations, jurors must communicate about the case only with one another and only when all jurors are present in the jury room. You will have in the jury room all of the evidence that was received during the trial. In reaching your decision, do not do any research on your own or as a group. Do not use dictionaries, the Internet, or any other reference materials. Do not investigate the case or conduct any experiments. Do not visit or view the scene of any event involved in this case or look at maps or pictures on the Internet. If you happen to pass by the scene, do not stop or investigate. All jurors must see or hear the same evidence at the same time. Do not read, listen to, or watch any news accounts of this trial.

You are not to communicate with any person outside the jury about this case. Until you have reached a verdict, you must not talk about this case in person or through the telephone, writing, or electronic communication, such as a blog, twitter, e-mail, text message, or any other means. Do not contact anyone to assist you, such as a family accountant, doctor, or lawyer. These communications rules apply until I discharge you at the end of the case.

If you become aware of any violation of these instructions or any other instruction I have given in this case, you must tell me by giving a note to the bailiff.

Any notes you have taken during the trial may be taken to the jury room for use during your discussions. Your notes are simply an aid to your own memory, and neither your notes nor those of any other juror are binding or conclusive. Your notes are not a substitute for your own memory or that of other jurors. Instead, your verdict must result from the collective memory and judgment of all jurors based on the evidence and testimony presented during the trial.

At the conclusion of the trial, the bailiff will collect all of your notes and immediately destroy them. No one will ever read your notes.

In reaching your verdict, do not let bias, sympathy, prejudice, public opinion, or any other sentiment for or against any party to influence your decision. Your verdict must be based on the evidence that has been received and the law on which I have instructed you.

Reaching a verdict is exclusively your job. I cannot participate in that decision in any way and you should not guess what I think your verdict should be from something I may have said or done. You should not think that I prefer

one verdict over another. Therefore, in reaching your verdict, you should not consider anything that I have said or done, except for my specific instructions to you.

Pay careful attention to all the instructions that I gave you, for that is the law that you must follow. You will have a copy of my instructions with you when you go to the jury room to deliberate. All the instructions are important, and you must consider all of them together. There are no other laws that apply to this case, and even if you do not agree with these laws, you must use them in reaching your decision in this case.

When you go to the jury room, the first thing you should do is choose a presiding juror to act as a foreperson during your deliberations. The foreperson should see to it that your discussions are orderly and that everyone has a fair chance to be heard.

It is your duty to talk with one another in the jury room and to consider the views of all the jurors. Each of you must decide the case for yourself, but only after you have considered the evidence with the other members of the jury. Feel free to change your mind if you are convinced that your position should be different. You should all try to agree. But do not give up your honest beliefs just because the others think differently. Keep an open mind so that you and your fellow jurors can easily share ideas about the case.

[I will give you a verdict form with questions you must answer. I have already instructed you on the law that you are to use in answering these questions. You must follow my instructions and the form carefully. You must consider each question separately. Please answer the questions in the order they appear. After you answer a question, the form tells you what to do next. I will now read the verdict form to you: (read form of verdict)**]**

[You will be given (state number) **forms of verdict, which I shall now read to you:** (read form of verdict(s))**]**

[If you find for (claimant(s))**, your verdict will be in the following form:** (read form of verdict)**]**

[If you find for (defendant(s))**, your verdict will be in the following form:** (read form of verdict)**]**

Your verdict must be unanimous, that is, your verdict must be agreed to by each of you. When you have finished filling out the form, your foreperson must write the date and sign it at the bottom and return the verdict to the bailiff.

If any of you need to communicate with me for any reason, write me a note and give it to the bailiff. In your note, do not disclose any vote or split or the reason for the communication.

You may now retire to decide your verdict.

Special Verdict Form

VERDICT

We, the jury, return the following verdict:

1. Was there negligence on the part of defendant Dilbert Driver which was a legal cause of damage to plaintiff, John Smith?

YES _____ NO_____

~~**2a. Was there negligence on the part of defendant Mishap Manufacturing Co. which was a legal cause of damage to plaintiff, John Smith?**~~

~~**YES _____ NO_____**~~

2~~b~~. Did defendant<u>s</u> Mishap Manufacturing Co.<u> and Sharp Sales Co.</u> place the hay baler on the market with a defect which was a legal cause of damage to plaintiff, John Smith?

YES _____ NO_____

~~**3a. Was there negligence on the part of defendant Sharp Sales Co. which was a legal cause of damage to plaintiff, John Smith?**~~

~~**YES _____ NO _____**~~

~~**3b. Did defendant Sharp Sales Co. place the hay baler on the market with a defect which was a legal cause of damage to plaintiff, John Smith?**~~

~~**YES _____ NO _____**~~

If your answers to questions 1~~-3~~ <u>and 2</u> are ~~all~~<u>both</u> NO, your verdict is for the defendants, and you should not proceed further except to date and sign this verdict form and return it to the courtroom. If your answer~~~~ed YES to any of~~ <u>to either</u> Question~~s~~ 1~~-3~~ <u>or 2 is YES</u>, ~~please~~ answer question 4<u>3</u>.

4<u>3</u>. Was there negligence on the part of plaintiff, John Smith, which was a legal cause of his damage?

YES _____ NO_____

~~**Please answer question 5.**~~

~~5~~4. State the percentage of any responsibility for plaintiff, John Smith's, damages that you charge to:

Defendant Dilbert Driver (fill in only if you answered YES to question 1) _____%

Defendant Mishap Manufacturing Co. and Sharp Sales Co. (fill in only if you answered YES to question 2~~a~~ ~~and/or question 2b~~) _____%

~~**Defendant Sharp Sales Co. (fill in only if you answered YES to question 3a and/or question 3b) _____%**~~

Plaintiff, John Smith (fill in only if you answered YES to question 4~~3~~) _____%

Total must be 100%

Please answer question ~~6~~5.

~~6~~5. What is the total amount (100%) of any damages sustained by plaintiff, John Smith, and caused by the incident in question?

Total damages of plaintiff, John Smith $ _____

In determining the total amount of damages, do not make any reduction because of the negligence, if any, of plaintiff, John Smith. If you find plaintiff, John Smith, negligent in any degree, the court, in entering judgment, will reduce Smith's total amount of damages (100%) by the percentage of negligence which you find is chargeable to John Smith.

SO SAY WE ALL, this _____ day of _____, 20 _____.

_____

FOREPERSON

NOTES ON USE

1. ~~This fact pattern assumes that the trial judge has ruled that the consumer expectations test should be given. For more explanation of whether the consumer expectations test and/or the risk/benefit test applies, see the Notes on Use to Instructions 403.7 and 403.15.~~The plaintiff may elect to also add the phrase "or the risk of danger in the design outweighs the benefits" to instruction 403.15 if he or she wishes to assume the burden of proof in that respect and to prove product defect in this alternative manner. See, *Aubin v. Union Carbide Corp.*, 177 So. 3d 489, 511 (Fla. 2015). Likewise, should the defendant allege and present evidence that no reasonable alternative design for the product existed and that the benefits of the product's design outweighed any risk of injury or death caused by the design, instruction 403.18b should be used. See also, RESTATEMENT (SECOND) OF TORTS §402a, comment k.

2. For a model itemized verdict form, as contemplated by section 768.77, Florida Statutes, refer to Model Verdict Forms 2(a) and 2(b).

Gowdy moved, Day seconded, and the Committee unanimously approved adopting the subcommittee's work and publishing the change to the instructions agreed on at the last meeting and the model instruction addressed today.

Wagner also pointed out that there is a change pending to the language of Instruction 401.21, the negligence charge. He recommended that the same change be made to 403.19 so that it is consistent. **Vargas explained that the model will be published with the current language. Vargas will explain in the report that there are multiple reports pending with the same issues and that if the court approves the amendments to 401.21, the consistent change will need to be made to 403.19.**

Vargas hoped to get the amendments published for comment so that any comments can be discussed at the October meeting.

Vargas thanked Wagner and the subcommittee for their work.

SUPREME COURT COMMITTEE ON
STANDARD JURY INSTRUCTIONS IN CIVIL CASES

JUDICIAL CONFERENCE ROOM, 23RD FLOOR
ORANGE COUNTY COURTHOUSE
425 N. ORANGE AVENUE
ORLANDO, FLORIDA

MEETING AGENDA

FEBRUARY 23, 2017
1:00 P.M. To 5:30 P.M.

Members Present: Rebecca Mercier Vargas (Chair); Laura Whitmore (Vice Chair); Joseph L. Amos, Jr.; Linda H. Babb; Brian Baggot (via phone); Wendy Berger, Steven Brannock; Beatrice Butchko; Jeffrey Cohen; James Daniel; Jack Day (via phone); Thomas Dukes; Bryan Gowdy (via phone); Barbara Green; Robert Gross; Robert Klein; Matthew Lucas (via phone); Douglas McCarron (via phone); Elizabeth Metzger; Seth Miles (via phone); Donald Myers; Jason Odom; Robert O'Quinn; Stephanie Ray; Daniel Rogers (via phone); David Sales; Nichole Segal; Thomas Slater; Jonathan Trohn; Alan Wagner; Peter Wechsler (via phone); Christine Welstead; Charles Wiggins; Melvin Wright.

Also Present: Heather Telfer (Bar Staff Liaison); Nicholas Brown (Reporter).

Members Absent: Gary Fox; Richard Suarez; Fred Lewis.

PRODUCTS LIABILITY — ALAN WAGNER (Materials, pp. 522–561).

Vargas explained that the Committee proposed new products liability instructions in response to Florida Supreme Court's decision in *Aubin v. Union Carbide Corp.*, 177 So. 3d 489 (Fla. 2015).

Wagner reported that comments were received from two individuals in response to the published instructions. First, William C. Ourand encouraged the Committee to make clear that the consumer expectations and risk utility tests were alternatives. The Subcommittee decided not to make any changes, however, because the instruction already makes that clear.

Wagner explained that Mr. Ourand also addressed the Comment K defense in 403.18, contending it carried the risk of having every case turn into a Restatement 3rd "safest product available" case. Comment K had only been applied to certain classes of products so far, namely, pharmaceuticals, medical devices, and drugs, although no cases state the defense is limited to those products. But because no Florida case had extended it beyond

those products, the Subcommittee decided it warranted amending the 403.18b note on use stating the Committee takes no position on whether it applies to products other than those to which it has already been applied (Materials, p. 525) (see below).

Wagner also addressed comments received from Julie H. Littky-Rubin. First, she argued the consumer expectation test should also apply to design defects, but the Subcommittee disagreed, noting *Aubin* does not support that conclusion. Ms. Littky-Rubin also suggested altering the warnings instruction, but *Aubin* did not address that issue either. Third, she encouraged the Subcommittee to review and clarify the "substantial change" language, but again, that was not addressed in *Aubin*, and the Subcommittee declined to do so.

Ms. Littky-Rubin also identified that the instructions suggest that the governmental rules and "state of the art" defense is not an actual legal defense. The Subcommittee agreed.

The Subcommittee accordingly recommended the following changes to 403.18:

403.18 DEFENSE ISSUES

If, however, the greater weight of the evidence supports [(claimant's) **claim] [one or more of** (claimant's) **claims], then you shall consider the defense[s] raised by** (defendant)**.**

On the [first]* defense, the issue[s] for you to decide [is] [are]:

**The order in which the defenses are listed below is not necessarily the order in which the instruction should be given.*

a. Comparative Negligence:

whether (claimant or person for whose injury or death claim is made) **was [himself] [herself] negligent *in** (describe alleged negligence) **and, if so, whether that negligence was a contributing legal cause of the injury or damage to** (claimant)**.**

*If the jury has not been previously instructed on the definition of negligence, instruction 401.4 should be inserted here.

b. ~~Risk/Benefit Defense~~Unavoidably Unsafe Product:

~~whether, on balance, the [benefits] [or] [value] of (the product) outweigh the risks or danger connected with its use.~~ whether there was no reasonable alternative design for (the product) **when it was placed on the market and, on balance, at that time, the [benefits] [or] [value] of** (the product) **outweighed the risks or danger connected with its use.**

NOTE ON USE FOR 403.18b

~~In a strict liability defective design case, a defendant may be entitled to an affirmative defense based on the risk/benefit test. See *Force v. Ford Motor Co.*, 879 So. 2d 103, 106 (Fla. 5th DCA 2004); *Adams v. G. D. Searle & Co.*, 576 So. 2d 728, 733 (Fla. 2d DCA 1991); *Cassisi v. Maytag Co.*, 396 So. 2d 1140, 1145–46 (Fla. 1st DCA 1981). Pending further development in the law, the committee takes no position on whether the risk/benefit test is a standard for product defect that should be included in instruction 403.7 or an affirmative defense under instruction 403.18. The court should not, however, instruct on risk/benefit as both a test of defectiveness under 403.7 and as an affirmative defense under 403.18.~~ Restatement (Second) Of Torts § 402A (1965), comment k (unavoidably unsafe products). Comment k has only been applied in Florida to medical devices, drugs, and vaccines and has not been extended to any other class of product. Pending further development in the law, the committee takes no position on whether this instruction is appropriate for products other than medical devices, drugs, and vaccines.

c. *Government Rules Defense:*

No instruction provided.

NOTE ON USE FOR 403.18c

F.S. 768.1256 provides for a rebuttable presumption in the event of compliance or noncompliance with government rules. The statute does not state whether the presumption is a burden-shifting or a vanishing presumption. See *F.S.* 90.301–90.304; *Universal Insurance Co. of North America v. Warfel*, 82 So. 3d 47 (Fla. 2012); *Birge v. Charron*, 107 So. 3d 350 (Fla. 2012). Pending further development in the law, the committee offers no standard instruction on this presumption, leaving it up to the parties to propose instructions on a case-by-case basis.

d. ~~*State-of-the-art Defense:*~~

~~In deciding whether~~ ~~(the product)~~ **~~was defective because of a design defect, you shall consider the state-of-the-art of scientific and technical knowledge and other circumstances that existed at the time of~~** ~~(the product's)~~ **~~manufacture, not at the time of the [loss] [injury] [or] [damage].~~**

~~NOTE ON USE FOR 403.18d~~

~~Instruction 403.18d applies only in defective design cases. *F.S.* 768.1257.~~

~~e.~~ *Apportionment of fault:*

whether (identify additional person(s) or entit(y)(ies)) **[was] [were] also [negligent] [at fault] [responsible] [**(specify other type of conduct)**]; and, if so, whether that [negligence] [fault] [responsibility] [**(specify other type of conduct)**] was a contributing legal cause of [loss] [injury] [or] [damage] to** (claimant, decedent or person for whose injury claim is made)**.**

NOTE ON USE FOR 403.18~~e~~d

See *F.S.* 768.81; *Fabre v. Marin*, 623 So. 2d 1182 (Fla. 1993). In most cases, use of the term "negligence" will be appropriate. If another type of fault is at issue, it may be necessary to modify the instruction and the verdict form accordingly. In strict liability cases, the term "responsibility" may be the most appropriate descriptive term.

NOTES ON USE FOR 403.18

1. Comparative negligence is a defense to strict liability claims if based on grounds other than the failure of the user to discover the defect or to guard against the possibility of its existence. *West v. Caterpillar Tractor Co.*, 336 So. 2d 80, 90 (Fla. 1976).

2. The "patent danger doctrine" is not an independent defense but, to the extent applicable (see note 1), it is subsumed in the defense of contributory negligence. *Auburn Machine Works Inc. v. Jones*, 366 So. 2d 1167 (Fla. 1979).

3. For the state-of-the-art defense see, *F.S.* 768.1257.

The Subcommittee further recommended the following amendment to 403.7 (Materials, p. 524):

403.7 STRICT LIABILITY

a. Manufacturing defect

A product is defective because of a manufacturing defect if it is in a condition unreasonably dangerous to [the user] [a person in the vicinity of the product] and the product is expected to and does reach the user or consumer without substantial change affecting that condition.

A product is unreasonably dangerous because of a manufacturing defect if it is different from its intended design and fails to perform as safely as the intended design would have performed.

b. Design defect

A product is defective because of a design defect if it is in a condition unreasonably dangerous to [the user] [a person in the vicinity of the product] and the product is expected to and does reach the user without substantial change affecting that condition.

A product is unreasonably dangerous because of its design if [the product fails to perform as safely as an ordinary consumer would expect when used as intended or when used in a manner reasonably foreseeable by the manufacturer]~~[and]~~ [or] [the risk of danger in the design outweighs the benefits].

[In deciding whether (the product) **was defective because of a design defect, you shall consider the state-of-the-art of scientific and technical knowledge and other circumstances that existed at the time of** (the product's) **manufacture, not at the time of the [loss] [injury] [or] [damage]].**

The Subcommittee also recommended adding the following note on use to 403.7:

7. For the state-of-the-art defense, *see* F.S. 768.1257.

Vargas noted there is no need to republish these instructions; instead, the Committee will submit the proposal to the Court, with a report explaining this is the proposal of the Committee in response to *Aubin*.

Vargas identified this change will also involve deleting the defense from 403.18(d) and renumbering (e), with which the Committee agreed. The Subcommittee will circulate the final language and have the Committee vote via email, then submit the report to the Court.

The Subcommittee also recommended changes to Model Instruction 7. The Subcommittee recommended the following edits to the facts of the hypothetical case:

MODEL INSTRUCTION NO. 7

Product liability case; negligence and strict liability claims; comparative negligence defense; aggravation of pre-existing injury

Facts of the hypothetical case:

John Smith claims he was injured when a hay baler being driven on the highway by Dilbert Driver struck ~~him~~his car. The hay baler suddenly swerved across the road into the path of Smith, who was driving in the opposite direction. At the time, Smith was looking at a group of deer in a field near the road, and therefore took no evasive action to avoid the collision. An examination of the hay

baler revealed that a bolt that was part of the steering mechanism was designed in such a way that it could not sustain the speed of highway driving, would loosen over time, weaken, and eventually break. ~~The retailer seller, Sharp Sales Co., prior to selling it to Driver, had not inspected it. The mechanism had broken, making it impossible for Driver to steer the baler. There was evidence that a person could have observed the weakened condition of the steering mechanism had he or she examined it.~~ At the time of the accident, Dilbert Driver was operating the hay baler at an unsafe speed when the bold suddenly broke, making it impossible for Dilbert Driver to steer the hay baler, which crashed into the car being driven by John Smith and injured him as a result. John Smith sued Dilbert Driver, alleging that his operation of the hay baler had been negligent. John Smith also sued the manufacturer of the hay baler, Mishap Manufacturing Co., and the retailer seller, Sharp Sales, alleging that the hay baler had been defectively designed ~~and that both defendants had been negligent in their inspections of the hay baler. He sought recovery against both the manufacturer and the retailer on claims of (1) negligence and (2) strict liability based on the consumer expectation test~~. The defendants denied liability, and affirmatively alleged that John Smith had been comparatively negligent. ~~There are also issues of a pre-existing injury.~~ The defendants also alleged that some of John Smith's injuries pre-existed the collision with the hay baler and John Smith alleged that his pre-existing condition was aggravated by the collision with the hay baler.

There was a motion to approve the revisions subject to the discussion, followed by a vote via email on the final language. The motion was seconded, and the Committee unanimously agreed to that procedure.

SUPREME COURT COMMITTEE ON
STANDARD JURY INSTRUCTIONS IN CIVIL CASES

MEETING MINUTES

CEREMONIAL COURTROOM
ST. JOHNS COUNTY COURTHOUSE
RICHARD O. WATSON JUDICIAL CENTER
4010 LEWIS SPEEDWAY
ST. AUGUSTINE, FLORIDA 32084

JULY 27, 2017
1:00 P.M. TO 5:30 P.M.

Members present: Rebecca Mercier Vargas (Chair), Laura Whitmore (Vice Chair), Linda Babb, Wendy Berger, Steven Brannock, Beatrice Butchko, Jeffrey Cohen, Jack Day (via phone), Bryan Gowdy, Robert Klein, Matthew Lucas (via phone), Douglas McCarron (via phone), Elizabeth Metzger (via phone), Seth Miles (via phone), Donald Myers, Jason Odom (via phone), Robert O'Quinn, David Sales, Thomas Slater, Johnathan Trohn, Peter Wechsler (via phone), Christine Welstead (via phone), Charles Wiggins (via phone), Melvin Wright.

Also present: Heather Telfer (Bar Staff Liaison), Nicholas Brown (Reporter).

Members Absent: Joe Amos, Brian Baggot, James Daniel, Thomas Dukes, Gary Fox, Barbara Green, Robert Gross, Stephanie Ray, Daniel Rogers, Nichole Segal, Richard Suarez, Alan Wagner, R. Fred Lewis.

Products Liability — Rebecca Mercier Vargas

Vargas is working on a report that addresses the amendments approved at the February meeting in response to *Aubin v. Union Carbide Corp.*, 177 So. 3d 489 (Fla. 2015).

SUPREME COURT COMMITTEE ON
STANDARD JURY INSTRUCTIONS IN CIVIL CASES

COMMUNITY ROOM
ST. PETERSBURG COLLEGE (DOWNTOWN CAMPUS)
244 2ND AVENUE NORTH
ST. PETERSBURG, FLORIDA 33701

OCTOBER 26, 2017
1:00 P.M. TO 5:30 P.M.

Meeting Minutes

Members Present: Rebecca Mercier Vargas (Chair), Laura Whitmore (Vice Chair), Joseph L. Amos, Jr., Linda H. Babb, Wendy Berger (via phone), Steven Brannock, Beatrice Butchko, Jeffrey Cohen, James Daniel, Jack Day, Brian Gowdy (via phone), Robert Gross, Robert Klein (via phone), Elizabeth Metzger, Seth Miles (via phone), Jason Odom, Robert O'Quinn, Stephanie Ray, Daniel Rogers, Nichole Segal, Thomas Slater, Jonathan Trohn, Peter Wechsler (via phone), Christine Welstead, Melvin Wright (via phone).

Also Present: Heather Telfer (Bar Liaison), Nicholas Brown (Reporter), James Barton (ex officio), Cheryl Worman (incoming member).

Members Absent: Brian Baggot, Thomas Dukes, Gary Fox, Barbara Green, R. Fred Lewis, Matthew Lucas, Douglas McCarron, Donald Myers, David Sales, Richard Suarez, Alan Wagner.

Products Liability — Alan Wagner.

Wagner had a last-minute scheduling conflict and had to cancel attending the meeting. In his absence, Vargas reported the Subcommittee had been reviewing recent decisions. The full Committee has approved amendments in response to the Supreme Court's decision in *Aubin v. Union Carbide Corp.*, 177 So. 3d 489 (Fla. 2015), and the Products Subcommittee is reviewing other recent decisions to confirm they are consistent with the instruction.

SUPREME COURT COMMITTEE ON
STANDARD JURY INSTRUCTIONS IN CIVIL CASES

FLORIDA SUPREME COURT
500 S. DUVAL STREET
TALLAHASSEE, FL 32399

MEETING MINUTES

JULY 26, 2018

Members Present: Laura Whitmore (Chair), Jeffrey A. Cohen (Vice Chair), Joseph L. Amos, Jr., Linda Babb, Wendy Berger (via phone), Beatrice Butchko (via phone) Bryan Gowdy, Barbara Green, Robert Gross, James Gustafson, Jr., Robert Klein (via phone), Douglas McCarron (via phone), Elizabeth Metzger, Seth Miles (via phone), Donald Myers, Jason Odom (via phone), Stephanie Ray, Daniel Rogers, Samuel Salario (via phone), Matthew Schultz, Nichole Segal, Tom Slater (via phone), Alan Wagner, Peter Wechsler (via phone), Christine Welstead (via phone), Cheryl Worman, Melvin Wright (via phone).

Also Present: Heather Telfer (Bar Staff Liaison), Nicholas Brown (Reporter).

Members Absent: Brian Baggot, Steven Brannock, James Daniel, Jack Day, R. Fred Lewis, Robert O'Quinn, Richard Suarez, Jonathan Trohn, Charles Wiggins.

PRODUCTS LIABILITY — ALAN WAGNER (Materials, Pages 139–265).

Wagner provided the report of the Subcommittee.

Wagner reported that many of the products liability instructions were re-drafted after the Supreme Court's decision in *Aubin v. Union Carbide Corp.*, 177 So. 3d 489 (Fla. 2015). The Committee published proposed instructions, which received only one comment. Ultimately, they were republished, this time drawing 27 comments in total, 25 of which involved the unavoidably unsafe product instruction.

The Subcommittee met and concluded that the unavoidably unsafe product instruction should be amended to address Comment K from the Restatement (Second) of Torts §402a, which was not involved in *Aubin*. Although one comment asked whether such an instruction should exist at all, because the issue is rarely raised, the Subcommittee concluded the endeavor is worthwhile, particularly because the issue is being raised more frequently in the drug context. The Subcommittee decided that the Comment K defense instruction should be an independent, stand-alone instruction.

The Subcommittee has accordingly prepared a draft of instruction and is working to refine it. The Subcommittee is also addressing the other comments that have been received regarding other

products instructions. Wagner anticipates having a full draft to present to the Committee by the October 2018 meeting.

Schultz added that, in addition to helping Florida state courts and practitioners, these instructions will also be helpful for federal judges around the country in cases applying Florida law.

Whitmore asked whether, given that there will likely be significant further edits to the instructions, they will need to be republished. Telfer anticipated that if an entirely new instruction is forthcoming, then it should be resubmitted for comments.

The Committee then discussed whether to: (A) move forward now with filing the subset of existing instructions that are not anticipated to change, or instead to (B) wait until the full set is complete and submit a unified set at that time. Cutting in favor of piecemeal submission is that some of the instructions currently published on the Supreme Court's website are now outdated and incorrect. But waiting to submit until a full set is prepared would reduce the likelihood of confusion and of inconsistencies within the full set.

The Subcommittee will meet to discuss how to proceed in light of the issues identified by the Committee.

SUPREME COURT COMMITTEE ON
STANDARD JURY INSTRUCTIONS IN CIVIL CASES

JUDICIAL CONFERENCE ROOM, 23RD FLOOR
ORANGE COUNTY COURTHOUSE
425 N. ORANGE AVENUE
ORLANDO, FLORIDA

OCTOBER 11, 2018 — 1:00 P.M. TO 5:30 P.M.

MEETING MINUTES

Members Present:	Laura Whitmore (Chair), Jeffrey A. Cohen (Vice Chair), Joseph Amos, Jr., Linda Babb, Wendy Berger, Steven Brannock, Beatrice Butchko, Brian Gowdy, Barbara Green, Robert Gross (via phone), Robert Klein, Douglas McCarron, Elizabeth Metzger, Seth Miles Donald Myers, Jason Odom, Robert O'Quinn, Jr., Stephanie Ray (via phone) Samuel Salario (via phone), Matthew Schultz (via phone), Nichole Segal, Thomas Slater, John Trohn, Alan Wagner, Christine Welstead (via phone), Charles Wiggins (via phone), Melvin Wright.
Also Present:	Heather Telfer (Bar Staff Liaison) (via phone), Nicholas Brown (Reporter).
Members Absent:	Brian Baggot, James Daniel, Jack Day, James W. Gustafson, Jr., R. Fred Lewis, Daniel Rogers, Richard Suarez, Peter Wechsler, Cheryl Worman.

Products Liability — Alan Wagner (Materials, Pages 200–248).

Wagner delivered the report of the Subcommittee.

Wagner reported that the Subcommittee has been working through a number of comments received on proposed instructions. The most significant was the instruction on "Comment k," which the Subcommittee agreed required amendment. Since the last meeting, the Subcommittee has attempted to create an instruction for Comment k.

Wagner explained that drafting the instruction has been difficult, in part because it has been meaningfully discussed only in a single decision, *Adams v. G.D. Searle & Co., Inc.*, 576 So. 2d 728 (Fla. 2d DCA 1991), which adopts Comment k as a mechanism for unavoidably unsafe

products. But given the way the law has changed since then, particularly in light of *Aubin v. Union Carbide*, 177 So. 3d 489 (Fla. 2015), unavoidably unsafe products now apply to an extremely narrow set of cases: design defect cases.

One comment from Wayne Hogan suggested that a standard instruction may not be necessary because this issue arises so rarely. The Subcommittee discussed the comment in detail and ultimately agreed that this instruction is probably not needed. Wagner estimated that he has seen the issue arise only a couple of times in the past 30 years. The Subcommittee's ultimate consensus was that although the revised instruction is legally accurate, it is based on an aging decision in an area in which the law and practice has changed. In the absence of any other cases discussing the issue, the Subcommittee concluded a standard instruction is not necessary. But the Subcommittee believes the draft instruction is correct, despite the absence of any Florida cases with the same language. The Subcommittee accordingly recommends withdrawing the proposed instruction.

Schultz and Cohen explained that the Subcommittee engaged in substantial research and debate in determining how to move forward on the issue. Wagner added that if these cases were being tried frequently, then there should be an instruction, but because it appears that is not the case, that there is no need for a standard instruction.

Whitmore asked whether it would be helpful to add a Note on Use explaining that the Committee is not proposing such an instruction. Cohen also asked about the impact of this decision on 403.18, which asks the jury to determine whether a product is defective because it violates consumer expectations or because it fails the risk/utility test. There, risk/utility is set forth as an affirmative defense. The Comment k instruction was a modification of that affirmative defense charge.

The Committee then engaged in discussion regarding how to move forward in light of the current state of the law and the other existing instructions. Ultimately, the Committee determined it should include an entry regarding unavoidably unsafe products, and simply explain that no instruction is provided, with a citation to Comment k and *Adams*. Whitmore noted that there are cross-references within the Instructions that the Subcommittee will need to address and update if necessary.

Telfer observed that there has been a number of prior publication notices on these instructions that the Committee should review to determine which remain applicable. Cohen asked whether, once the Committee finishes the set (including the modifications just discussed and any others it determines are necessary), it can simply republish it altogether and open it for comments, rather than doing so piecemeal. Telfer agreed that submitting it all as one cohesive set would be prudent. Whitmore confirmed with Telfer that the publication notice can describe that it seeks to clarify and resolve all outstanding issues.

Whitmore identified that the Subcommittee is nearly finished with the set, and asked whether the Products Subcommittee can finalize it for presentation to the full Committee at the February meeting. Wagner responded that the Subcommittee would aim to do so.

Wagner reported further that other comments were the result of the piecemeal approach to publication, such as those regarding the state-of-the-art defense, which is now subsumed within the determination of a defect. Another comment asked whether the learned intermediary issue is a defense or if it should be part of the warnings instruction. Wagner suggested including that issue in the Subcommittee's work that will be presented at the February meeting.

Whitmore thanked Wagner and the Subcommittee for their continued work.

SUPREME COURT COMMITTEE ON
STANDARD JURY INSTRUCTIONS IN CIVIL CASES

FOURTH DISTRICT COURT OF APPEAL
110 SOUTH TAMARIND AVENUE
WEST PALM BEACH, FL 33401

MEETING MINUTES

MARCH 7, 2019

Members Present: Laura Whitmore (Chair), Jeffrey A. Cohen (Vice Chair), Linda Babb, Wendy Berger, Steven Brannock (via phone), Beatrice Butchko (via phone), Jack Day (via phone), Bryan Gowdy, Barbara Green, Robert Gross, James Gustafson, Jr., Lacey Diggs Hofmeyer, Daniel J. Kissane, Robert Klein, Norma Lindsey, Douglas McCarron, Elizabeth Metzger, Seth Miles, Stephanie Miles, Jason Odom, Stephanie Ray (via phone), Daniel Rogers, Samuel Salario, Jr. (via phone), Matthew D. Schultz, Nichole Segal, Alan Wagner, Christine Welstead, Jennifer T. Williams, Cheryl L. Worman, Melvin Wright (via phone).

Also Present: Heather Telfer (Bar Staff Liaison), Nicholas Brown (Reporter), Rebecca Mercier Vargas (ex officio).

Members Absent: Joseph Amos, Jr., James Daniel, Jonathan Trohn.

Products Liability — Alan Wagner (Materials, Pages 84–110).

Wagner provided the report of the Subcommittee.

He reported that the Subcommittee has now worked through the many comments received in response to the May 2018 publication. The project began by incorporating the Florida Supreme Court's decision in *Aubin v. Union Carbide Corp.*, 117 So. 3d 489 (Fla. 2015) and the consumer expectations and risk/utility test in the instructions. It also addressed language in *Aubin* regarding the unavoidably unsafe defense, then addressed comment k of Restatement (Second) of Torts §402A (1965).

The Subcommittee believed its comment k instruction was accurate, but then a comment was received asking why it was necessary. In particular, the comment noted that the defense had only ever been applied to medical devices, and asked whether there should be a standard instruction for such an infrequent defense. The Subcommittee ultimately agreed with the comment, omitted the unavoidably unsafe defense and did not add an instruction covering the comment k issue.

Wagner also reported that the last submission by the Errors & Omissions Subcommittee corrected certain minor discrepancies in the Products Liability instructions. In addition, Telfer corrected errors in the citations in 403.7 Note on Use No. 1.

Telfer invited the Committee to discuss whether to (i) publish the revised set of instructions for further comment, or instead (ii) submit it directly to the Court. Whitmore observed that it is likely that the Court itself will publish the set for public comment, thereby reducing the need to republish it for another round of comments before submission. Wagner added that the most numerous and contentious issues in the last round of comments were the unavoidably unsafe defense and comment k, which have now been resolved. Cohen identified that there also were comments addressing the learned intermediary issue, which Wagner said the Subcommittee had worked through as well.

Cohen proposed that because the substantive changes addressed by the commenters have already been published, it makes sense to submit the set to the Court. Telfer agreed, noting that some of the instructions in the set have been published three times already. Vargas added that there is no need to republish a set each time a change is made in response to comments, and further, that the Court will likely publish the set for comment anyway, so it makes sense to submit the set.

Gowdy moved to submit the set to the Court, Whitmore seconded the motion, and the Committee unanimously voted in favor. Whitmore reported that the Filing Subcommittee will handle the submission.

Whitmore thanked Wagner and the Subcommittee for the great work on this enormous project.