IN THE SUPREME COURT OF FLORIDA

In the matter of Standard Jury Instructions (Civil), CASE NO. SC09-1264

Products Liability Instructions
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COMMENTS TO PROPOSALS 8, 10, AND 11: PROPOSED PRODUCT LIABILITY STANDARD JURY INSTRUCTIONS 403.7, 403.9, AND 403.10

The Committee on Standard Jury Instructions in Civil Cases has recommended that The Florida Bar be authorized to publish revised Florida Standard Jury Instructions (Civil) for Products Liability, and has submitted its report proposing both new and revised civil jury instructions to be used in product liability actions. Upon its initial review, the Court identified several proposals that required further discussion, and invited all interested persons to comment on the proposed product liability standard jury instructions. Accordingly, the undersigned respectfully submits its comments to proposals 8, 10, and 11 (proposed product liability standard jury instructions 403.7, 403.9, and 403.10).

I. Comments to Proposal No. 8

Paragraph 3 of the proposed Notes On Use For 403.7 provides that "[p]ending 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." Such

language should be stricken because the risk/benefit test *is* a standard and viable test for product defect in design defect cases, and should not be relegated to a mere affirmative defense. See, e.g., Agrofollajes, S.A. v. E.I. Du Pont de Nemours & Co., Nos. 3D07-2322, 3D07-2318, 3D07-1036, 2009 WL 4828975, at *21 (Fla. 3d DCA Dec. 16, 2009); Force v. Ford Motor Co., 879 So. 2d 103, 109 (holding instructions on both the consumer expectations test and risk/benefit test should have been submitted to the jury, but noting that "there may indeed be products that are too complex for a logical application of the consumer-expectation standard").

In Agrofollajes, a design defect case, the trial court instructed the jury on both the consumer expectations and risk/benefit tests. Citing the Restatement (Third) of Torts: Products Liability, the Third District held that it was error for the trial court to instruct the jury on the consumer expectations test because such a test "could not be used as an independent basis for finding a product defective" in a design defect case, "especially in the case of a complex product" like the one at issue in the case. Id. at *21 (citing Restatement § 2, comment g and Kohler Co. v. Marcotte, 907 So. 2d 596, 598-600 (Fla. 3d DCA 2005)).

As a result, the risk/benefit test is a viable standard for product defect that should be included in proposed jury instruction 403.7. Whether the risk/benefit test should be submitted to a jury together with, alternative to, or to the exclusion of, the consumer expectations test, depends on the particular circumstances of a

case, (*e.g.*, the nature and complexity of the product). Such a determination should remain within the discretion of the court. Alternatively, § 2 of the Restatement (Third) should provide the sole basis for product liability based on design defect as suggested in Kohler v. Marcotte, supra.

II. Comments to Proposal No. 10

Paragraphs 1 and 2 of the proposed Notes On Use For 403.9 should be eliminated because they are inappropriate and unnecessary. Paragraph 1 gives explanations and case examples demonstrating circumstances under which a product has been found to be in an unreasonably dangerous condition. It merely provides a roadmap to attorneys to determine whether, in any particular case, a product could be found to be in an unreasonably dangerous condition. Paragraph 1 does not provide guidance to the court regarding the application of the jury instruction, which is the purpose of the Notes On Use. As a result, Paragraph 1 should be eliminated.

Paragraph 2 of the proposed Notes On Use For 403.9 should also be eliminated. Paragraph 2 is simply a restatement of the Cassisi inference, Cassisi v. Maytag Co., 396 So. 2d 1148 (Fla. 1st DCA 1981) (when a product malfunctions during normal operation, a legal inference of product defectiveness arises, and the injured plaintiff has thereby established a prima facie case for jury consideration). Indeed, the two cases cited in support in Paragraph 2, Armor Elevator Co. v.

Wood, 312 So. 2d 514 (Fla. 3d DCA 1975) and Ford Motor Co. v. Cochran, 205 So. 2d 551 (Fla. 2d DCA 1967), involve products that malfunctioned and caused injury during their normal and intended use. Given that proposed product liability jury instruction 403.11, "Inference of Product Defect or Negligence," codifies the Cassisi inference, Paragraph 2 is superfluous and should be eliminated.

III. Comments to Proposal No. 11

Proposed product liability jury instruction 403.10, "Negligent Failure to Warn," should be eliminated because it is redundant in light of instruction 403.8, "Strict Liability Failure to Warn." The case cited in support in the Note On Use For 403.10, Ferayorni v. Hyundai, 711 So. 2d 1167 (Fla. 4th DCA 1998), initially states that strict liability failure to warn and negligent failure to warn claims are not co-extensive. However, the court goes on to state that in a negligent failure to warn case, a plaintiff is required "to prove that a manufacturer or distributor did not warn of a particular risk for reasons which fell below the acceptable standard of care, i.e., what a reasonably prudent manufacturer would have known and warned about," and that in a strict liability failure to warn case, a plaintiff is required to prove that a manufacturer or distributor "did not adequately warn of a particular risk that was known or knowable in light of the general and medical knowledge available at the time of manufacture or distribution." Id. at 1172. The two claims, therefore, are essentially identical because it necessarily follows that

"what a reasonably prudent manufacturer would have known and warned about" is the equivalent of what is "known or knowable in light of the general and medical knowledge available at the time of manufacture or distribution." As a result, proposed jury instruction 403.10 should be eliminated as unnecessary in light of instruction 403.8, "Strict Liability Failure to Warn."

In the alternative, if proposed jury instruction 403.10 is not eliminated, reference to a "defective product" in the instruction is not required because whether a product is unreasonably dangerous, i.e. defective, in failure to warn claims necessarily depends upon the adequacy of the warning. If the benefits of a particular product outweighs its risks, and the warning adequately discloses the dangerous properties or features of the product to the ordinary consumer based on what is known or knowable in light of the general and medical knowledge available at the time of manufacture or distribution, the product may be dangerous, but it is not unreasonably so. If, however, the warning fails to adequately disclose the dangerous properties of the product to the ordinary consumer based on what is known or knowable in light of the general and medical knowledge available at the time of manufacture or distribution, the product is unreasonably dangerous. Accordingly, if proposed jury instruction 403.10 is not eliminated, reference to a "defective product" is not necessary.

Respectfully submitted,

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CERTIFICATE OF SERVICE

We hereby certify that a true and correct copy of the foregoing was served via U.S. mail on this 1st day of February, 2010 on the Committee on Standard Jury Instructions in Civil Cases Chair, Tracy Raffles Gunn, Gunn Appellate Practice, P.A., 777 S. Harbour Island Blvd., Suite 770, Tampa, Florida 33602.

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that this document complies with the font requirements set forth in Florida Rule of Appellate Procedure 9.210 by using Times New Roman 14-point font.

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