IN THE SUPREME COURT OF FLORIDA

CASE NO. SC09-1264

IN RE: STANDARD JURY INSTRUCTIONS
IN CIVIL CASES -- Report No. 09-10 (Products Liability)
_____/

COMMENTS ON PROPOSED INSTRUCTIONS
(By Joel D. Eaton)

The Court has requested comments on the Committee's proposed product liability instructions. I have substantive comments on three of the proposals:

PROPOSAL #8 -- 403.7, STRICT LIABILITY

In my opinion, it was inappropriate to merge PL4 (strict liability for manufacturing defect) and PL5 (strict liability for design defect) into a single, one-size-fits-all instruction. The two causes of action are considerably different. Strict liability for a manufacturing defect arises when the design of the product is reasonably safe but some defect or flaw in the product was introduced in the manufacturing process through no fault of the defendant. Proof of negligence is not required in such a case. On the other hand, it is widely recognized and accepted that strict liability for a design defect is indistinguishable from an action for negligent design, because a design can be "unreasonably dangerous" only if the designer failed to use "reasonable care" in its design.

Although the two concepts have been merged into a single instruction, the

Committee has recognized that they are distinctly different by sprinkling various qualifiers throughout its "Notes on Use." For example, Note 1 to 403.7 says:

> In cases involving a claim of a manufacturing defect in the product, to clarify the issue for the jury, this instruction can be modified by adding the following language in the second paragraph after "if [the product": "was not built according to its intended design [or] because the product . . . ." The risk/benefit test does not apply in cases involving claims of manufacturing defect.

And Note 5 to 403.7 says:

> 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.

The same qualifier appears in Note 2 to 403.8, Note 3 to 403.9, and the Note following 403.10.

This frequently-repeated qualifier is applicable to manufacturing defect cases. It is not applicable to a design defect case, because a design defect case is essentially a negligent design case. To insert this qualifier into an instruction in a design defect case would be to contradict the very essence of a design defect case. The qualifier is bound to cause confusion, in my judgment. At the very least, the qualifier should explain that it is limited to manufacturing defect cases. It would be more appropriate and much less susceptible to confusion, in my opinion, to have separate instructions for manufacturing defect cases (which incorporate the qualifiers in the Notes) and for

design defect cases (which do not need the qualifiers).

This was long the judgment of the Committee, and it appears to me that the Committee's recent effort to simplify the instructions may have made them much more complicated. I therefore respectfully submit that the Court should not approve 403.7, and that it should direct the Committee to consider whether separate instructions for the two types of strict liability would be more appropriate.

PROPOSAL #19 -- 403.18d, DEFENSE ISSUES

In my opinion, the "State-of-the-Art Defense" instruction, 403.18d, is misplaced in the sequence of instructions, if it is appropriate at all, because "state-of-the-art" is not an affirmative defense. An affirmative defense is one that "admits" all or part of a plaintiff's claim, but "avoids" all or part of the claim on a ground that is not an element of the plaintiff's claim -- like comparative negligence, statute of limitations, release, and the like. Although the word "defense" appears in the title of §768.1257, Fla. Stat., the text of the statute itself does not create an "affirmative defense."

The text of the statute merely states that, in a design defect case, the "finder of fact shall consider the state of the art of scientific and technical knowledge and other circumstances that existed at the time of manufacture, not at the time of loss or injury." In other words, the statute says that, in determining whether the design of a product is defective because "unreasonably dangerous," the finder-of-fact should make its determination based on the state of the art at the time of the product's manufacture, rather than the state-of-the-art at the time of the injury.

The instruction is therefore directed at an element of the plaintiff's case; it is not

an "affirmative defense" that will avoid a finding of liability for an unreasonably dangerous and therefore defective design. And if it is to be given at all, it belongs as a qualifying instruction to the instructions defining the elements of the plaintiff's cause of action. The proof of that, I believe, can be found in the fact that, although the Committee has inserted the concept into 403.18 as a "defense," it could find no place in its model verdict form for a jury to return a finding of fact on the "defense." If a "defense" does not require a finding of fact on a verdict form, it is not a "defense" at all. I therefore respectfully submit that the Court should not approve 403.18d, or at the least, that it should direct the Committee to consider whether the instruction belongs as a qualifier to the instructions defining the elements of the plaintiff's claim.

PROPOSAL #19 -- 403.18b, DEFENSE ISSUES

I have the same problem with the "Risk/Benefit Defense" instruction, 403.18b. Like the so-called state-of-the-art "defense," the so-called risk/benefit "defense" is not an affirmative defense that will avoid a finding of liability for an unreasonably dangerous and therefore defective design. It is directed at an element of the plaintiff's claim (and, in my judgment, the Committee has appropriately included it as an element of the plaintiff's claim in 403.7 as a result). 403.7 states that a product is "unreasonably dangerous" and therefore defective if the risk of danger in the design of the product outweighs the benefits of the product. If the finder-of-fact finds the product "unreasonably dangerous," it has necessarily resolved the risk/benefit "defense," and it is therefore not a separate defense requiring a separate instruction.

Put another way, the so-called risk/benefit "defense" is no more a defense than

"not defective" or "not unreasonably dangerous" is a defense. And the Committee has recognized as much in its Note on Use for 404.18b, where it states that a court "should not . . . instruct on risk/benefit as both a test of defectiveness under 403.7 and as an affirmative defense under 403.18."

Once again, the proof that a separate instruction on the "defense" is not appropriate can be found in the fact that, although the Committee has inserted the concept into 403.18 as a "defense," it could find no place in its model verdict form for a jury to return a finding of fact on the "defense." If a "defense" does not require a finding of fact on a verdict form, it is not a "defense" at all. I therefore respectfully submit that the Court should not approve 403.18b, and that the "defense" should remain as a qualifier to the instructions defining the elements of the plaintiff's claim.

I HEREBY CERTIFY that a true copy of the foregoing was mailed this 29th day of January, 2010, to: Tracey Raffles Gunn, Gunn Appellate Practice, P.A., 400 North Ashley Drive, Suite 2055, Tampa, FL 33602.

Respectfully submitted,

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