Supreme Court of Florida

CASE NO. SC09-1264

In Re Standard Jury Instructions in Civil Cases—Report No. 09-10 (Products Liability)

FLORIDA JUSTICE ASSOCIATION'S RESPONSE TO REQUEST FOR COMMENTS ON PROPOSALS NOS. 8, 10, 11, 12, 13, 19 & 21—REVISIONS TO PRODUCT LIABILITY JURY INSTRUCTIONS

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STATEMENT OF INTEREST OF RESPONDENT

The Respondent, Florida Justice Association (hereinafter "FJA"), formerly known as the Academy of Florida Trial Lawyers, is a statewide non-profit organization with approximately 3,800 members, most of whom are Florida attorneys actively engaged in civil trial and appellate litigation The FJA has appeared over the last more than forty years as amicus curiae in approximately 500 cases involving issues important to the rights of individuals and to the administration of justice. The Objectives and Goals of the FJA are as follows:

> Section I. The objectives of this corporation are to: (a) Uphold and defend the principles of the Constitutions of the United States and the State of Florida. (b) Advance the science of jurisprudence. (c) Train in all fields and phases of advocacy. (d) Promote the administration of justice for the public good. (e) Uphold the honor and dignity of the profession of law. (f) Encourage mutual support and cooperation among members of the Bar. (g) diligently work to promote public safety and welfare while protecting individual liberties. (h) Encourage the public awareness and understanding of the adversary system and to uphold and include the adversary system, assuring that the courts shall be kept open and accessible to every person for redress of any injury and that the right to trial by jury shall be secure to all and remain inviolate.

Article II, FJA Charter, approved October 26, 1973.

The FJA has a Jury Instruction Review Committee comprised of members including board certified attorneys in the specialties of Civil Trial and Appellate Practice. That Committee has studied Report No. 09-10 of this Court's Committee on

Standard Jury Instructions in Civil Cases, conducted legal research, held several meetings, and formulated the present responses to this Court's Request for Comments on Proposals Nos. 8, 10, 11, 12, 13, 19 and 21.

PRELIMINARY STATEMENT

At the outset, the FJA notes that with the exception of mainly two members, the Committee on Standard Jury Instructions in Civil Cases ("the Committee") was unanimous in its approval of the Product Liability instructions. The FJA believes that this is a significant fact, given that the two main objectors are, according to their published biographies, members of the Products Liability Advisory Council, a manufacturer advocacy organization that has conducted a nationwide campaign to, among other things, abolish strict liability and the consumer expectation test and replace it with a risk/benefit test. From the Committee record, it appears that had it not been for the zealous opposition of those two members, the Committee probably would have been able to present a unanimous proposal to the Court. That opposition also contributed to the Committee making some unwarranted and imprudent compromises, especially in instructions 403.7, 403.9 and 403.10, as will be explained in detail below.

COMMENTS

I.

COMMENTS ON PROPOSAL #8—ELIMINATE STANDARD INSTRUCTION PL4, PL5, PL5 NOTES ON USE AND COMMENT, AND ADD INSTRUCTION 403.7, STRICT LIABILITY

A. Introduction:

This comment responds to the Court's request for comments concerning the proposal to eliminate standard instructions PL4 and PL5, eliminate PL5Notice on Use and Comment, and to add instruction 403.7. With respect to the elimination of previous instructions PL4, PL5 and the accompanying Notes and Comments, FJA notes that the basic language of PL4 and PL5 has been incorporated into instruction 403.7 and, while the accompanying Notes on Use and Comments have been revised and updated, much of those matters remain in the new instructions.

Thus, in the new Note On Use #3 to instruction 403.7, the Committee has continued its position that if a court determines that the risk/benefit test is a test for product defect, it takes no position on whether both the consumer expectations and risk/benefit tests should be given alternatively or together[1]; former Note and Comment

[1] As addressed below, FJA disagrees that the risk/benefit test is the appropriate test for defining a product defect under strict liability.

#6 on foreseeable bystanders has been updated in Note On use #2 to instruction 403.7; former Comment #3 on "obvious defects" has been reformatted and appears as Note On Use #2 to instruction 403.18; former Comment #5 on Comparative negligence has also been reformatted and appears as Note On Use #1 to instruction 403.18 and former Comment #7 on the "*Cassisi* inference" has been moved to instruction 403.11. The Committee also eliminated the Note On Use concerning inconsistent verdicts and the Comment #2 provision concerning the so-called "two issue" rule because it determined that such comments fall outside its purview and could inappropriately influence a trial court in its selection of instructions. Finally, the Committee eliminated two comments, on "privity" and the Uniform Commercial Code, as no longer being necessary.

FJA generally supports the new instruction 403.7 on strict liability and the changes to the Notes and Comments, subject to the following comments, which are in direct response to the Court's specific requests for comments.

B. Whether 403.7 Merges Multiple Different Theories of Liability:

There are two possible ways in which the question could arise whether 403.7 merges multiple theories of liability that are different. One is whether the use of the instruction in both cases involving manufacturing defects and cases involving design defects merges different theories. The other possibility is that the inclusion of both the consumer expectations test for product defect and the risk/benefit test constitutes a

merger of different theories. The FJA submits that the answers to these two questions are different.

1. Merger of Manufacturing Defects and Design Defects:

To the extent that instruction 403.7 merges PL4 (manufacturing defect) and PL5 (design defect), the instruction does not merge multiple theories of liability that are different. Both manufacturing and design defects are strict liability claims (to be distinguished from negligence claims as noted below). As correctly noted in Note on Use #1 to instruction 403.7, in strict liability a claimant is not required to plead or prove whether the defect in the product came from its manufacture or design. *Ford Motor Co. v. Hill*, 404 So. 2d 1049 (Fla. 1981); *McConnell v. Union Carbide Corp*., 937 So. 2d 148 (Fla. 4th DCA 2006). Stated another way, when a product is defective, a claimant should not have to select whether the defect was the result of a manufacturing flaw or its original design and thus be at risk of losing her case if she makes the wrong claim. This is consistent with section 402A of the *Restatement (Second) of Torts*, the governing law in Florida, which makes no distinction in strict liability between manufacturing and design defects.

The FJA notes that instruction 403.7 retains the essentials of the consumer expectations test and the risk/benefit test as contained in PL5 (but see subsection 2 below concerning the risk/benefit test). It also corrects an omission in PL4. Since

402A makes no distinction between manufacturing defects and design defects, in pure manufacturing defect claims claimants can proceed on a consumer expectations basis if they so elect. As a practical matter, in most instances claimants elect to define that test as the product not having been built according to its intended design; i.e., the ordinary consumer would expect that a product would be built according to this intended design, the language found in PL4. Thus, while PL4 was technically correct, it was also too narrow and should have included the broader consumer expectations alternative.

That has been corrected by the merger of PL4 and PL5 in instruction 403.7. The more narrow alternative for pure manufacturing defect claims, where the claimant proceeds on the theory that the product was not built according to its intended design, is covered in Note on Use #1 to instruction 403.7, which notes that in those cases the instruction can be clarified by modifying it with the addition of the phrase "the product was not built according to its intended design."

In summary, instruction 403.7 maintains the essential language of PL4 and PL5 and, in that respect, does not merge multiple theories of liability that are different.

2. Inclusion of Risk/Benefit Test with Consumer Expectations Test:

The Committee records shows that because of vigorous opposition from a distinct minority of members and the historical fact that the risk/benefit test had been included in PL5 for many years, the Committee decided to continue to include it in

403.7 and add a special Note On Use that the Committee takes no position on whether it is a valid standard for strict liability. By the inclusion of a risk/benefit test for strict liability claims, instruction 403.7 merges theories of negligence and strict liability, which are different. It also causes confusion by providing no guidance to courts because, conceptually, risk/benefit is a form of negligence. The former instructions never explained how courts should choose between the strict liability (consumer expectations) and negligence (risk/benefit) tests. This same defect has been carried over into the new instructions. But that should not be a choice trial courts have to make. Because the risk/benefit test is a "negligence" claim, it should have never been included in PL5, which was intended as a strict liability instruction, nor should it be included in instruction 403.7.

There are few legal concepts that have spawned as much confusion as the so-called risk/benefit test. Originally, modern products liability claims were based on negligence. Those claims were, however, often unsuccessful because of insurmountable proof requirements concerning what went wrong and how the manufacturer failed to act reasonably, and due to residual contractual type defenses such as privity and notice. That changed in 1965 with the adoption of *Restatement (Second) of Torts* Section 402A, which imposed strict liability for injuries resulting

from defective products even though "the seller has exercised all possible care in the preparation and sale of the product."

By eliminating any negligence requirement, 402A established a separate liability concept based on the rationale that in marketing products manufacturers bear special responsibility to consumers and implicitly represent that their products are safe; the public has a right to expect that reputable sellers will stand behind their products; and the burden of injuries should be placed upon those who market the products, rather than their users. While negligence liability remained, once "strict liability" was adopted, negligence became largely a secondary theory used to supplement strict liability claims.

Liability under 402A is not, however, unlimited. It does not apply to all product harms. There must be something wrong with the product that makes it "unreasonably dangerous" to users, that is, as set forth in comment i, "dangerous to an extent beyond that which would be contemplated by the ordinary consumer..." and in comment g, "In a [d]efective condition." "The rule . . . applies only where the product is . . . in a condition not contemplated by the ultimate consumer, which will be unreasonably dangerous to him." In the lexicon of products liability law, those provisions have come to be known as the "consumer expectation" test. Thus, if a product was unreasonably

dangerous to an ordinary consumer, whether because of design or some manufacturing problem, the seller is liable for any harm resulting from that "defect."

The *Restatement* also recognized that there were some products which science and art cannot make completely safe for ordinary use but which still had utility. For those products which were "unavoidably unsafe," comment k to section 402A provided that a seller would not be liable for marketing "an apparently useful and desirable product, [even though it is] attended with a known but apparently reasonable risk," as long as the manufacturer provides "proper directions and warning." Comment k to 402A came to be recognized as providing an "unavoidability unsafe" defense when a manufacturer provides proper warnings and can prove that the benefits of the product outweigh its risks. It was, however, of limited application since it did not apply to avoidable risks and manufacturers are obligated to test designs for residual risks, are charged with knowledge of what such testing would reveal and, where feasible, must adopt safer designs over warning of risk.

The 402A comment k risk/benefit "defense" is not, however, the risk/benefit test that was contained in PL5. That "test" arose out of early objections to product strict liability. That risk/benefit test is generally attributed to Dean John Wade and his article *On the Nature of Strict Tort Liability for Products*, 44 Miss. L.J. 825 (1973). In that article, Dean Wade argued that product liability should only be based on

negligence and not strict liability. He proposed that liability for defective products should be based on the reasonableness of the marketing decision under a reasonably prudent manufacturer standard, taking into account up to seven different factors.

While Dean Wade used a risk/benefit rationale for advocating a return to negligence principles, he did not believe that juries should be specifically instructed on a "risk/benefit test." Instead, he proposed instructing the jury:

> A [product] is not duly safe if it is so likely to be harmful to persons [or property] that a reasonably prudent manufacturer [supplier], who had actual knowledge of its harmful character would not place it on the market. It is not necessary to find that this defendant had knowledge of the harmful character of the [product] in order to determine that is was not duly safe.

Id. at 840.

Strict liability nonetheless quickly became the law of the land. That did not, however, deter defense interests from embracing the negligence-based risk/benefit theory of product defect. They realized, however, that there was little chance of overturning 402A liability so they modified Dean Wade's approach by dividing product liability cases into manufacturing and design defects. For the former, 402A liability was conceded. For the latter they argued that 402A and its consumer expectation test should be abolished and replaced by a negligence-based risk/benefit theory. This became a nationwide strategy coordinated by the Washington, D.C. based

Products Liability Advisory Council (PLAC).[2]

Eleven years after 402A was promulgated, Florida joined most other jurisdictions and expressly adopted it in *West v. Caterpillar Tractor Co., Inc.*, 336 So. 2d 80 (Fla. 1976), although earlier decisions had already effectively adopted its principles. Specifically, *West* held that to impose liability, the injured party must prove: "the manufacturer's relationship to the product in question, the defect and unreasonably dangerous condition of the product, and the existence of the proximate causal connection between the condition and the user's injuries or damages." *Id.* at 87.

Echoing the justification for 402A, the Court held:

> The obligation of the manufacturer must become what in justice it ought to be—an enterprise liability. . . . The cost of injuries or damages, either to persons or property, resulting from defective products, should be borne by the makers of the products who put them into the channels of trade, rather than by the injured or damaged persons who are ordinarily powerless to protect themselves. We therefore hold that a manufacturer is strictly liable in tort when an article he places on the market, knowing that it is to be used without inspection for defects, proves to have a defect

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[2] According to its web site, PLAC is an association of over 130 corporate members representing a broad cross-section of product manufacturers and several hundred product liability defense *attorneys* that advocates for changes in products liability laws to favor manufacturers, principally through coordinating efforts across jurisdictions and filing amicus briefs. One of its major goals is the abolition of strict liability and the consumer expectation test for design defects, replacing it instead with a negligence-based risk/benefit test. For a review of cases tracing PLAC's role, see Larry S. Stewart, *"Courts Overrule ALI 'Consensus' On Products",* Trial Magazine, November 2003, p. 18.

that causes injury to a human being.

Id. at 92.

As a result of *West*, in 1975 the Supreme Court Committee on Standard Jury Instructions in Civil Cases promulgated the first products liability instruction, PL4, "*Strict Liability*": "A product is defective if it is in a condition unreasonably dangerous to the user and the product is expected to and does reach the user without substantial change affecting that condition." *In Re: Standard Jury Instructions—Civil*, No. 46,366-A (Fla. July 24, 1975)(unreported).

There was no reference in *West* to a risk/benefit test or analysis but six years later it came up in two Florida decisions. The first was *Cassisi v. Maytag Co.*, 396 So. 2d 1140, 1145-46 (Fla. 1st DCA 1981). The Court there quoted with apparent approval from the California decision of *Barker v. Lull Engineering Co.*, 573 P. 2d 443 (Cal. 1978) (holding that in a design defect case the risk /benefit test shifts the burden of proof to the defendant to prove the product was not defective because the benefits of the design outweighed its risks, *Id.* at 455). It ultimately held, however, that it did not have decide whether to authorize or how to apply the risk/benefit test because *Cassisi* was a manufacturing defect, not a design defect[3], case and strict liability applied.

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[3] *Hill* also involved the question of whether strict liability was a proper

In the second case, *Ford Motor Co. v. Hill*, 404 So. 2d 1049 (Fla. 1981), the Court was squarely faced with the issue of whether Florida should adopt a negligence-based risk/benefit test for design defect cases. *Hill* involved a claim of lack of vehicle crashworthiness due to a design defect. Ford conceded that strict liability applied to manufacturing defects but contended that design defects involved complex engineering choices that could only be evaluated under a negligence standard that took into account all practical and technical problems of the design; i.e., a risk/benefit type test. The Court, however, rejected that argument holding: "We feel the better rule is to apply the strict liability test to all manufactured products without distinction as to whether the defect was caused by the design or the manufacturing. If so choosing, however, a plaintiff may also proceed in negligence. *Id.* at 1052.

The Court also added a footnote stating that the standard jury instruction "could be improved" and directed the Committee to develop "an appropriate instruction which adequately addresses the issue and which reflects the holding of the instant case." *Id.* at 1052, n. 4.

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standard for enhanced injury, i.e., crashworthiness cases. On that point, the Court held there is no difference between primary and enhanced injury cases and that strict liability applied to both. *Id.* at 1050 -1051.

A review of the complete minutes of the Committee from July 1980 through November 1982 reveals that it spent a year debating how to change the instruction. For one thing, the Committee decided to have separate instructions for manufacturing and design defects, even though *Hill* specifically held that the strict liability/consumer expectation test applied to both design and manufacturing defects. Consistent with the *Hill* directive and the Court's rejection of Ford's contention that plaintiffs should only be able to recover in design defect cases if they prove negligence, in the new draft PL5 for design defect cases, the Committee added language expressly describing the consumer expectation test: that a product is defective it "fails to perform as safely as an ordinary consumer would expect."

Had that been as far as the Committee went, it would have fully complied with the Court's directive. But the Committee inexplicitly decided to add a negligence-based risk/benefit test for design defect cases to PL5. The Committee therefore obtained a copy of Ford's appellate brief and resurrected Ford's argument about a negligence-based risk/benefit test, adding to the draft PL5 an alternative test that a product is unreasonably dangerous if "the risk of danger in the design outweighs the benefits." Apparently the Committee never considered Dean Wade's proposed formulation of a jury instruction for the risk/benefit type of liability nor did it recognize that a risk/benefit test was essentially a negligence claim.

The Committee also appeared confused over the burden of proof. The Committee acknowledged that *Cassisi* and *Baker* held that the defendant has the burden of proving that the benefits outweigh the risks of danger in the design. The Committee nonetheless decided that the "ultimate" burden of proof "remains with the plaintiff" (PL5, Comment 2), and therefore made no provision for who bears the burden of proving that the benefits of a product design outweigh its risks. The Committee never addressed why the burden of proof for an affirmative defense might be different for products liability cases.

In Comment 2 the Committee noted the absence of any definitive authority in Florida and declined to take a position on whether the consumer expectation test and the risk/benefit test should "be given alternatively or together." In authorizing publication of the new instruction, the Court departed from its usual language and, in a reference to the unsettled nature of the law, emphasized that in permitting publication it was "not deciding any questions of law or correctness or applicability of the charge." *Matter of Standard Jury Instr. (Civil Cases)*, 435 So. 2d 782, 783 (Fla. 1983).

This merger of strict liability (the consumer expectation test) and negligence (the risk/benefit test) and the accompanying Comment, in which the Committee declined to take a position on how to apply the different tests, provided no guidance to trial courts. It was a recipe for error.

Shortly after the Court approved PL5 for publication, it decided *Radiation Technology, Inc. v. Ware Constr. Co.,* 445 So. 2d 329 (Fla. 1983). Some have claimed that *Radiation Technology* adopted the risk/benefit and implicitly went even further. The case, however, only involved a claim for negligently caused property damage, the Court specifically noting that there was no claim for strict liability. The issue before the Court was whether an "inherently dangerous" product was limited to one which potentially threatens bodily harm. In dicta, in discussing the Florida adoption of strict liability the Court conflated the concepts of strict liability and negligence-based risk/benefit but made no holdings in that regard.

Although several other decisions allude to the risk/benefit concept in dicta[4], no Florida court has expressly held that risk/benefit is an appropriate test for product defects of any type. On the other hand, Florida courts have expressly reaffirmed the 402A consumer expectation test for strict liability claims. *See Force v. Ford Motor Co.,* 879 So. 2d 103 (Fla. 5th DCA 2004); *McConnell v. Union Carbide Corp.,* 937 So. 2d 148 (Fla. 4th DCA 2006); *Falco v. Copeland,* 919 So. 2d 650 (Fla. 1st DCA 2006). *See also Tran v. Toyota Motor Corp.,* 420 F.3d 1310 (11th Cir 2005) (applying Florida law).

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[4] *See, e.g., Light v. Weldarc Co., Inc.*, 569 So. 2d 1302 (5th DCA 1990) and

It is clear from the record before the Court that in proposing the new 403.7 instruction, the Committee followed this same analysis in coming to the conclusion that it was no longer satisfied that risk/benefit was a proper test for strict liability claims. Because, however, risk/benefit had been part of PL5 since 1983 the Committee declined to eliminate it from the strict liability instruction. Instead, it retained risk/benefit in instruction 403.7 and added the new Note on Use #3 to "flag" the issue for the bench and bar. The end result is that, just like PL5, instruction 403.7 continues to merge different theories of liability and provides no guidance to the courts on how to determine which test to apply. FJA believes that the proper course would have been to eliminate risk/benefit from instruction 403.7 and add a substitute Note On Use #3 as follows:

> **3. Risk/benefit has not been recognized in Florida as a test of product defect in strict liability claims. It is, in essence, a negligence claim. As a result, the Committee has eliminated it from this instruction. Evidence of the risk and benefit of a product may be relevant to the issue of negligence or as an affirmative defense to a strict liability claim. See instructions 403.9 and 403.18.**[5]

Liggett Group, Inc. v. Davis, 973 So. 2d 467 (Fla. 4th DCA 2007).

[5] The FJA files herewith its appendix containing its proposed revisions to the subject instructions, notes on use, and comments.

No discussion of the "risk/benefit" test would be complete without reference to the new *Restatement (Third) Torts: Products Liability,* which defense interests have been trying to get adopted as the law of Florida. That, of course, is not the purpose of standard jury instructions, but we include this discussion because the issue will most probably come up in the process.

Throughout the 1980s and into the 1990s, defense interests continued to advocate for the abolition of strict liability and the exclusive use of the negligence-based risk/benefit test for design defect cases**.** These efforts came to a head in 1991 when the American Law Institute decided to undertake a new restatement of products liability law. Unlike, 402A, the new *Restatement* was intended to be a complete document covering all aspects of products liability law.

The Reporters proposed dividing product liability claims into manufacturing defects, design defects and failure to warn cases and to impose rules that closely paralleled those advocated by PLAC. When the Reporters claimed the majority rule in the United States for design defects was the risk/benefit "test" and that one factor of that test—the availability of a reasonable alternative design—as an absolute requisite for liability, the projected was plunged into controversy with the Reporters' scholarship on

design defect liability being directly contradicted by other commentators and academics.[6] The Reporters inclusion of Florida illustrates the fundamental flaws in their claim of a majority rule. In a classic case of pre-determined results, the Reporters claimed *Radiation Technology, Inc. v. Ware Constr. Co., supra,* was "the leading case in Florida" and interpreted it as holding that Florida adopted the risk/benefit test for design defect cases that implicitly requires proof of an alternative design. *Restatement (Third) of Torts: Products Liability,* § 2(b) Reporters' Note at 66-67. As noted above, there was, however, no such holding in *Radiation Technology*.

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[6] *See, e.g.*, John F. Vargo, *The Emperor's New Clothes: The American Law Institute Adorns a "New Cloth" for Section 402A Products Liability Design Defects—A Survey of the States Reveals a Different Weave*, 26 U. Mem. L. Rev. 493 (1996); Andrew F. Popper, *Restatement Third Goes to Court*, Trial, April 1999, p. 54; Marshall S. Shapo, *Products Liability: The Next Act*, 26 Hofstra L.Rev. 761 (1998); David Owen, *Products Liability Law Restated*, 49 S.C. L. Rev. 273, 286 (1998); Robert E. Keeton, *Warning Defect: Origins, Policies, and Directions*, 30 U. Mich. J. L. Reform 367, 397-96 (1997); Frank J. Vandall, *Constructing a Roof Before the Foundation Is Prepared: The Restatement (3rd) of Torts: Product Liability Section (2)(b) Design Defect*, 30 U. Mich. J. L. Reform 261, 279 (1997); Ellen Wertheimer, *Unavoidably Unsafe Products: A Modest Proposal*, 72 Chi-Kent L. Rev. 189, 194 (1996); Frank J. Vandall, *The Restatement (Third) of Torts: Product Liability: Section 2(b): The Reasonable Alternative Design Requirement*, 61 Tenn. L. Rev. 1407 (1994); Oscar S. Gray, *The Draft ALI Product Liability Proposals: Progress or Anachronism?* 61 Tenn. L. Rev. 1105 (1994).

After six years of contentious debate, the core provisions of section 2(b)—which for design defects purport to abolish section 402A strict liability and the consumer expectations test, impose a risk/benefit test in which proof of an alternative design is required, and restrict claimants to a single claim (whether negligence or strict liability)—passed by extremely close votes and many believed they were fundamentally flawed.[7] For a more complete accounting of the eventual adoption of the new *Restatement* and the controversy surrounding it, see Larry S. Stewart, *Strict Liability for Defective Product Design: The Quest for a Well-Ordered Regime*, 74 Brooklyn L. Rev. 1038 (2009).

More important, however, than its controversial adoption, has been the subsequent history of the core proposals in the courts. While still only in draft form, the Georgia Supreme Court[8] refused to require proof of an alternative design and the

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[7] Many of the other provisions of Restatement (Third) Torts: Products Liability were non-controversial and passed with relative little debate or controversy. Even within some of the comments to section 2(b) there was general agreement to a number of the rules. It was the basic premise of that section—that 402A should be abolished and a negligence based risk/benefit test with an absolute requirement of proof of a reasonable alternative design substituted in its place—that engendered all the controversy.

[8] *Banks v. ICI Americas., Inc.*, 450 S.E.2d 671 (Ga. 1994).

Supreme Courts of California and Connecticut[9] rejected section 2(b). *Potter* was the most stunning of these decisions, coming just days after final passage of the proposal. In *Potter* the Court boldly questioned the scholarship underlining section 2(b) and concluded that the Reporters were wrong. The Court independently reviewed the law and found "that the majority of jurisdictions do not impose upon plaintiffs an absolute requirement to prove a feasible alternative design" and that a such requirement "imposes an undue burden on plaintiffs that might preclude otherwise valid claims from jury consideration." *Id.* at 1331. The *Potter* court also rejected another tenet of the Reporters' formulation that the consumer expectation test should not apply in design defect cases.

After *Potter,* the Supreme Courts of Missouri, Kansas, Oregon, Wisconsin, New Hampshire and the Maryland Court of Appeals[10] all refused to adopt section 2(b).

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[9] *Carlin v. Superior Court*, 920 P.2d 1347 (Cal. 1996); *Potter v. Chicago Pneumatic Tool Co*, 694 A.2d 1319 (Conn. 1997).

[10] *Rodriguez v. Suzuki Motor Corp*., 996 S.W.2d 47, 64-65 (Mo. 1999); *Delaney v. Deer and Co.*, 999 P.2d 930 (Kan. 2000); *McCathern v. Toyota Motor Corp.*, 23 P.3d 320 (Or. 2001); *Green v. Smith & Nephew APF, Inc.*, 629 N.W. 2d 727 (WI 2001); *Vautour v. Body Masters Sports Industries, Inc.*, 784 A.2d 1178 (N.H. 2001); and *Halliday v. Sturm, Ruger & Co.*, 792 A.2d 1145 (Md. 2002).

While some jurisdictions either expressly or by implication adopted section 2(b)[11], it is now clear that section 2(b)—proposing to abolish 402A for design defect cases and substituting in its place a risk/benefit test with an absolute requirement of proof of reasonable alternative design—is not the majority rule in the United States.

The FJA is aware of the recent decision (not yet final) in *Agrofollajes, S.A. v. E.I. Du Pont De Nemours & Co., Inc.*, __ So. 2d __; 34 Fla. L. Weekly D2578a; No. 3D07-2322 (Fla. 3d DCA Dec. 16, 2009). *Agrofallajes* involved a claim of *negligent* design of the fertilizer, Benlate, in which the trial court gave the PL5 *strict liability* instruction and included both the consumer expectations and risk/benefit tests. This is precisely the type of confusion that can result from the erroneous inclusion of the risk/benefit test in PL5 and its inherent lack of guidance. In a strange holding, without any discussion or analysis, the Court held that including the consumer expectation test was error because the Court had earlier "applied" the new *Restatement* in a component manufacturer case and the new *Restatement* rejected the consumer expectations test.

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[11] *Wright v. Brooke Group Ltd.*, 652 N.W.2d 159 (Iowa 2002). Texas and Tennessee courts have also cited Section 2(b) with approval but those courts were constrained to do so because they were interpreting tort reform legislation, which already contained section 2(b) propositions. *Hernandez v. Tokai Corp*., 2 S.W.3d 251 (Tex. 1999); *Ray v. Bic Corp.*, 925 S.W. 2d 527 (Tenn. 1996).

There are numerous flaws in that holding. Merely because provisions of the new *Restatement* on component manufacturer liability might be applicable doesn't necessary mean that other controversial provisions on strict liability automatically should be followed; the decision is in direct conflict with decisions of the other district courts and the Supreme Court of Florida recognizing the consumer expectations test; it purportedly adopts section 2(b) of the new *Restatement*, which is in direct conflict with *West* and is a decision, which in light of *West*, could only be made by the Supreme Court; in apparently adopting the new *Restatement* it is also in direct conflict with decisions of the other district courts; and it confuses negligence and strict liability. This decision is emblematic of the loose and confused reasoning that has come to predominate many product liability decisions. See Larry S. Stewart, *Strict Liability for Defective Product Design: The Quest for a Well-Ordered Regime*, 74 Brooklyn L. Rev. 1038, 1043, 1049-50 (Spring 2009).

Thus, to sum up, in continuing to recognize risk/benefit as a strict liability test, instruction 403.7 does merge theories of negligence and strict liability, which are different. Risk/benefit should properly be relegated to negligence claims and as an affirmative defense to strict liability claims. The FJA therefore objects to that portion of instruction 403.7 that includes the risk/benefit test. Corresponding changes need to be made to instructions 403.15(d) and 403.16. In addition to eliminating risk/benefit

from instructions 403.7, 403.15(d) and 403.16, the FJA also believes there should be a substitute Note On Use #3 to instruction 403.7, as follows:

> **3. Risk/benefit has not been recognized in Florida as a test of product defect in strict liability claims. It is, in essence, a negligence claim. As a result, the Committee has eliminated it from this instruction. Evidence of the risk and benefit of a product may be relevant to the issue of negligence or as an affirmative defense to a strict liability claim. See instructions 403.9 and 403.18.**

C. Whether the Proposal Addresses or Should Address the Issue of Foreseeable Bystanders:

Potential claims by foreseeable bystanders are recognized in Florida case law and were recognized in both PL4 and PL5—providing that claimant be a "[a person in the vicinity of the product*]" and noting "* When the injured person is a bystander, use the language in the second pair of brackets. *See West v. Caterpillar Tractor Co., Inc.*, 336 So. 2d 80 (Fla. 1976), and *Sanchez v. Hussey Seating Co.*, 698 So. 2d 1326 (Fla. 1st DCA 1997)." This is a necessary provision for a complete instruction.

The same language has been carried over to instruction 403.7 and Note On Use #2 properly explains its presence, expanding the original note from the former instructions with direct quotes from the governing cases. Thus, instruction 403.7 addresses foreseeable bystanders and the cases require that it should do so.

The FJA supports this portion of instruction 403.7 and the accompanying Note On Use.

D. Whether the Notes on Use to the Instruction Should Comment on Risk/Benefit Analysis:

As noted above, the FJA believes that risk/benefit should not be part of 403.7 (nor a part of instructions 403.15(d) and 403.16) and that instead there should be a substitute Note On Use #3 to instruction 403.7, as follows:

> **3. Risk/benefit has not been recognized in Florida as a test of product defect in strict liability claims. As a result, the Committee has eliminated it from this instruction. Evidence of the risk and benefit of a product may be relevant to the issue of negligence or as an affirmative defense to a strict liability claim. Compare instructions 403.9 and 403.18.**

Alternatively, if risk/benefit remains as part of instruction 403.7, then the FJA concurs in the proposed Note On Use #3. To have no Note On Use about risk/benefit would be a disservice to the bench and bar and could lead trial courts into error.

E. Whether the Proposal Should Address the Distinction Between Strict Liability and Negligence:

Florida law recognizes both strict liability and negligence claims in products liability actions. As noted above, there are substantive differences between those claims. For the benefit of the bench and bar, this distinction should be made clear in the instructions. While the proposed Notes On Use are acceptable, FJA believes they could be improved by an additional Note On Use to both instructions 403.7 and 403.9 as follows:

Claimants have the choice to bring product liability claims under theories of strict liability or negligence or both. The theories are different. Strict liability claims focus on the condition of the product. Negligence claims focus on the conduct of the manufacturer. Compare instructions 403.7 and 403.9.

Such a Note On Use would help inform the bench and bar about the instructions.

II.

COMMENTS ON PROPOSAL #10 — INSTRUCTION 403.9, NEGLIGENCE

A. Introduction:

As noted immediately above, the FJA believes that the Notes On Use to this instruction could be improved by the addition of a Note On Use as follows:

Claimants have the choice to bring product liability claims under theories of strict liability or negligence or both. The theories are different. Strict liability claims focus on the condition of the product. Negligence claims focus on the conduct of the manufacturer. Compare instructions 403.7 and 403.9.

Turning to the queries from the Court concerning this instruction, the FJA submits that 403.9 should not include a reference to "defective product" and should not include as an element of negligence that the product is "in an unreasonably dangerous condition." The FJA also submits that the Notes on Use 1 should be removed, even thought the Note includes a correct statement of law.

B. Whether the Instruction Should Include Reference to

"Defective Product" with "Evidence of Negligence":

The FJA does not believe that Instruction 403.9 should include reference to "defective product" with "evidence of negligence," nor should it include, as it presently does, a requirement that manufacturer's negligence must "***result in a product being in an unreasonably dangerous condition***." (Emphasis added). Both the term "defective product" and the concept of "unreasonably dangerous" are principles of strict liability, which belong in Instruction 403.7 and not in Instruction 403.9 (or 403.10). See, *West v. Caterpillar Tractor Co. Inc*., 336 So.2d 80, 89 (Fla. 1976); *Restatement (Second) of Torts* §402A.

From the record before the Court, it is obvious that this was a much-discussed topic in the Committee deliberations and one which the Committee ultimately compromised. But, in doing so, the Committee conflated negligence and strict liability, which will lead to confusion and erroneous results.

Traditionally, to establish negligence a claimant had to prove a duty to protect the claimant, a breach of that duty, and a proximately resulting injury. Engrafting the additional requirement that negligence must also result in an "unreasonable dangerous" or a "defective" product results in a new, heretofore unknown, form of negligence that mixes strict liability concepts with negligence and could lead to juror confusion in cases involving claims of both strict liability and negligence. For example, a supplier of a component part could be negligent but its negligence does not become manifest until the product is finally assembled. In those cases a confusion of the terminology of the elements of proof in a negligence claim as opposed to a strict liability claim could result in the negligent supplier being exonerated because the "defect" and/or "unreasonably dangerous" condition did not become manifest until final assembly.

Or, for another example, a drug that is known to interact with certain other drugs that a patient may be taking, such as Viagra's interaction with Beta blocking heart drugs. The negligent failure to warn about these drug interactions may result in the preventable death of a patient without Viagra being unreasonably dangerous in its design or manufacture. Under the current wording of this instruction a jury could erroneously conclude that the manufacturer was not liable for its negligence since the drug was not overall unreasonably dangerous.

Including a requirement that the negligence causes ***"a product [to be] in an***

unreasonably dangerous condition" also results in a double proximate cause requirement in which claimants will first have to prove that the negligence caused a "defect" or an "unreasonably dangerous" condition, and then that the defect/unreasonably dangerous condition caused an injury. Defendants are not entitled to two bites at the causation apple.

While there are Florida decisions that seemed to hold that negligence needs to result in a "defect,"[12] not every statement in every opinion justifies a jury instruction. It is the responsibility of the Committee to analyze decisions to arrive at the appropriate rules of law and to craft instructions to convey those rules to jurors. In this instance, the Committee went too far and should have, instead, adhered to the traditional negligence instruction.

Therefore, FJA submits that the "unreasonably dangerous" phrase in instruction 403.9 and the corresponding language in instruction 403.15(f) should be eliminated and instruction 403.9 should not contain and reference to "defective product."

C. Whether Notes on Use 1 Regarding "Dangerous Product" Is Supported by the Decisional Law Upon Which the Proposal Is Based:

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[12] See for example, the early decisions of *Royal v. Black & Decker Mfg. Co.*, 205 So. 2d 307 (Fla 3d DCA 1967) and *E.R. Squibb & Sons Inc. v. Jordan*, 254 So. 2d 17 (Fla. 1st DCA 1971). These decisions, however, conflate principles of strict liability and negligence without recognition of the different basis of liability.

The purpose of Note On Use #1 appears to be to illustrate the variety of ways that a product can be unreasonably dangerous. While the FJA believes that this Note is a correct statement of the law, the cases are outdated and the principle of law involved—"unreasonably dangerous" products—is a matter of strict liability. The Note On Use should therefore be removed.

III.

COMMENTS ON PROPOSAL #11— INSTRUCTION 403.10, NEGLIGENT FAILURE TO WARN

The request for comment here mirrors the request on instruction 403.9 in that both involve the identical point. For the same reasons set forth in connection with instruction 403.9, the FJA does not believe that Instruction 403.10 should include reference to "defective product" with "evidence of negligence" nor should it include, as it presently does, a requirement that manufacturer negligence must "result in a product being in an unreasonably dangerous condition." The corresponding "unreasonably dangerous" language in instruction 403.15(g) should also be eliminated.

The FJA also notes that with respect to the Note On Use to instruction 403.10, that while the principle of law stated is correct, the *Ferayorni* decision cited in the Note has been quashed. *Ferayorni v. Hyundai Motor Company*, 822 So. 2d 502 (Fla. 2002). Appropriate citations for the proposition that Florida recognizes the tort of Negligent

Failure To Warn would be: *High v. Westinghouse Elec. Corp.*, 610 So. 2d 1259 (Fla. 1992); and *Rodriquez v. New Holland North America, Inc.*, 767 So. 2d 543 (Fla. 3d DCA 2000).

IV.

COMMENTS ON PROPOSAL #12— NOTES ON USE FOR INSTRUCTION 403.11, INFERENCE OF PRODUCT DEFECT OR NEGLIGENCE

The Products Liability subcommittee of the Committee proposed an instruction 403.11 based on section 768.1256, Florida Statutes and a companion instruction as part of the defenses instruction 403.18. Instruction 403.11 would have read as follows[13]:

> If you find that at the time (the product) was [sold] [or] [delivered], it did not comply with (describe applicable statute, code, rule, regulation or standard), you should presume that [(the product) was defective] [(defendant) was negligent] unless (defendant) proves by the greater weight of the evidence that (the product) did comply with (describe applicable statute, code, rule, regulation or standard). You may consideration this presumption together with all the other facts and circumstances in evidence, in determining whether [the product was defective] [(defendant) was negligent].

NOTES ON USE FOR 403.11

1. Failure to comply with applicable statutes, codes, rules, regulations, or standards creates a rebuttable presumption of defect or

[13] There is an additional Note On Use to instruction 403.11 concerning the so-called *Cassisi* inference which is not relevant to this discussion. FJA supports that Note On Use.

> negligence if the applicable statutes, codes, rules, regulations, or standards are relevant to the event causing injury or death, were designed to prevent the type of harm that allegedly occurred, and compliance was required as a condition for selling or distributing the product. F.S. 768.1256(2). This presumption does not apply, however, to an action brought for harm allegedly caused by a drug that is ordered off the market or seized by the United States Food and Drug Administration. 768.1256(3), Fla. Stat.

Because there was no decisional law on that statute, the Committee rejected that proposal and changed the Note On Use. This presumption has been mandated by the Florida Legislature. The FJA believes that the Committee cannot ignore the plain wording of the statute and the instruction should be reinstated as proposed by the Products Liability Subcommittee, with the accompanying Note On Use.

V.

COMMENTS ON PROPOSAL #13—INSTRUCTION 403.16, ISSUES ON CRASHWORTHINESS AND "ENHANCED INJURY CLAIMS"

Subject to two additions to more accurately focus the issues in a crashworthiness case, FJA believes that instruction 403.16 accurately conforms with the principles of law established in *D'Amario v. Ford Motor Co.,* 806 So. 2d 424 (Fla. 2001). The two additions which FJA believes are necessary arise from the Court's emphasis on the: ***important distinction between fault in causing the accident*** *and fault in* ***causing***

additional or enhanced injuries as a result of a product defect, a distinction that defines and limits a manufacturer's liability in crashworthiness cases." *Id.* at 441.

Those additions should be in the first and third paragraphs of the instruction, as follows:

> **[In addition, there is a second set of issues you must also decide in this case.]*** (Claimant) **[next] claims [he] [she] suffered [greater] [or] [additional] injuries in the accident than [he] [she] would have otherwise suffered if** (describe the alleged crashworthiness defect) **had not been defective.** (Claimant) **does not claim that** (describe the alleged crashworthiness defect) **caused the accident and how the accident was caused is not part of your decision-making process.****
>
> ***Use the bracketed language when there are other defect claims in the case.
>
> **When a crashworthiness claim is being tried without any other claims, when appropriate, the jury should be instructed that no claim is being made for damages arising out of the initial accident, although the defendant will be responsible for the claimant's entire injury if the jury cannot apportion the damages. *D'Amario v. Ford Motor Co.*, 806 So. 2d 424 (Fla. 2001).
> **The issues you must decide on this claim are whether** (describe the alleged defective part of the product) **was defective and, if so, whether that defect was a legal cause of [loss] [injury] [or] [damage] to** (claimant, decedent, or person for whose injury claim is made) **apart from the original [claim] [collision] [or] [impact]** ~~**that was**~~ **[greater than] [or] [additional to that which] [he] [she] would have suffered if** (describe the alleged defective part of the product) **had not been defective.**

These additions would serve to make it clear that a crashworthiness/enhanced injury claim is only for injuries that are greater than or in addition to those that would otherwise been suffered in the accident. Beyond those additions, the instruction

correctly notes that when appropriate, the jury should be instructed that no claim is being made for damages arising out of the initial accident, although the defendant will be responsible for the claimant's entire injury if the jury cannot apportion the damages.

The issues are framed in the standard language that has been used throughout the new instructions. Compare for example, 403.15, 401.18, and 402.11. And the explanation of product defect uses the same language as 403.7. Note, however, as discussed above, the FJA does not believe that risk/benefit should be listed as an alternative test of product defect.

Finally, the instruction explains that normally a defendant is responsible for only the damage caused by its product and not the actions of others. Then, in conformity to *D'Amario,* the instruction adopts the previously approved *Gross v. Lyons* language. See 501.5(b).

There is, however, need for a Note On Use to clarify that the fault of others is not an issue in such cases as set forth in *D'Amario v. Ford Motor Co.,* 806 So. 2d 424, 437, 440 (Fla. 2001); *Griffin v. Kia Motors Corp.*, 843 So. 2d 336, 339 (Fla. 1st DCA 2003). The FJA suggests that the note should be as follows:

> In crashworthiness cases the focus is not on the conduct that gave rise to the initial accident, but rather, on the cause of the enhanced injuries. Therefore, the fault of a driver or others in causing the basic accident is not an issue in crashworthiness cases. *D'Amario v. Ford Motor Co.*, 806 So. 2d 424, 437, 440 (Fla. 2001); *Griffin v. Kia Motors Corp.,* 843 So. 2d

336, 339 (Fla. 1st DCA 2003).

The FJA therefore supports instruction 403.16 as proposed, subject to the the additional language and the above new Note On Use.

VI.

COMMENTS ON PROPOSAL #19— INSTRUCTION 403.18, DEFENSE ISSUES

The FJA makes the following comments on the Defense Issues instruction:

A. Instruction 403.18(a), Comparative Negligence:

Instruction 403.18(a), Comparative Negligence, is a basic standard instruction that follows the general comparative negligence defense instructions that have been proposed in other substantive law sections. See for example 401.22(a) and 402.14(b). FJA notes, however, that the two general Notes On Use to this proposed instruction apply only to the Comparative Negligence defense and, for clarity, they should be moved to follow 403.18(a).

B. Instruction 403.18(b), Risk/Benefit Defense:

Instruction 403.18(b), Risk/Benefit Defense, harkens back to the discussion of the risk/benefit earlier in these comments. While no Florida decision has held that risk/benefit is a test of product defect, the historical context of strict liability indicates

that it is only a negligence, not a strict liability concept, and several Florida cases appear to hold that 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). Accordingly, this instruction is appropriate.

The defense is, however, limited to instances where the manufacturer was unable to design a safe product (i.e., residual risks were unavoidable and could not be designed out of the product) and the manufacturer gave proper warnings of those risks. *See Restatement (Second) of Torts* §402A, *Comment k.* The FJA believes therefore that the Note On Use to this instruction should be modified as follows:

> 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 of defectiveness that should be included in instruction 403.7 or an affirmative defense under instruction 403.18. The court should not, however, instruct on risk-utility as both a test of defectiveness under 403.7 and as an affirmative defense under 403.18. The committee has included the risk/benefit test in both instances to alert the bench and bar to the issue and to provide an instruction for use, depending on the court's ruling on the issue. The court should not, however, instruct on risk/benefit as both a test of defectiveness under 403.7 and as an affirmative defense under 403.18b.~~ This defense is

limited to those situations where the manufacturer has been unable to design a product without residual risks and has given proper warnings of those risks.

C. Instruction 403.18(c), Government Rules Defense:

Instruction 403.18(c), Government Rules Defense, as proposed by the Products Liability Subcommittee would have implemented Florida Statutes section 768.1256, as a companion instruction to 403.11. However as noted above, the Committee decided to reject the Products Liability Subcommittee recommendation in that regard. Consistent with what was proposed for 403.11, the Products Liability Subcommittee recommended an instruction 403.18(c) and Note On Use as follows:

> **whether at the time** (the product) **was [sold] [or] [delivered] it complied with** (describe applicable statute, code, rule, regulation or standard)**. If you find that** (the product) **complied with** (describe applicable statute, code, rule, regulation or standard) **you should presume that [**(the product) **was not defective] [**(defendant) **was not negligent] unless** (claimant) **proves by the greater weight of the evidence that** (the product) **did not comply with (**describe applicable statute, code, rule, regulation or standard)**. . You may consider this presumption together with all the facts and circumstances in evidence in determining whether [the product was defective] [**(defendant) **was negligent]**.

NOTE ON USE FOR 403.18(c)

Compliance with applicable statutes, codes, rules, regulations, or standards creates a rebuttable presumption of no defect or negligence if the applicable statutes, codes, rules, regulations, or standards relevant to the event causing injury or death were designed to prevent the type of harm that allegedly occurred and compliance was required as a condition

for selling or distributing the product. F.S. 768.1256(1)(b). This defense does not apply, however, in an action based on injury caused by a drug ordered off the market or seized by the United States Food and Drug Administration. 768.1256(3), Fla. Stat.

Consistent with its position on instruction 403.11, the FJA believes that the Committee cannot ignore the plain wording of the statute and this defense instruction should also be reinstated as proposed by the Products Liability Subcommittee, with the accompanying Note On Use.

D. Instruction 403.18(d), State-of-the-Art Defense:

Instruction 403.18(d), State-of-the-Art, follows directly from section 768.1257, Florida Statutes. The instruction is, however, partially inaccurate in that it does not clarify that "state-of-the-art" does not require that any manufacturer had actually implemented or adopted the proposed design. *See Sta-Rite Industries, Inc. v. Levey*, 909 So. 2d 901, 904, n.4 (Fla. 3d DCA 2004). This qualification is not evident from the face of the proposed instruction. A jury hearing and reading proposed instruction 403.18(d), without any additional clarification may well erroneously conclude that a design that was perfectly feasible at the time of manufacture—but not yet adopted by any manufacturer of the product—is beyond the state of the art. In order to avoid this potential confusion, the following language should be added to the instruction and the *Sta-Rite* decision should be noted in the Note On Use:

In deciding the issues in this case, 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 or injury. A proposed design can be within the state-of-the-art even though no manufacturer of the product in question has actually adopted or implemented the design.**

NOTE ON USE FOR 403.18d

Instruction 403.7d applies only in defective design cases. *F.S.* 768.1257. See also *Sta-Rite Industries, Inc. v. Levey*, 909 So.2d 901, 904, n.4 (Fla. 3d DCA 2004).

VII.

COMMENTS ON PROPOSAL #21—ELIMINATING MODEL CHARGE NOS. 7 AND 8 AND ADDING MODEL INSTRUCTION NO. 7 AND SPECIAL VERDICT FORM

Former Model Charge 7 involved claims of negligence and breach of warranty. According to the record, the Committee decided to eliminate that model charge because breach of warranty claims are rare in modern trials. FJA has no objection to that decision.

Former Model Charge 8—the "hay bailer case" (now renumbered as Model Charge 7)—has been reformatted with the new instructions. FJA has no objection to the revised Model Charge nor to the Special Verdict form which follows.

CONCLUSION

WHEREFORE, the Florida Justice Association submits that this Court should incorporate its foregoing comments in the new set of product liability jury instructions to be adopted by the Court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served by U.S. Mail upon Tracy Raffles Gunn, Committee on Standard Jury Instructions in Civil Cases Chairperson, Gunn Appellate Practice, P.A., 400 North Ashley Drive, Suite 2055, Tampa, Florida 33602, on this the 29th day of January, 2010.

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