IN THE SUPREME COURT OF FLORIDA

CASE NO. SC09-1264

In the matter of Standard
Jury Instructions (Civil),
Products Liability
Instructions
______________________/

Comments Re: Report No. 09-10 (Products Liability) of the
Committee On Standard Jury Instructions (Civil)

To the Chief Justice and Justices of
the Supreme Court of Florida

The undersigned attorneys, Kathleen M. O'Connor and Frederick J. Fein, file the following in accordance with this Court's invitation to interested persons to comment on specific proposed product liability standard jury instructions identified by the Court. These comments address the lack of any instruction on § 768.1256, Fla. Stat., entitled "Government rules defense." Specifically, these comments will address Proposal #12 – Notes on Use for instruction 403.11, Inference of Product Defect or Negligence as well as Proposal #19 – instruction 403.18, Defense Issues.

I. The Applicable Statute.

Section 768.1256, enacted in 1999, establishes a rebuttable presumption that a product is not defective or unreasonably dangerous, and the manufacturer is not liable if, at the time of sale or delivery to the initial purchaser or user, the product

complied with applicable and relevant government rules or standards designed to prevent the type of harm that allegedly occurred and compliance with the rules or standards was required as a condition for selling or distribution the product. *See* § 768.1256(1).[1] The statute also establishes a rebuttable presumption that a product is defective or unreasonably dangerous, and the manufacturer is liable if the manufacturer failed to comply with applicable and relevant government rules or standards designed to prevent the type of harm that allegedly occurred and which require compliance as a condition for selling or distributing the product. *See* § 768.1256(2).[2]

[1] "(1) In a product liability action brought against a manufacturer or seller for harm allegedly caused by a product, there is a rebuttable presumption that the product is not defective or unreasonably dangerous and the manufacturer or seller is not liable if, at the time the specific unit of the product was sold or delivered to the initial purchaser or user, the aspect of the product that allegedly caused the harm: (a) Complied with federal or state codes, statutes, rules, regulations, or standards relevant to the event causing the death or injury; (b) The codes, statutes, rules, regulations, or standards are designed to prevent the type of harm that allegedly occurred; and (c) Compliance with the codes, statutes, rules, regulations, or standards is required as a condition for selling or distributing the product."

[2] "(2) In a product liability action as described in subsection (1), there is a rebuttable presumption that the product is defective or unreasonably dangerous and the manufacturer or seller is liable if the manufacturer or seller did not comply with the federal or state codes, statutes, rules, regulations, or standards which: (a) Were relevant to the event causing the death or injury; (b) Are designed to prevent the type of harm that allegedly occurred; and (c) require compliance as a condition for selling or distributing the product."

II. The Subcommittee's Prior Proposed Instructions

Subsequent to the enactment of § 768.1256, the Products Liability Subcommittee of the Committee on Standard Jury Instructions in Civil Cases undertook the drafting of instructions to reflect the new law. Less than a year ago, the Subcommittee drafted and published for comment two instructions intended to reflect the provisions of § 768.1256(1) and (2).

The Subcommittee addressed § 768.1256(2), the rebuttable presumption of defect when there is a failure to comply with relevant and applicable government rules or standards, by creating a new instruction, 403.11. *See Report (No. 09-10) of the Committee on Standard Jury Instructions (Civil)* ("*Report No. 09-10*") at 17-20. After receiving comments, the version of instruction 403.11 ultimately submitted for a vote provided:

> **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 consider this presumption together with all the other facts and circumstances in evidence, in determining whether [the product was defective] [**(defendant) **was negligent].**

See Report No. 09-10 at 18.

The Subcommittee addressed § 768.1256(1), which creates a rebuttable presumption that a product was not defective or unreasonably dangerous, by including a separate provision, in subsection (c) of "Defense Issues" embodied in Instruction 403.18. The proposed instruction provided:

> **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].**

See Report No. 09-10 at 28.

III. The Committee's Current Proposals.

After discussion at its March 2009 meeting, the Committee decided not to include any instructions at all on § 768.1256. The Committee has withdrawn proposed instruction 403.11, and now proposed the following "Notes On Use" regarding the non-existent instruction on government rules.

> 1. Florida Statutes section 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. 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.
>
> 2. *Cassisi v. Maytag Co.,* 396 So. 2d 1148 (Fla. 1st DCA 1981), held that 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. Pending further development of Florida law, the committee takes no position on the sufficiency of these instructions in cases in which the *Cassisi* inference applies. See *Gencorp, Inc. v. Wolfe,* 481 So. 2d 109 (Fla. 1st DCA 1991); see also *Parke v. Scotty's Inc.,* 584 So. 2d 621 (Fla. 1st DCA 1991); *Miller v. Allstate Ins. Co.,* 650 So. 2d 671 (Fla. 3d DCA 1995).

See Report No. 09-10 at 19-20.

Similarly, Proposed Instruction 418(c) under "Defense Issues" has been eliminated by the Committee. The explanation for its deletion is identical to the explanation for deletion of Proposed Instruction 403.11.

IV. Summary of Comments

We believe it is imperative to give effect to the legislatively-created rebuttable presumptions embodied in § 768.1256. That is because (A) the statute expresses the law and public policy of the State of Florida and it is appropriate to instruct the jury on the statutory rebuttable presumptions (as opposed to mere inferences); (B) jurors who receive evidence about applicable government rules and standards need guidance in order to properly weigh that evidence in a products

liability action; and (C) jury instructions on the rebuttable presumptions are consistent with legislative intent behind § 768.1256.

In addition, as a preliminary matter we believe that the applicable rebuttable presumptions should appear in a single instruction, as opposed to being separated in the manner originally proposed by the Subcommittee.

V. Comments

Introduction: Placement of Jury Instructions.

We believe that all government rules jury instructions should be included in one location under 403.11. The Subcommittee's proposal would have separated out the instruction in favor of a manufacturer that applies where compliance with applicable and relevant government rules exists and included it under "Defense Issues." Placement of the instruction as one of the "Defense Issues" for a jury's consideration in 403.18 is inappropriate because that portion of the instructions begins with the language:

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).

It is entirely inappropriate to tell the jury it should consider a rebuttable presumption of non-liability only ***after*** it has already determined that liability exists. The rebuttable presumptions of liability and non-liability are starting points

in the jury's analysis and, accordingly, both presumptions should be included under 403.11.

A. Section 768.1256 establishes mandatory rebuttable presumptions (not mere inferences) on which a jury must be instructed.

Section 768.1256 requires the application of rebuttable presumptions of liability or non-liability in products liability actions where there are applicable and relevant "government rules." The only possible way to follow and apply this statute is to instruct the jury on the rebuttable presumptions when the circumstances described in the statute exist. Ignoring the existing law and public policy of the State of Florida, as expressed by the legislature, is simply not an option.

We do not believe that the Committee's detour into the murky area of "vanishing" presumptions or presumptions affecting the burden of proof, as expressed in the "Notes on Use" of the now non-existent Instruction 403.11 is even necessary. The statute establishes the law of Florida and that law cannot be given effect with appropriate jury instructions. To the extent that certain members of the Committee believed that instructions on presumptions are never warranted, that belief is simply incorrect.

Juries are routinely instructed on rebuttable presumptions. For instance, our entire criminal justice system is premised on the most well-known rebuttable presumption in our legal system. A defendant is presumed innocent. That

presumption is only rebutted if the State proves guilt beyond a reasonable doubt. Florida Standard Jury Instruction (Crim.) 3.7, which is used when requested by a defendant who pleads not guilty, provides in pertinent part that:

> The defendant has entered a plea of not guilty. This means you must presume or believe the defendant is innocent. The presumption stays with the defendant as to each material allegation in the [information] [indictment] through each stage of the trial unless it has been overcome by the evidence to the exclusion of and beyond a reasonable doubt.

For purposes of determining whether a jury instruction is necessary, we see no meaningful difference between instructing a jury on a rebuttable presumption of innocence in a criminal case and a rebuttable presumption of non-liability or liability in a civil case. In both contexts, the presumption is a rule of law on which the jury is instructed in order to provide guidance to the jury in determining the issues before it.

Even if it is necessary to wade into a consideration of "vanishing presumptions," *see* § 90.302(1), Fla. Stat., or a presumption affecting the burden of proof, *see* 90.302(2), Fla. Stat., we believe it is obvious that the presumption in question clearly falls into the latter category. In a products liability action, the burden of proof is on the plaintiff and the standard of proof is "preponderance" or "greater weight" of the evidence. Where, however, section 768.1256 applies because a defendant has not complied with applicable government rules, the

burden shifts to the defendant to prove that it was not liable. *See* § 768.1256(2) (providing that in a products liability action, there is a rebuttable presumption that the product is defective or unreasonably dangerous and the manufacturer or seller is liable if the manufacturer or seller did not comply with applicable and relevant government rules.)

Professor Ehrhardt describes rebuttable presumptions which affect the burden of proof as follows:

> Section 90.304 provides that rebuttable presumptions not included within the definition in section 90.303, i.e. presumptions that implement public policy rather than being established primarily as procedural devices, are presumptions affecting the burden of proof or the burden of persuasion. These presumptions are recognized because they express a policy that society deems desirable. Because of the harm that would result to society and the individual if the presumed fact is disproved, a greater burden is placed upon a party to disprove the presumed fact. Presumptions recognized for this purpose, e.g., that a marriage is legal, are included within the section 90.304 definition. When proof is introduced of the basic facts giving rise to a section 90.302(2) presumption affecting the burden of proof, the presumption operates to shift the burden of persuasion regarding the presumed fact to the opposing party.

See Charles W. Ehrhardt, Evidence § 304.1 (2009) (footnotes omitted).

The legislature obviously has determined that the public policy of the State of Florida is to encourage the manufacture of safe products and the legislature has implemented that public policy by enacting § 768.1256. To ignore the statute by

failing to instruct the jury on it is tantamount to judicial overruling of a validly enacted statute.

Courts have held that a jury instruction embodying the statutory rebuttable presumption is appropriate when the conditions specified in the statute are present. *See, e.g. Keene-McPeters v. Cooper Tire & Rubber Co.,* 303 Fed. Appx. 743, 2008 WL 5233140, *1 (11th Cir. 2008) (unpublished) (applying § 768.1256, Fla. Stat. and holding that "the evidence amply justified the jury instruction submitting to the jury the issue of the government standard defense"); *Clarksville-Montgomery County School Sys. v. United States Gypsum Co.,* 925 F.2d 993, 1004 (6th Cir. 1991) (applying Tenn. Code Ann. § 29-28-104 and holding that jury instruction on statutory rebuttable presumption that a product was not unreasonably dangerous if it complied with applicable regulations or standards was appropriate); *Egbert v. Nissan North America, Inc.,* 167 P.3d 1058, 1061 (Utah 2007) (holding that "the jury should be informed of the presumption of nondefectiveness under Utah Code section 78-15-6(3)").

As the Supreme Court of Utah recognized:

> It is common to instruct juries as to the law, and as to presumptions specifically. Presumptions generally must be incorporated into the fact-finding process for juries to appropriately discharge their obligations as fact finders. The [plaintiffs] do not cite a good reason, and we cannot conceive of one, not to instruct the jury here that the rebuttable presumption of nondefectiveness applies to Nissan.

Egbert, 167 P.3d at 1061.

Lastly, we do agree with the second paragraph of the Committee's "Notes on Use" and the lack of a jury instruction on the *Cassisi* inference. *See Cassisi v. Maytag Co.,* 396 So. 2d 1148 (Fla. 1st DCA 1981). The only Florida court to address the specific issue has rejected an instruction on a *Cassisi* inference. *See Gencorp, Inc. v. Wolfe,* 481 So. 2d 109 (Fla. 1st DCA 1991).

The lack of a jury instruction on a mere inference is consistent with the observations of Professor Ehrhard.

> A presumption differs from an inference. An inference is a logical deduction of fact that the trier of fact may draw from the existence of another fact or group of facts. Whether the inferred fact is found to exist will be decided by the trier of fact. A presumption is stronger; it compels the trier of fact to find the presumed fact if it finds certain basic facts to be present. Even if a court finds that a presumption is not present in a particular situation, an inference of the same fact can be drawn if it is supported logically by the evidence.
>
> The presence of an inference and its effect on the case can be argued by counsel to the jury. The jury may accept or reject the inference as it sees fit. Generally, the court should not give a jury instruction concerning an inference.

Charles W. Ehrhardt, Evidence § 301.1 (2009); *see also Palmas y Bambu S.A. v. E.I.DuPont de Nemours & Co.,* 886 So. 2d 565, 581-581 (Fla. 3d DCA 2004) (disapproving an adverse inference jury instruction and noting that "an inference is

not a presumption"); *Jordan v. Masters,* 821 So. 2d 342, 346-347 & n.2 (Fla. 4th DCA 2002) (disapproving adverse inference jury instructions because they invade the province of the jury and suggesting that Committee on Standard Jury Instructions amend Instruction 2.3 to include a note that an adverse inference charge is generally not appropriate).

B. An Instruction is Necessary to Provide Guidance to Jurors Who Have Received Evidence Regarding Government Rules

Litigants have a right to have a trial court instruct the jury on the law applicable to the issues presented. *Langston v. State,* 789 So. 2d 1024, 1025 (Fla. 1st DCA 2001); *Gallagher v. Federal Ins. Co.,* 346 So. 2d 95, 96 (Fla. 3d DCA 1977). During a trial in a products liability action where government rules are an issue, the parties will present evidence regarding a manufacturer's compliance or non-compliance with applicable and relevant rules. Without an instruction to guide them, jurors could easily be confused about the implication of the government rules.

It is certainly possible that, without an appropriate instruction on the rebuttable presumptions established by § 768.1256, jurors could undervalue or overvalue the evidence. Some jurors might give dispositive weight to evidence that a manufacturer complied with applicable rules. Other jurors might ignore the evidence altogether. The failure to instruct jurors on the law applicable to the government rules evidence is certain to result in confusion and speculation on the

part of jurors. Accordingly, an instruction on the rebuttable presumptions established by § 768.1256 is necessary.

C. An Instruction on the law established by § 768.1256 is consistent with Legislative Intent.

It is apparent from a review of legislative history that the legislature intended that the rebuttable presumptions established by § 768.1256 would the embodied in jury instructions. For instance, the Staff Analysis for House Bill 775, dated June 2, 1999, makes it clear that the original intent of a statute providing for a "government rules defense" was to level the playing field in regard to jury instructions. *See* Florida Staff Analysis, H.B. 775 (6/2/1999).

The Staff Analysis of an early version of the bill noted that under current law, violation of statutes or rules designed to prevent the type of harm caused to the plaintiff can be construed as "negligence per se." "Florida's standard jury instructions require an instruction to the jury that non-compliance with such standards constitutes negligence or a defect. There is no converse jury instruction, however, as the manufacturer or seller is not insulated from liability if the product conforms to the applicable government rules and regulations." *Id.*

Clearly, the legislature intended to remedy the lack of any jury instruction on the effect of a manufacturer's compliance with applicable rules by enacting § 768.1256. In doing so, the legislature also provided for the converse situation by

establishing a rebuttable presumption arising from a manufacturer's failure to comply with applicable government rules and standards.

VI. CONCLUSION

Existing Florida law, as set forth in Section 768.1256, requires the application of certain rebuttable presumptions under appropriate circumstances in products liability actions. The only way to give effect to that law is to instruct a jury on the rebuttable instructions that they are to apply during their deliberations. Failure to provide appropriate instructions to the jury has the effect of eliminating the statute altogether and creating confusion in the minds of jurors who have heard evidence about government rules. An instruction on the rebuttable presumptions that arise from compliance or non-compliance with applicable and relevant government rules is essential under the law and will fully effectuate the letter, spirit and intent of the legislature.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing was mailed and e-mailed this 29th day of January 2010 to: 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, FL 33602.

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