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February 1, 2010

TO: The Chief Justice and Justices of the Supreme Court of Florida
500 South Duval Street
Tallahassee, Florida 32399

CC: Tracy Raffles Gunn, Committee on Standard Jury Instructions in Civil Cases Chair
Gunn Appellate Practice, P.A.
777 S. Harbour Island Blvd. Suite 770
Tampa, Florida 33602

RE: In the matter of Standard Jury Instructions (Civil), Product Liability Instructions

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Thank you for the additional opportunity to comment on the proposed revisions to the standard product liability jury instructions. We commend and thank the members of the Committee on Standard Jury Instructions (Civil) ("the Committee") who have spent extensive time and effort to update the civil jury instructions. In seeking additional comments, the Court rightly has identified many problematic issues with the proposed instructions.

From a practical standpoint, if the Court approves instructions that do not conform to Florida law, substantial additional and unnecessary litigation will be generated at the trial level. For example, a party may be more inclined to argue for variations from the standard instructions or submit additional special instructions to the Court. This review and revision process is an opportunity for the Court and the Committee to conserve valuable and limited judicial resources.

We offer the following comments on the proposed revisions:

PROPOSAL #8 – Eliminate standard instruction PL 4, PL 5, PL 5 Notes On Use and Comment, and add instruction 403.7, Strict Liability

Design vs. Manufacturing Defect

Proposed instruction 403.7 attempts to merge manufacturing and design defects into a single instruction. Design and manufacturing defects are distinct legal concepts and should not be merged into a single instruction. By combining PL 4 (manufacturing) and PL 5 (design defect), the Committee blurs the distinction between these two concepts.

A product contains a manufacturing defect when the product departs from its intended design. *Kohler Co. v. Marcotte*, 907 So. 2d 596, 599 (Fla. 3d DCA 2005). In *Cassisi v. Maytag Co.*, 396 So. 2d 1140, 1145 (Fla. 1st DCA 1981) the Court explained a manufacturing defect as one that due to a "miscarriage in the manufacturing process…produces an unintended result." On the other hand, a design defect conforms to the manufacturer's design intent, but unforeseen hazards accompany normal use of the product. *Id*. These distinctions should be included in the body of two separate instructions to avoid confusion regarding the alleged defect.

Furthermore, we do not believe that the proposed Note on Use for 403.7(1), "A claimant is not required to plead or prove whether the defect in the product came from its manufacture or design" is an accurate statement of Florida law. We disagree that *Ford Motor Co. v. Hill*, 404 So. 2d 1049 (Fla. 1981) and *McConnell v. Union Carbide Corp.*, 937 So. 2d 148 (Fla. 4th DCA 2006) specifically support this statement, and suggest deleting the statement from the proposed note. As the Committee points out in Note 1 (and addressed in more detail below), the risk benefit test does not apply in cases involving manufacturing defect. Since the applicable test depends on the type of defect alleged, it is logical that the claimant must plead *and* prove that the alleged defect is due to either the manufacturing or design process.

As a practical matter, not requiring the claimant to plead and prove a specific defect, (including whether the defect is one of design or manufacturing) is bad public policy. In order to protect the public against product defects and to promote advancement and improvement of products, a manufacturer should be entitled to know whether the claimant and his or her experts contend the claimant's injuries were caused by a defect in the manufacturing or design process.

For these reasons, we suggest the Committee make separate instructions for strict liability manufacturing and design defects. Furthermore, we suggest deleting the first sentence of Note on Use 1.

Consumer Expectation vs. Risk-Benefit Test

The proposed jury instruction 403.7 and the Notes on Use inappropriately minimize the use in Florida of the risk-benefit test and the Restatement (Third) of Torts. For example, Note 3 states, "Pending further development in the law, the committee takes no position on whether the risk/benefit test is a standard for product defect that should be included in instruction 403.7…" Similarly, Note 4 states, "While the committee has cited *Force* in other contexts, it does not approve the risk/benefit instruction that is set forth in *Force*."[1] Based on the legal support below, we suggest the Committee delete both of these statements from the proposed Notes on Use.

Contrary to the Notes on Use of Proposed Rule 403.7, Florida courts – notably the Third

[1] We find this comment unusual in that jury instructions should accurately summarize the current state of Florida law on a particular issue. We do not believe the Committee should "reject" a holding from a state appellate court, particularly when it cites the same case for other propositions.

District Court of Appeal – have relied on, applied, and specifically adopted the Restatement (Third) of Torts and use of the risk-benefit (risk-utility) test. *See Kohler Co. v. Marcotte*, 907 So. 2d 596, 598-600; *Agrofollajes v. Pont De Nemours*, --- So.3d ----, 2009 WL 4828975, *48 (Fla. 3d DCA 2009). In *Agrofollajes*, not only did the court adopt the risk-utility test, it specifically rejected the use of the consumer expectation jury instruction in design defect cases, referring to the test as "inappropriate," particularly cases involving "complex" products like the fungicide Benlate. Moreover, in *Force v. Ford Motor Co.*, 879 So. 2d 103, 110 (Fla. 5th DCA 2004), the Fifth District Court of Appeal also recognized that the consumer expectation test may not logically be applied to all products, in that some products are "too complex" for the consumer expectation standard.

The Committee cites *Cassisi v. Maytag*, Co., 396 So. at 1146, for the proposition that the risk benefit test does not apply in cases involving manufacturing defect. What is not included in the Notes on Use, however, is that the *Cassisi* Court also noted that the consumer expectation standard is "difficult" to apply in design defect cases and inadequate warning cases. *Id*. at 1145. The consumer expectation standard is "very vague and imprecise" because the ordinary consumer cannot be said to have expectations regarding complex products or components. *Id*. The court recognized that legal scholars suggested rejection of the consumer expectation test, particularly as to design defects, in favor of the risk-utility test. *Id*.

Florida courts have long since recognized the consumer expectation test does not apply in certain types of product liability matters. With limited exceptions, Florida courts have left open the issue of whether the consumer expectation or risk-benefit test applies to a certain product or alleged defect. We believe the Notes on Use, however, incorrectly focus on the consumer expectation test.

Proposal #10 – Instruction 403.09 Negligence and Proposal # 11 – Instruction 403.10, Negligent Failure to Warn (new)

Proposed Instructions 403.09 and 403.10 should be clarified to require the claimant to prove a defect in the product. Unless the product is proven defective, there cannot be a finding of negligence or a negligent failure to warn. *See e.g. Siemens Energy v. Medina*, 719 So. 2d 312, 315 (Fla. 3d DCA 1998)("Because the jury found in its verdict that Siemens did not manufacture a defective product, this precluded any findings of strict liability or negligence based on a defective product.") *See also, Nissan Motor Co., Ltd. v. Alvarez*, 891 So. 2d 4, 6 (Fla. 4th DCA 2005)("If the only evidence of negligence that the Alvarezes presented at trial related to design defect, then the jury could not have found Nissan liable for negligence while finding that the vehicle did not contain a design defect."); *Terex Corp. v. Bell*, 689 So. 2d 1122 (Fla. 5th DCA 1997)(Because the only evidence of negligence offered against appellant at trial related to its alleged negligent design and the jury found there was no design defect, there was no other evidence to sustain its verdict.)[2]

[2] Federal District Courts applying Florida law have also required the claimant to prove a defect in the product to prevail on a negligence claim. *See e.g. Humphreys v. General Motors Corp.*, 839 F. Supp 822, 829 (N.D. Fla. 1993) (In granting summary judgment for the defendant, the court stated, "Plaintiffs' negligence action is bottomed on the existence of a defect in the seat back locking device….[T]he record does not contain any evidence of a defect. If there is no defect, then Defendant has not negligently designed, tested or inspected the automobile. Furthermore, if there is no defect, then there is not any unforeseen danger. Thus, without any

These decisions support the idea that a negligence claim grounded in product liability requires the claimant to prove a defect in the product in addition to proving the elements of a negligence claim. Furthermore, including this language in the proposed jury instructions will help reduce inconsistent verdicts that have resulted in product liability cases when the jury finds the product is not defective, but also finds negligence on the part of the manufacturer. *See e.g. Nissan Motor Co., Ltd. v. Alvarez*, 891 So. 2d at 6.

Proposal #13 – Instruction 403.16, Issues on Crashworthiness and "Enhanced Injury" Claim (new)

"Crashworthiness" and "enhanced injury" are unique legal concepts which, we believe, are not easily understood by all lay persons. In *D'Amario v. Ford Motor Co.*, 806 So. 2d 424 (Fla. 2001), the majority wrote approximately 18 pages to explain these concepts and to explain the rational underlying its holding. While we believe a standard instruction will be helpful for courts, trial lawyers, and jurors, the proposed instruction insufficiently describes these concepts.

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proof of a defect, Defendant cannot be said to have breached any duty toward Plaintiffs."; *Pinchinat v. Graco Children's Products*, 390 F. Supp. 2d 1141, 1149 (N.D. Fla. 2005)(To establish a prima facie case of product liability negligence, the plaintiff must also establish the product is defective or unreasonably dangerous.); *Alvarez v. General Wire Spring Co.*, 2009 WL 248264, (M.D. Fla. 2009)(To establish claims of negligent design and negligent manufacturing, the plaintiff must establish the product was defective.); *Broderick v. Danek Medical, Inc.*, 1999 WL 1062135, *3 (S.D. Fla. 1999)(Proof of negligent design and negligent manufacturing requires evidence of a defect in the product.")

More importantly, we believe the proposed instruction could be refined and clarified.

Specifically, the information in the first and final paragraphs should be combined and placed at the beginning of the instruction. We suggest including the following statements in the introductory paragraph of the instruction:

1. The claimant does not allege a defect in the vehicle caused the accident. (This is the third sentence of the first paragraph. We submit this sentence is always appropriate in crashworthiness cases.)
2. The manufacturer is not responsible for injuries caused in the "initial" collision or accident. *Id*. at 441.
3. The claimant alleges he or she sustained "enhanced" or separate and distinct injuries over and above what he or she would have sustained had the vehicle not contained the allegedly defective component.
4. The claimant has the burden to prove he or she sustained these additional injuries due to the allegedly defective component. *Id*. at 139.
5. The manufacturer is solely responsible for the enhanced injuries to the extent the claimant demonstrates the existence of a defective condition and that the defect proximately caused the enhanced injuries. *Id*.

If this information is incorporated at the beginning of the instruction, we believe the instruction will be greatly improved. Again, the concepts of crashworthiness and enhanced injury will not be familiar to most jurors, therefore it is imperative the instruction explains these concepts in sufficient detail to allow the jury to correctly apply Florida law.

Respectfully,

s/ Loren W. Fender

Robert J. Rudock
Loren W. Fender

CERTIFICATE OF SERVICE

We HEREBY CERTIFY that a true and correct copy of the foregoing was furnished this 1st day of February 2010, to: **Tracy Raffles Gunn**, Committee on Standard Jury Instructions Civil Cases Chair, Gunn Appellate Practice, P.A., 777 S. Harbor Island Blvd., Suite 770, Tampa, Florida 33602.

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