

IN THE SUPREME COURT OF FLORIDA

**IN RE: STANDARD JURY INSTRUCTIONS
IN CIVIL CASES – REPORT NO. 09-10**

(PRODUCTS LIABILITY)-

CASE NO. SC09-1264

**COMMENTS ON PROPOSED PRODUCT LIABILITY JURY
INSTRUCTIONS ON PROPOSAL #10-NEGLIGENCE (403.9) AND
PROPOSAL #11-NEGLIGENT FAILURE TO WARN (403.10)**

The undersigned, hereby submits comments to the proposed Standard Jury Instructions recommended by the Committee on Standard Jury Instructions in Civil Cases with respect to proposed instructions dealing with issues of negligence (403.9-Comment 10) and negligent failure to warn (403.10-Comment 11).

Proposal #10—instruction 403.9, Negligence

The wording of the negligence instruction should include a requirement of product defect and plaintiff should be required to pinpoint a specific defect. The proof of the existence of a defect is a key requirement in a products liability claim whether based on strict liability or negligence. *Cassisi v. Maytag Co.*, 396 So.2d 1140, 1143, 1146 (Fla. 1st DCA 1981) (stating that claimants have the burden of establishing that a defect was present in the product whether their case is founded on negligence or strict liability); *see Royal v. Black & Decker Mfg. Co.*, 205 So.2d 307, 309 (Fla. 3d DCA 1967); *West v. Caterpillar Tractor Co.*, 336 So.2d 80, 86 (Fla. 1976) (“the plaintiff’s injury must have been caused by some defect in the

product.”); *see also Consolidated Aluminum v. Braun*, 447 So.2d 391, 392)(Court held that there could be no negligence absent a finding of defect). If the conduct of a manufacturer, designer or supplier or the absence of conduct of those parties does not render a product defective, it is not a proximate cause of the loss or injury. *See Savage v. Danek Medical, Inc.*, 31 F.Supp.2d 980 (M.D. Fla. 1999); *Bogle v. Sofamor Danek Group, Inc.*, 1999 WL 1132313 (S.D. Fla. 1999). Moreover, as courts in this state have already recognized, there is an increased likelihood of an inconsistent verdict if the jury is not required to find a defective product in order to find a Defendant negligent. *See Ashby Div. of Consol. Aluminum Corp. v. Dobkin*, 458 So.2d 335, 337 (Fla. 3d DCA 1984)(Court held that a verdict finding no defect but holding Defendant liable for negligence was inconsistent and stated that “[a]bsent proof of a defect, there were no grounds upon which to find the defendants negligent”); *see generally Nissan Motor Co. v. Alvarez*, 891 So.2d 4, 6 (Fla. 4th DCA 2005)(verdict was inconsistent where jury found no defect and also found defendant liable for negligence).

Proposal #11—instruction 403.10, Negligent Failure to Warn

For the reasons stated above in Proposal #10, the decisional law requires that

the instruction include a reference to a “defective product”.

Date: February 1, 2010

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CERTIFICATE OF COMPLIANCE

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

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on February 1, 2010 an original and 9 paper copies were filed with the Florida Supreme Court, 500 South Duval St., Tallahassee, FL 32399 as well as filed by email to e-file@flcourts.org and a copy served on 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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