IN THE SUPREME COURT OF FLORIDA

In the matter of Standard Jury Instructions (Civil), **Committee Report Number 09-10**

Products Liability Instructions
_____/

OPPOSITION TO PROPOSED JURY INSTRUCTIONS 403.8 AND 403.10

While it is not clear if commentary is being accepted for the newly proposed strict liability and negligent failure to warn jury instructions, we submit the following comments to further the argument that instructions on these matters are not yet ripe. For the past several years, product liability practitioners have been discussing whether to adopt standard civil jury instructions for strict liability failure to warn and negligent failure to warn in the product liability context. While negligent failure to warn is a well-established cause of action, which is appropriately provided for in the negligence standard jury instruction, only two district courts of appeal have adopted a separate cause of action for strict liability failure to warn. This is largely due to the complex and confusing question of whether strict liability failure to warn is a distinct theory from negligent failure to warn, and if so, whether having a separate cause of action for strict liability failure to warn is legally sound. Thus, the adoption of separate jury instructions for strict liability failure to warn and negligent failure to warn is premature in light of the lack of analysis and acceptance by Florida courts. If, however, the Court finds

that Florida law has sufficiently developed on the issue so that standard jury instructions may be adopted, the instructions should reflect the case law.

I. Jury Instructions are Premature

The first Florida decision to explicitly analyze and adopt strict liability failure to warn as a separate cause of action from negligent failure to warn was Ferayorni v. Hyundai Motor Co., 711 So. 2d 1167 (Fla. 4th DCA 1998). In that case, the Fourth District found that the trial judge improperly refused to give a separate jury instruction on strict liability failure to warn, reasoning that an instruction on negligent failure to warn alone was sufficient. Thus, the court fashioned a new strict liability failure to warn cause of action that is a "hybrid of traditional strict liability and negligence doctrine" on the basis that "manufacturers are not required to warn of every risk which might be remotely suggested by any obscure tidbit of available knowledge, but only of those risks which are discoverable in light of the '*generally recognized* and *prevailing best*' knowledge available. Id. at 1172 (emphasis in original). In doing so, the court recognized that while manufacturers are not insurers and must have some knowledge of a product defect, including a defect by failure to warn, they are to be held to a higher standard of care than imposed under a negligence cause of action.

The first and only Florida state court decision to discuss and adopt Ferayorni was the First District Court of Appeals case Griffin v. Kia Motors Corp., 843 So.

2d 336 (Fla. 1st DCA 2003). Griffin did not add any analysis to the Ferayorni decision. Consequently we are essentially left with only one district court's analysis on this subject, which is not sufficient to support an independent jury instruction on strict liability failure to warn.

Eight years after Ferayorni, the Fourth District readdressed the cause of action and jury instruction for strict liability failure to warn in McConnell v. Union Carbide Corporation, 937 So. 2d 148 (Fla. 4th DCA 2006). In that case the Plaintiffs asserted claims against Union Carbide for strict liability failure to warn. Plaintiffs requested the court give the standard products liability jury instructions for failing to warn of serious risk of harm when a dangerously defective product is used as intended. Those requested jury instructions were FSJI PL4-PL5 (2004) for design and manufacturing defects. The trial court rejected the Plaintiffs' request and, at Carbide's request, gave the following instructions:

> In order to find Union Carbide strictly liable, the Plaintiff must prove that Union Carbide sold a defective product by failing to adequately warn of a particular risk that was known or noticeable in light of the generally recognized and prevailing best scientific and medical knowledge available at the time of sale of the product, and in light of the level of education and knowledge of the danger of Union Carbide's customers such as Georgia Pacific.

Id. at 150.

On appeal the court rejected Union Carbide's instructions, which more accurately reflected the language in Ferayorni, and stated FSJI PL4-PL5 were specifically designed for the strict liability claims asserted by Plaintiffs. The court stated that Union Carbide's instructions were not an accurate reflection of the law. The McConnell decision is not consistent with the Fourth District's earlier holding in Ferayorni that an independent cause of action and separate jury instruction is necessary for a failure to warn cause of action. To be consistent, the court should have only rejected Union Carbide's instruction regarding the knowledge of Union Carbide's customers. The court should not have rejected the entire instruction, which actually mirrored the Ferayorni knowledge requirement. The court's holding creates further confusion as to whether strict liability failure to warn is indeed a separate cause of action warranting a separate jury instruction.

II. Any Adopted Instructions Should Reflect the Case Law

If the Court feels it is an appropriate time to adopt a separate jury instruction for strict liability failure to warn, then the jury instruction must accurately reflect the case law. As discussed above, the only Florida decision to date to explicitly analyze and adopt strict liability failure to warn as a separate cause of action is the Fourth District Court of Appeals in Ferayorni. Therefore, the only standard language appropriate for a jury instruction on strict liability failure to warn is that language cited in Ferayorni.

The currently proposed instruction by the committee states:

> A product is defective if users or consumers of (the product) may not be aware that the product is dangerous when used as intended or reasonably foreseeable and (defendant) failed to give reasonable notice or warning of such danger to the users or consumers of the product.

It is not clear from where this language originated, as it does not track the language of Ferayorni. Instead, a jury instruction based on the Ferayorni standard would state:

> The rules of strict liability require a plaintiff to prove only that the defendant did not adequately warn of a particular risk that was known or knowable in light of the generally recognized and prevailing best scientific and medical knowledge available at the time of manufacture and distribution.

The Ferayorni court emphasized the importance of keeping the required showing of "generally recognized and prevailing best" knowledge available because a manufacture or seller is not an insurer of its product. Ferayorni, 711 So. 2d at 1172. The proposed jury instruction not only fails to cite the language in Ferayorni, but it would also have the unintended effect of making a manufacturer or seller an insurer of its products.

There are also additional concerns. We do not agree with the use of the word "dangerous" in the proposed instruction without the qualifying word "unreasonable." The concept of strict liability is concerned with unreasonably dangerous products, not merely dangerous products. RESTATEMENT (SECOND)

TORTS§402A(2)(a). Furthermore, the committee cites to McConnell in support of its proposed instruction. As discussed above, McConnell is not supportive of the need for a separate jury instruction. Finally, the commentary states "the cases recognize strict liability for failure to warn of defects that may not be apparent to users." We cannot agree with the use of the term "defects." A manufacturer would warn of a risk or danger inherent in a product not a defect in a product.

III. There is No Need for Separate Instruction on Negligent Failure to Warn

We would also like to reiterate our position that the proposed jury instruction for negligent failure to warn is redundant of the newly proposed negligence instructions. Negligent failure to warn is a claim based on negligence. See High v. Westinghouse Elec. Corp., 610 So. 2d 1259, 1263 (Fla. 1992). The proposed negligence instruction would encompass negligent failure to warn. A separate instruction is not needed and may cause confusion. If, however, a jury instruction on negligent failure to warn is adopted, then we support the commentary which would require instruction on the finding of a defect before the finding of negligence on the part of the manufacturer.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and accurate copy of the above and foregoing has been served via email (tgunn@gunnappeals.com) on the Committee on Standard Jury Instructions in Civil Cases Chair, Tracy Raffles Gunn, Gunn Appellate Practice P.A., 400 North Ashley Drive, Suite 2055, Tampa, FL 33602 on February 1, 2010.

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