IN THE SUPREME COURT OF FLORIDA

IN THE MATTER OF STANDARD JURY
INSTRUCTIONS (CIVIL),
PRODUCT LIABILITY INSTRUCTIONS
_____/

COMMENTS TO PROPOSED REVISIONS TO
STANDARD JURY INSTRUCTIONS IN PRODUCT LIABILITY CASES

The following comments pertain to the Proposed Revisions to Standard Jury Instructions Applicable to Product Liability Cases.

Notes On Use For 403.7 – Strict Liability

The Note on Use No. 1 for this proposed instruction should be modified. Specifically, the statement that "[a] claimant is not required to plead or prove whether the defect in the product came from its manufacture or design" is an inaccurate statement of Florida law.

As an initial matter, claims based on manufacturing and design defects generally involve different sets of facts and legal theories. A product contains a manufacturing defect when there is a departure from the intended design of the product resulting from the manufacturing process which produces an unintended result. *Husky Indus. v. Black*, 434 So. 2d 988, 994 n.4 (Fla. 4th DCA 1983). A product contains a design defect when the product is produced as designed but the design is defective. *See Ford Motor Co. v. Hill*, 404 So. 2d 1049, 1051 (Fla. 1981) .

The *Ford Motor Co. v. Hill*, 404 So. 2d 1049 (Fla. 1981) decision cited in Note on Use No. 1 does not provide legal support for the first sentence of the Note. The issue the Supreme Court of Florida addressed in *Hill* was whether both strict liability and negligence are proper theories for design defect claims in enhanced injury cases. *Id*. at 1050. In *Hill*, the defendant car manufacturer argued that strict liability should not be applied to a design defect claim in an enhanced injury case. *Id*. at 1051. The Supreme Court held that strict liability was applicable to both manufacturing and design defect claims, including claims involving second collision cases, and that a plaintiff could also proceed in negligence in such cases. *Id*. at 1052.

Nowhere in *Hill* did the Supreme Court state that a claimant was not required to plead or prove whether the defect in the product came from its manufacture or design, as stated in the first sentence of Note on Use No. 1 with citation to *Hill* and *McConnell v. Union Carbide Corp*., 937 So. 2d 148 (Fla. 4th DCA 2006). To the extent *McConnell* suggests otherwise, *McConnell* goes beyond the holding of *Hill* and is inconsistent with other interpretations of the *Hill* case. *See, e.g*., *Baione v. Owens-Illinois, Inc*., 500 So. 2d 1377, 1377 (Fla. 2nd DCA 1992); *Barrow v. Bristol-Myers Squibb Co*., No. 96-689-CIV-ORL-19B, 1998 U.S. Dist. LEXIS 23187, *155 (M.D. Fla. Oct. 29, 1998). Research did not reveal any

other Florida cases supporting the first sentence of the Note on Use No. 1 for proposed instruction 403.7; therefore, we suggest it be omitted.

Further, to the extent it is appropriate or relevant for a note regarding a jury instruction to include statements regarding pleading standards, the language proposed in Note on Use No. 1 for 403.7 regarding the pleading and proof standard is at odds with well-established Florida law. "Florida uses what is commonly considered as a notice pleading concept and it is a fundamental rule that the claims and ultimate facts supporting same must be alleged. The reason for the rule is to appraise [sic] the other party of the nature of the contentions that he will be called upon to meet, and to enable the court to decide whether same are sufficient." *Rios v. McDermott, Will & Emery*, 613 So. 2d 544, 545 (Fla. 3d DCA 1993) (quoting *Brown v. Gardens by the Sea S. Condo. Assoc.*, 424 So. 2d 181 (Fla. 4th DCA 1983)); *see also* Fla. R. Civ. P. 1.110(b). Pleadings must contain ultimate facts supporting each element of a cause of action and provide ultimate facts pertaining to a defective condition. *Clark v. Boeing Co.*, 395 So. 2d 1226, 1229 (Fla. 3d DCA 1981) (affirming dismissal of strict liability count alleging defendant sold aircraft "in an unsafe, defective condition" where the plaintiff failed to plead ultimate facts); *Rice v. Walker*, 359 So. 2d 891, 892 (Fla. 3d DCA 1978) (affirming dismissal where plaintiff alleged various components were unsafe but the facts of such defects were not stated) (citing *Royal v. Black & Decker Mfg. Co.*, 205 So. 2d

307 (Fla. 3d DCA 1968) and *West v. Caterpillar Tractor Co., Inc*., 336 So. 2d 80, 87 (Fla. 1976))).

In Florida, the allegations of a complaint must be sufficiently specific to identify the types of defect(s) alleged and what the plaintiff claims in fact was defective about the product. The allegations must also permit the defendant to determine which theories are at issue and prepare its defense as to the plaintiff's theories, such as identifying necessary experts, and to give notice as to plaintiff's theory at trial. *See McClain v. Metabolife Int'l, Inc.*, 401 F.3d 1233, 1237, 1240-44 (11th Cir. 2005) (product liability case involving pharmaceutical product will necessarily require evaluation by an expert of complex medical compositions that are varied in effect, as well as the susceptibilities of patients who will be prescribed the product).

Of lesser significance to the substance of the note, but in the interest of making it more user-friendly, we recommend revising the second sentence in the Note on Use No. 1 for 403.7 regarding manufacturing defects, to encompass products that are not necessarily "built" – for example, medications. We suggest replacing the language with "if it was not [made or manufactured] according to its intended design and thereby…."

403.8 – Strict Liability Failure to Warn

The current version of this proposed instruction should not be approved because the instruction is not an accurate statement of Florida law regarding a cause of action for strict liability failure-to-warn.

In *Ferayorni v. Hyundai Motor Co*., 711 So. 2d 1167 (Fla. 4th DCA 1998), the Court of Appeal, Fourth District, considered an issue of first impression in Florida – that is, whether there was a substantive difference between a claim for failure to warn under a negligence theory and a claim for failure to warn under a strict liability theory. In that case, a driver suffered fatal injuries after a collision in which she was improperly wearing her seatbelt. *Id*. at 1169. Her estate sued the car manufacturer, alleging defective design in the belt, negligent failure to warn, and strict liability failure to warn. *Id*. At trial, the jury found in favor of the defendant. *Id*. The plaintiff appealed on several grounds. *Id*.

The Fourth District found that the trial court had erred by refusing to give a jury instruction on strict liability failure-to-warn. *Id*. at 1173. With respect to a strict liability failure-to-warn claim, the Fourth District held:

> 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**.

Id. at 1172 (emphasis added) (footnoted omitted) (quoting and adopting a formulation of negligence and strict liability claims as set forth by the Supreme Court of California in *Anderson v. Owens-Corning Fiberglas Corp*., 53 Cal. 3d 987, 810 P. 2d 549, 558-59 (1991)). The Fourth District acknowledged that requiring proof of knowledge or constructive knowledge makes strict liability failure to warn to some degree a hybrid between negligence and strict liability theories. *Id*. at 1172 (citing *Carlin v. Sup. Ct . Sutter Cty*, 13 Cal. 4th 1104, 1112, 920 P. 2d 1347 (1996)). However, the *Ferayorni* court found that this formulation would best serve to promote the policies underlying strict liability as articulated in *West v. Caterpillar Tractor Co.*, 336 So. 2d 80, 87 (Fla. 1976) (adopting the strict product liability standard of the *Restatement (Second) of Torts*, §402A)).

Significantly, the Fourth District noted that, in formulating a strict liability failure-to-warn claim:

> [M]anufacturers are to be held to a higher standard than that imposed under negligence jurisprudence, but are not reduced to insurers; 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). The Fourth District rejected the view that an infusion of knowledge and reasonableness requirements would merge strict liability failure-to-warn and negligence failure-to-warn cases and held that a prima

facie case of strict liability failure-to-warn does not require a showing of negligence. 711 So. 2d at 1172.

In *Griffin v. Kia Motors Corp*., 843 So. 2d 336, 339 (Fla. 1st DCA 2003), the Court of Appeal, First District, expressly adopted the Fourth District's standard for a cause of action for strict liability failure-to-warn as set forth by *Ferayorni*. In *Griffin*, the plaintiff appealed a judgment entered in favor of the defendant car manufacturers in a product liability action after the jury found the seatbelt design in the plaintiff's vehicle was not defective. 843 So. 2d at 337. The First District held that the trial court committed reversible error by declining plaintiff's request for a jury instruction on his cause of action for strict liability failure-to-warn. *Id*. at 337. The plaintiff had based his requested jury instruction on the standard set forth in *Ferayorni*. *Id*. at 339. Stating that it followed "the Fourth District in recognizing this cause of action," the First District directed the trial court on remand to instruct the jury on the strict liability failure-to-warn claim. *Id*. at 339.

The following federal courts sitting in Florida have applied the *Ferayorni* hybrid formulation for a strict liability failure-to-warn claim based on Florida law: *Wolicki-Gables v. Arrow Int'l Inc.*, 641 F. Supp. 2d 1270, 1287 (M.D. Fla. 2009) (citing *Marzullo v. Crosman Corp*., 289 F. Supp. 2d 1337, 1347 (M.D. Fla.) and *Ferayorni*, 711 So. 2d at 1172); *Pinchinat v. Graco Children's Products, Inc*., 390 F. Supp. 2d 1141, 1146 (M.D. Fla. 2005) (citing *Ferayorni*, 711 So. 2d at 1172);

Marzullo v. Crosman Corp., 289 F. Supp. 2d 1337, 347 (M.D. Fla. 2003) (citing *Ferayorni*, 711 So. 2d at 1172); *Thomas v. Bombardier Recreational Vehicle Prods., Inc.*, No. 2:07-cv-730-FtM-29SPC, 2009 U.S. Dist. LEXIS 12361, *6-7 (M.D. Fla. Jan. 21, 2009) (citing *Ferayorni*, 711 So. 2d at 1172); *Hughes v. American Tripoli, Inc.*, No. 2:04-cv-485-FtM-29DNF, 2006 U.S. Dist. LEXIS 34469, *11 (M.D. Fla. May 30, 2006) (citing *Ferayorni*, 711 So. 2d at 1172); *Bearint v. Johnson Controls, Inc.*, No. 8:04-CV-1714-T-17MAP, 2006 U.S. Dist LEXIS 46571, *13 (M.D. Fla. July 10, 2006) (citing *Pinchinat*, 390 F. Supp. 2d at 1146); *Covas v. Coleman Co*., No. 00-08541-Civ-Lenard/Klein, 2005 U.S. Dist. LEXIS 45880, *19-20 (S.D. Fla. June 13, 2005) (citing *Marzullo v. Crosman Corp*., 289 F. Supp. 2d 1337, 1347 (M.D. Fla.) and *Ferayorni*, 711 So. 2d at 1172).

Accordingly, proposed instruction 403.8 is deficient because it does not encompass the required showing of knowledge, or constructive knowledge, as set forth in *Ferayorni* and *Griffin*. Under *Ferayorni* and *Griffin*, the following proposed instruction for strict liability failure-to-warn claims is recommended:

> A product is defective due to failure to warn if the product does not adequately warn of a particular risk that was known or knowable in light of the generally recognized and best scientific and medical information available at the time of manufacture and distribution and the product is expected to and does reach the consumer without substantial change affecting that condition.

See also Flynn, Michael, *The Healthy Debate: A Proposal for the Addition of Negligent Failure to Warn and Strict Liability Failure to Warn Jury Instructions to Florida Standard Jury Instructions for Product Liability Cases*, 25 Nova L. Rev. 267, 274 (Fall 2000) (suggesting a similar instruction for a strict liability failure to warn claim).

The Note on Use No. 1 for proposed instruction 403.8 cites the following cases as recognizing strict liability for failure to warn of defects: *McConnell v. Union Carbide Corp*., 937 So. 2d 148, 151-52 (Fla. 4th DCA 2006); *Union Carbide Corp. v. Kavanaugh*, 879 So. 2d 42, 45 (Fla. 4th DCA 2004); *Scheman-Gonzalez v. Saber Mfg Co.*, 816 So. 2d 1133 (Fla. 4th DCA 2002) and *Ferayorni v. Hyundai Motor Co*., 711 So. 2d 1167 (Fla. 4th DCA 1998). While these cases may support the proposition that a cause of action for strict liability failure-to-warn exists, *McConnell*, *Kavanaugh* and *Scheman-Gonzalez* do not support the proposed jury instruction. Rather, *Ferayorni* and *Griffin* remain the controlling Florida law on the requirements for a strict liability failure-to-warn claim.

The proposed language for the 403.8 instruction quotes language from *Scheman-Gonzalez v. Saber Mfg Co.*, 816 So. 2d 1133, 1139 (Fla. 4th DCA 2002). In *Scheman-Gonzalez*, the plaintiff sued tire and wheel manufacturers alleging that defects in the design and warnings caused a wheel to explode when he attempted to mount a 16-inch tire onto a 16.5-inch wheel. 816 So. 2d at 1337. The issue

presented was whether the warnings regarding the dangers associated with mismatching tires onto wheels were sufficient.

In dicta, the *Scheman-Gonzalez* court merely stated that it deemed the *Restatement (Third) of Torts: Products Liability* (1998) "instructive." *Id.*; *see also Liggett*, 973 So. 2d at 475-476 and concurrence of Gross, J. (explaining that the reference to *Restatement (Third)* in *Scheman-Gonzalez* was for explanatory and instructive, and not adoptive, purposes.) It cannot be gleaned from the *Scheman-Gonzalez* opinion whether the Fourth District was making reference to the Restatement (Third) in the context of a negligence failure-to-warn claim or a strict liability failure-to-warn claim; the opinion makes no such distinction. *Id*. at 1139.

Further, the *Scheman-Gonzalez* court's citation, in dicta, to *Warren v. K-Mart Corp*. 765 So. 2d 235, 237-238 (Fla. 1st DCA 2000) is also not instructive because – among other reasons – following *Warren*, in 2003, the First District adopted the *Ferayorni* standard for a strict liability failure-to-warn claim in *Griffin*. Thus, *Griffin* is the controlling law in the First District on this issue. Accordingly, *Scheman-Gonzalez* cannot be relied upon for the formulation of a strict liability failure-to-warn jury instruction.

Similarly, *Union Carbide Corp. v. Kavanaugh*, 879 So. 2d 42, 45 (Fla. 4th DCA 2004), does not support proposed instruction 403.8. First, the opinion appears to address with specificity only a negligent failure-to-warn claim. Second,

Kavanaugh does not set forth the standard for a strict liability failure to warn claim. Third, the opinion relies on a negligence section from the *Restatement (Second) of Torts* (section 388, Chattel Known to be Dangerous for Intended Use) for much of its decision. *Id*. at 44-46. Finally, the *Kavanaugh* decision does not mention or overrule *Ferayorni.*

Notes on Use for 403.9 – Negligence

The following portion of Note on Use No. 1 for 403.9 is an incomplete and inaccurate statement of Florida product liability law.

> An unreasonably dangerous condition in a product can result in a variety of ways, for example, from latent characteristics in the product, which create an unexpected danger, from failure to meet industry standards in the design or manufacture of the product or from an unsafe design choice for the product.

Under Florida law, a product can be defective in only three distinct ways: (1) improper design; (2) improper manufacturing; and (3) an inadequate warning. *See Liggett Group, Inc. v. Davis*, 973 So. 2d 467, 475 (Fla. 4th DCA 2007) (citing *Jennings v. BIC Corp*., 181 F.3d 1250, 1255 (11th Cir. 1999)); *Ferayorni v. BIC Corp.*, 711 So. 2d 1167, 1170-71 (Fla. 4th DCA 1998); *see also Brown v. Grove & Glade Supply, Inc.*, 647 So. 2d 1033, 1035 (Fla. 4th DCA 1994) (collecting cases); *Humphreys v. General Motors Corp.*, 839 F. Supp. 822, 829 (N.D. Fla. 1993), *aff'd*, 47 F.3d 430 (11th Cir. 1995) (applying Florida law), *aff'd*, 47 F.3d 430 (11th Cir.

1995). Accordingly, a product may not be defective "in a variety of ways," as the Note suggests.

Further, under Florida law, failure to meet industry standards is "merely evidence of negligence." *Jackson v. H.L. Boulton Co.*, 630 So. 2d 1173, 1775 (Fla. 1st DCA 1994) (citing *Seaboard C. L. R. Co. v. Clark*, 491 So. 2d 1196 (Fla. 4th DCA 4th Dist. 1986)). Similarly, compliance with industry standards is merely evidence a product is not defective. *Jackson*, 630 So. 2d at 1775; *Loznicka v. Flexitallic Gasket Co.*, 489 So. 2d 1229, 1230 (Fla. 1st DCA 1986); *American Cyanamid Co. v. Roy*, 446 So. 2d 1079, 1083 (Fla. 4th DCA 1984), *aff'd in part, quashed in part on other grounds*, 498 So. 2d 859.

Thus, failure to meet industry standards does not, by itself, make a product unreasonably dangerous or defective as Note on Use No. 1 suggests. Additionally, Note 1 is inconsistent with Florida's statutory "Government rules defense" which, in sum, states that noncompliance with industry standards merely creates a "rebuttable presumption" that a product is defective if certain conditions are met, and that compliance with industry standards merely creates a "rebuttable presumption" that a product is not defective if certain conditions are met. *See* § 768.1256, Fla. Stat. Additionally, the *Royal v. Black & Decker Mfg. Co.*, 205 So. 2d 307 (Fla. 3d DCA 1967) opinion cited in Note on Use No. 1 merely discusses, very generally and briefly, the evolution of product liability law and the nature of a

defect, and does not stand for the proposition that noncompliance with industry standards alone could equate to a defect. *Id*. at 309-10.

CONCLUSION

For the foregoing reasons, the Proposed Revisions to Standard Jury Instructions Applicable to Product Liability Cases should not be adopted in their current form.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on January **29**, 2010 an original and nine copies of the foregoing was served via Federal Express on the Florida Supreme Court, 500 South Duval Street, Tallahassee, Florida 32399; a copy of the foregoing was served via Federal Express on The Supreme Court Committee on Standard Jury Instructions in Civil Cases Chair: Tracey Raffles Gunn, GUNN APPELLATE PRACTICE, P.A. 777 S. Harbour Island Blvd., Suite 770, Tampa, Florida 33602 and a copy of the foregoing was electronically submitted to the Supreme Court of Florida per Fla. Admin. Order No. AOSC04-84 (Sept. 13, 2004).

Barbara Bolton Litten

CERTIFICATE OF COMPLIANCE

I hereby certify that these Comments comply with the font requirements set forth in Rule 9.210(a)(2) of the Florida Rules of Appellate Procedure by using Times New Roman 14-point font.

Barbara Bolton Litten

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