IN THE SUPREME COURT OF FLORIDA
SC09-1264

In re Standard Jury Instructions (Civil) Committee Report No. 09-10
Products Liability Instructions

COMMENTS TO PROPOSAL NUMBERS 8, 10, 11 and 13

These comments are submitted by undersigned counsel, Wendy F. Lumish and Richard "Dick" Caldwell, both of whom were members of the Supreme Court Committee on Standard Jury Instructions in Civil Cases from 2001-2009. In that capacity, the undersigned were involved in the discussion and preparation of the proposed product liability jury instructions. We were also the authors of many of the minority reports presented to the Committee. See, e.g., Exh. E attached to the Committee Report at 276-334, 502-69, 597-600.[1] Since those reports were prepared in response to evolving versions of the instructions, and because we are no longer on the committee, we thought it useful to provide comments that incorporate our position on the final submission.

Dick Caldwell is of counsel to Rumberger, Kirk and Caldwell. He has been board certified in Civil Trial Practice since 1983, and has been involved in the handling of products liability cases in Florida and elsewhere for over 35 years.

Wendy Lumish is a shareholder at Carlton Fields, P.A. and is the Practice Group Leader for the Appellate and Trial Support Practice Group. She is a board

[1] All references to Exh. E are to the PDF page numbers.

certified appellate attorney, whose principal focus has been in the area of trial support and appeals in products liability cases for 25 years. A number of the cases discussed in these comments were handled by Ms. Lumish at the appellate level.

In providing these comments, the undersigned are guided by the fact that the Committee's function is to draft instructions based on Florida's established law. Where the law is not settled, the instructions should reflect that uncertainty. It is not the Committee's role to guess as to what the law should be or attempt to resolve conflicts in the law. With that in mind, we offer comments on Proposals 8, 10, 11 and 13.

I. PROPOSAL NO. 8 – INSTRUCTION 403.7 AND NOTES ON USE RELATED TO THE DEFINITION OF DEFECT

Proposed Instruction 403.7 replaces current PL4 (Manufacturing Defect) and PL5 (Design Defect). Proposed Notes on Use 3 and 4 replace current Comment 2. Together, the proposed instruction and related Notes make several significant changes that we believe to be inconsistent with existing Florida law:

A. The instruction includes a Note to the effect that the Committee takes no position on the issue of whether the risk benefit test is a test of product defect or an affirmative defense. (Note 3).

B. It includes a Note concerning Force v. Ford Motor Co., 879 So. 2d 103 (Fla. 5th DCA 2004), and the RESTATEMENT (THIRD) OF TORTS, PRODUCTS LIABILITY, section 2(b). (Note 4).

C. It eliminates the separate instruction on manufacturing defect currently found in PL4.

D. It includes a Note on the relationship between strict liability and negligence, while eliminating the current Note on Use about the possibility of an inconsistent verdict. (Note 5).

E. It eliminates a portion of current Comment 2 related to the two issue rule.

Each is discussed below along with our alternative suggestions for proposed instructions.

A. The Consumer Expectation/Risk Benefit Issue (Note 3)

The current instruction on design defect (PL5) includes two tests: the consumer expectation test ("if the product fails to perform as safely as an ordinary consumer would expect when used as intended or in a manner reasonably foreseeable by the manufacturer") and the risk benefit test ("if the risk of danger in the design outweighs the benefits"). PL 5 has included both since 1983. See In re Standard Jury Instructions (Civil Cases), 435 So. 2d 782 (Fla. 1983). Proposed Instruction 403.7 makes no change to the substance of this instruction. The significant change relates to current Comment 2.

The current Comment 2 cites Radiation Tech., Inc. v. Ware Constr. Co., 445 So. 2d 329, 331 (Fla. 1983), Cassisi v. Maytag Co., 396 So. 2d 1140, 1143-45 (Fla. 1st DCA 1981), and Adams v. G.D. Searle & Co., 576 So. 2d 728, 733 (Fla. 2d DCA 1991), as cases discussing the definition of the term "unreasonably dangerous." The comment also states that absent more definite authority, the committee recommends neither test to the exclusion of the other, nor does it opine

as to whether they should be given alternatively. The current version of this comment reflects changes made in 2004 to update the cases discussing the tests of design defect. See In re Standard Jury Instructions—Civil Cases, 872 So. 2d 893 (Fla. 2004).

After the comments were approved, the Fifth District decided Force v. Ford Motor Co., 879 So. 2d 103 (Fla. 5th DCA 2004). That case involved an allegation that a seat belt design was defective and caused the plaintiff to sustain an injury greater than he would have sustained in the accident absent the defect. The parties agreed that the risk utility test applied, and the Force plaintiff agreed to the following non-standard formulation of that test:

> A product is unreasonably dangerous when the foreseeable risks of harm posed by the product could have been reduced or avoided by the adoption of a reasonable alternative design and the failure to use a safer alternative design renders the product unreasonably dangerous.

Id. at 105-06 (citation footnote omitted). This formulation is derived from the RESTATEMENT (THIRD) OF TORTS, PRODUCTS LIABILITY, section 2(b).

The plaintiff also sought an instruction on the consumer expectation test, but Ford objected, arguing that test was inappropriate in the context of a complex product. The trial court agreed with Ford and did not instruct on the consumer expectation test. After a defense verdict, the plaintiff appealed, claiming the court erred in failing to instruct on the consumer expectation test. Force, 879 So. 2d at 105-06.

The Fifth District acknowledged the Florida Standard Jury Instruction Committee's comment, which reflected uncertainty as to whether either or both the consumer expectation and risk benefit tests should be given. Id. at 106-07. The court divided its analysis into two components. First, it addressed the issue of whether Florida recognized the consumer expectation test. On this issue, the court reviewed existing Florida products liability cases and held that Florida had recognized the consumer expectation test as "**one of** the independent standards to be applied in at least some products liability cases." Id. at 108 (emphasis supplied).

The court then addressed the question of whether the consumer expectation test applies to an allegedly defective seat belt design, concluding: "Some products may, in fact, be too complex for an ordinary consumer to have any expectations concerning their proper operation. Seat belts seem to be one of those products on the cusp." Id. at 109. It held:

> We conclude that there may indeed be products that are too complex for a logical application of the consumer expectation standard. We leave the definition of those products to be sorted out by trial courts. With respect to seatbelts, however, we believe that the cases finding that they may be tested by the consumer-expectation standard are better reasoned and more persuasive . . . . We hold that Mr. Force was entitled to submit his case to the jury on both the risk-utility test and consumer-expectation test . . . .

Id. at 110.

After Force, the undersigned proposed that Comment 2 be amended to reference the new decision as another case in which "these concepts are discussed."

See, e.g., Exh. E attached to the Committee Report at 239-55. This amendment was first discussed at the full Committee meeting in February 2006, and Committee members expressed various views. The subcommittee was asked to continue to work on the comment. See Minutes of Feb. 2006 meeting; Exh. D attached to the Committee Report.

After multiple debates and revisions, the Committee approved Proposed Note on Use 3. Instead of simply adding a citation to the Force decision as another case discussing the tests of defect, the Note takes issue with the risk benefit test as a test of design defect and suggests it may be an affirmative defense. For the reasons which follow, the undersigned submit that Note on Use 3 is not reflective of, and indeed, is contrary to, existing Florida law.

1. The proposed Note on Use improperly suggests that the risk benefit test has not been adopted in Florida

The risk benefit test first appeared in Florida in Auburn Machine Works Co. v. Jones, 366 So. 2d 1167, 1170 (Fla. 1979). In Auburn, this Court considered whether a manufacturer could be relieved of liability where a danger was obvious. The Court rejected the patent danger doctrine and noted that the trend was to consider the obviousness of the danger as a "mitigating defense in determining whether a defect is unreasonably dangerous and whether plaintiff used [due care]." Id. at 1169. The Court acknowledged law from other states holding that to determine if a product is unreasonably dangerous, one must balance the likelihood

and gravity of harm to be expected from a product with a given design against the burden of precaution which would be effective to avoid the harm. Id. at 1170. The obviousness of the danger was just one factor to consider, along with other considerations in the risk benefit test.

To illustrate, this Court distinguished between a knife and metal slicer: a knife is not unreasonably dangerous because everyone realizes the danger, a blade guard would eliminate its utility and the cost of a safe knife would be prohibitive. On the other hand, a metal slicer may be unreasonably dangerous even though the danger of unguarded cutters is known, if a guard over the blade did not eliminate the machine's usefulness and the resulting cost of a safe metal slicer was reasonable. Id. The Court explained that this formulation came from 2 Harper & James, THE LAW OF TORTS § 28.4 (1956 ed.), as expanded by Dean Wade. Auburn, 366 So. 2d at 1170.

Two years later, in Cassisi v. Maytag Co., 396 So. 2d 1140 (Fla. 1st DCA 1981), the First District was faced with a case involving a manufacturing defect. In dicta, the court pointed out the consumer expectation test, which applies to manufacturing defects, is difficult to apply in a design defect case because ordinary consumers cannot be expected to have expectations as to safety regarding features of complex products. It cited Dean Wade's factors and noted that "this balancing approach was implicitly approved by the Florida Supreme Court's opinion rejecting

the patent danger doctrine in Auburn Machine Works." Cassisi, 396 So. 2d at 1145 n.9.

Two years after Cassisi, the Second District Court of Appeal certified a question to this Court as to whether an "inherently dangerous product" is limited to products that threaten bodily injury. See Radiation Tech., Inc. v. Ware Constr. Co., 445 So. 2d 329, 330, 331 (Fla. 1983). Responding to that question, this Court cited West and the adoption of section 402A, in finding that this term had become passé as a result of the adoption of strict liability. The Court explained:

> The term "unreasonably dangerous" more accurately depicts liability of a manufacturer or supplier in that it **balances the likelihood and gravity of potential injury against the utility of the product**, the availability of other safer products to meet the same need, the obviousness of the danger, public knowledge and expectations of the danger, the adequacy of instructions and warnings on safe use, and the ability to eliminate or minimize the danger without seriously impairing the product or making it unduly expensive. Thus, an unsafe product, whether it is characterized as inherently dangerous or unavoidably dangerous, would not necessarily be an unreasonably dangerous product. See Auburn Machine Works Co. v. Jones, 366 So. 2d 1167 (Fla. 1979).

Radiation, 445 So. 2d at 331 (emphasis supplied).

In 1990, in Light v. Weldarc, 569 So. 2d 1302, 1304 (Fla. 5th DCA 1990), the Fifth District specifically referenced both tests of defect, citing to Radiation, 445 So. 2d at 331.

The next case addressing this issue was Force. As noted above, the issue in Force was whether the consumer expectation test applied in the context of a

complex product. But implicit in the Fifth District's decision that the consumer expectation test can be used regarding less complex products, was an acknowledgment that the risk benefit test remains viable in Florida. For example, its holding that consumer expectation is "**one of** the independent standards to be applied," id. at 108 (emphasis supplied), reflects that there is an additional test – the risk benefit test. Likewise, the conclusion that some products may be too complex for the ordinary consumer test again shows that the risk benefit test is a recognized alternative in Florida. See id. at 108-10.

This was confirmed once again in the recent Third District decision in Agrofollajes, S.A. v. E.I. DuPont De Nemours & Co., No. 3D07-2322, 2009 WL 4828975 (Fla. 3d DCA Dec. 16, 2009) (rehearing pending). In that case, the jury was instructed under the risk benefit and consumer expectation tests, and the district court ruled it was error to instruct under the consumer expectation test for a complex product like a fungicide.[2] Agrofollajes, 2009 WL 4828975, at *21.

In short, we believe the law is well settled that there are two tests of design defect in Florida and which applies is determined by the product at issue.

[2] Indeed, the Third District relied on the RESTATEMENT (THIRD) for this conclusion, a point discussed more fully infra.

2. There is no support in Florida law for the position that the risk benefit test is an affirmative defense

Proposed Note on Use 3 not only questions the risk benefit test as a test of defect, but also suggests the risk benefit test may actually be an affirmative defense. While no case is cited in the Note to support this statement, throughout the Committee's discussions, some members argued it was supported by Cassisi v. Maytag Co., 396 So. 2d 1140, 1143-45 (Fla. 1st DCA 1981), and Adams v. G.D. Searle & Co., 576 So. 2d 728, 733 (Fla. 2d DCA 1991). See, e.g., Exh. E attached to the Committee Report at 446-48, 460-70. Neither case supports that conclusion.

Cassisi involved an allegation of a manufacturing defect. While the court referenced the fact that California treated the risk utility test as an affirmative defense in a design case, it did not state this to be Florida law and acknowledged that any discussion of the proper test of design defect was dicta. See id. at 1144-46.

Adams was a drug case involving the application of Comment k. Comment k protects a manufacturer from strict liability in certain instances involving unavoidably unsafe products like prescription drugs.[3] In Adams, 576 So. 2d at 733, the court held:

[3] Comment k provides in pertinent part:

> Unavoidably Unsafe Products. There are some products which, in the present state of human knowledge, are quite incapable of being made safer for their intended and ordinary use. These are especially common in the field of drugs . . . .

> We therefore reject a blanket approach and decline to apply comment k to all prescription products. Instead, we follow those courts which hold that comment k is an affirmative defense to a strict liability claim. See, e.g., Ortho Pharmaceutical Corp. v. Health, 722 P.2d 410, 416 (Colo. 1986).

The court thus acknowledged that Comment k applies to products that current knowledge and technology cannot make safe for their ordinary use, but for which society has a need great enough to justify using the products despite their dangers. It further concluded that Comment k does not apply to all drug cases; rather, Comment k is an affirmative defense to strict liability. The court then adopted a risk benefit analysis in determining whether the comment applies. See id. The seller thus has the burden of proving that the comment applies by demonstrating the product's benefits outweigh its known risks.

Thus, Adams does not hold that the risk benefit test is an affirmative defense in the ordinary products liability case. It finds that Comment k is an affirmative defense to be applied in certain cases involving *unavoidably unsafe products*. No case has ever suggested that products like cars, forklifts, infant products or road graders are unavoidably unsafe products implicating Comment k.

> The seller of such products, again with the qualification that they are properly prepared and marketed, and proper warning is given, where the situation calls for it, is not to be held to strict liability for unfortunate consequences attending their use, merely because he has undertaken to supply the public which an apparently useful and desirable product, attended with a known but apparently reasonable risk.

RESTATEMENT (SECOND) OF TORTS, § 402(A), cmt. k.

3. Because the law has not developed to the point where it is clear which test will apply in any particular case, the only change to the Note should be citations to additional relevant cases

The issue of the proper test of a design defect has been debated since West v. Caterpillar, 336 So. 2d 80 (Fla. 1976), was decided 30 years ago, and the Committee has repeatedly acknowledged the uncertainty on this issue. Because this Court has not issued any relevant opinions since Auburn and Radiation, the undersigned believe the only appropriate change is the addition of citations to Force and Agrofollajes as further cases discussing the issue.

The undersigned believe that in lieu of proposed Note 3, the current version of Comment 2 should be amended to include the following italicized additions:

> PL 5 defines "unreasonably dangerous" both in terms of consumer expectations, see comment i to § 402A of the RESTATEMENT, and in terms weighing the design risk against its utility. These concepts are discussed in Radiation Tech. Inc., v. Ware Constr. Co., 445 So. 2d 329, 331 (Fla. 1983); Cassisi v. Maytag Co., 396 So. 2d 1140, 1143-45 (Fla. 1st DCA 1981); Adams v. G. D. Searle & Co., 576 So. 2d 728, 733 (Fla. 2d DCA 1991); *Force v. Ford Motor Co., 879 So. 2d 103 (Fla. 5th DCA 2004); Liggett Group, Inc. v. Davis, 975 So. 2d 1281 (Fla. 4th DCA 2008); and Agrofollajes, S.A. v. E.I. DuPont De Nemours & Co., No. 3D07-2322, 2009 WL 4828975 (Fla. 3d DCA Dec. 16, 2009)*. Absent more definitive authority in Florida, the committee recommends neither test to the exclusion of the other and expresses no opinion about whether the two charges should be given alternatively or together. PL 5 provides language suitable for either standard, or both, determined by the trial court to be appropriate.

B. Note On Use Concerning The Force Decision And RESTATEMENT (THIRD) Section 2(b) (Note 4)

In Note 4, the Committee proposes language stating it does not "approve the risk/benefit instruction that is set forth in Force." The risk benefit test used in Force was taken from the RESTATEMENT (THIRD) and was given without objection. See 879 So. 2d at 105-06. The reason for this Note is the Committee's belief that Florida courts have not approved of the RESTATEMENT (THIRD) OF TORTS, PRODUCTS LIABILITY, section 2(b). However, in Agrofollajes, S.A. v. E.I. DuPont De Nemours & Co., 3D07-2322, 2009 WL 4828975 (Fla. 3d DCA Dec. 16, 2009) (rehearing pending), the Third District held it was error to instruct on the consumer expectation test because the RESTATEMENT (THIRD) "rejects the 'consumer expectations' test as an independent basis for finding a design defect." Id. at *21; see also Scheman-Gonzalez v. Saber Mfg. Co., 816 So. 2d 1133 (Fla. 4th DCA 2002).

In light of the foregoing, the undersigned submits that Proposed Note 4 should be modified as follows:

> 4. In Force v. Ford Motor Co., 879 So. 2d 103 (Fla. 5th DCA 2004), the parties agreed to a risk/benefit instruction based on section 2(b) of the RESTATEMENT (THIRD) OF TORTS, Products Liability. Cases addressing the RESTATEMENT (THIRD) include: Agrofollajes, S.A. v. E.I. DuPont De Nemours & Co., 3D07-2322, 2009 WL 4828975 (Fla. 3d DCA Dec. 16, 2009); Liggett Group, Inc. v. Davis, 975 So. 2d 1281 (Fla. 4th DCA 2008); McConnell v. Union Carbide Corp., 937 So. 2d 148 (Fla. 4th DCA 2006); and Force v. Ford Motor Co., 879 So. 2d 103 (Fla.

> 5th DCA 2004). Pending further development, the committee takes no position on whether Florida has adopted this section of the RESTATEMENT (THIRD).

Alternatively, we submit that Note on Use 4 should be deleted.

C. Instruction Combining Manufacturing And Design Claims

In the current instructions, claims based on manufacturing defects and/or design defects are treated separately. In 2004, this Court approved changes to PL4 to define a manufacturing defect as follows:

> A product is unreasonably dangerous because of a manufacturing defect if it does not conform to its intended design and fails to perform as safely as the intended design would have performed.

In re Standard Jury Instructions—Civil Cases, 872 So. 2d 893, 895 (Fla. 2004). Since that time, there have been no cases addressing manufacturing defect claims that would require a modification to this instruction. Nonetheless, Proposed Instruction 403.7, is intended to apply to both manufacturing and design claims.

The related Note on Use 1 states:

> A claimant is not required to plead or prove whether the defect in the product came from its manufacture or design. Ford Motor Co. v. Hill, 404 So. 2d 1049 (Fla. 1981); McConnell v. Union Carbide Corp., 937 So. 2d 148 (Fla. 4th DCA 2006). In cases involving a claim of a manufacturing defect in the product, to clarify the issue for the jury, this instruction can be modified by adding the following language in the second paragraph after "if [the product": "was not built according to its intended design [or] because the product . . . ." The risk/benefit test does not apply in cases involving claims of manufacturing defect. See Cassisi v. Maytag Co., 396 So. 2d 1140, 1146 (Fla. 1st DCA 1981).

The undersigned disagree with the Committee's proposal to eliminate the separate instruction and disagree with Note on Use 1.

1. The instruction improperly merges two claims

In a manufacturing defect case, courts have recognized that the consumer expectation test applies. See Cassisi, 396 So. 2d at 1145; Force, 879 So. 2d at 107. As set forth in Cassisi, "[t]his standard works reasonably well as to those types of product defects characterized as defects resulting from manufacturing flaws caused by a miscarriage in the manufacturing process which produce an unintended result." Id. at 1145. No Florida decision holds that the risk benefit test applies to a manufacturing defect case and, thus, the current standard instructions, as amended in 2004, properly use only a consumer expectation test for manufacturing defect cases.

Proposed Note on Use 1 recognizes the risk benefit test does not apply to manufacturing claims, and it even provides guidance as to how to rewrite the instruction in a manufacturing defect case. But this begs the question why, after recognizing the difference between the elements of each claim, the Committee eliminated the separate instruction on manufacturing defect.

At the Committee meetings, it appeared the merger was based on two factors. First, the combined instruction was drafted at a time when some Committee members proposed eliminating the risk benefit test as a definition of

defect in 403.7. But the final version retained the risk benefit test. As such, the proposed instructions recognize the distinction between the two claims and thus, there should be separate instructions.

Second, the merger seems to have been predicated on the first sentence of the Note to the effect that "[a] claimant is not required to plead or prove whether the defect in the product came from its design or manufacture." Neither of the cited cases support the statement.

First, Ford Motor Co. v. Hill, 404 So. 2d 1049 (Fla. 1981), involved a crashworthiness claim (i.e., a claim that an alleged defect did not cause the accident, but rather the defect caused a greater injury than what would have been experienced absent the defect). In Ford Motor Co. v. Evancho, 327 So. 2d 201 (Fla. 1976), the Court had adopted the crashworthiness doctrine in the context of a negligence claim, and the issue in Hill was whether to extend crashworthiness to a strict liability claim. Hill, 404 So. 2d at 1049-50. The Court held that there was no basis to distinguish between a case in which the product causes the primary collision and one in which the product brings about further injury. Id. at 1050-52.

Ford responded that the Court should maintain a distinction between manufacturing defects for which there could be strict liability, and design defects for which a negligence theory should apply. The Court disagreed and found strict liability applies in a design defect case whether based on design or manufacture,

and whether based on a defect that caused the accident, or one that caused an enhanced injury (i.e., a crashworthiness claim). Id. Accordingly, we do not believe that Hill stands for the proposition that "[a] claimant is not required to plead or prove whether the product defect came from its manufacture" or design. Nor does Hill conflate the tests in a manufacturing defect case and a design case.

Nor do we believe McConnell v. Union Carbide Corp., 937 So. 2d 148 (Fla. 4th DCA 2006), resolves this issue. McConnell was an asbestos claim involving strict liability for failure to warn. See id. at 149-51. The defendants objected to the use of PL4 and PL5 claiming that Florida does not recognize a manufacturing or design defect claim for "raw" asbestos incorporated into a manufactured product. Id. at 1049-50. The defendant also argued the plaintiffs had not pled whether the alleged defect was one of design or manufacture and thus PL4 and PL5 should not be used. Id. at 152. The trial court did not give PL4 or PL5 and instead instructed on failure to warn. Id. at 150.

The Fourth District reversed holding, inter alia: the argument that PL4 and PL5 were not applicable because of the failure to plead and prove whether the defect came from its design or from its manufacturer is not correct. Id. at 152. Thus, the issue was whether the failure to characterize the defect as manufacturing or design, avoided application of PL4 and PL5. That, in our view, does not constitute a holding that the theories are the same and can be merged.

2. The Note on Use is incorrect

Should the Court decide that 403.7 will not include a separate instruction on manufacturing defect, the Proposed Note on Use 1 should be revised in two respects. First, the undersigned believe it is not the role of the Committee to comment upon pleading and proof requirements and, thus, the first sentence to the effect that "[a] claimant is not required to plead or prove whether the defect is the product came from its manufacture or design" should be deleted.

Second, the proposed instruction deviates from the approved language of PL4, without any justification for doing so. Proposed Note on Use 1 would instruct that a product is unreasonably dangerous if the product "was not built according to its intended design [or] because the product fails to perform as safely as an ordinary consumer would expect when used as intended or when used in a manner reasonably foreseeable by the defendant." Using that definition, a product is unreasonably dangerous if it does not conform to its specifications, even if that deviation does not make it dangerous. The [or] in the proposed comment would need to be changed to [and].

In sum, the undersigned submit that Note on Use 1 should be deleted and there should be a separate instruction on manufacturing defect consistent with PL4 approved by this Court in 2004. See In re Standard Jury Instructions-Civil Cases,

872 So. 2d 893, 893, 895 (Fla. 2004). At a minimum, the Note on Use should be revised.

D. Relationship Between Defect And Negligence (Note 5)

Note on Use 5 references the potential need to instruct the jury that, in cases involving both negligence and strict liability claims, the seller can be strictly liable even if he exercised due care. The undersigned submit that this Note should be deleted. Rather, as discussed infra, Proposed Instructions 403.9 and 403.10 explain the elements of a negligence claim, thereby obviating the need for this comment.

The Court should, however, retain the portion of the current Note on Use related to inconsistent verdicts to the effect that:

> In cases involving claims of both negligence and defective design, submission of both claims may result in an inconsistent verdict. See, e.g., Consol. Aluminum Corp. v. Braun, 447 So. 2d 391 (Fla. 4th DCA 1984); Ashby Div. of Consol. Aluminum Corp. v. Dobkin, 458 So. 2d 335 (Fla. 3d DCA 1984). See also Moorman v. American Safety Equip., 594 So. 2d 795 (Fla. 4th DCA 1992); North American Catamaran Racing Ass'n. v. McCollister, 480 So. 2d 669 (Fla. 5th DCA 1985).

E. Objection To Elimination Of Reference To Two Issue Rule

Several years ago, the Committee determined that it was important to alert judges and lawyers that the decision as to whether to use one of two definitions of design defect (risk benefit and consumer expectation) could implicate the two issue rule. Minutes of Nov. 2001 meeting; Exh. D attached to the Committee Report. Thus, the Committee added a sentence in Comment 2 as follows:

> The committee notes, however, that the two issue rule may be implicated if both tests of design defect are used. Zimmer, Inc. v. Birnbaum, 758 So. 2d 714 (Fla. 4th DCA 2000).

This Court agreed and the comments were amended. See In re Standard Jury Instructions-Civil Cases, 872 So. 2d 893, 896-97 (Fla. 2004).

The proposed instruction eliminates that reference, notwithstanding that the law has not changed since 2004. Accordingly, the undersigned believe this comment should be added back into the Notes on Use.

II. PROPOSAL NOS. 10, 11 – INSTRUCTIONS 403.9, 403.10 NEGLIGENCE/NEGLIGENT FAILURE TO WARN

For the first time, the standard instructions incorporate instructions on negligence (403.9) and failure to warn (403.10) in the products liability context. We agree these instructions are necessary, but disagree with the instructions as drafted because both fail to include language advising the jury that in a design defect case, the defendant can only be liable if the jury first finds that the product was defective. This can be accomplished by adding the following italicized language to 403.9.

> *In order to find [Defendant] liable for negligent [design] [manufacture] [importing] [selling] [supplying], you must first find that the [describe product] was in a defective condition, as defined earlier.*

Comparable language is necessary for 403.10 as well.

The law is well settled that "[a]t the heart of each theory [of product liability] is the requirement that the plaintiff's injury must have been caused by

some defect in the product." Royal v. Black & Decker Mfg. Co., 205 So. 2d 307, 309 (Fla. 3d DCA 1968); West v. Caterpillar Tractor Co., 336 So. 2d 80, 86 (Fla. 1976) (quoting Royal). See also Marzullo v. Crosman Corp., 289 F. Supp. 2d 1337, 1342 (M.D. Fla. 2003) (recognizing that in a products liability case, the elements of negligence apply, but the plaintiff must also prove that the product was defective or unreasonably dangerous).

Applying this requirement, Florida courts have often held that where a jury finds that a product is not defective by virtue of its design, the manufacturer cannot be negligent in so designing the product. For example, in North American Catamaran Racing Association, Inc. v. McCollister, 480 So. 2d 669 (Fla. 5th DCA 1985), the trial court instructed the jury as to both strict liability/design and negligence/design. Id. at 670-71. The jury found that the product was not defective (i.e., defendant was not strictly liable), but found that defendant was negligent. Id. at 671. Because the plaintiff's negligence claim was premised on the theory that the product was negligently designed, the court ruled that a verdict finding no defect, but finding negligence, was fundamentally inconsistent. See id.

Similarly, in Consolidated Aluminum Corp. v. Braun, 447 So. 2d 391 (Fla. 4th DCA 1984), the court rejected a jury determination of negligence where the jury also determined there was no defect in the product. The court concluded that

the allegations of negligence were dependent upon proof of a defect. See id. at 392. Therefore, absent a finding of a defect, there could be no negligence. See id.

Other decisions are in accord. See, e.g., Nissan Motor Co. v. Alvarez, 891 So. 2d 4, 6, 8 (Fla. 4th DCA 2004) (fundamentally inconsistent verdict results where jury returns verdict finding that product was not defectively designed, but that manufacturer was negligent in the design, manufacture, assembly, distribution or sale of the vehicle); Siemens Energy & Automation, Inc. 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 . . . . "); Ashby Div. of Consol. Aluminum Corp. v. Dobkin, 458 So. 2d 335, 337 (Fla. 3d DCA 1984) (finding verdict inconsistent, reasoning that "[a]bsent proof of a defect, there were no grounds upon which to find defendants negligent").

Indeed, the foregoing decisions were the basis of the current Note on Use related to inconsistent verdicts. In light of this settled law, the jury must be instructed concerning the need to find a defect before they reach the negligence question.

III. PROPOSAL NO. 13 – INSTRUCTION 403.16 CRASHWORTHINESS

The Committee members were in agreement as to the need for an instruction based on D'Amario v. Ford Motor Co., 806 So. 2d 424 (Fla. 2001). There remains,

however, disagreement over some of the language. First, we believe the crashworthiness concept is a difficult one that requires a clear and simple explanation about the doctrine itself – what is part of the claim and what is not part of the claim. For this reason, we believe the first paragraph of 403.16 should be included in the definition section of the instructions, just like the definition of strict liability, negligence, and other legal concepts. See 403.4 – 403.10.

Further, in D'Amario, this Court found a manufacturer is entitled to an instruction to the effect that

> no claim is being made for damages arising out of the initial accident, and that the manufacturer should not be held liable for damages caused by the initial collision. Indeed, such an instruction should ensure, much like [the Court's] holding in Fabre, that no defendant will be held responsible for damage it did not cause.

Id. at 440. The proposed instruction states, "**Normally**, a defendant is responsible for only [loss] [injury] or [damage] caused by its product and not the action of others." (Emphasis supplied). The undersigned does not believe this language, especially the word "normally" adequately conveys this significant qualifying concept.

In addition, D'Amario makes clear that it is a plaintiff's burden to establish the defect, causation and additional injuries. See id. at 439-40. We proposed the following instruction as a more clear articulation of these burdens:

Insert before Issues on Main Claim (403.15)

> Plaintiff claims that the (name vehicle) was defective by virtue of the (describe defect[s]). Plaintiff does not claim that [this] [these] alleged defect[s] caused the accident. Instead, (claimant) claims that this [these] defect[s] caused him/her to suffer greater injuries than [he] [she] would have sustained in the accident if the vehicle had not been defective.
>
> Insert before the causation instruction:
>
> If you find that the (name vehicle) was defective, then you must determine whether the defect caused (claimant) to suffer greater injuries than [he] [she] would have sustained in the accident if the vehicle had not been defective. Defendant is only responsible for injuries that were over and above those that (claimant) would have sustained if the vehicle was not defective. If you find that (claimant) suffered a greater injury than [he] [she] would have suffered absent the defect, you should try to determine whether part of (claimant's) condition resulted from the (vehicle's) defect and only award damages for those injuries. If you cannot determine which part of the (claimant's) condition resulted from the defect, then you should award damages for the entire condition suffered by (claimant).

With respect to the Note on Use, we agree that the term "enhanced" should not be used, but "aggravated" is likewise incorrect in the context of a crashworthiness claim. "Aggravated" implies an underlying injury that has been made worse by the alleged defect. In most cases, that is not the circumstance. We suggest that the term "enhanced" be eliminated from the title and neither "enhanced" nor "aggravated" be used. The relevant concept is expressed by the description "injury greater than Plaintiff would have suffered absent the defect."

We also disagree with the final sentence of Note on Use 1, which goes beyond a Note and offers the Committee's perspective on the scope of the doctrine's applicability when it states: "Although many of these claims involve

motor vehicles, there is no reason the same principle would not apply to any 'enhanced injury' claim regardless of the product involved." We believe this is not part of the Committee's role.

Finally, Note on Use 4 to 403.16 mirrors Note on Use 3 to 403.7 and for the same reasons, it should not be included in its present form. See pages 3-13, supra.

Respectfully submitted,

RICHARD J. CALDWELL, JR.
Florida Bar No. 131265
Rumberger, Kirk & Caldwell
100 North Tampa Street, Suite 2000
Tampa, Florida 33602-5853
Telephone: (813) 223-4253
Facsimile: (813) 221-4752

CARLTON FIELDS, P.A.
4000 Miami Tower
100 Southeast Second Street
Miami, Florida 33131
Telephone: (305) 530-0050
Facsimile: (305) 530-0055

By:_____
WENDY F. LUMISH
Florida Bar No. 334332

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing was served via U.S. Mail this 1st day of February, 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.

By:_____
WENDY F. LUMISH

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