

DLA Piper LLP (US)
Suite 2200
100 North Tampa Street
Tampa, Florida 33602-5809
T 813.229.2111
F 813.229.1447
W www.dlapiper.com

FREDRICK H.L. MCCLURE
fredrick.mcclure@dlapiper.com
T 813.222.5908 F 813.371.1111

January 29, 2010

The Supreme Court Committee on
Standard Jury Instructions in Civil Cases
c/o Tracy Raffles Gunn, Chair
Gunn Appellate Practice, P.A.
400 North Ashley Drive
Suite 2055
Tampa, FL 33602

**RE: Proposed Changes and Reorganization of Jury Instructions for Use
in Products Liability Cases**

Dear Committee:

My partners Lewis J. Conwell, Angela J. Crawford and I write to you today with respect to the referenced matter. All of us are resident members of The Florida Bar who regularly practice products liability law. As an initial matter, we thank you for your service to The Bar in this important undertaking. However, we disagree with a few of the proposed revisions which we set forth below.

Proposed Instruction 403.2

This proposed instruction does not include language requiring the plaintiff to prove that the product was defective when it left the possession of the defendant. The exclusion of this very important requirement, is contrary to long-standing Florida law that the plaintiff has the burden of establishing that a defect existed, the defect caused the injuries complained of, and that the injurious defect existed at the time it left the possession of the defendant. See, *Cassisi v. Maytag Co.*, 396 So. 2d 1140 (Fla. 1st DCA 1981). We believe that failure to continue to include this language in the Instruction would leave jurors with the impression that they can find a defendant liable for a defect that did not exist until after it had left the possession of the defendant. Accordingly, Instruction 403.2 should include language requiring proof that the defect existed at the time the product left the possession of the defendant before that defendant can be held liable for injuries resulting from the defective product.

Proposal #8 – Eliminate standard instructions PL4, PL5, PL5 Notes On Use and Comment, and add instruction 403.7, Strict Liability

We disagree with the Committee's comments in Use Note 3 with respect to the risk/benefit test for determining whether or not there is a defect. The Committee creates its own problem when it collapses, wrongfully in our opinion, into a new single strict liability instruction both design defects and manufacturing defects. It would make sense, of course, that the risk/benefit test would not be applied to manufacturing defect cases, but just the opposite in cases premised upon design defects. Moreover, the current standard instruction, Standard PL5 Jury Instruction, specifically implores use of the risk/benefit test in design defect cases. Thus, there can be no question that it is a test to establish defect, the burden

of proving which plaintiff must meet to pursue the cause of action. It is not, as the Committee says, that it is instead an affirmative defense. Accordingly, we believe that Proposed Instruction 403.7 should make clear that in manufacturing defect cases, it is the consumer expectations test that, generally, should be applied, and in design defect cases, it is the risk/benefit test that is to be applied. Most importantly, however, it is imperative that the Instruction make clear that it is plaintiff's burden to satisfy the applicable test. To do otherwise would be an improper and impermissible shifting of the burden of proof to defendant.

Proposal #10 - instruction 403.9, Negligence and Proposal #11 – instruction 403.10, Negligent Failure to Warn (new)

The Proposed Instructions both suffer from a very serious omission: a requirement that the plaintiff prove that a specific defect existed in the product that caused injury to plaintiff. An Instruction that does not require such proof for a finding of liability is inconsistent with Florida law. See, e.g., *Rodriguez v. National Detroit, Inc.*, 857 So. 2d 199, 201 (Fla. 3d DCA 2003)(citing *Cassisi v. Maytag Co.*, 396 So.2d 1140, 1143 (Fla. 1st DCA 1981)).

Proposal #19 – instruction 403.18, Defense Issues (new)

Please see our comments with respect to Note 3 of Proposed Instruction 403.7.

Again, Members of the Committee, we thank you for undertaking this significant and worthwhile endeavor on behalf of the Bench and Bar. We greatly appreciate the sacrifices you have made in the service of others.

Sincerely,

DLA PIPER LLP (US)

s/ Fredrick H.L. McClure

Fredrick H.L. McClure

FHLM:sh

cc: Lewis J. Conwell, Esq.
Angela J. Crawford, Esq.

IN THE SUPREME COURT OF FLORIDA

In re: Standard Jury Instructions)
in Civil Cases – Report No. 09-10)
(Products Liability))
_____ /

Case No. SC09-1264

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the attached Comments to Proposed Changes and Reorganization of Jury Instructions for Use in Products Liability Cases was electronically served 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 January 29, 2010.

s/ Fredrick H.L. McClure

Fredrick H.L. McClure
Florida Bar No. 147354
Lewis J. Conwell
Florida Bar No. 813450
Angela J. Crawford
Florida Bar No. 43611
DLA PIPER LLP (US)
100 North Tampa Street
Suite 2200
Tampa, FL 33602
(813) 229-2111
(813) 229-1447 (fax)