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February 3, 2010

The Supreme Court Committee on Standard
Jury Instructions in Civil Cases
Tracy Raffles Gunn, Committee Chair

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Re: Comments on Proposed Changes and Reorganization of Products Liability Civil Jury Instructions

Introduction

Patrick Emmanuel, Alan Bookman, and Mike Patterson write to this Committee as attorneys practicing with the firm of Emmanuel, Sheppard and Condon (ESC) in Pensacola, Florida. Products liability claims make up a significant portion of our litigation practice, and therefore, we feel it necessary to bring several of our concerns regarding the Notice of Proposed Changes and Reorganization of Jury Instructions in Civil Cases for Products Liability ("Proposed Changes") to the Committee's attention. We thank the Committee for the opportunity to submit our comments and for the Committee's consideration.

Proposed Instruction 403.7 – Strict Liability

The newly proposed revision wrongfully merges manufacturing defect and design defect jury instructions. We understand the Committee's attempt to make jury instructions more understandable, but combining the language of manufacturing defect and design defect jury instructions into one large sentence creates confusion.

Additionally, manufacturing defects and design defects are two distinct theories that require proof of different elements. The Committee recognized this fact in Note on

Use 1, commenting that an important difference between these two theories is that the risk/benefit test does not apply to manufacturing defect claims. Additionally, Note on Use 1 cites *Ford Motor Co. v. Hill*, 404 So.2d 1049 (Fla. 1981) and *McConnell v. Union Carbide Corp.*, 937 So.2d 148 (Fla. 4th DCA 2006) for the proposition that "[a] claimant is not required to plead or prove whether the defect in the product came from its manufacture or design." *Ford Motor Co.* and *McConnell*, in fact, do not support this conclusion.

In *Ford Motor Co.*, the Florida Supreme Court took up two primary issues: (1) whether strict liability applied to second collision cases; and (2) whether strict liability principles should only apply to manufacturing defect claims, with negligence principles being applied to design defect claims. In addressing these two issues, the Florida Supreme Court never stated that claimants are not required to plead and prove whether a product defect resulted from defective design or defective manufacturing.

In *McConnell*, the Fourth District Court of Appeals considered a defendant's failure to warn. *McConnell*, 937 So.2d at 152. As a secondary argument, the defendant in *McConnell* argued that application of the standard jury instruction was unnecessary because the plaintiff failed to plead and prove either a design or manufacturing defect. *Id.* In dicta, the 4th DCA cited *Ford Motor Co.*, stating a plaintiff does not need to plead or prove whether a product defect resulted from defective design or defective manufacturing. *Id.* As discussed above, however, *Ford Motor Co.* does not stand for this proposition.

The Florida Supreme Court's decision in *Arky, Freed, Stearns, Watson, Greer, Weaver & Harris, P.A. v. Bowmar Instrument Corp.* holds that in product liability lawsuits, plaintiffs must always plead and prove the nature of the alleged defect because the tests used for manufacturing and design defects are different. 537 So.2d 561, 563 (Fla. 1988). Only by requiring plaintiffs to plead and prove either a product's manufacturing or design defect may defendants mount a viable defense.

Finally, we disagree with the Committee's characterization of the risk/benefit test as an affirmative defense. Numerous Florida Supreme court decisions reference the risk/benefit test as a test used to determine whether a product suffered from a design defect. *See, e.g., Radiation Technology v. Ware Constr. Co.*, 445 So.2d 329 (Fla. 1984); *Auburn Mach. Works Co. v. Jones*, 366 So.2d 1167 (Fla. 1979). The risk/benefit test is not, however, an affirmative defense. Making the risk/benefit analysis an affirmative defense improperly transfers the burden of proof from the plaintiff to the defendant. Therefore, we respectfully request that any language describing the risk/benefit test as an affirmative defense be removed.

Proposed Instruction 403.9 & 403.10 – Negligence and Negligent Failure to Warn

We agree with the inclusion of negligence and negligent failure to warn instructions within the product liability jury instructions. However, both proposed

instructions are deficient because they fail to include a necessary requirement: a products-liability-based negligence claim must first be asserted.

Proof of a product's defect is an essential requirement to bringing a successful products liability claim. *See generally*, *E.I. du Pont de Nemours & Co. v. Desarollo Industrial Bioacuatico S.A.*, 857 So.2d 925 (Fla. 4th DCA 2003); *Consolidated Aluminum v. Braun*, 447 So.2d 391 (Fla. 4th DCA 1984); and *Cassisi v. Maytag Co.*, 396 So.2d 1140 (Fla. 1st DCA 1981). Additionally, if a plaintiff is not required to identify a specific defect, this will certainly result in inconsistent verdicts. Therefore, both the negligent and negligent failure to warn instructions should require a plaintiff to prove a specific product defect existed.

Proposed Instruction 403.18 –Defense Issues

We believe that the this proposed instruction improperly characterizes the risk/utility test as a defense, rather than an alternative defect test. As clearly demonstrated by Florida case law, plaintiffs use the risk/utility test to prove a product's design is defective. *See generally*, *Cassissi* 396 So.2d at 1142; *Radiation Tech.*, 445 So.2d at 331. Clearly, the risk/utility test is not a defense and the plaintiff bears the burden of proof regarding a product's defective design.

Conclusion

We thank the Committee for the opportunity to comment on the proposed instructions and offer our continued support for the improvement of the Florida Standard Jury Instructions in Civil Cases.

Respectfully submitted,

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2005-2006 Florida Bar President

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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of this document has been served by Federal Express to the Committee on Standard Jury Instructions in Civil Cases Chair, Tracy Raffles Gunn of Gunn Appellate Practice, P.A. at 400 North Ashley Dr., Suite 2055, Tampa, Florida 33602 on this ____ day of January, 2010.

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