IN THE SUPREME COURT OF FLORIDA

IN RE: STANDARD JURY INSTRUCTIONS IN CIVIL CASES (PRODUCTS LIABILITY INSTRUCTIONS)

Case No.: SC09-1264

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COMMENTS ON PROPOSED CHANGES TO PRODUCTS LIABILITY STANDARD JURY INSTRUCTIONS IN CIVIL CASES

Attorneys Edward Moss, Thomas Sherouse, Daniel Rogers, Alfred Saikali, and Mihai M. Vrasmasu respectfully offer the following comments regarding the proposals in the Notice of Proposed Changes and Reorganization of Jury Instructions in Civil Cases for Products Liability ("Proposed Changes") identified by this Court as requiring further discussion following issuance of the Committee on Standard Jury Instructions in Civil Cases ("Committee) report (In re Standard Jury Instructions in Civil Cases – Report No. 09-10 (Products Liability) ("Report")). The undersigned are active members of the Florida Bar who regularly litigate products liability claims. We believe that many of these Proposed Changes are imprudent and, in some instances, are contrary to settled Florida products liability law. Therefore, we respectfully request that the Court either decline to adopt these Proposed Changes or limit them in the manner described below.

I. Proposal # 8 – Eliminate Standard Instructions PL4, PL5, PL5 Notes on Use and Comment, and add Instruction 403.7, Strict Liability

(1) Whether the proposal merges multiple theories of liability that are different

This Proposed Change improperly merges manufacturing and design defects – two distinct theories of liability. The distinction between these two different types of defect is well-grounded in Florida law and properly reflected in the current standard jury instructions. The distinction is important because different jury instructions may be appropriate depending on the type of defect at issue. None of the case law cited in the Proposed Changes support collapsing these two distinct types of product defect.[1]

Note on Use 1 in the Proposed Changes 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." The actual holdings in those cases, however, do not support that proposition.

Hill held only that a strict liability claim can be predicated on either a manufacturing or design defect. *See Hill*, 404 So. 2d at 1052. *Hill* did not hold –

[1] In addition to manufacturing and design defects, Florida law also provides that a product may be defective because it was not accompanied by proper warnings. *See Force v. Ford Motor Co.*, 879 So. 2d 103, 106 (Fla. 5th DCA 2004) ("In the byzantine world of products liability, there are three basic families of defects that may be subject of strict products liability: manufacturing defects, design defects, and failures to warn.")

nor could it – that the pleading and proof for a strict liability manufacturing defect claim is the same as the pleading and proof for a strict liability design defect claim. In fact, this Court agreed with Ford that "analysis of whether a product is in a defective condition unreasonably dangerous to the user involves a negligence analysis in a 'design defect' case, unlike the analysis ordinarily required in a 'manufacturing flaw' situation." *Id.* at 1051.

McConnell was a strict liability failure to warn case, where the Fourth District held that the non-standard products liability jury instruction given by the trial court incorrectly stated the law and that the court should have given the Florida standard instruction. *See McConnell*, 937 So. 2d at 151-56. Notably, because *McConnell* "primarily considered the duty to warn," the Fifth District has stated it is "of limited utility" when considering design defect issues. *Force v. Ford Motor Co.*, 879 So. 2d 103, 107 (Fla. 5th DCA 2004). We acknowledge that, in *dicta*, *McConnell* quoted *Hill* for the proposition that a plaintiff need not plead or prove whether the product defect is based on its manufacture or design. *See McConnell*, 937 So. 2d at 152. However, as discussed above, *Hill* does not stand for the proposition *McConnell* cites it for, and *McConnell* does not – and cannot – cite anything else for the incorrect statement that a products liability plaintiff need not plead or prove whether the defect in the subject product was a design or manufacturing defect.

In its Report, the Committee reasons that there should be only one instruction collapsing design and manufacturing defect claims because "claimants are not required to plead or prove whether a defect in a product resulted from its manufacture or design." (Committee Report at 12.) To the contrary, Florida law provides that a products liability plaintiff must plead and prove the nature of the alleged defect. This Court has held that "litigants at the outset of a suit must be compelled to state their pleadings with sufficient particularity for a defense to be prepared." *Arky, Freed, Stearns, Watson, Greer, Weaver & Harris, P.A. v. Bowmar Instrument Corp.*, 537 So. 2d 561, 563 (Fla. 1988). Applying *Arky Freed* to products liability cases, it becomes clear that identifying the specific defect at issue – *i.e.*, how the product was defectively designed or defectively manufactured (entirely separate concepts) – is required so that a defendant can prepare a proper defense. Indeed, the Third District has held that merely specifying that a product is defective because of its design, manufacture, or a failure to warn is insufficient; ultimate facts specifying the precise nature of the defect must be pled (and then proven). *See, e.g., Agrofollajes, S.A. v. E.I. du Pont De Nemours & Co., Inc.*, Case Nos. 3D07-2322; 3D07-2318; 3D07-1036, 34 Fla. L. Weekly D2578, D2585-86 (Fla. 3d DCA Dec. 16, 2009) (explaining that a plaintiff must plead more than the naked legal conclusion that the defendant was negligent in placing a defective product on the market and that pleadings must contain ultimate facts supporting

how the product was defective, thus allowing the defendant to prepare a proper defense); *Clark v. Boeing Co.*, 395 So. 2d 1226, 1229 (Fla. 3d DCA 1981) (holding that pleadings must contain ultimate facts supporting each element of a cause of action, and that plaintiffs' complaint failed to plead sufficient ultimate facts establishing that the subject product "was defectively designed or unreasonably unsafe for its intended use when it left the manufacturer"); *Rice v. Walker*, 359 So. 2d 891, 892 (Fla. 3d DCA 1978) (affirming judgment of dismissal where plaintiff failed to "allege facts showing how, as made, any [components of the subject product] were defective or dangerous to the user, or how they reasonably could or should have been made safe"); *see also, e.g.*, *E.I. du Pont de Nemours & Co. v. Desarollo Industrial Bioacuatico S.A.*, 857 So. 2d 925 (Fla. 4th DCA 2003) (reversing defense judgment because complaint alleged negligent design, formulation, manufacture, testing, and distribution, but plaintiff relied at trial and recovered on a failure to warn theory).

Maintaining the current distinction between design and manufacturing defect claims is important because, as the current Notes on Use and the Notes on Use in the Proposed Changes correctly recognize, different standards/tests may be applicable to a manufacturing defect than a design defect. *See* Comment 2 to current Standard PL Jury Instruction (stating that Charge PL4, which uses only the "consumer expectations" test, should be used for manufacturing defect cases and

Charge PL5, which uses either or both the "consumer expectations" and "risk/benefit" test, should be used for design defect cases); *see also* Proposed Changes Notes on Use for 403.7(1) ("The risk/benefit test does not apply in cases involving claims of manufacturing defect.").

This recognition of the differences between the standards for manufacturing and design defect is amply supported by Florida law. For example, although the "consumer expectations" test usually applies to manufacturing defect claims, it does not apply to ***all*** design defect claims, especially where the product is complex and beyond the understanding of the ordinary consumer. *See Agrofollajes*, 34 Fla. L. Weekly D2578, D2586-87 (holding trial court erred by instructing the jury that it could find a complex product had a design defect using the "consumer expectations" test); *Force*, 879 So. 2d at 110 ("We conclude that there may indeed be products that are too complex for a logical application of the consumer-expectations standard."); *Cassisi v. Maytag Co.*, 396 So. 2d 1140, 1145 (Fla. 1st DCA 1981) (noting how the "consumer expectations" test is "more difficult" to apply in design and failure to warn defect cases). *Cassisi*, which provides for an inference of product defect from malfunctions during normal operations, makes a critical distinction between manufacturing and design defects: "for the purposes of the product defectiveness inference, which we are adopting infra, when the plaintiff's evidence consists as here only of proof showing that a product

malfunctioned during normal operation, it will be inferred that the defect was one of construction, rather than design, because a malfunction of a product is not a result ordinarily intended by the manufacturer." 396 So. 2d at 1146 n.10.

The foregoing demonstrates that the Proposed Change from the current PL Standard Instruction to the proposed Instruction 403.7 for strict liability claims will inappropriately merge manufacturing and design defect claims into one standard instruction. The differences between the two types of defect claims under Florida law requires different instructions. Adopting Instruction 403.7 in its proposed form will result in juries making findings of product defect under the wrong standard.

(2) Whether the proposal addresses or should address the issue of foreseeable bystanders

Note on Use 2 improperly dispenses with the requirement that a bystander-plaintiff be foreseeable. Although in its Report the Committee claims that this is in fact not the case "since [Note on Use 2] deals only with *foreseeable bystanders*," a careful reading of Note on Use 2 reveals otherwise. (Committee Report at 13.) Specifically, the Note reads, "[s]trict liability does not depend on whether the defendant foresaw the particular bystander's presence." This language clearly leaves open the possibility of applying strict liability to unforeseeable bystanders, which is contrary to Florida law.

The authority cited by the Committee for dispensing with the foreseeability requirement is *West v. Caterpillar Tractor Co.*, 336 So. 2d 80 (Fla. 1976), but *West* does not support this proposed change. Indeed, Comment 6 to the current Standard PL Jury Instruction states that "[t]he committee takes no position regarding whether the injured bystander must be foreseeable. *See West v. Caterpillar Tractor Co.*, 336 So.2d 80 (Fla. 1976)." We do not understand why the Committee has suddenly reversed course and decided that this 30-year old case now supports dispensing with the bedrock foreseeability requirement. Nor do we understand how the Committee interprets Florida law as holding a products-defendant liable for injuries to unforeseeable bystander-plaintiffs. As *West* unequivocally states, "[s]trict liability does not make the manufacturer or seller an insurer." 336 So. 2d at 90. Thus, all language calling into question the foreseeability requirement should be eliminated.

(3) Whether the Notes on Use to the instruction should comment on risk/benefit analysis

None of the language in proposed Note on Use 3 referring to the "risk/benefit" test as an affirmative defense should be adopted. In its Report, the Committee explains that proposed Note on Use 3 does not "take the position that risk/benefit *is* an affirmative defense, but, rather, is withholding a position pending further development in the law." (Committee Report at 14.) The Committee adopted this position after purportedly conducting "an extensive research of the

relevant authorities" and concluding that: (i) it is no longer satisfied with the view that Florida has adopted the risk/benefit test; and (ii) it now believes that the risk/benefit test may be available as an affirmative defense. (*Id.* at 13.)

A review of the relevant case law, however, reveals that the "risk/benefit" test is not an affirmative defense in almost every products liability case. It is, instead, a test for determining whether there is a design defect in a product. Indeed, this Court previously approved of using the "risk/benefit" test for product defect in design defect cases, belying any assertion that the "risk/benefit" test is not the law in Florida. *See* current Standard PL5 Jury Instruction. Numerous Florida cases have recognized use of the "risk/benefit" test as a test for determining a design defect in a product. *See*, *e.g.*, *Radiation Tech., Inc. v. Ware Constr. Co.*, 445 So. 2d 329, 331 (Fla. 1984) ("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 expectation 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.") (emphasis added); *Agrofollajes*, 34 Fla. L. Weekly D2578, D2587 (holding trial

court should have only instructed the jury that it could find a complex product had a design defect using the "risk/benefit" test).

The law cited in Proposed Changes' Note on Use 3 does not support the Committee's statement that the "risk/benefit" test is (or could be) an affirmative defense in every case rather than an independent test for product defect. *McConnell* neither holds nor in any way suggests that the "risk/benefit" test is an affirmative defense. 973 So. 2d 148. Likewise, *Force* does not state, much less hold, that the "risk/benefit" test is an affirmative defense; rather, it notes that the parties and trial court all agreed that it was a test for design defect. 879 So. 2d at 106.

Adams v. G.D. Searle & Co., 576 So. 2d 728, 731 (Fla. 2d DCA 1991), involved application of comment k to the Restatement (Second) of Torts § 402A, which comment concerns "unavoidably unsafe 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 product despite its dangers." The Second District agreed with courts outside of Florida that "comment k is an affirmative defense to a strict liability claim" and that "a risk/benefit analysis" should be used "in determining whether comment k applies to a given product." *Id.* at 733. *Adams*'s holding is thus extremely limited to cases involving such "unavoidably unsafe products" and does not stand for the proposition that the "risk/benefit" test

is an affirmative defense, outside the context of those limited cases implicating comment k. *Cassisi* also does not stand for the proposition that the "risk/benefit" test is an affirmative defense. Because *Cassisi* involved a manufacturing defect claim, the court stated that "[w]e are not required, therefore, to consider the balancing approach taken by other courts in determining whether a product was defectively designed." 396 So. 2d at 1146.[2]

For the foregoing reasons, we strongly urge the Court not to adopt the Committee's Proposed Note on Use 3 that describes the "risk/benefit" test as a possible affirmative defense in every products liability case rather than a test for whether a product is defective/unreasonably dangerous. Suggesting that the "risk/benefit" test could possibly be an affirmative defense not only presents the real possibility that the burden of proof on the product defect question will be inappropriately shifted from the plaintiff to the defendant, it also creates the very real possibility of inconsistent application of the law, which the standard jury instructions are designed to prevent—not foster. If the Court decides to include a Note on Use about the "risk/benefit" test being a possible affirmative defense, it

[2] *Cassisi*, 396 So. 2d at 1145-46, does reference a California case, *Barker v. Lull Engineering Co.*, 143 Cal. Rptr. 225 (1978), that implies the defendant may have the burden of proof as to "risk/benefit" test. But *Cassissi* never adopts that position in *Barker*. *Cassisi* also never states that Florida law is in accord with *Barker*. As shown above, it is not.

should clarify that it is only considered an affirmative defense in cases involving "unavoidably unsafe products."

II. Proposal # 10 – Instruction 403.9, Negligence and Proposal # 11 – Instruction 403.10, Negligent Failure to Warn

We agree with the Committee's proposal to include negligence and negligent failure-to-warn instructions within the products liability instructions, if a products-liability-based negligence claim has been asserted. We believe, however, that (i) a definition of product defect should be incorporated therein and (ii) a plaintiff should be required to pin-point the specific defect in the product (as discussed above).

In its Report, the Committee states that "the 'defect' requirement is included in the last phase of the instruction and plaintiffs are not required to pin-point defects as shown by the cases cited in Note On Use No. 2 to this instruction." (Committee Report at 17.) Although the Committee is correct that the proposed negligence instruction does include a requirement that the jury find the defendant's negligence "result[ed] in a product being in an unreasonably dangerous condition," there is no corresponding instruction – as there is in the strict liability instruction – on when the jury can find the product unreasonably dangerous. We believe that an instruction (similar to that found in section 403.7) including the consumer expectations test and the risk/benefit test, as means for determining when a product

is "unreasonably dangerous," should be included in both sections 403.9 and 403.10.

It has been recognized that the term "unreasonably dangerous" has proven "confusing since it may suggest to the jury the idea that 'the product was unusually or extremely dangerous.'" *Cassisi*, 396 So. 2d at 1144 n.2 (quoting Wade, On the Nature of Strict Tort Liability for Products, 44 Miss.L.J. 825, 832 (1973)). As used in section 403.7, the consumer expectations test and the risk/benefit test help prevent such confusion and promote the correct application of governing law to the particular facts of a case. Including a specific instruction defining the term "unreasonably dangerous" in sections 403.9 and 403.10 would help prevent similar confusion in the negligence context. Doing so would be especially helpful when juries are confronted with alleged defects similar to those described in proposed Note on Use 1 under section 403.9, which, upon first impression, may not necessarily appear to pose an unusual or extreme danger to the consumer. *See, e.g., Food Fair Stores of Florida, Inc. v. Macurda*, 93 So. 2d 860, 861 (Fla. 1957) (finding that although "worms, grasshoppers, snails and the like are acceptable as delicious morsels of food" in some cultures, worn segments recovered from canned spinach are deleterious and unfit for human consumption); *E.R. Squibb & Sons, Inc. v. Stickney*, 274 So. 2d 898, 906 (Fla. 1st DCA 1973) (holding that the fact that plaintiff's spinal operation fell within the group of 10 to 15% of surgical

operations which failed after certain grafting material was used is not competent proof of the fact that the grafting material was inherently defective or unfit for its intended use).

III. Proposal # 12 – Notes on Use For Instruction 403.11, Inference of Product Defect or Negligence

A full jury instruction on section 768.1256, Florida Statutes (2009), regarding a defendant's compliance (or lack thereof) with applicable government rules, similar to that previously proposed by the Committee, should be included under section 403.11. Such an instruction would help promote one of the essential purposes of having standardized texts for jury instructions – to "ensure that judicial statements of the law to lay juries are uniform throughout the state, especially as to like issues on similar evidence." *McConnell*, 937 So. 2d at 153. A full jury instruction would also help prevent jurors from being misled and confused regarding the law applicable to the facts in evidence, and avoid the miscarriage of justice. *See generally Wransky v. Dalfo*, 801 So. 2d 239, 243 (Fla. 4th DCA 2001). Moreover, we believe that the Notes on Use included with this jury instruction should clarify that, before the instruction is given, the trial court must find that the specific requirements of section 768.1256 have been met, including that (a) the rule must be relevant to the injury-causing event, (b) the rule is designed to prevent the injury that allegedly occurred, and (c) compliance with the rule was a condition of selling/distributing the product.

IV. Proposal # 19 – Instruction 403.18, Defense Issues (New)

For all of the reasons expressed above, we strongly believe that none of the language referring to the "risk/benefit" test as an affirmative defense should be adopted or, at a minimum, qualified and limited to cases involving "unavoidably dangerous products." Framing the "risk/benefit" test as a possible affirmative defense in all cases is unjustified and inconsistent with Florida products liability law. Florida law, as well as the law of other jurisdictions, is clear that the plaintiff has the burden of proving his/her/its claim that the product is defective and may do so, in a design defect case at least, by proving that the risk posed by the product outweighs its benefits. *See, e.g.*, *Cassissi*, 396 So. 2d at 1142 (noting that a products liability plaintiff is required to prove a defect in the product); *see also, e.g.*, *Radiation Tech.*, 445 So. 2d at 331 (noting that a products liability plaintiff can show a defect through a risk/benefit analysis).

As to the "Government Rules Defense," we believe that an instruction is appropriate and should be provided, with the same comments above (as to Proposal # 12) about incorporating the requirements of section 768.1256, Florida Statutes, into the instruction or being more clear about trial court's findings on those prerequisites.

V. Proposal # 21 – Eliminating Model Charge Nos. 7 and 8 and Adding Model Instruction No. 7 and Special Verdict Form

Proposed Model Instruction No. 7 includes instructions from sections 403.9 and 403.7. We direct the Court to our comments pertaining to those sections as applicable herein.

CONCLUSION

Because the above-discussed Proposed Changes on which the Court requested comment are imprudent or contrary to settled Florida products liability law, we respectfully suggest that the Court either decline to adopt these Proposals or limit them in the manner described above.

DATED this 29th day of January, 2010

Respectfully submitted,
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and exact copy of the foregoing has been furnished by U.S. Mail on this 29th day of January, 2010 to the 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.

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief uses font size Times New Roman 14 in compliance with the font requirements of Florida Rule of Appellate Procedure 9.210(a)(2).

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