IN THE SUPREME COURT OF FLORIDA

IN RE: STANDARD JURY INSTRUCTIONS IN CIVIL CASES – REPORT NO. 09-10

(PRODUCTS LIABILITY) – CASE NO. SC09-1264

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PETITIONER'S OPPOSITION COMMENTS TO PROPOSED STANDARD JURY INSTRUCTIONS ON CRASHWORTHINESS AND "ENHANCED INJURY" CLAIMS (403.16) AND CONSUMER EXPECTATION INSTRUCTION

The undersigned Petitioner, in comment as set forth by the Supreme Court of Florida, hereby submits this his comment in opposition to the proposed Standard Jury Instructions recommended by the Committee on Standard Jury Instructions in Civil Cases with respect to proposed Instructions dealing with issues on crashworthiness and "enhanced injury" claims, proposed Instruction 403.16, and the Committee's note under 403.7 (strict liability) that it does not approve of the risk/benefit Instruction. The Petitioner in opposition to these proposed Instructions would state as follows:

1. With regard to the proposed Instruction concerning issues on crashworthiness and "enhanced injury" claims, proposed Instruction 403.16,

the Petitioner sets forth the following statements in opposition to the Instruction whether "the proposal fully and accurately conforms to the principle of law established in *D'Amario v. Ford Motor Co.*, 806 So. 2d 424 (Fla. 2001)." The Petitioner would in opposition comment as follows:

A. The proposed Jury Instruction does not accurately reflect the status of Florida law despite *D'Amario.* The public policy of this State, as set forth in the April 2006 revisions to Fla. Stat. § 768.18(3), is contrary to *D'Amario,* as well as contrary and inconsistent with proposed Standard 403.16. Regardless of the type of case involved, including "product liability" which was addressed by the House and Senate Committees including "product liability" cases. In Florida, inconsistent with the proposed Instruction, the jury must be instructed that everyone was responsible for any motor vehicle crash be determined to have their pro rata share of fault determined, whether or not they are a party. *See Fabré v. Marin*, 623 So. 2d 1182 (Fla. 1993). There should no longer be in Florida, as ruled by *D'Amario*, some type of artificial separation between a first collision

and a second collision in terms of apportionment of fault and apportionment of injuries and damages.

B. Although as set forth below this Petitioner opposes the decision of *D'Amario* as not reflective of Florida law and not supported by legal precedent as set forth therein, that if this Court is going to adopt an Instruction on what a jury must do in terms of "enhanced injury" cases, the Instruction proposed by the Committee is inadequate. This is a very complicated and complex area of the law. Factually, it is very difficult, and the only way the jury will get evidence as to the "but for" an alleged second collision or crashworthiness defect as a legal cause of the "enhanced injury", or the injury which was made greater, will only be through expert witness testimony such as that rendered by biomechanical engineers, biomedical engineers, and injury mechanism experts. Therefore, as much guidance and instruction as possible should be given to a jury. The proposed 403.16 Instruction is not sufficient enough and is too vague, ambiguous and allows for too much uncertainty and questions on the part

of the jury. The first two paragraphs of 403.16 are not adequate. Attached as Appendix "A" to this Petition is an Alternative Proposed Jury Instruction to substitute for the first two paragraphs of 403.16 in the event the Court makes a determination that any separate crashworthiness and "enhanced injury" claims Jury Instructions based upon *D'Amario* is required.

C. As noted, the Petitioner does not believe that *D'Amario* accurately reflects the law in Florida. Attached hereto as Appendix "B" and Appendix "C" are two Florida Bar Journal articles which set forth the main deficiencies in the *D'Amario* legal rationale.

D. In addition, *D'Amario* now cuts broadly against the clear legal tidal wave in this country throughout all jurisdictions which, unlike the proposed Instruction in 403.16 and footnote 2 of *D'Amario* dealing with the "ordinarily" exception, which Chief Justice Wells in his dissent in *D'Amario* stated to be unworkable for trial judges. Instructions on fault of all parties and non-parties involved with respect to comparative responsibility must

be included in any crashworthiness case, for example, if the adverse tort feasor driver caused the initial first collision or first crash, even if that person or persons were drunk or illegally intoxicated. The *Restatement (Third)* adopts this position. *Restatement (Third) of Torts, Products Liability,* Ch. 4, § 16 at 236-256. In 1998, the *Restatement (Third)* comments predicted that Florida, which was prior to the time of *D'Amario*, would adopt the *Fox-Mitchell* burden of proof standard.

E. The minority jurisdiction cases relied upon by *D'Amario* were either misread or misinterpreted, as well as the fact that at least one of those cases has been overruled, and other minority jurisdictions have adopted since *D'Amario* the position advocated by this Petitioner. *Reed v. Chrysler Corporation*, 494 S.W. 2d 224 (Iowa 1993) relied upon as a minority jurisdiction case has now been overruled by the Supreme Court of Iowa which specifically referred to and rejected *D'Amario. Jahn v. Hyundai Motor Company,* 2009 W.L. 3232781 (Iowa, October 9, 2009), at *4. Additionally, other cases

provided in *D'Amario* as supporting the minority position, in fact do not. *Cota v. Harley Davidson*, 141 Ariz. 7, 14, 684 P.2d 888, 895 (Ct. App. Div. 2 1984) was cited for support in excluding an intoxicated plaintiff's actions in a crashworthiness case. *Cota* did not so hold. It was subsequently, however, not followed by the Arizona Appeals Court in *Zeurn v. Ford Motor Company*, 188 Ariz. 486, 937 P.2d 676 (Ct. App. Div. 1997). The *Zeurn* case was decided after Arizona's adoption of a comparative fault statute. There Ford had a non-party, intoxicated driver, who rear-ended *Zeurn's* Aerostar van for comparative negligence. *Zeurn* held that the trial court did not err "in admitting evidence bearing on Ellison's [other driver] fault, including evidence of his intoxication and criminal conviction". 188 Ariz. at 492, 937 P.2d at 682. *Green v. General Motors Corp.*, 310 N.J. *supra.*, 507, 709 A.2d 205 (App. Div. 1998) was also cited by *D'Amario*, although not being a minority jurisdiction decision, but as authority involving a related, analogous situation. *Green* involved

a claim for a defective T-top on a 1986 Camaro causing a paralysis injury. The plaintiff driver ran into a school van going the opposite direction. That Court affirmed exclusion of plaintiff's negligence as to the issue of the vehicle's design defect. 709 A.2d at 211. However, the Court sustained a Jury Instruction which allowed consideration of the "speed of the vehicle, use of a seatbelt, the use of the vehicle, crossing lanes of traffic and the like" (emphasis added) by the plaintiff himself, which could be considered in the allocation of damages between those arising from the accident into the bus, and those arising from the lack of the Camaro's crashworthiness. *Id.* at 210, 213. Finally, this Court selectively, in *D'Amario,* plucked out only one quotation from the *Montana Law Review* by Professor Reichert supporting *D'Amario* when other "selective" quotations by the Professor are inconsistent with other parts of *D'Amario.* For example, according to Professor Reichert's article he wrote as follows:

> One consequence of requiring a plaintiff to show "enhanced injuries" is that when injuries are not

> capable of apportionment into those caused by a defect, then those injuries are not caused by a defect, a manufacturer is free from liability. The axiom from which second collision liability is derived limits the manufacturer liability to enhanced injury; if the injury suffered by the plaintiff cannot be identified as caused by an alleged defect it cannot by definition be injuries enhanced by an alleged defect. (Emphasis added.)

Reichert, Limitations on Manufacturer Liability in Second Collision Cases, 43 Montana L. Rev. 109, 115 (1982). Contrary to this, the Florida Supreme Court said just the opposite if the so-called "enhanced injury" was "indivisible".

F. Additionally, proposed 403.16 does not account for what has happened since *D'Amario* in 2001. Litigants are now using *D'Amario,* a second collision crashworthiness motor vehicle case, in completely inapplicable situations, and therefore the Court must address or recognize this fact that "two accident" types of defenses are being asserted based upon this Court's holding in *D'Amario. See Jackson v. York Hanover Nursing Centers,* 876 So. 2d 8, 11 (5th DCA 2004) (medical malpractice in nursing home case involving dehydration); *Stay-Rite Industries,*

Inc. v. Levey, 909 So. 2d 901, 908-909 (Fla. 3d DCA 2004) (a case involving a young boy being trapped at the bottom of a swimming pool by a draped cover over a drain resulting in severe brain injury.)

G. Other jurisdictions since *D'Amario* have failed to follow this Court's holding in that case, and adopted the majority view which is clearly the vast predominance of judicial opinions across the country. *See Dannenfelser v. Daimler Chrysler Corporation*, 370 F. Supp. 2d 1091, 1094-1095 (D. Hawaii 2005).

2. This Petitioner also requests the Court to adopt the risk utility test as a Jury Instruction in not allowing for inconsistent Instructions across the State as under strict liability in proposed 403.7. The problem is one judge may determine one thing and another judge may determine another. Most recently, the Third District Court of Appeals approved the *Restatement (Third) of Torts, Products Liability* which adopted the risk utility test as the proper Jury Instruction. *See Agrofollajas, S.A. v. E.J. DuPont De Nemours & Co., Inc.,* 34 F.L.W. D2578, D2587 (Fla. 3d DCA, Dec. 16, 2009). The problem with having the alternative Instruction is that it does not provide ample guidance to trial judges. Further, at least in sophisticated, scientific

type cases such as motor vehicle crashes, how can there be a factual basis for a "consumer expectation test" when the issues involved are far beyond the ability of an average consumer or average person to have knowledge of? That is the reason Courts allow expert witness opinions, such as biomedical engineers, biomechanical engineers, and injury mechanism experts. If it was something a common person could understand, then perhaps there would be some basis for a consumer expectation test. Rhetorically, how can a reasonable consumer have an expectation of what will happen to them, if, for example, they are rear-ended in a motor vehicle crash by drunk driver traveling 70 miles per hour impacting the consumer's vehicle which is stopped on the street, with the degree of tremendous forces and energy, which can kill or catastrophically injure a consumer irrespective of any defect in the vehicle. In fact, as this Court must know the scientific and technical literature actually shows for motor vehicle crashes, three separate collisions. The first impact, or first collision, an alleged second collision or crashworthiness action, and a third collision between the internal organs of a consumer's body which reacts to the forces involved in a motor vehicle crash. For example, the internal organs of the heart, liver, spleen, gallbladder, and the like, move and shift when forces are imposed upon them, irrespective of blunt trauma. Further, something called "diffuse

axonal injuries (DAI)" can occur to individuals simply as a result of the brain moving within the skull as a result of forces involved in motor vehicle crashes. *See, e.g., "Shear Injuries", Brain Injury Law Group,* available at http:\\tbilaw.com\aboutmildbrain7.html (viewed September 10, 2009). Accordingly, how can a consumer have any expectation of what will happen to them in such situations? There must be some differentiation between a normal, fungible consumer product such a lawnchair, a microwave oven, or a mixmaster, and physics, energy forces, injury mechanisms, design analysis, crash testing and the like which goes into issues involving things such a motor vehicle crashes.

CONCLUSION

The Supreme Court is respectfully requested to not adopt the present and proposed Jury Instruction on "enhanced injury" cases as set out in 403.16, and either adopt or supplement the proposed Instruction with Appendix "A", or to revise the Instruction altogether to include fault of everyone and their pro rata share of responsibility as set forth in § 768.18(3). Further, the Court is requested to not have potentially inconsistent Instructions, either/or with regard to consumer expectation or risk utility Jury Instructions, and to provide clarification and specificity to the trial

courts with respect to the types of cases to which such alternative Instructions would apply.

RESPECTFULLY SUBMITTED this 26 day of January, 2010.

/s/ Larry M. Roth

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that this Petition complies with font requirements set forth in the Florida Rule of Appellate Procedure 9.210 by using Times New Roman 14-point font.

/s/ Larry M. Roth

By:_____
Larry M. Roth

APPENDIX "A"

Special Jury Instruction

The Court instructs you that under Florida law a crashworthiness defect is one which does not cause the underlying accident or event. Instead, the legal concept of crashworthiness applies to a particular vehicle, or component part of a vehicle, which the Plaintiff claims did not cause the original crash, but due to its design the injuries to Plaintiff were enhanced or made greater from what they would have been but for the alleged defect. This is to say, the alleged defect enhanced, increased or made greater the injuries which occurred in the crash or accident from what they should have been. A manufacturer is not required by law to design, manufacture or sell a vehicle which is accident or injury proof. And a manufacturer is not by law an insurer that no one will be injured in its vehicle. Instead, a manufacturer is required by law to provide reasonable protection against injuries to an occupant in the event of a foreseeable accident.

If you find the subject vehicle involved defective due to a lack of crashworthiness under the circumstances of this case, the Defendants cannot be held liable for all the injuries. A defendant under our laws is only liable or responsible for the "enhanced" injuries that you determine have resulted as a legal cause by the alleged crashworthiness defect in the subject vehicle.

The Plaintiff claims as a result of the lack of crashworthiness of the vehicle his/her injuries were enhanced or made greater from what they should have been in this accident.

You will be asked on the Verdict Form to specify the percentage (%), from zero (0%) percent to one hundred (100%) percent of the enhanced injuries that you have attributed, if any, to the alleged defect in the product involved in this case. You should record on the Verdict Form the amount, from zero (0%) percent to one hundred (100%) percent, that you find the injury to the Plaintiff was made greater, increased or enhanced by the alleged defect. The Plaintiff has the burden of proof to establish by the greater weight of the evidence the claims he/she is asserting. If the Plaintiff does not by the greater weight of the evidence prove the percentage (%) of the injury which was enhanced, then your verdict must be for the Defendant. If you are able to attribute a percentage of the injuries which the evidence has shown by the greater weight of the evidence to be enhanced or increased, the Court will adjust your verdict of the total damages by that percentage (%).