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 COMMENTS ON PROPOSED STANDARD JURY INSTRUCTIONS FOR PRODUCTS LIABILITY CASES

Petitioner, Smith Toole & Wiggins, PL, pursuant to and in compliance with the Florida Supreme Court's Publication Notice, hereby submits its comments concerning the proposed Standard Jury Instructions for products liability recommended by the Committee on Standard Jury Instructions in Civil Cases (hereinafter the "Committee"). Previously, in January of 2009, Petitioner submitted comments to the Committee in response to the Committee's "Notice of proposed changes and reorganization of jury instructions for civil cases for products liability" (Petitioner's previous comments submitted to the Committee are attached hereto as "Appendix A"). Although the Committee made minor concessions after reviewing comments submitted by Petitioner and others, the majority of the proposed instructions were submitted to the Florida Supreme Court without change. This Court, identified specific proposals worthy of further discussion and

invited all interested persons to comment on the proposed product liability standard jury instructions. Petitioner's current practice includes litigating product liability claims, both in Florida and nationwide, related to automobiles, medical devices, and industrial equipment. Therefore, Petitioner thanks the Court for this opportunity to comment further on this issue. Petitioner would respond to the "Proposals" identified by the Court as follows:

Proposal #8

403.7 Strict Liability: Florida Law Does Not Support The Combining Of Manufacturing Defect and Design Defect Instructions.

The first question set forth in the Court's Proposal #8 is "whether the proposal merges multiple theories of liability that are different." The answer to this question is clearly yes, since the Committee's proposed instruction is an attempt to merge two, separate jury instructions -- one concerning manufacturing defect claims, and the other concerning design defect claims - into a single instruction. Florida law recognizes such claims as two, separate and distinct legal theories, with different legal requirements. *See generally Cassisi v. Maytag Co.,* 396 So. 2d 1140, 1145-1146 (Fla. 1981); and *Force v. Ford Motor Co.*, 879 So. 2d 103, 106 (Fla. 5th DCA 2004).

A manufacturing defect claim depends on whether a product malfunctioned or failed to operate properly, even though it was produced according to its design. Such a claim focuses on how the product performed. A design defect claim, on the other hand, depends on whether the design of the product itself was flawed and resulted in the creation of a product with an unanticipated hazard. As a result, a design defect claim focuses on the technical and scientific aspects of a product's design, and routinely requires the testimony of multiple experts.

It is, in part, for this reason Florida courts have recognized that different tests may apply to manufacturing defect claims versus design defect claims, and indicated that, while the consumer expectation test may be adequate to identify unintended manufacturing defects, it is "more difficult to apply" in design defect cases. *Cassisi* at 1145; *Force* at 107. In design defect cases, a risk-utility test is often the applicable standard, since "a complex product, even when it is being used as intended, may often cause injury in a way that does not engage its ordinary consumers' reasonable minimum assumptions about safer performance." *Force* at 109. A risk utility test requires jurors to weigh the utility of a design versus the magnitude of its inherent risk. *Cassisi* at 1145.

Since manufacturing defect claims and design defect claims are different theories, that involve different facts, and in many instances application of a different test, combining the instructions on these theories would be confusing to all involved, including the jury. Therefore, Petitioner respectfully submits that consideration should be given to constructing separate instructions, as currently done in PL4 and PL5.

Note On Use No. 2 Improperly Suggests That Bystander Foreseeability Is No Longer Required.

In their Report, the Committee rejected all comments concerning proposed Note on Use No. 2, and asserted that the note was clear because it only dealt with "foreseeable bystanders." However, even though Note 2 might deal with foreseeable bystanders, sentence 3 and the lines that follow seem to contradict this assertion and state: "Strict liability does not depend on whether the defendant foresaw the particular bystander's presence. See *West Caterpillar Tractor Co. Inc.*, 366 So. 2d 80, 89 (Fla. 1976) ('Injury to a bystander is often feasible. A restriction of the doctrine to the users and consumers would have to rest on the vestige of the disappearing privity requirement.'). See also *Sanchez v. Hussey Seating Co.*, 698 So. 2d 1326 (Fla. 1st DCA 1997)."

This quoted language from sentence 3 suggests that a bystander does not have to be foreseeable. Such a conclusion, however, would not be supported by the holding in *West*. In fact, in *West* the Florida Supreme Court stated that the "doctrine of strict liability applies when harm befalls a ***foreseeable*** bystander who comes within range of the danger" *West* at 92. (Emphasis added). Similarly, in *Sanchez v. Hussey Seating Co.,* 698 So. 2d 1326, 1327 (Fla. 1st DCA 1997), the other case cited in Note 2, the court cited *West* for the proposition that "the supreme court made it clear that the doctrine of strict liability applied to injuries of ***foreseeable*** bystanders…" (emphasis added).

Based on the statements in both *West* and *Sanchez,* Petitioner submits that sentence 3 in Note on Use No. 2 is misleading, and should be removed.

Note On Use No. 3 Improperly Suggests That The Consumer Expectations Test Is Applicable In All Situations, While The Risk-Utility Test Might Not Be Applicable At All.

Note On Use No. 3 clearly states that Florida recognizes the consumer expectations test, but is unclear about the application of the risk-utility test or whether it should be applied at all. The proposed instruction, when read with Note On Use No. 3, gives a clear impression that the consumer expectations test should be used in ***all*** strict defect cases – both

manufacturing defect and design defect cases – while use of the risk-utility test is questionable at best. As discussed previously above, this is not a correct interpretation of Florida law. While the consumer expectation test may be adequate to identify unintended manufacturing defects, it is "more difficult to apply" in design defect cases. *Cassisi* at 1145; *Force* at 107. In design defect cases, a risk-utility test is often the applicable standard, since "a complex product, even when it is being used as intended, may often cause injury in a way that does not engage its ordinary consumers' reasonable minimum assumptions about safer performance." *Force* at 109. A Judge reading Note On Use No. 3, as worded, could easily get the incorrect impression that the consumer expectation test should always be used, and that Florida courts are moving away from the risk-utility test.

Petitioner also strongly disagrees with the Committee's suggestion that the risk-utility test is an affirmative defense. The risk-utility test was previously approved by the Florida Supreme Court in PL5 as part of the standard that must be met in order for a party pursuing a design defect case to prevail. *See* current Standard PL5 Jury Instruction. In addition, Florida courts recognize the risk-utility test as a test for product defect. *See generally Radiation Technology, Inc. v. Ware Constr. Co.,* 445 So. 2d 329,

331 (Fla. 1979); *Agrofollajes, S.A. v. E.I. DuPont De Nemours & Co., Inc.*, 2009 WL 4828975 (Fla. 3d DCA, Dec. 16, 2009); and *Force v. Ford Motor Co.*, 879 So. 2d 103, 110 (Fla. 5th DCA 2004). Moreover, Comment 2 to current Standard PL 5 makes it clear that "in Florida, the ultimate burden of persuasion in cases submitted to the jury remains with the plaintiff… PL 5 therefore allocates that burden to the plaintiff." Any suggestion that the risk-utility test should be an affirmative defense rather than part of the test to be met by the claimant would improperly transfer this burden. Therefore, Petitioner respectfully submits that Note On Use No. 3 should not be adopted.

Proposals #10 and #11

Both 403.9 and 403.10 Should Include A Reference To Defective Product.

Petitioner submits that both proposed instructions should include proof of the existence of a defect. The Committee points to the last sentence of the proposed instruction that reads: "…which results in a product being in a unreasonably dangerous condition." This however, is not the same as instructing a juror that liability can exist only if there is a defect.

Florida law requires the existence of a defect before there can be a finding of liability for claims founded in negligence. *See Consolidated*

Aluminum v. Braun, 447 So. 2d 391, 392 (Fla. 4th DCA 1984) (where the court held that, absent the finding of a defect, there could be no negligence); *but see Cassisi v. Maytag Co.*, 396 So. 2d 1140, 1143 (Fla. 1st DCA 1981) (which states that claimants "have the burden, whether their case is founded in ***negligence***, breach of an implied warranty, or strict liability, of establishing (1) ***that a defect was present in the product;*** (2) that it caused the injuries complained of; and (3) that it existed at the time the retailer or supplier parted possession with the product" [emphasis added]; but which also states that "it appears that the terms defective and unreasonably dangerous are redundant").

The failure to include a defect requirement also increases the likelihood of an inconsistent verdict. *See generally Nissan Motor Co. v. Alvarez,* 891 So. 2d 4 (Fla. 4th DCA 2005)(holding that where a jury found there was no design defect, yet still found defendant liable for "negligent" failure to warn -- the verdict was inconsistent); and *Ashby Div. of Consol. Aluminum Corp. v. Dobkin*, 458 So. 2d 335, 337 (Fla. 3d DCA 1984) (where the court held that a verdict finding no defect but holding a defendant liable for negligence was inconsistent and stated that "[a]bsent proof of a defect, there were no grounds upon which to find defendants negligent").

For the foregoing reasons, Petitioner submits that both the negligence and negligent failure to warn instructions should require proof of the existence of a defect.

Proposal #12

403.11 – A Proposed Instruction Should Be Drafted Concerning §768.1256, Fla. Stat. (2010).

Petitioner respectfully submits that a complete instruction should be drafted concerning §768.1256, Fla. Stat. (2010). The instruction should address all of the requirements set forth in both sections 1 and 2 of the statute.

Proposal #13

403.16 – The Proposed Instruction Does Not Fully And Accurately Conform With *D'Amario.*

Crashworthiness and enhanced injuries are complex concepts that are not adequately defined in the Committee's proposed instruction. As the Florida Supreme Court indicated in *D'Amario v. Ford,* 806 So. 2d 424, 437, 440 (Fla. 2002), a claimant in a crashworthiness case is not alleging that a vehicle defect caused the primary collision, but rather that a defect caused "separate and distinct injuries" over and above those that would have been sustained if the vehicle had not been defective. It is for this reason that the

Florida Supreme Court stated that crashworthiness defendants are "entitled to have the jury told 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." *Id.* at 440. (Emphasis added).

The last sentence in the first paragraph of the Committee's proposed instruction, which reads: "(Claimant) **does not claim that** (describe the alleged crashworthiness defect) **caused the accident.****" **–** along with the corresponding note stating: "**The defendant is entitled to have the jury instructed on this last sentence 'when appropriate'" -- does not go far enough to explain this concept. The defendant is entitled not only to have the jury instructed that no claim is being made for damages arising out of the initial accident, ***but also*** that the manufacturer should not be held liable for damages caused by the initial collision. The proposed jury instruction falls short of this requirement.

In addition, *D'Amario* states that "plaintiff not only has the burden of proving the existence of a defect and its causal relationship to [his/]her injuries" but also the burden of proving the existence of additional or enhanced injuries caused by the defect. *Id.* at 439. We respectfully submit that the proposed instruction as drafted does not adequately advise jurors of

these burdens. For example, in significant automobile incidents that occur within a matter of seconds, *D'Amario* creates an artificial separation between a first collision and second collision in terms of apportionment of fault, and places Florida within the minority of states that have addressed this issue. In apparent recognition of this fact, the Florida Supreme Court in *D'Amario* stated:

> We are not unmindful of the concerns that a manufacturer not end up improperly being held liable for damages caused by the initial collision. Of course, we must remember that in crashworthiness cases the plaintiff not only has the burden of proving the existence of a defect and its causal relationship to her injuries, but she must also prove the existence of additional or enhanced injuries caused by the defect… The major concern of [] courts following the majority rule is in seeing that successive tortfeasors only be held liable for damages caused by the initial tortfeasor. We agree with this concern, but see no reason why it cannot be properly addressed … by a recognition of the crashworthiness doctrine's legal rationale limiting a manufacturer's liability only to those damages caused by the defect.
>
> Further, when appropriate, the defendant manufacturer in a crashworthiness case will be entitled to have the jury told 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 our holding in *Fabre*, that no defendant will be held responsible for damages it did not cause. *Id.* at 439-440.

However, despite the Court's assurances that manufacturers would only be paying for their apportionment of fault, the proposed jury instruction indicates that, if a claimant cannot meet his burden of proving what injuries were caused by the artificially-created second collision, the manufacturer will be responsible for all injuries (see last sentence of Proposed Instruction 403.16). Such a rule would have the effect of shifting the burden of proving what injuries were caused by the second collision to the manufacturer. A failure by the manufacturer to meet that burden would result in the manufacturer being penalized. Petitioner respectfully submits that this result is improper, and that the proposed instruction should not be adopted.

RESPECTFULLY SUBMITTED this 30th day of January, 2010.

/s/ David C. Knapp

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that the lettering in this Petition is Times New Roman 14-point Font and complies with font requirements of Florida Rule of Appellate Procedure 9.210(a)(2).

/s/ David C. Knapp

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by Federal Express on January 30, 2010, to the Committee on Standard Jury Instructions in Civil Cases Chair – Tracy Raffles Gunn, Gunn Appellate Practice P.A., 400 N. Ashley Drive, Suite 2055, Tampa, FL 33602.

/s/ David C. Knapp

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