IN THE SUPREME COURT OF FLORIDA
CASE NO. SC09-1264

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

To the Justices of the Supreme Court of Florida:

INTRODUCTION

I wish to thank the Court for extending an opportunity to all interested parties to comment on the proposed revisions to the product liability Standard Jury Instructions submitted by the Committee on Standard Jury Instructions in Civil Cases (Committee). Providing judges and, in turn, juries with clear and accurate instructions for the application of Florida law to jury deliberations in product liability lawsuits is of paramount public importance. The bench, the Bar, and the public have an interest in ensuring that verdicts rendered in product liability lawsuits are based upon the jury's unambiguous understanding of Florida law.

The Committee is to be commended for its efforts to codify existing Florida law into clear and concise instructions for the jury's consideration. The charge of the Committee was to propose revisions to the Florida Standard Jury Instructions pertaining to product liability actions based upon the clear and unambiguous black letter law of Florida; and where there is no unanimity among the courts, to advise judges of this disparity and provide guidance to them in the fashioning of

appropriate instructions for a particular case in front of them. These comments are being submitted to the Court because I believe that in many material respects the Committee has failed to recognize existing law, and in some instances, to provide guidance regarding clear trends in the development of product liability law.

For the past thirty years my practice has been devoted almost exclusively to representing manufacturers in the defense of product liability claims. As such, I may have tried more product liability lawsuits than any active practitioner in the State of Florida. Additionally, I have had the opportunity to appear *pro hac vice* in product liability lawsuits in nearly two dozen states and to try product liability lawsuits in more than a dozen states. It is based on this experience as an active practitioner in the field of product liability law that I submit these comments related to the Committee's proposed revisions to the Florida Standard Jury Instructions in Civil Cases involving products liability.

Comments to Proposal #8

The Committee's proposal to eliminate separate and distinct instructions for design defect claims and manufacturing defect claims and, instead, to merge those theories of liability into a single charge: (1) ignores an existent body of Florida law; and (2) flies in the face of the real world application of engineering science. If the purpose of jury instructions is to aid the trier of fact in resolving real world conflicts within the legal framework, this proposal clearly misses the mark. There

are vast conceptual and actual differences between a design defect and a manufacturing defect. A design defect claim contrasts the choices made by a product designer against alternative feasible approaches. In doing so, the jury considers the product design intent, including the intended and reasonably foreseeable user, as well as the intended and reasonably foreseeable uses of the product. This analysis incorporates an examination of the engineering design process, including the engineering aspirations and engineering trade-offs that went into the creation of the product's specifications (i.e., its design).

In contrast, a manufacturing defect claim focuses entirely on whether a manufacturer failed in its execution of those specifications (i.e., whether it built the product true to its design). Because the proof elicited in those two distinct claims varies so dramatically, one focusing on creation and the other focusing on execution, the law has always provided separate instructions on these claims.

If the Court agrees with the Committee's recommendation to merge multiple distinct theories of liability, the Court should eliminate the word "intended" from the Note on Use instructing judges to add the language "was not built according to its intended design [or] because the product…" The use of the word "intended" in that context has the potential to fundamentally confuse and mislead jurors. No designer intends its product to cause harm. The use of the word "intended" in that context suggests that the mere happening of an injury through the use of a product

establishes a product defect.

The most disturbing aspect of the Committee's proposed revisions, however, relates to its handling of the risk/benefit analysis vis-à-vis the consumer expectations test. Initially, the Committee sought to codify the consumer expectations test as the sole test of product defect, relegating the risk/benefit test to the status of an affirmative defense. Subsequently, the Committee chose to "maintain the risk/benefit test as a defect standard" in Instruction 403.7. However, the Committee Report and the Committee's proposed Note on Use make it clear that the Committee has determined that the consumer expectation test applies to, and must be given in, all products liability cases, leaving it to the individual trial court's discretion to determine whether to also charge on the risk/benefit test, or to treat risk/benefit as an affirmative defense.

There are several deficiencies in this analysis. First, there is not a general consensus under Florida law that the consumer expectation test is the appropriate standard for all products liability claims. Indeed, several of the cases cited in the proposed Note on Use for the proposition that "Florida recognizes the consumer expectation test" for all products liability claims are unique to and limited by their facts. *See, e.g.*, *Force v. Ford Motor Co.*, 879 So. 2d 103 (Fla. 5th DCA 2004); *Cassisi v. Maytag Co.*, 396 So. 2d 1140 (Fla. 1st DCA 1981).

Second, the concept advanced by the Committee that Florida law has not adopted the risk/benefit test is pure sophistry. Not only have numerous courts adopted that test, but clearly the trend throughout the courts of the fifty United States, including Florida, is toward the adoption of the risk/benefit test as the sole test of product defect. *See, e.g., Agrofollajes v. E.I.DuPont De Nemours & Co., Inc.*, 2009 WL 4828975 (Fla. 3rd DCA)(rejecting the consumer expectations test as an independent basis for finding design defect). *See also Restatement (Third) of Torts: Products Liability.*

In its proposed Jury Instruction 403.7, the Committee deviates from its charge to codify existing law, and appears to be attempting to transform Florida law. The clear impression that will be left with any trial judge who reads the instructions and the accompanying Notes on Use proposed by the Committee, will be that it is only settled under Florida law that the consumer expectations test applies to all product liability claims. The implication from the language contained in both the proposed instruction and the Note on Use is that the trend within the courts is away from the risk/benefit analysis as a test of product defect, and toward the use of that analysis as an affirmative defense.

Proposal No. 12

A full instruction under 403.11 should be drafted. It should be consistent with Florida Statutes §768.1256.

Proposal No. 13

The Court has requested interested parties to comment on whether proposed Jury Instruction 403.16, Issues on Crashworthiness and "Enhanced Injury" Claim (new), conforms with the principles of law established in *D'Amario v. Ford Motor Co.*, 806 So. 2d 424 (Fla. 2001). Here again, the Committee's proposal appears to be an attempt to create law, rather than to codify existing law. While much of proposed Jury Instruction 403.16 is a correct recitation of the law enunciated by the Court in *D'Amario*, the proposed instruction as written shifts the burden of proof to prove enhanced injuries from the plaintiff to the defendant. In adopting the minority view, the *D'Amari*o Court attempted to alleviate concerns that this approach to crashworthiness claims would create an uneven playing field for the litigants. The Court directly addressed these concerns stating:

> 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 the defect and its causal relationship to her injuries, ***but she must also prove the existence of additional or enhanced injuries caused by the defect***.

D'Amario, 806 So. 2d at 439 (emphasis added).

Clearly, in footnote 16 of its opinion, the *D'Amario* Court cited *Gross v. Lyons*, 763 So. 2d 276 (Fla. 2000) for the proposition that in those instances when the jury is not able to separate the enhanced injuries which occurred in the

secondary collision from those injuries which occurred in the primary collision, the parties should resort to established precedent in that area of the law. Apparently, seizing upon that footnote, the Committee has placed the following language at the conclusion of proposed Jury Instruction 403.16:

> However, if you cannot separate some or all of the damages, you must award (claimant) any damages that you cannot separate as if they were caused by (defendant).

In *D'Amario* the issue was whether, in a mere crashworthiness case, there should be an apportionment of fault between the manufacturer and the party responsible for causing the initial impact. The Court rejected the concepts of apportionment of fault as enunciated in *Fabre v. Marin*, 623 So. 2d 1182 (Fla. 1993). In adopting the minority view that there should not be an apportionment of fault between the party causing the accident and the party causing the enhanced injury, the Court gave assurances to manufacturers that apportionment of fault was unnecessary because they would only be paying for that portion of the injuries caused by the product defect. As such, apportionment of fault would be unnecessary and, in essence, double-dipping on the part of the manufacturer. For the Court to now accept the Committee's proposed Jury Instruction 403.16, with language to the effect that if the jury is unable to separate the enhanced injuries from the injuries resulting from the primary collision the Defendant pays for all damages, the Court will have codified precisely what it said it was not doing in

D'Amario. The burden of proving the enhanced injuries will have shifted to the defendant manufacturer and the defendant manufacturer will be at peril of paying for all damages, not just those damages related to the enhanced injury. *Reductio Ad Absurdum*. Obviously, if the jury is unable to separate the damages which occurred in the primary collision from the enhanced injuries related to the product defect, it would be more fair to allow the jury to apportion fault between the party causing the accident and the manufacturer causing the enhanced injuries, and to apply that apportioned fault to the total damages to assess the responsibility of the defendant manufacturer.

Proposed Instruction No. 403.13

While the Court has not asked for comments on proposed Jury Instruction 403.13, I feel compelled to address an issue raised by this proposed instruction. The second phrase in that instruction, "[or] [control the risk of harm that (the product) might cause after it was sold to (claimant or ultimate user)]" could be interpreted as a statement that Florida has recognized a post-sale duty to warn in all circumstances. While at least one court has addressed the jury's ability to assess the conduct of a party once it initiates a post sale warning campaign, *Sta-Rite Industries, Inc. v. Levey*, 909 So. 2d 901 (Fla. 3d DCA 2004), neither the statutory nor the common law of the State of Florida imposes a post sale duty to warn upon manufacturers. As such, this portion of proposed Jury Instruction 403.13 would

appear to be a misstatement of Florida law.

Respectfully submitted,

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By:_____
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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing was served via Express Mail this 29th day of January, 2010 to: The Supreme Court of Florida , and 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.

By:_____/s/_____
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