Rumberger
KIRK & CALDWELL

Myron Shapiro
Rumberger, Kirk & Caldwell, P.A.
Attorneys at Law
Brickell Bayview Centre
Suite 3000
80 Southwest 8th Street
Miami, Florida 33130-3037
Phone: 305.358.5577
Fax: 305.371.7580
mshapiro@rumberger.com
www.rumberger.com

February 3, 2010

Supreme Court of Florida
Supreme Court Building
500 South Duval Street
Tallahassee, FL 32399-1925

Re: In re Standard Jury Instructions in Civil Cases – Report No. 09-10 (Products Liability), Case No. SC09-1264

In re Standard Jury Instructions in Civil Cases – Report No. 09-01 (Reorganization of the Civil Jury Instructions), Case No. SC09-284

The following is submitted pursuant to the Court's invitation to comment on products liability standard jury instructions.

Proposal #8 – 403.7

Rather than clarification, the proposed definition of defect is designed to insure confusion regarding the definition of defect. The definition is contrary to the concept of what constitutes a design defect in RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. (1998). The writers of the RESTATEMENT (THIRD) are distinguished professors of law and dedicated legal commentators who have devoted their careers spanning in excess of seventy five years specializing in products liability. The writers (Twerski and Henderson) are unbiased neutrals who represent neither plaintiffs nor the defense bar in products liability matters. Their goal is the very essence of what truly makes sense in the common application and correct statement of the law. Their work represents a lifetime of scholarly research and writing where the RESTATEMENT (THIRD) has existed for twelve years, is beyond reproach, has never been the subject of serious criticism and should not be rejected. To ignore the RESTATEMENT (THIRD) approach to what constitutes design defect including the proposed definition of defect, represents a step backwards inviting misapplication of the law.

Furthermore, the suggestion in the notes that the risk utility test may not be a test relating to defect but rather an affirmative defense is short-sighted and plainly wrong. Products and their design do not exist in a vacuum but represents a reasoned conscious choice including necessary and essential compromises regarding the risk utility of any particular product. Since the utility of

the product and the risk associated with it are part of the design concept, most certainly it is the test to be applied as to whether the product as designed constitutes a defect. Risk utility is not a mere afterthought to be relegated to an affirmative defense.

Also troubling is the attempt to merge manufacturing and design claims requiring separate and distinct jury instructions and appropriate definitions. No manufacturing process is perfect. Defect in the manufacturing process is not the same as a defect in design which represents a disciplined and conscious choice of one preferred design over that of another. It does not constitute a physical or mental mistake which may be part of or contained within the manufacturing process.

Proposals 9 & 10 - 403.9 and 403.10

The approach taken in these proposals are overly simplistic and tantamount to guaranteeing liability regarding negligence and negligent failure to warn. As drafted, it fails to recognize the mandatory condition precedent which is that there must be determination of a **defect** before there can be any negligence. Stated somewhat differently, there must be competent evidence of a defect determined by a jury before there can be negligence or negligent failure to warn. Without a finding of a **defect**, both negligence and negligent failure to warn must be dismissed or subject to a directed verdict.

Proposal 11 - 403.11

This proposal is fatally flawed in that it fails to take into account compliance with government standards under Section 768.1256. By way of example, Federal Motor Vehicle Safety Standards promulgated by the Department of Transportation pursuant to the Motor Vehicle Safety Act (1966) has for more than forty years specialized in improved motor vehicle safety based upon a body of expertise second to no one in the civilized world relating to motor vehicle safety. Compliance with these government standards as well as other standards represent solid and strong evidence of compliance with a safety code and must be taken into consideration by the jury when evaluating whether or not the particular design at issue is allegedly defective.

Proposal 13 - 403.16

The concern with this proposal is that in a crashworthiness case, the manufacture can only be liable for the harm it caused, i.e. enhanced injury, and the requisite burden of proof required to establish there was an enhanced injury. The manufacturer in a crashworthiness case is not the original tortfeasor responsible for causation of the accident and therefore can't never be liable for 100% of the entire injury, only that portion of the injury which has been determined to be enhanced by competent medical/biomechanics evidence.

Proposal 19 - 403.18

To avoid redundancy, please see comments relating to Proposal 8 regarding the risk utility test and Proposal 11 regarding compliance with government standards.

Respectfully submitted,

/s/ Myron Shapiro

MYRON SHAPIRO

MS:lbf

I hereby certify that on this 28th day of January, 2010, a true and correct copy of the foregoing has been deposited in the U.S. Mail 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.

/s/ Myron Shapiro
Myron Shapiro