IN THE SUPREME COURT OF FLORIDA

SC09-1264

In Re Standard Jury Instructions (Civil)
In Civil Cases – Products Liability
Instructions

COMMENTS TO PROPOSAL NUMBER 8

My name is Aaron D. Twerski, and I hold the position of Irwin and Jill Cohen Professor of Law at the Brooklyn Law School, Brooklyn, New York. I am also of counsel with Herzfeld and Rubin, PC, with offices in New York City and Miami. My curriculum vitae is attached to this submission.

Over the past four decades, I have written voluminously in the field of products liability. Professor James A. Henderson, Jr. and I are co-authors of a leading products liability casebook in use in a large number of law schools throughout the country. In 1992, Professor Henderson and I were appointed as co-reporters for the Restatement Third, of Torts: Products Liability. The Restatement was approved by the American Law Institute on May 20, 1997. The Reporter's Notes to the Restatement reflect our assessment of the case law up to the drafting of the Restatement.

Given my deep concern with regard to the development of products liability, I write in response to the Notice from the Supreme Court of Florida, requesting comments on certain proposed jury instructions in the area of products liability. My comments are directed to Proposal number 8, as set forth in the Court's Notice, concerning proposed instruction 403.7 and related Notes On Use numbers 3 and 4. In my opinion, these Notes do not accurately reflect Florida law with respect to the significance of the risk-utility test in the jurisprudence of this state.

First, the risk-utility test is well entrenched in Florida law. In 1983, the Florida Supreme Court discussed with approval the several elements of the risk-utility analysis. *See Radiation Tech., Inc. v. Ware*, 445 So.2d 329, 331 (Fla. 1983) ("The term 'unreasonably dangerous' . . . **balances** the likelihood and gravity of potential injury **against the utility of the product**. . . ."). More recently, in *Force v. Ford Motor Co.*, 879 So. 2d 103, 105, 108-10 (Fla. 5th DCA 2004), the Fifth District recognized that Florida precedent has supported the "two-prong" test for defect, under which a plaintiff can establish the existence of a design defect by demonstrating either that (1) the product failed to meet the expectations of the ordinary consumer, or (2) the product failed to meet risk-utility standards. As noted in *Force*, Florida law is not clear concerning the line of demarcation between cases that may be decided under the consumer-expectations test, and those which require risk-utility balancing. *See* 879 So.2d at 106-07, 108-10. However, the *Force* court explained that there are cases of such complexity that the ordinary consumer would not know what to expect and thus, the relevant inquiry would require risk-utility balancing to set the standard for defect. *Id*. at 109. Based on this established law, I disagree with note 3, which suggests that it is unclear whether the risk-utility test is part of Florida products liability law.

Second, Florida's adoption of the risk-utility test is consistent with the vast majority of jurisdictions in the United States as either the sole test of defect in a

strict liability case, or as an alternative to the consumer-expectations test. In 2009, I authored an article for the Brooklyn Law Review, through which I reviewed and analyzed almost every products liability design defect case across the country. This analysis demonstrated the overwhelming acceptance of the risk-utility test. Aaron D. Twerski & James A. Henderson, Jr., *Manufacturers' Liability for Defective Product Designs: the Triumph of Risk-Utility*, 74 BROOK. L. REV. 1061 (2009). For the Court's convenience, I have attached a copy of my article to this submission. In footnote 160, I commented on Florida law and concluded, consistent with the point discussed above, that Florida law "supports the two-part test for defect." Id. at 1098 n.160.

Third, the notion expressed in Note On Use 3 to the effect that the risk-utility test constitutes merely an affirmative defense is contrary to the law of Florida and of virtually every other state that has examined this test. Only California, Alaska, and Puerto Rico—which have adopted a unique procedure under which Plaintiff need only prove that the design was a substantial factor in producing the injury—treat the risk-utility test as a species of affirmative defense. Based on my review of Florida precedent, I see no evidence that it has treated the risk-utility test in such a manner.

Finally, I would like to comment on the interplay between the risk-utility test and the RESTATEMENT (THIRD) OF TORTS, PRODUCTS LIABILITY. The risk-utility

test was part of products liability jurisprudence long before the RESTATEMENT THIRD was drafted. Indeed, the RESTATEMENT was an attempt to clarify and restate existing law, not to create a test that previously did not exist. Thus, the determination as to whether the risk-utility test is part of Florida law does not turn on whether Florida has adopted the RESTATEMENT THIRD.

In any event, Note on Use 4, which states that Florida has not adopted section 2(b) of the RESTATEMENT THIRD is incorrect. In the recent decision, *Agrofollajes, S.A. v. E.I. DuPont De Nemours & Co.*, Nos. 3D07-2322, 3D07-2318, 3D07-1036, __ So. 3d __, 2009 WL 4828975, at *21-*22 (Fla. 3d DCA Dec. 16, 2009), the Third District Court of Appeal held that it was an error to instruct the jury on the consumer-expectations test, because the RESTATEMENT THIRD rejects that test as an independent basis for finding a design defect, especially where the product in question (the fungicide Benlate) was extremely complex. Given that the District Court cited with approval section 2 of the RESTATEMENT (THIRD) OF TORTS: PRODUCT LIABILITY, Note on Use 4 should be rewritten to reflect this decision.

In sum, my review of Florida precedent leads to the inescapable conclusion that the risk-utility test is firmly fixed in the state—at a minimum as an alternative with consumer expectations as a test for defect in design cases. Indeed, in light of

the *Agrofollajes* decision, Florida may now have joined the numerous jurisdictions which recognize risk-utility as the sole test of defect in such cases.

Respectfully submitted,

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