

**IN THE SUPREME COURT OF FLORIDA  
CASE NO. SC09-1264  
Committee Report Number 09-10**

**In the matter of Standard Jury  
Instructions (Civil),**

**Products Liability Instructions**

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**RESPONSE OF THE  
COMMITTEE ON STANDARD  
JURY INSTRUCTIONS (CIVIL)  
TO COMMENTS FROM INTERESTED  
PERSONS REGARDING REPORT NO. 09-10**

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**RESPONSE OF THE COMMITTEE ON  
STANDARD JURY INSTRUCTIONS (CIVIL)  
TO COMMENTS FROM INTERESTED  
PERSONS REGARDING REPORT NO. 09-10**

**To the Chief Justice and Justices of  
the Supreme Court of Florida:**

On July 15, 2009, the Committee on Standard Jury Instructions in Civil Cases submitted its Report No. 09-10 (Products Liability Instructions) to this Court and recommended that The Florida Bar be authorized to publish revised Florida Standard Jury Instructions (Civil) for Products Liability, as set forth in Appendix A to that report.

On December 8, 2009, this Court issued a publication notice, explaining that “[u]pon initial review, the Court has identified specific proposals that require further discussion” and invited interested persons to comment on these specific proposals. The notice identified the following specific proposals:

**Proposal #8 – Eliminate standard instructions PL4, PL5, PL5 Notes On Use and Comment, and add instruction 403.7, Strict Liability**

Comments are sought including, but not limited to: (1) whether the proposal merges multiple theories of liability that are different; (2) whether the proposal addresses or should address the issue of foreseeable bystanders; (3) whether the Notes on Use to the instruction should comment on risk/benefit analysis; and (4) whether the proposal should address the distinction between strict liability and negligence;

**Proposal #10 –instruction 403.9, Negligence**

Comments are sought including, but not limited to: (1) whether the wording of the instruction should include reference to “defective product” with “evidence of negligence”; and (2) whether Notes on Use 1 regarding “dangerous product” is supported by the decisional law upon which the proposal is based;

**Proposal #11 –instruction 403.10, Negligent Failure to Warn (new)**

Comments are sought including, but not limited to: (1) whether the decisional law requires that the instruction include a reference to a “defective product”;

**Proposal #12 –Notes on Use for instruction 403.11, [Inference] of Product Defect or Negligence**

Comments are sought including, but not limited to: (1) whether a full instruction under 403.11 should be included in light of section 768.1256, Florida Statutes;

**Proposal #13 –instruction 403.16, Issues on Crashworthiness and “Enhanced Injury” Claim (new)**

Comments are sought including, but not limited to: (1) whether the proposal fully and accurately conforms with the principle of law established in *D’Amario v. Ford Motor Co.*, 806 So. 2d 424 (Fla. 2001);

**Proposal #19 –instruction 403.18, Defense Issues (new)**

Comments are sought pertaining to: (1) the elements and wording of all defensive issues; and

**Proposal #21 – Eliminating Model Charge Nos. 7 and 8 and adding Model Instruction No. 7 and Special Verdict Form**

Comments are sought pertaining to: (1) all aspects of these proposed modifications.

Eighteen comments were received. They were distributed in this way:

	<b>Respondent</b>	<b>#8</b>	<b>#10</b>	<b>#11</b>	<b>#12</b>	<b>#13</b>	<b>#19</b>	<b>#21</b>
1.	Larry M. Roth	✓				✓		
2.	W.L. Kirk	✓	✓	✓	✓		✓	
3.	Myron Shapiro	✓	✓	✓	✓	✓	✓	
4.	Wendy F. Lumish Richard J. Caldwell, Jr.	✓	✓	✓		✓		
5.	Florida Justice Association	✓	✓	✓	✓	✓	✓	✓
6.	Daniel B. Rogers	✓	✓		✓		✓	✓
7.	David C. Knapp	✓	✓	✓	✓	✓		
8.	Aaron Twerski	✓						
9.	Patricia E. Lowrey	✓	✓					
10.	Frederick J. Fein				✓		✓	
11.	P. Michael Patterson	✓	✓	✓			✓	
12.	John C. Seipp, Jr.	✓			✓	✓		
13.	Joel D. Eaton	✓					✓	
14.	Robert J. Rudock	✓	✓			✓		
15.	Frank H. Gassler	✓		✓				
16.	Robert M. Fulton		✓	✓				
17.	Mercer K. Clarke	✓	✓	✓				
18.	Fredrick H.L. McClure	✓	✓				✓	

Sixteen comments addressed Proposal #8, twelve comments addressed Proposal #10, nine comments addressed Proposal #11, seven comments addressed Proposal #12, seven comments addressed Proposal #13, eight comments addressed Proposal #19, and two comments addressed Proposal #21. Although the number and intensity of the comments was notable, the Committee already has considered almost all of the points raised by these respondents over the years.

In fact, the Committee thoroughly considered its proposed instructions over a span of multiple years (2006-2009). The various appendices attached to Report 09-10 demonstrate the energy the Committee expended in getting these proposed instructions correct. That said, it is not surprising that the publication notice garnered disagreements from the respondents. Indeed, as noted in Report 09-10, the Committee itself was unable to reach unanimity in its report and various members disagreed on aspects of the proposal. Yet, in the end, the Committee did agree that there was nothing more that it could do to reach unanimity and that the proposal should be submitted to this Court with the support of the large majority of the Committee.

In this regard, the Committee explained that “[t]he Committee worked diligently to seek unanimity where possible. Nevertheless, . . . some members of the Committee do not agree with all of the changes that are being proposed. The

process, however, has been thorough and thoughtful.” The Committee further elaborated as follows:

The Committee is in agreement that these proposed instructions should be submitted to the Court at this time. Further discussion within the Products Liability Subcommittee or the Committee at large will not be fruitful.

During the Committee’s process of revising the products liability instructions, disagreements arose. The proposed instructions were changed numerous times in response to feedback from the Committee’s members. The areas of disagreement were narrowed through this diligent and time-consuming process. At a point, it became clear that total unanimity would not be achieved on some proposed changes. Although a large majority of the Committee agrees that these proposed instructions are necessary and accurate, there are some Committee members who do not agree.

As a result of this healthy debate within the Committee, the vast majority of issues and themes raised by the recent comments have been addressed by the Committee already. For example, discussion of the various issues and themes raised in the comments can be found in memoranda located in Appendix E to Report 09-10 at pages 12-293 through 12-380 (February 2008), 275 through 294 (February 2008), 295 through 297 (February 2008), and 87 through 113 (October 2008). In particular, the memorandum located in Appendix E to Report 09-10 at pages 57 through 74 (March 2009) responded directly to many similar comments from interested persons that were previously received by the Committee.

Further, the minority positions on the Committee were well-memorialized in memoranda located in Appendix E to Report 09-10 at pages 12-233 through 12-291 (February 2008), 351 through 390, 395 through 418, 114 through 117 (October 2008), and 75 through 80 (March 2009). And Wendy Lumish and Richard (Dick) Caldwell summarized many objections raised by some of the Committee's members over the years in a submission they both filed in response to this Court's publication notice (both Ms. Lumish and Mr. Caldwell now have rotated off of the Committee).

The Committee's discussions of these points was captured, most recently, in the excerpts of the Committee's Minutes from the general meetings on July 10th and 11th, 2008, October 23rd and 24th, 2008, and March 5th and 6th, 2009. The excerpts from the Committee's Minutes are found in Appendix D to Report 09-10. (Earlier excerpts from the Committee's Minutes on these issues are also included in Appendix D to Report 09-10 and may be instructive; because the issues narrowed over time, however, the most recent excerpts are most directly on point).

Nevertheless, not everything mentioned in the latest round of comments was addressed by the Committee previously. For instance, many respondents mentioned a new case from the Third District Court of Appeal, Agrofollajes, S.A. v. E.I. DuPont De Nemours & Co., No. 3D07-2322, 2009 WL 4828975 (Fla. 3d DCA Dec. 16, 2009) (rehearing pending), in comments directed to Proposal #8. These respondents suggested that the Third District's case verified that Florida has

adopted the risk/benefit test of defect. This case was released after the Committee submitted Report 09-10.

In a comment by the Florida Justice Association, the respondents suggested an additional Note on Use for proposed Instructions 403.7 and 403.9. The Committee has not addressed this specific suggestion.

In Frank H. Gassler's comment, he argued that no failure to warn instructions are justified and/or necessary at this time. Because the Committee was unanimous that such instructions were needed, it did not dwell on the point raised by the specific comment.

Likewise, Larry M. Roth's comment opposed the crashworthiness instruction (proposed Instruction 407.16) because, among other reasons given, "[t]he public policy of this State, as set forth in the April 2006 revisions to Fla. Stat. § 768.18(3), is contrary to *D'Amario* [*v. Ford Motor Co.*, 806 So. 2d 424 (Fla. 2001)], as well as contrary and inconsistent with proposed Standard 407.16." The Committee was unanimous in determining that a crashworthiness instruction was necessary in the light of this Court's *D'Amario* decision and did not consider the argument that a crashworthiness instruction should be omitted on grounds that *D'Amario* should not be followed, as Mr. Roth's comment urged.



Too, some of the comments suggested specific ways to revise the wording of the proposals. Although the Committee considered the gist of these comments previously, it may not have considered the exact revisions to wording suggested.

It must be noted that, in the time between the due date for comments from interested persons (February 1, 2010) and the due date for this Committee's response (February 22, 2010), the Committee had no general membership meeting scheduled. It was not practical for the Committee to reopen discussions of the proposal without, at a minimum, having a general membership meeting at which to do so.

And, since the time the Committee submitted Report 09-10, fifteen new members were appointed to the Committee by the Court. Moreover, four prominent and active members of the Products Liability Subcommittee rotated off of the Committee (S. Sammy Cacciatore, Richard (Dick) Caldwell, Wendy Lumish, and Larry Stewart). Thus, the Committee in 2010 is significantly different in composition than the 2009 Committee that considered and submitted Report 09-10.

The Committee's new members were not present for the lengthy discussions that the Committee held about the proposed products liability instructions. As a logistical matter, it was impractical to re-open discussions of the proposal prior to submitting this response.

Of course, the Committee would be pleased to further examine any issues raised in these comments through its usual deliberative processes, if this Court so requests.

Respectfully submitted,

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**CERTIFICATE OF COMPLIANCE**

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

By: \_\_\_\_\_  
Joseph H. Lang, Jr.