IN THE SUPREME COURT OF FLORIDA
Case No. SC09-1264

In the matter of Standard Jury Instructions (Civil), Products Liability Instructions
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RESPONSE OF LARRY S. STEWART FORMERLY CHAIR OF THE BOOK REORGANIZATION SUBCOMMITTEE AND MEMBER OF THE PRODUCTS LIABIITY SUBCOMMITTEE

The undersigned was a member of the Supreme Court's Committee on Standard Jury Instructions for Civil cases from 2000 to 2009 and during that time served as Chair of the Book Reorganization Subcommittee and on several substantive law subcommittees, including the Product Liability Subcommittee. In those capacities, I was involved in the drafting of the proposed FSI product liability instructions currently pending before the Court.

In response to the Committee's proposed standard product liability instructions, this Court called for comment on seven of those proposals and allowed the Committee to respond to any such comments. A total of eighteen comments were submitted. The Committee does not intend to substantively respond to those comments because it has already considered the vast majority of the matters raised, although it does note that there are some "new" matters involving rewording, additional wording and additional Notes On Use that it has not previously considered

but would have considered if there had been sufficient time to do so.[1] Most of the commentary, which therefore goes without response, is from defense-oriented commentators who urge this Court to reject the proposed strict liability instruction (403.7) because it merges manufacturing and design defects and raises a question about the applicability of risk/benefit as a strict liability test. That commentary goes on to urge this Court to embrace the design defect proposals of section 2(b) of *Restatement (Third) of Torts: Products Liability*. Because it is unclear what role, if any, I will have as a former member of the Committee in any future substantive response from the Committee and because I believe that those comments and some other points should be responded to, I file this individual response.

By way of background, I have been a practicing tort lawyer for over 45 years with substantial experience in product liability cases, primarily representing plaintiffs. I have served in many law association positions at the state and national levels, have authored numerous articles on substantive law subjects, including products liability, and have lectured in numerous CLE courses in Florida and throughout the United States. In addition, I have been a member of the American Law Institute since 1993 and on its governing Council since 2003, being substantially involved in the debates and actions leading to the adoption of *Restatement (Third) of Torts: Products Liability.* Recently, I participated in a special ten-year anniversary

[1] The Committee's response offers to consider those "new" matters if the Court so requests. The response also raises a practical problem resulting from a change in composition of the Committee. Many of the current members were not present for the extensive deliberations that lead to the current proposals and several members, who were present, have rotated off the Committee.

symposium at the Brooklyn Law School to assess the success of *Restatement (Third) of Torts: Products Liability*.[2]

My comments are as follows:

Proposal #8 – Eliminate standard instructions Pl 4, PL 5, PL5 Notes On Use and Comment, and add instruction 403.7, Strict Liability

As a member of the Committee, I supported proposed instruction 403.7, even though it included a compromise on risk/benefit, because I believed that it was the best that could be obtained and it was a reasonable step forward that would, at least, alert the bench and bar to the considerable issue of the application of the risk/benefit test. In light of the defense-orientated commentary, I wish to express a contrary position to that commentary which in part concurs with the Committee's recommendation but differs with the compromise of including risk/benefit in the instruction.

The pending Product Liability instructions are the Committee's first-ever effort to draft a comprehensive set of product liability instructions.[3] That process involved a complete review of the current instructions to determine to what extent they comport with Florida law and to what degree changes or additions were needed. As the new instructions were drafted, they were formatted in accord with the new template that had been adopted as part of the Book Reorganization project and revised for plain English usage. Unfortunately, that effort by the Committee provoked a barrage of advocacy that only made the project more difficult.

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[2] My views on the success of *Restatement (Third) of Torts: Products Liability* appear in an article published following the symposium at: Larry S. Stewart, *Strict Liability for Defective Product Design: The Quest for a Well-Ordered Regime,* 74 Brooklyn L. Rev. 1039 (2009).

[3] In the past, products liability instructions were added on an *ad hoc* basis without any attempt to provide a complete set of instructions.

A primary focus of much of that advocacy involved instruction 403.7. Two principle points were involved. Current instructions separate strict liability into manufacturing defects (PL4) and design defects (PL5). Within the design defect instruction, PL5 contained two distinct tests: consumer expectations and risk/benefit. The Committee conducted extensive research to examine both subjects.

On the first point, the Committee determined that under Florida law strict liability rules mandated that there was no difference between manufacturing and design defects. It therefore merged current PL4 and PL5. On the second point, despite the Committee's conclusion that it was no longer satisfied that risk/benefit had ever been adopted as a strict liability test in Florida, Committee Report, p. 16, rather than delete that provision, the Committee compromised and retained the risk/benefit test with a "pending further development in the law" Note On Use.

On the first point, I concur with the views expressed by the Products Liability Subcommittee Chair, Judge Gary M. Farmer that, under Florida law, there is no difference between strict liability for a manufacturing and design defect and the Committee correctly merged PL4 and PL5. See *Ford Motor Co. v. Hill*, 404 So. 2d 1049, 1052 (Fla. 1981) (holding that strict liability applies "to all manufactured products without distinction as to whether the defect was caused by the design or the manufacturing").

On the second point, I believe that failing to delete risk/benefit from instruction 403.7 (and related instructions[4]) perpetuates an erroneous statement of Florida law, co-mingles strict liability and negligence principles and provides no guidance to the bench and bar as to how to

[4] The risk/benefit test also appears in the strict liability formulations in 403.15(d) and 403.16. Those instructions likewise should be corrected. It would also be helpful to include a Note On Use explaining this action along the lines suggested by the Florida justice Association in its Comments. FJA Comment, p. 17.

apply those differing principles. In this view, I also concur with the views expressed by Judge Farmer.

Most of the defense-oriented comments concerning the risk/benefit test seek, in essence, to have this Court rewrite Florida law to adopt the design defect proposals of section 2(b) of *Restatement (Third).* That is beyond the purview of this process or the role of standard jury instruction committees. Rather, the jury instruction committees are charged with analyzing Florida law in a dispassionate, intellectually honest manner and, based on that analysis, to develop jury instructions that will best convey principles of law to jurors. Sometimes, however, that process goes awry and committee members as well as commentators become advocates arguing for what they want the law to be, instead of acknowledging what the law is.

Nowhere has that been more evident than in the process of reorganizing the Product Liability instructions, especially in the defense-oriented comments urging adoption of the design defect proposals of section 2(b) of *Restatement (Third).*[5] Most of those comments ignore the historical development of product liability law, both generally and in Florida, and the basic differences between *strict liability* and *negligence.* Instead, they tout *Restatement (Third)* as though it was a Holy Grail. At a minimum, an intellectually honest comment should acknowledge that section 2(b) of *Restatement (Third)* – which for design defect claims would abolish 402a strict liability, abolish the consumer expectation test and restrict plaintiffs to a

[5] Those comments include one from Professor Aaron Twerski, one of the Reporters for *Restatement (Third),* in which he makes a number of claims about Florida law. His scholarship and motives have, however, been seriously questioned. See *Potter v. Chicago Pneumatic Tool Co.*, 694 A. 2d 1319, 1331-32 (Conn. 1997); *Denny v, Deere & Co.*, 999 P. 2d 930, 946 (Kan. 2000); John F. Vargo, *The Emperor's New Clothes: The American Law Institute Adorns a "New Cloth" for Section 402A Products Liability Design Defects: A Survey of the States Reveals a Different Weave,* 26 U. Mem. L. Rev. 493 (1996); Stewart, *supra* note 26 at 1045. Indeed, a number of commentators saw the design defect proposals as nothing more than a thinly disguised "tort reform" agenda. Stewart, *supra* note 27 at 1045.

single claim[6] – is the most controversial proposal of all the Restatements and has been largely rejected by Supreme Counts across the United States. Stewart, *supra* at 1048 – 1050. Indeed, it borders on disingenuousness to not acknowledge the troubled judicial history of section 2(b).

Those comments also ignore that those core design defect proposals of *Restatement (Third)* contained in section 2(b) constitute strict liability in title only. Abolishing 402A and its consumer expectations test as a basis for liability would eliminate the strict liability adopted in *West v. Caterpillar Tractor Co., Inc.,* 336 So2d 80 (Fla. 1976). The proposed substitute of a risk/benefit analysis is, at its core, a balancing standard that would substitute negligence principles. And, by restricting plaintiffs to only a single risk/benefit claim, section 2(b) would constitute a massive regression in the law taking products design defect claims full circle back to the pre-402A era of negligence-only claims, with all of the attendant pitfalls inherent in such claims. In fact, the core proposals of section 2(b) would go even further to impose a new, more restrictive form of negligence in which plaintiffs not only would have to prove the manufacturer's negligence but also prove a new element that an alternative design existed. See *Green v. Smith & Nephew AHP, Inc.,* 629 N.W. 2d 727, 751-52 (Wis. 2001). It is no wonder that defense interests would want these proposals adopted but, as noted by the Connecticut and Wisconsin Supreme Courts, that would be bad policy because it would raise the bar too high. *Potter v. Chicago Pneumatic Tool Co.*, 694 A. 2d 1319, 1332 (Conn, 1997); *Green, surpa* at 751.

Of course it takes only a moments reflection to realize that section 2(b) of *Restatement (Third)* collides directly with the adoption of 402A strict liability in *West* and the application of

[6] If section 402a and its consumer expectation test did not apply to design defect claims or to some products, as some commentators suggest, there would be no need to abolish such liability.

those rules in *West's* progeny. Given that reality, only this Court, in an appropriate case, can consider such an issue.

In the rush to get this Court to require that the standard instructions embrace section 2(b) of *Restatement (Third),* a number of the defense-oriented commentators take refuge in the recent decision of the Third District Court in *Agrofollajes, S.A. v. E.I. Du Pont De Nemours & Co., Inc.*, __ So. 2d __, 34 Fla. L. Weekly D2578a, (Fla. 3rd DCA 12/16/2009). In a bizarre holding involving a claim of *negligent* design, where the trial court gave the PL5 *strict liability* instruction and included both the consumer expectations and risk/benefit tests, the Third District appears to have overruled *West* and its progeny. Without any discussion or analysis, the Court summarily held that instructing the jury on the consumer expectation test was error because the Court had earlier "applied" the new *Restatement* in a component manufacturer case and the new *Restatement* rejected the consumer expectations test.[7] With all due respect to the Third District, only this Court can overturn *West* and its progeny.

Of course, *Agrofollajes* was decided after the Committee had submitted its proposed instructions. But, had it been available, the Committee would have been required to dispassionately analyze it against the full panoply of Florida law. And, if it concluded it was an outlier, as it should have, it should not give the decision any credence in developing a proper instruction.

[7] The component manufacturer proposals are contained in section 5 of *Restatement (Third).* Adoption of that section in an earlier decision does not *ipso facto* mean that the controversial provisions of section 2(b) have also been adopted, yet that appears to be the "reasoning" of the Third District Court of Appeal.

Two commentators, Wendy F. Lumish and Richard "Dick" Caldwell, both former members of the Committee,[8] have also argued that based on the decision in *Force v. Ford Motor Co.*, 879 So. 2d 103 (Fla. 5th DCA 2004), Note On Use No. 4 to instruction 403.7 should be changed to acknowledge that the parties in *Force* agreed to a modified strict liability instruction based on section 2(b) of *Restatement (Third)* – thereby implicitly giving the Committee's imprimatur to the agreement -- or, failing that, that Note On Use No. 4 should be eliminated. This is illustrates how the process can go astray when advocacy trumps scholarship. Drafting jury instructions is not about providing one side with ammunition for gaining trial advantages. While parties can make agreements for the purposes of individual cases, those agreements have no precedental value and the Committee correctly decided to make clear in Note On Use No. 4, that while it cited *Force* for its holding, that in no way constituted approval of the agreed to non-standard strict liability instruction.

Apart from the issue of *Restatement (Third)*, there is the independent question of whether Florida has ever recognized risk/benefit as a strict liability test for design defect claims. *West* adopted section 402A of Restatement (Second), thereby recognizing strict liability for all product defects based on a consumer expectation test.[9] The only reference to risk/benefit in 402A is in

[8] In the interest of full disclosure, it should be noted that these individuals are defense attorneys who are, according to their published biographies, members of the Products Liability Advisory Council (PLAC). According to its web site, PLAC is an association of corporate interests and defense attorneys that promotes changes in products liability laws to protect manufacturers.

[9] See Section 402A, Comment i, providing that the product must be "dangerous to an extent beyond that which would be contemplated by the ordinary consumer" and comment g: "The rule . . . applies only where the product is . . . in a condition not contemplated by the ultimate consumer."

the limited Comment k affirmative defense for "unavoidably unsafe" products.[10] While there has been no decision from this Court specifically dealing with that defense, two District Court of Appeal decisions have recognized it. *Adams v. G.D. Searle & Co.*, 576 So.2d 728 (Fla. 2d DCA 1991); *Force v. Ford Motor Co.*, 879 So. 2d 103 (Fla. 5th DCA 2004). On the other hand, aside from reference to risk/benefit in dicta in several decisions, there has been no on-point holding in a Florida decision adopting such a test for a design defect claim.[11]

Indeed, as already noted, after extensive research, the Committee came to similar conclusion, that it was not satisfied that risk/benefit had ever been adopted as a strict liability test in Florida. Committee Report, p. 16. It just stopped short of eliminating it from instruction 403.7, opting instead for a "pending further development in the law" Note On Use. That does not, in my view, fully discharge the obligations of the Committee.

For those reasons, I believe instruction 403.7 and its related instructions should be modified to eliminate risk/benefit. I concur with Judge Farmer that Florida law recognizes strict liability as an enterprise liability based on a consumer expectation test and that risk/benefit arises only as an affirmative defense in the limited circumstances of Comment k.[12] These changes to the proposed SJI instructions would not be changing Florida law but rather *conforming* the instructions to Florida law.

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[10] Under Comment k, this defense is available when the product is "useful and desirable" even though "avoidably unsafe" and the manufacturer provides "proper directions and warnings."

[11] In this view, I concur with the analysis of the Florida Justice Association. FJA Comment, p. 16.

[12] This result will not preclude risk/benefit evidence. It merely means that such evidence will be relegated to its proper place; i.e., to a risk/benefit affirmative defense if it is applicable and where the plaintiff chooses to pursue a negligence claim.

Proposals #10 and #11 – Instruction 403.9, Negligence and Instruction 40310, Negligent Failure to Warn

The Court's inquiry concerning these two instructions, poses the same issue – whether these negligence instructions should include an additional requirement that the plaintiff must also prove the product was "unreasonably dangerous" or "defective."[13] As proposed by the Committee both instructions include an "unreasonably dangerous" requirement. I believe there should be no such requirement and that, instead, the standard negligence instruction should be used.

The elements of negligence are duty, breach and a proximately resulting injury. Imposing an additional requirement that the negligence must also cause an "unreasonable dangerous" or a "defective" product results in a new, heretofore unknown, form of negligence that mixes strict liability concepts with negligence and creates a double causation requirement. It mixes strict liability and negligence concepts because requiring proof of "unreasonable danger" or "defect" is tantamount to requiring strict liability proof. In other words, the instruction would conflate strict liability and negligence, a mistake that has been made in many decisions. Indeed, some commentators have even gone so far as to suggest that the "strict liability" language of instruction 403.7 should be incorporated into instruction 403.9. This only highlights how incorporating "unreasonably dangerous" or "defect" would effectively trump negligence by requiring strict liability proof, a result long advocated by defense interests (so they can argue that plaintiffs can only bring a single claim).

[13] The two terms are synonymous. The definition of "defect' in the products liability context is that the product is "unreasonably dangerous."

Incorporating a requirement that the negligence must cause an "unreasonably dangerous" condition or "defect" in the product also creates a double causation requirement because it means claimants will first have to prove that the negligence caused a "defect" and/or an "unreasonably dangerous" condition, and then that the defect/unreasonably dangerous condition caused an injury. Defendants are not entitled to two bites at the causation apple.

Proposal #12 and #19 – Inference of Product Defect or Negligence or Lack Thereof

The Court also inquired as to whether section 768.1256, Florida Statutes warrants a standard jury instruction. As a member of the Products Liability Subcommittee, I concurred in its recommendation that instructions on section 768.1256 should be provided[14] but the Committee declined to do so. This statute provides a *presumption* based on compliance or not. It is a matter about which litigants have the right to have jurors instructed. There should be standard instructions on this subject.

New Proposals Not Previously Submitted to the Committee

As noted by the Committee, the comments contain several "new" proposals, which have not previously been considered by the Committee. While these are, for the most part, relatively

[14] The Products Liability subcommittee drafted two instructions in accordance with Section 768.1256: one on the presumption that arises when a product fails to comply with government rules (Instruction 403.11) and the other on the presumption that arises when a product complies with government rules (Instruction 403.18(c)). I believe that both proposals should be incorporated in the Product Liability instructions.

minor changes that should not require extensive deliberation, I believe several would improve the instructions.

The Florida Justice Association suggests that a new Note On Use should be added to 403.7 and 403.9, as follows:

> **Claimants have the choice to bring product liability claims under theories of strict liability or negligence or both. The theories are different. Strict liability claims focus on the condition of the product. Negligence claims focus on the conduct of the manufacturer. Compare instructions 403.7 and 403.9.**

This Note is consistent with *Ford Motor Co. v. Hill*, 404 So. 2d 1049 (Fla. 1981). In light of some of the defense-oriented comments concerning instruction 403.9, I concur that this Note is needed and should be added. I also concur that Note On Use No. 1 to 403.9 should be eliminated.

The Florida Justice Association has also suggested two slight revisions to instruction 403.16 to make it clear that the focus of a crashworthiness claim is on the "secondary" collision, not the original accident, and that a Note On Use be added to instruction 403.16 to clarify that the fault of others is not an issue. The suggested Note On Use is:

> **In crashworthiness cases the focus is not on the conduct that gave rise to the initial accident, but rather, on the cause of the enhanced injuries. Therefore, the fault of a driver or others in causing the basic accident is not an issue in crashworthiness cases. *D'Amario v. Ford Motor Co.*, 806 So. 2d 424, 437, 440 (Fla. 2001); *Griffin v. Kia Motors Corp.*, 843 So. 2d 336, 339 (Fla. 1st DCA 2003).**

This instruction was not easy to draft and I concur that both suggestions would improve the instruction.

Lastly, the Florida Justice Association has suggested that instruction 403.18(d) needs additional language to comply with the holding in *Sta-Rite Industries, Inc. v. Levey*, 909 So.2d 901, 904, n.4 (Fla. 3d DCA 2004) ("state-of-the-art" does not require that any manufacturer had

actually implemented or adopted the proposed design). Additionally, Joel D. Eaton suggests that this instruction is misplaced in that, notwithstanding the title of section 768.1257, Florida Statutes, this provision is not really a "defense" but rather a direction to the jury as to how to apply certain evidence. I concur with both suggestions. I believe that this instruction, as modified by the additional language, should be a new stand-alone instruction following 403.15, (i.e., instruction 403.16), with the balance of the instructions renumbered.

Respectfully submitted,

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Certificate Of Service

I hereby certify that a true copy of the foregoing was placed in the United States Mail addressed to Tracy Raffles Gunn, Chair of Committee on Standard Jury Instructions (Civil), Gunn Appellate Practice, P.A., 400 N. Ashley Drive, Suite 2055, Tampa, FL 33602, this 19th day of February, 2010, and on this same day was transmitted by electronic mail to her at tgunn@gunnappeals.com.

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