

IN THE SUPREME COURT OF FLORIDA

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

Committee Report Number 09-04

**Burden of Proof
on Defense Issues Instruction**

**REPORT (NO. 09-04) OF THE
COMMITTEE ON STANDARD
JURY INSTRUCTIONS (CIVIL)**

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Florida Bar Number 131265
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**To the Chief Justice and Justices of
the Supreme Court of Florida:**

The Committee on Standard Jury Instructions in Civil Cases recommends that this Court approve for publication and use reorganized and revised Florida Standard Jury Instructions (Civil) for Negligence, *Burden of Proof on Defense Issues*, as set forth in Appendix A to this report. This Report is filed pursuant to article V, section 2(a), of the Florida Constitution.

I. INTRODUCTION AND PROCEDURAL NOTE

The Committee has submitted simultaneously herewith a proposal for reorganization of the Standard Jury Instructions in Civil Cases, which includes a renumbering of the instructions. The “book reorganization” proposal was separately filed as this Committee’s report number 09-01.

This report, number 09-04, proposes a revision to Florida Standard Jury Instruction (Civil) 3.7 to directly account for *Fabre* [*v. Marin*, 623 So. 2d 1182 (Fla. 1993)] defendants in instructing on the burden of proof for defenses and to clarify the instruction with the application of plain English principles. The current instruction does not account for *Fabre* defendants. The current instruction also uses the terms “determine” and “chargeable to” instead of plain English terms “decide” and “caused by.” Therefore, the Committee recommends changing “determine” to

“decide” and “chargeable to” to “caused by” in this instruction. The appendix to report number 09-01 includes this proposed instruction as it would appear in the reorganized book if adopted by the Court.

The instruction proposed herein is a stand-alone instruction that can be adopted prior to a ruling on the book reorganization. Should this Court elect to rule on this proposal first, the Committee would simply use its current numbering system for the new instruction.

II. PROPOSED INSTRUCTION

The Committee proposes to revise Florida Standard Jury Instruction (Civil) 3.7 (to be numbered 401.23 in the reorganized book)¹ as indicated below:

401.23 BURDEN OF PROOF ON DEFENSE ISSUES

If the greater weight of the evidence does not support (defendant's) defense[s] and the greater weight of the evidence does support (claimant's) claim, then [your verdict should be for (claimant) in the total amount of [his] [her] damages] *[you should decide and write on the verdict form what percentage of the total negligence of [both] [all] defendants was caused by each defendant].

**Use second bracketed alternative above when there is more than one defendant.*

¹ It should be noted that, at the times this proposal was considered at various Committee meetings, it was anticipated that it would be numbered 401.22 in the reorganized book. Thus, the minutes and materials refer to this proposed revision as 401.22, rather than 401.23, as it will actually be numbered.

If, however, the greater weight of the evidence shows that both (claimant) and [(defendant)] [one or more of (defendants)] were negligent and that the negligence of each contributed as a legal cause of [loss] [injury] [or] [damage] sustained by (claimant), you should decide and write on the verdict form what percentage of the total negligence of [both] [all] parties to this action was caused by each of them.

Use the following instruction in cases with a comparative negligence defense and an apportionment of a non-party defense:

If, however, the greater weight of the evidence shows that (claimant) and [(defendant)] [one or more of (defendants)] and (identify additional person(s) or entit(y)(ies) were negligent and that the negligence of each contributed as a legal cause of [loss] [injury] [or] [damage] sustained by (claimant), you should decide and write on the verdict form what percentage of the total negligence of [both] [all] parties to this action and (identify additional person(s) or entit(y)(ies)) was caused by each of them.

Use the following instruction in cases without a comparative negligence defense but with an apportionment of a non-party defense:

If, however, the greater weight of the evidence shows that [(defendant)] [one or more of (defendants)] and (identify additional person(s) or entit(y)(ies)) were negligent and that the negligence of each contributed as a legal cause of [loss] [injury] [or] [damage] sustained by (claimant), you should decide and write on the verdict form what percentage of the total negligence of [(defendant)] and (identify additional person(s) or entit(y)(ies)) was caused by each of them.]

NOTES ON USE FOR 401.23

1. *Preemptive instructions on defense issues.* If a preemptive instruction for claimant is appropriate on a defense issue, as when comparative negligence or assumption of risk has been brought to the jury's attention on voir dire or by opening statements or argument and is now to be withdrawn, an instruction in the form of instruction

401.13 should be given immediately following instruction 401.21. If a preemptive instruction for defendant is required on some aspect of a defense, as when, for example, the court holds that any comparative negligence of the driver will reduce claimant's recovery, a preemptive instruction announcing the ruling should be given immediately after framing the defense issues (instruction 401.22a).

2. Instructions on issues raised by replies to affirmative defenses.

Plaintiff bears the burden of proof on issues raised by any replies to affirmative defenses, and instruction 401.23 should be modified as appropriate for those issues.

III. APPENDICES

The following appendices are attached to this Report:

- Appendix A: Proposed instruction
- Appendix B: January 1, 2008, Florida Bar News published notice of proposed instruction
- Appendix C: Comments received by the Committee in response to publication
- Appendix D: Relevant excerpts from the Committee's minutes
- Appendix E: Committee materials relevant to this proposal

IV. DISSENTING VIEWS FROM THE COMMITTEE

There are no dissenting views from the Committee. The Committee believes that this instruction will greatly improve the process of jury instruction and the jury's understanding of the law it must follow and unanimously recommends publication of this change.

V. COMMENTS RECEIVED

The proposed new instruction was published for comment on January 1, 2008 and one comment was received. The comment suggested that the Committee should use the term "plaintiff" rather than "claimant" in the proposed instruction to refer to the plaintiff. The Committee discussed this comment and concluded that the designation "claimant" would not actually be read to the jury, as it is simply a signal for the trial judge to substitute the party's proper name. Thus, the Committee concluded that no change was required in the light of this comment.

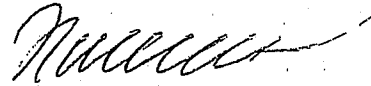
The Committee now submits this proposed instruction to the Court.

VI. CONCLUSION

WHEREFORE, the Committee respectfully requests that the Court approve the instruction set forth above and in Appendix A for publication and use as a new standard jury instruction for civil cases.

(signature block on next page)

Respectfully submitted,



James Richard Caldwell, Jr.
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Negligence Subcommittee,
Rumberger Kirk & Caldwell
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Supreme Court Committee on
Standard Jury Instructions (Civil)
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Tampa, Florida 33602
(813) 272-6994
(813) 276-2725 (fax)

CERTIFICATE OF COMPLIANCE

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

By: _____


Joseph H. Lang, Jr.

TAB A

APPENDIX A

401.23 BURDEN OF PROOF ON DEFENSE ISSUES

If the greater weight of the evidence does not support (defendant's) defense[s] and the greater weight of the evidence does support (claimant's) claim, then [your verdict should be for (claimant) in the total amount of [his] [her] damages] * [you should decide and write on the verdict form what percentage of the total negligence of [both] [all] defendants was caused by each defendant].

**Use second bracketed alternative above when there is more than one defendant.*

If, however, the greater weight of the evidence shows that both (claimant) and [(defendant)] [one or more of (defendants)] were negligent and that the negligence of each contributed as a legal cause of [loss] [injury] [or] [damage] sustained by (claimant), you should decide and write on the verdict form what percentage of the total negligence of [both] [all] parties to this action was caused by each of them.

Use the following instruction in cases with a comparative negligence defense and an apportionment of a non-party defense:

If, however, the greater weight of the evidence shows that (claimant) and [(defendant)] [one or more of (defendants)] and (identify additional person(s) or entit(y)(ies) were negligent and that the negligence of each contributed as a legal cause of [loss] [injury] [or] [damage] sustained by (claimant), you should decide and write on the verdict form what percentage of the total negligence of [both] [all] parties to this action and (identify additional person(s) or entit(y)(ies)) was caused by each of them.

Use the following instruction in cases without a comparative negligence defense but with an apportionment of a non-party defense:

If, however, the greater weight of the evidence shows that [(defendant)] [one or more of (defendants)] and (identify additional person(s) or entit(y)(ies)) were negligent and that the negligence of each contributed as a legal cause of [loss] [injury] [or] [damage] sustained by (claimant),

you should decide and write on the verdict form what percentage of the total negligence of [(defendant)] and (identify additional person(s) or entit(y)(ies)) was caused by each of them.]

NOTES ON USE FOR 401.23

1. *Preemptive instructions on defense issues.* If a preemptive instruction for claimant is appropriate on a defense issue, as when comparative negligence or assumption of risk has been brought to the jury's attention on voir dire or by opening statements or argument and is now to be withdrawn, an instruction in the form of instruction 401.13 should be given immediately following instruction 401.21. If a preemptive instruction for defendant is required on some aspect of a defense, as when, for example, the court holds that any comparative negligence of the driver will reduce claimant's recovery, a preemptive instruction announcing the ruling should be given immediately after framing the defense issues (instruction 401.22a).

2. *Instructions on issues raised by replies to affirmative defenses.*

Plaintiff bears the burden of proof on issues raised by any replies to affirmative defenses, and instruction 401.23 should be modified as appropriate for those issues.

TAB B

Notices

Proposed amendments to jury instructions dealing with evidence and burden of proof

The Supreme Court Committee on Standard Jury Instructions in Civil Cases proposes to amend its instructions on the greater weight of evidence and burden of proof on defense issues. The current instruction appears at 3.8, page 4. The proposed amendments are shown on the copy below. Comments are invited. After reviewing all comments, the committee may submit its proposal to the Florida Supreme Court.

Send all comments to Tracy Raffles Gunn, Committee Chair, Fowler White Boggs Banker PA, 501 East Kennedy Blvd. Suite 1700, Tampa 33602. You may e-mail your comments to her at tgunn@fowlerwhite.com or fax them to her at (813) 229-8313. Comments must be received by February 15, 2008, to ensure that they are considered by the committee.

GREATER WEIGHT OF EVIDENCE AND BURDEN OF PROOF ON DEFENSE ISSUES:

If the greater weight of the evidence does not support the (defendant's) defense(s) of (defendant(s)) and the greater weight of the evidence does support the (claimant's) claim of (claimant), then [your verdict should be for (claimant) in the total amount of [his] [her] damages] * [you should decide determine and write on the verdict form what percentage of the total negligence of [both] [all] defendants is chargeable to each defendant].

* Use second bracketed alternative above when there is more than one defendant. If, however, the greater weight of the evidence shows that both (claimant) and (defendant) (defendant) [one or more of the defendants (defendants)] were negligent and that the negligence of each contributed as a legal cause of [loss] [injury] [or] [damage] sustained by (claimant), you should determine and write on the verdict form what percentage of the total negligence of [both] [all] parties to this action is chargeable to each of them. Use the following instruction in cases with a comparative negligence defense and an apportionment of a non-party defense:

If, however, the greater weight of the evidence shows that (claimant) and [(defendant)] [one or more of (defendants)] and (identify additional person(s) or entity(y)(ies)) were negligent and that the negligence of each contributed as a legal cause of [loss] [injury] [or] [damage] sustained by (claimant), you should determine and write on the verdict form what percentage of the total negligence of [both] [all] parties to this action and (identify additional person(s) or entity(y)(ies)) is chargeable to each of them.

Use the following instruction in cases without a comparative negligence defense but with an apportionment of a non-party defense:

If, however, the greater weight of the evidence shows that [(defendant)] [one or more of (defendants)] and (identify additional person(s) or entity(y)(ies)) were negligent and that the negligence of each contributed as a legal cause of [loss] [injury] [or] [damage] sustained by (claimant), you should determine and write on the verdict form what percentage of the total negligence of [(defendant)] and (identify additional person(s) or entity(y)(ies)) is chargeable to each of them.



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THE UNIVERSITY OF FLORIDA Trial Team recently brought home a national title at the St. John's University National Civil Rights Trial Competition in Jamaica, NY. After a three-day competition, team members Jessica Anderson, Frank Gauden, Alicia Philip, and Justin Stevens defeated 15 teams from across the country including Pace, Arizona State, and Emory, among others. The team was coached by Stacy Scott and Third DCA Chief Judge David Garsten. The civil rights case concerned a student accusing his college of violating his due process and free speech rights in the way in which the school sanctioned him after he was accused and found responsible for harassing a college dorm director. Pictured from the left are Scott, Stevens, Philip, Gauden, Anderson, and Chief Judge Garsten.

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Approved by the Florida Supreme Court

TAB C



"Gunn, Tracy"
<tgunn@fowlerwhite.com>
01/03/2008 01:47 PM

To "Brett Marlowe" <bmarlowe@floridalawonline.com>
cc <grose@flabar.org>
bcc

Subject RE: Proposed amendments to standard jury instruction

Dear Brett,

Thank you for your thoughtful comments and input. I will send your comments to the full Committee for consideration at our upcoming meeting.

Have a very happy new year.

Best regards,
Tracy

Tracy Raffles Gunn
Board Certified Appellate Attorney
Shareholder, Fowler White Boggs Banker P.A.
501 East Kennedy Boulevard Suite 1700
Tampa, Florida 33602
(813) 228-7411
fax (813) 229-8313

From: Brett Marlowe [mailto:bmarlowe@floridalawonline.com]
Sent: Thursday, January 03, 2008 1:45 PM
To: Gunn, Tracy
Subject: Proposed amendments to standard jury instruction

Tracy,

I have taken a look at the proposed amendments to the jury instruction dealing with "greater weight of evidence and burden of proof" appearing the January 1, 2008 Florida Bar Briefs. I think the instruction is good overall and will serve to simplify things. The only suggestion that I have is that if the instruction is going to refer to the defendant as the defendant, I think the plaintiff should be referred to as the plaintiff instead of as claimant. I think this will avoid any confusion that may result from the jury hearing about the "plaintiff" throughout the case and then hearing about the "claimant" in the jury instructions. Thanks to you and the rest of the Committee members for your hard work and dedication. Happy new year.

Brett

BRETT A. MARLOWE, ESQUIRE
Page, Eichenblatt, Bernbaum & Bennett, P.A.
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Orlando, Florida 32801
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Fax: (407) 209-1006

FEBRUARY 21/22 2008

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FEBRUARY 21/22 2008

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TAB D

**SUPREME COURT COMMITTEE ON
STANDARD JURY INSTRUCTIONS (CIVIL)**

MINUTES

**The Breakers
Palm Beach, Florida**

[DATES]

July 12, 2007 (1:00 p.m. to 5:00 p.m.)

July 13, 2007 (8:30 a.m. to noon)

2. REORGANIZATION OF BOOK (Tab 11):

401.22

The instruction was rewritten as follows:

If the greater weight of the evidence does not support (Defendant's) defense[s] and the greater weight of the evidence supports (Claimant's) claim[s], then [your verdict should be for (claimant) in the total amount of [his] [her] damages] *[you should decide and write on the verdict form what percentage of the total negligence of [both] [all] defendants was caused by each defendant].

If, however, the greater weight of the evidence shows that both (Claimant) and [defendant] [one or more of the defendants] were negligent and that the negligence of each contributed as a legal cause of [loss] [injury] [or] [damage] to (Claimant), you should decide and write on the verdict form what percentage of the total negligence of [both] [all] parties to this action was caused by each of them.

Makar directed the negligence subcommittee to present the Committee with a proposed Fabre addition to this instruction, including an accompanying note on use.

**SUPREME COURT COMMITTEE ON
STANDARD JURY INSTRUCTIONS (CIVIL)**

MINUTES

**[The Omni Hotel]
Jacksonville, Florida**

[DATES]

October 25, 2007 (1:00 p.m. to 5:00 p.m.)

October 26, 2007 (8:30 a.m. to noon)

- 5. NEGLIGENCE** (Tab 6). Caldwell and Fulford presented two proposed options for new instruction 401.22, which addresses Fabre defendants. One option applies to cases with a comparative negligence defense and a Fabre defense, and the other option applies to cases without a comparative negligence defense, but with a Fabre defense.

Makar-noted that in option 1, the phrase "persons/entities" should be changed to "non-party tortfeasors," for consistency. **Caldwell stated that the subcommittee needs to do some minor re-writing to make the bracketed language internally consistent.**

Gunn suggested that after the minor revisions, the instructions be published for comment. **Makar directed instruction 401.22 be published for comment. Gunn asked the subcommittee to email the revised instruction to Rose, copying all Committee members for comment. Fulford volunteered to handle the revisions and to circulate the instruction.**

Gunn also inquired whether the subcommittee has considered an instruction about how to tell the jury what happens to its award and how it is allocated. Caldwell responded that the Committee may want to adopt the language in the existing instruction 501.1(2).

TAB E



"Caldwell, Jr., Dick"
<dcaldwell@rumberger.com>
10/11/2007 04:50 PM

To <grose@flabar.org>
cc <tgunn@fowlerwhite.com>, <griffinj@flcourts.org>,
<lcbrown@co.palm-beach.fl.us>, "Sammy Cacciatore"
<sammy@riancelaw.com>, "Lumish, Wendy F."
bcc

Subject FW: Negligence subcommittee assignments

Gerry: here is the draft instruction re: *Fabre* parties, new 401.22, prepared by Jeff Fulford. Please insert this in the materials for the upcoming meeting in Jacksonville. Let me know if you need additional info.

Thx.

From: Jeff [mailto:jeff@fulfordkinglaw.com]
Sent: Thursday, October 11, 2007 4:35 PM
To: Caldwell, Jr., Dick; tgunn@fowlerwhite.com; griffinj@flcourts.org; lcbrown@co.palm-beach.fl.us; Sammy Cacciatore; Lumish, Wendy F.
Subject: RE: Negligence subcommittee assignments

Dick

Attached are proposed versions of the new instruction (401.22) which contains a reference to *Fabre* parties. After analyzing these provisions, I think the best approach is the most simple and should just include the *Fabre* parties as part of 401.22, rather than a separate paragraph. That was one of your ideas and I think it is appropriate. On the verdict form the defendants and *Fabre* parties would all be included in one apportionment question anyway, so it seems to make sense to place them together in the instructions as well. We could go to a 3rd paragraph, but I don't think it is really necessary and personally prefer the inclusion in the paragraph with all the parties (plaintiff and defendants) that may need to have their negligence apportioned. I did include 2 options for when there is a comparative negligence defense and one without a comparative negligence defense. I'm not sure if we need both, but I didn't see a way to combine one paragraph with both scenarios. Sorry for the delay in this effort, but I thought I did it a while back and was looking for it today when we had a different subcommittee meeting.

Jeff

401.22 BURDEN OF PROOF ON DEFENSE ISSUES:

If the greater weight of the evidence does not support (Defendant's) defense[s] and the greater weight of the evidence does support (Claimant) claim, then [your verdict should be for (claimant) in the total amount of [his] [her] damages] *[you should decide and write on the verdict form what percentage of the total negligence of [both] [all] defendants was caused by each defendant].

**Use second bracketed alternative above when there is more than one defendant.*

OPTION 1

If, however, the greater weight of the evidence shows that both (Claimant) and [defendant]

October 25/26 2007
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[one or more of the defendants] and [identify non-party tortfeasor(s)] were negligent and that the negligence of each contributed as a legal cause of [loss] [injury] [or] [damage] sustained by (Claimant), you should determine and write on the verdict form what percentage of the total negligence of [both] [all] parties and [persons/entities] to this action was caused by each of them.

(To be used in cases with a comparative negligence defense and a *Fabre* defense)

OPTION 2

If, however, the greater weight of the evidence shows that [defendant] [one or more of the defendants] and [identify non-party tortfeasor(s)] were negligent and that the negligence of each contributed as a legal cause of [loss] [injury] [or] [damage] sustained by (Claimant), you should determine and write on the verdict form what percentage of the total negligence of [both] [all] parties and [persons/entities] was caused by each of them.

(To be used in cases without a comparative negligence defense, but with a *Fabre* defense)

From: Caldwell, Jr. , Dick [mailto:dcaldwell@rumberger.com]

Sent: Friday, July 20, 2007 3:31 PM

To: Jeff; tgunn@fowlerwhite.com; griffinj@flcourts.org; lcbrown@co.palm-beach.fl.us; Sammy Cacciatore; Lumish, Wendy F.

Subject: RE: Negligence subcommittee assignments

Jeff: the assignment had to do with instructing the jury on the burden of proof as to defense claims concerning *Fabre* defendants. New 401.21f is the instruction on the *Fabre* issue, and 401.22 is the burden of proof instruction re: defense issues. I've attached both 401.21f and 401.22 for ready reference below.

As you can see, 401.22 doesn't really say anything about *Fabre* "defendants" directly. The issue, as I understood it, is how to best address the burden of proof concerning these persons/entities. For example, should we just put in another phrase in brackets in the 2d part of 401.22, like "... [identify additional person or entity claimed to be negligent/at fault]...." ? Or, is it better and clearer to draft up a 3d part of 401.22, saying that if the GWOTE shows that Claimant, defendant and the additional person/entity were negligent, then apportion, etc.

If you can come up with a recommendation, we can have a conference call among members of the Negligence subcommittee, and put together a written recommendation for consideration by the full Committee at the fall meeting. Thanks for undertaking the laboring oar on this.

October 25/26 2007

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If anyone else on the subcommittee has additional thoughts on this, let's hear them. Thx. to all.

f. Apportionment of fault:

whether (identify additional person(s) or entit(y) (ies)) [was] [were] also [negligent] [(specify other type of conduct)]; and, if so, whether such [negligence] [fault] [responsibility] was a contributing legal cause of the [loss] [injury] [or] [damage] sustained by (Claimant, Decedent or person for whose injury claim is made).

NOTE ON USE 401.21f

1. In most cases, use of the term "negligence" will be appropriate. If another type of fault is at issue, it may be necessary to modify the instruction and the verdict form accordingly. In strict liability cases, the term "responsibility" may be the most appropriate descriptive term.

401.22 BURDEN OF PROOF ON DEFENSE ISSUES:

If the greater weight of the evidence does not support (Defendant's) defense[s] and the greater weight of the evidence does support (Claimant) claim, then [your verdict should be for (claimant) in the total amount of [his] [her] damages] *[you should decide and write on the verdict form what percentage of the total negligence of [both] [all] defendants was caused by each defendant].

**Use second bracketed alternative above when there is more than one defendant.*

If, however, the greater weight of the evidence shows that both (Claimant) and [defendant] [one or more of the defendants] were negligent and that the negligence of each contributed as a legal cause of [loss] [injury] [or] [damage] sustained by (Claimant), you should determine and write on the verdict form what percentage of the total negligence of [both] [all] parties to this action was caused by each of them.

NOTE ON USE

1. *Preemptive charges on defense issues.* If a preemptive charge for claimant is appropriate on a defense issue, as when comparative negligence or assumption of risk has been brought to the jury's attention on voir dire or by opening statements or argument and is now to be withdrawn, a charge in the form of 401.13 should be given immediately following 401.20. If a preemptive charge for defendant is required on some aspect of a defense, as when, for example, the court holds that any comparative negligence of the driver will reduce claimant's recovery, a preemptive charge announcing the ruling should be given immediately after framing the defense issues (401.21a).

From: Jeff [mailto:jeff@fulfordkinglaw.com]

Sent: Wednesday, July 18, 2007 12:49 PM

To: Caldwell, Jr. , Dick; tgunn@fowlerwhite.com; griffinj@flcourts.org; lcbrown@co.palm-beach.fl.us; Sammy Cacciatore; Lumish, Wendy F.

Subject: RE: Negligence subcommittee assignments

Dick

I just came into the office and saw your note. I am happy to draft the initial instruction. Give me a little guidance, if you will. I don't recall this particular discussion on what the committee thought was needed (or was this a general discussion questioning whether one might be helpful?). I'll start looking over the materials and begin a draft of a proposed instruction to use when the defendant(s) has/have asserted an affirmative defense dealing with Fabre issues. If something else was contemplated, then let me know. I should have something in the next couple of weeks. Jeff

From: Caldwell, Jr. , Dick [mailto:dcaldwell@rumberger.com]

Sent: Tuesday, July 17, 2007 1:30 PM

To: tgunn@fowlerwhite.com; griffinj@flcourts.org; lcbrown@co.palm-beach.fl.us; Sammy Cacciatore; Lumish, Wendy F.; Jeff

Subject: Negligence subcommittee assignments

At the committee meeting last week, the Negligence subcommittee received two assignments:

1. The issue was discussed whether there should be an instruction on non-delegable duties, in contexts other than med mal. Sammy Cacciatore has volunteered to take the lead on this project.
2. Also discussed was whether there should be a separate instruction which included reference to *Fabre* defendants, rather than having simply a reference to such as a part of Instruction 401.22 (under the new numbering system proposed for the Book Reorganization). Will someone volunteer to undertake the laboring oar on this one?

Thanks to all. See you in November.

October 25/26 2007

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January 1, 2008

Proposed amendments to jury instructions dealing with evidence and burden of proof

The Supreme Court Committee on Standard Jury Instructions in Civil Cases proposes to amend its instructions on the greater weight of evidence and burden of proof on defense issues. The current instruction appears at 3.8, page 4. The proposed amendments are shown on the copy below. Comments are invited. After reviewing all comments, the committee may submit its proposal to the Florida Supreme Court.

Send all comments to Tracy Raffles Gunn, Committee Chair, Fowler White Boggs Banker PA, 501 East Kennedy Blvd. Suite 1700, Tampa 33602. You may e-mail your comments to her at or fax them to her at (813) 229-8313. Comments must be received by February 15, 2008, to ensure that they are considered by the committee.

GREATER WEIGHT OF EVIDENCE AND BURDEN OF PROOF ON DEFENSE ISSUES:

If the greater weight of the evidence does not support the (defendant's) defense[s] ~~of (defendant)(s)~~ and the greater weight of the evidence does support the (claimant's) claim of (claimant), then [your verdict should be for (claimant) in the total amount of [his] [her] damages] *[you should ~~determine~~ and write on the verdict form what percentage of the total negligence of [both] [all] defendants is chargeable to each defendant].

**Use second bracketed alternative above when there is more than one defendant.*

If, however, the greater weight of the evidence shows that both (claimant) and [~~defendant (defendant)] [one or more of the defendants (defendants)] were negligent and that the negligence of each contributed as a legal cause of [loss] [injury] [or] [damage] sustained by (claimant), you should determine and write on the verdict form what percentage of the total negligence of [both] [all] parties to this action is chargeable to each of them.~~

Use the following instruction in cases with a comparative negligence defense and an apportionment of a non-party defense:

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If, however, the greater weight of the evidence shows that (claimant) and [(defendant)] [one or more of (defendants)] and (identify additional person(s) or entit(y)(ies)) were negligent and that the negligence of each contributed as a legal cause of [loss] [injury] [or] [damage] sustained by (claimant), you should determine and write on the verdict form what percentage of the total negligence of [both] [all] parties to this action and (identify additional person(s) or entit(y)(ies)) is chargeable to each of them.

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Use the following instruction in cases without a comparative negligence defense but with an apportionment of a non-party defense:

If, however, the greater weight of the evidence shows that [(defendant)] [one or more of (defendants)] and (identify additional person(s) or entit(y)(ies)) were negligent and that the negligence of each contributed as a legal cause of [loss] [injury] [or] [damage] sustained by (claimant), you should determine and write on the verdict form what percentage of the total negligence of [(defendant)] and (identify additional person(s) or entit(y)(ies)) is chargeable to each of them.

[Updated: 01-02-2008]

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"Gunn, Tracy"
<tgunn@fowlerwhite.com>
01/03/2008 01:47 PM

To "Brett Marlowe" <bmarlowe@floridalawonline.com>
cc <grose@flabar.org>
bcc
Subject RE: Proposed amendments to standard jury instruction

Dear Brett,

Thank you for your thoughtful comments and input. I will send your comments to the full Committee for consideration at our upcoming meeting.

Have a very happy new year.

Best regards,
Tracy

Tracy Raffles Gunn
Board Certified Appellate Attorney
Shareholder, Fowler White Boggs Banker P.A.
501 East Kennedy Boulevard Suite 1700
Tampa, Florida 33602
(813) 228-7411
fax (813) 229-8313

From: Brett Marlowe [mailto:bmarlowe@floridalawonline.com]
Sent: Thursday, January 03, 2008 1:45 PM
To: Gunn, Tracy
Subject: Proposed amendments to standard jury instruction

Tracy,

I have taken a look at the proposed amendments to the jury instruction dealing with "greater weight of evidence and burden of proof" appearing the January 1, 2008 Florida Bar Briefs. I think the instruction is good overall and will serve to simplify things. The only suggestion that I have is that if the instruction is going to refer to the defendant as the defendant, I think the plaintiff should be referred to as the plaintiff instead of as claimant. I think this will avoid any confusion that may result from the jury hearing about the "plaintiff" throughout the case and then hearing about the "claimant" in the jury instructions. Thanks to you and the rest of the Committee members for your hard work and dedication. Happy new year.

Brett

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FEBRUARY 21/22 2008

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May 13, 2008

Tracy Raffles Gunn, Esq.
Fowler, White, Boggs & Banker, P.A.
501 East Kennedy Blvd.
Suite 1700
Tampa, FL 33602

Re: Proposed Revisions to Florida Standard Jury Instructions in Civil Cases

Dear Ms. Gunn:

Please be advised that I am a civil trial lawyer practicing in the fields of personal injury, wrongful death with a special interest in medical malpractice litigation. My Florida Bar number is 157550. I am sending you this letter to express my comments regarding the proposed revisions of the Florida Standard Jury Instruction in Civil Cases which are posted on the Florida Bar web site.

The language of the proposed instructions that I object to are as follows:

202.2 EXPLANATION OF THE TRIAL PROCEDURE

Witnesses:

The plaintiff's lawyer will normally ask a witness the questions first *so as to provide you the testimony that the plaintiff's lawyer believes is helpful to [his] [her] case.*

OBJECTION:

The proposed bold italicized language in 202.2 implies that the plaintiff's attorney is manipulating testimony by offering only testimony favorable to his case. No such language is contained in the instruction about defense counsel putting on witnesses. Also it is the client's case not the plaintiff's attorney's case. The italicized language above should be removed so that the sentence reads "*The plaintiff's lawyer will normally ask a witness the questions first. That is called direct examination*", etc.

401.12 LEGAL CAUSE

b. Concurring cause:

Negligence may be a legal cause of [loss] [injury] [or] [damage] even though it operates in combination with some other cause if the negligence contributes substantially to producing such [loss] [injury] [or] [damage].

OBJECTION:

The proposed revision of Florida Standard Jury Instruction 5.1(b) eliminates several important provisions of existing Florida law on causation. The existing language of 5.1 (b) should be preserved as follows:

"In order to be regarded as a legal cause of loss, injury or damage, negligence need not be the only cause". "Negligence may be a legal cause of loss, injury or damage even though it operates in combination with the act of another or some natural cause is such cause occurs at the same time as the negligence and if the negligence contributes substantially to producing such loss, injury or damage."

By eliminating the language in section (b) and keeping it in section (c) the proposed revision would automatically require the giving of (c) in all cases where the defense of comparative negligence has been raised; where there is more than one defendant; where there is a *Fabre* non-party and where there aggravation of an existing disease is in issue. It would be much easier to keep the language in (b) and eliminate the necessity of giving (c) in most cases.

401.14 PRELIMINARY ISSUES - VICARIOUS LIABILITY

a. *Owner, Lessee, or bailee of vehicle driven by another:*

[An owner of a vehicle is one who has legal title to the vehicle *and* who has the right of control and authority over its use].

OBJECTION:

The substitution of "*and*" for "*or*" contained in existing Florida Standard Jury Instruction 3.3 (a) substantially changes the law on the subject of vicarious liability arising out of the use of a motor vehicle under the dangerous instrumentality doctrine.

The law is that vicarious liability can arise out of either owning a vehicle and loaning it to someone else to use *or* having the right of control and authority over it use and allowing someone else to use it. Existing case law does not require ownership *and* the right of control. The proposed revision does not reflect existing case law and is an attempt to change the law of vicarious liability in order to make it more restrictive in favor of the defense. The existing wording of 3.3 (a) should be retained.

401.22 DEFENSE ISSUES:

d) *Comparative negligence of parent predicated on other parent's negligence (claim for death of child):*

whether (parent) was negligent in caring for and supervising the child, (name); if so, whether that negligence was a contributing legal cause of the death of (child), and if so, whether,

(other parent), in the exercise of reasonable care, should have anticipated that negligence on the part of (parent).

e) *Comparative negligence of custodian of child other than parent:*

whether, before the incident in this case, (claimant) placed (child) in the care and custody of (custodian), if so, whether (custodian) was negligent in caring for and supervising the child, (name); and, if so, whether that negligence was a contributing legal cause of [injury] [and] [death] to (child).

OBJECTION:

The issues of *Fabre* non-party negligence are adequately covered by proposed instruction 401.22 (f). The two cited cases that are 44 and 58 years old. *Wynne v. Adside*, 163 So.2d 760 (Fla. 1st DCA 1964) and *Winner v. Sharp*, 43 So.2d 634 (Fla. 1950). Those cases were decided under a system of contributory negligence which can no longer be used to bar a plaintiff's claim under Florida law. The cases are archaic and so are sections (d) and (e) of the proposed instructions. The stated purpose of the revisions is to modernize the instructions. Sections (d) and (e) should be eliminated and section (f) used in their place.

501.7 REDUCTION OF DAMAGES TO PRESENT VALUE:

Note: The language of the proposed instruction is the same as existing SJI 6.10.

OBJECTION:

The stated purpose of revising the Florida Standard Jury Instructions in Civil Cases is to modernize them. The Florida Supreme Court has stated that it is not necessary to offer expert testimony in order reduce future economic losses to their present money value. *Delta Air Lines, Inc. v. Ageloff*, 552 So.2d 1089 (Fla. 1989). The court stated that there were several different methods which could be used by juries to arrive at the present money value of an award.

I would suggest that this instruction should be modified to incorporate the ruling of the Florida Supreme Court and to make it clear that it is not necessary for the jury to hear expert

Tracy Raffles Gunn, Esq.
Fowler, White, Boggs & Banker, P.A.
May 13, 2008
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testimony on the subject in order to arrive at a proper verdict. I would suggest adding the following language to the end of the instruction.

"There is no preferred method of reducing future economic damages to present money value and you may use whatever method you choose based on the evidence and on your own common knowledge as guided by the argument of counsel."

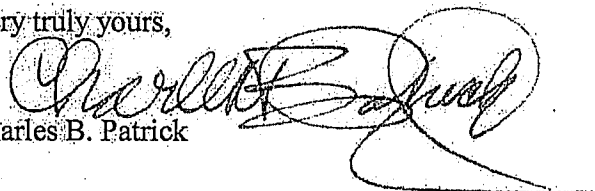
Please present these comments for consideration by the committee as well as the other comments I have submitted on the other proposed changes to the Florida Standard Jury Instructions in Civil Cases that I previously submitted.

If anyone on the committee wishes to discuss my objections you may reach me at (305) 854-1770 or by e-mail at charlespatrick@bellsouth.net.

Thank you for your consideration.

Very truly yours,

Charles B. Patrick



CBP/dcr