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IN THE SUPREME COURT OF FLORIDA

CASE NO. SC13-_____

In re Standard Jury Instructions (Civil),

Committee Report Number 13-01

Products Liability Instructions

_____/

REPORT NO. 13-01 OF THE COMMITTEE ON STANDARD JURY INSTRUCTIONS (CIVIL): PRODUCTS LIABILITY INSTRUCTIONS

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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 requests that this Court approve for publication and use revised Florida Standard Jury Instructions (Civil) for Products Liability, 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

In 2009, the Committee submitted a proposal to reorganize the Standard Jury Instructions in Civil Cases and simplify the instructions to make them more understandable. See In re Standard Jury Instructions in Civil Cases—Report No. 09-01 (Reorganization of the Civil Jury Instructions), 35 So. 3d 666 (Fla. 2010) ("In re Reorganization"). As part of that project, the Committee comprehensively reviewed the products liability jury instructions. In a separate report, the Committee reformatted the products liability instructions in accord with the new "template" developed for the reorganized civil jury instructions, updated and clarified the instructions, and simplified the instructions to make them more understandable. See In re Standard Jury Instructions in Civil Cases—Report No. 09-10 (Products Liability), 91 So. 3d 785 (Fla. 2012) (Case No. SC09-1264) ("In re Products Liability").

This Court issued its corrected opinion on the Committee's products liability report on May 17, 2012. See In re Products Liability, 91 So. 3d at 785. This Court stated that it preliminarily approved several of the products liability instructions as proposed by the [1]Committee. Id. at 786-88. The Court preliminarily approved other instructions as modified in the appendix to the [2] decision. Id. at 787. This Court explained that these "approvals are only preliminary because this group of instructions must be viewed as a full package before authorization can be provided." Id. at 787.

The Court rejected the following instructions and requested that the Committee "make revisions consistent with the instructions preliminarily approved" in the decision:

403.7	-	Strict Liability;
403.11	-	Inference of Product Defect or Negligence (new);
403.13	-	Preliminary Issue (new);

1 Instruction 403.1 – Introduction (new); instruction 403.2 – Summary of Claims (new); instruction 403.4 – Express Warranty; instruction 403.5 – Implied Warranty of Merchantability; instruction 403.6 – Implied Warranty of Fitness for Particular Purpose; instruction 403.8 – Strict Liability Failure to Warn (new); instruction 403.10 – Negligent Failure to Warn (new); instruction 403.12 – Legal Cause; instruction 403.14 – Burden of Proof on Preliminary Issue; instruction 403.15 – Issues on Main Claim; and instruction 403.17 – Burden of Proof on Main Claim; and instruction 403.19 – Burden of Proof on Defense Issues. Although the opinion stated that instructions 403.10 and 403.15 had been preliminarily approved as proposed by the Committee, the Court actually revised these instructions.

2 The decision stated that instruction 403.9 – Negligence and instruction 403.18 – Defense Issues (new) had been approved as modified in the appendix. However, it does not appear that the Court modified instruction 403.18. The Court also rejected instruction 403.3 – Greater Weight of the Evidence, but preliminarily approved the instruction as modified in the appendix to conform with revisions to the "Greater Weight of the Evidence" throughout the Florida Standard Jury Instructions in Civil Cases.

403.14	-	Burden of Proof on Preliminary Issue;[3]
403.16	-	Issues on Crashworthiness and "Enhanced Injury" Claims (new); Model Instruction 7; and Special Verdict Form.

Id.

In addition, the Court asked the Committee to review all of the products liability instructions to make sure they are consistent with In re Reorganization, 35 So. 3d at 366, and the instructions addressing jurors' use of electronic devices, In re Standard Jury Instructions in Criminal Cases—Report No. 2010-01 & Standard Jury Instructions in Civil Cases—Report No. 2010-01, 52 So. 3d 595 (Fla. 2010). The Court issued both of these decisions amending the civil jury instructions after the Committee submitted its original products liability report in July 2009.

In a letter from Tom Hall, the Clerk of Court of the Supreme Court of Florida dated June 4, 2012, the Court asked this Committee to consider its decision on the products liability report and to file a new report with the Court by November 19, 2012. The Committee requested additional time to file this report so that the Committee could publish its proposed amendments for public comments and then consider the comments at a meeting of the full Committee. This Court granted this Committee an extension until April 15, 2013.

3 The decision stated the Court preliminarily approved instruction 403.14 – Burden of Proof on Preliminary Issue, but also referred it back to the Committee for further work.

II. DESCRIPTION OF APPENDICES

The following appendices are attached to this Report:

Appendix A: Proposed instructions

Appendix B: February 1, 2013, Florida Bar *News* Notice

Appendix C: Comments received by the Committee

Appendix D: Relevant excerpts from the Committee's minutes

Appendix E: Committee materials relating to this topic.

III. DRAFTING HISTORY OF PROPOSED INSTRUCTIONS

The products liability [4] subcommittee specifically considered: (1) thedefinition of strict liability, affecting instructions 403.7, 403.15, and 403.18; (2)crashworthiness, affecting instructions 403.16 and 403.2; (3) inferences, instruction403.11; (4) preliminary issues, affecting instructions 403.13 and 403.14; and (5)review of all products liability instructions for consistency and to conform themwith this Court's recent decisions in instructions cases. The productssubcommittee deferred consideration of the model charges and verdict formspending final approval

4 Rebecca Mercier Vargas chaired the products liability subcommittee, composed of Committee members Brian J. Baggot, the Honorable Tyrie W. Boyer, Gary D. Fox, Elizabeth K. Russo, David J. Sales and Laura Whitmore and *ex officio* member Gary Farmer, Sr. In addition, former Committee members Ralph Artigliere and the Honorable John Marshall Kest served on the products liability subcommittee until the end of their terms on the Committee.

of the instructions. After meeting numerous times by phone and e-mail, the products liability subcommittee submitted a detailed memorandum

and proposed instructions for the consideration of the full Committee, which are attached in Appendix E.

At a meeting on October 25-26, 2012, the full Committee considered the instructions proposed by the products liability subcommittee. The minutes from the Committee's meetings are attached in Appendix D. The Committee made several revisions to the proposed products liability instructions and approved the revised instructions for publication.

The Committee published the proposed products liability instructions for comment in the February 1, 2013, Florida Bar *News*, which is attached in Appendix B. The Committee also published the proposed products liability instructions on this Court's website on January 21, 2013. The Committee sent a copy of the publication notice to each of the attorneys who participated in the oral argument in the In re Products Liability case.

The Committee received four comments on the publication notice from members of the public. These comments are included in Appendix C to this report. The Committee considered these comments and the recommendations of the products liability subcommittee during a meeting on March 7-8, 2013.

After making revisions at this meeting, the Committee unanimously approved the proposed instructions to be submitted to this Court. In order to meet this Court's deadline, the Committee deferred consideration of the products

liability model charges and special verdict form. The Committee is also continuing to consider some of the issues raised in the comments, as discussed below.

The Committee proposes the following revisions to the products liability instructions:

Instruction 403.2 – Summary of Claims

The Committee made a minor change to the language summarizing a crashworthiness claim. This revision makes the language in instruction 403.2 consistent with the language in the notes on use for Instruction 403.16 – Issues on Crashworthiness and "Enhanced Injury" claims.

Instruction 403.3 – Greater Weight of the Evidence

This Court rejected instruction 403.3 – Greater Weight of the Evidence, and revised this instruction to make it consistent with the Greater Weight of the Evidence instructions[5] approved in companion case In re Reorganization, 35 So. 3d at 668-69 & 671. This Court did not refer instruction 403.3 to the Committee for further work. See In re Products Liability, 91 So. 3d at 787. The Committee agrees with the Court that no further revisions are needed to instruction 403.3, which is now consistent with the instructions on the Greater Weight of the Evidence throughout the Florida Standard Jury Instructions in Civil Cases.

5 Instructions 401.3, 402.3, 404.3, 405.3, 406.3, 407.3, 408.3, 409.3, 410.3, 412.5, 413.3, 503.1b(1), b(2), b(3), b(4), and c(1), and 503.2b(1), b(2), b(3), and b(4).

Instruction 403.7 - Strict Liability

This Court rejected the definition of strict liability the Committee proposed in instruction 403.7. In the appendix to the decision, the Court modified the Committee's proposed instruction and then struck-through the instruction. This Court preliminarily approved instruction 403.15 – Issues on Main Claim, and instruction 408.18 Defense Issues. The Committee considered all three of these related instructions together to make sure that they use consistent language regarding strict liability.

The Committee's 2009 proposal: In instruction 403.7, the Committee submitted a single definition of "strict liability" applicable to both manufacturing and design defect cases. The former PL instructions provided separate instructions for manufacturing defects in PL 4 and design defects in PL 5. Like PL 5, the Committee's proposed instruction 403.7 included both the risk/benefit and consumer expectations tests to define strict liability. In note on use 3, the Committee explained that both of these tests had been included in PL 5 and, "[p]ending further development in the law, the committee takes no position on whether the risk/benefit test is a standard for product defect that should be included in instruction 403.7 or an affirmative defense under instruction 403.18."

The note on use to instruction 403.18b, the risk/benefit affirmative defense, contains very similar language that the defendant may be entitled to an instruction

on the risk/benefit affirmative defense. The note states that pending further development in the law, the Committee takes no position on whether the risk/benefit test is an element of the strict liability cause of action or an affirmative defense.

The Court's decision: In the corrected opinion, the Court revised instruction 403.7 in several respects. First, the Court provided separate definitions of design and manufacturing defects, which is consistent with former PL 4 and PL 5. Second, the Court deleted the risk/benefit test from the definition of defect in 403.7, from the statement of issues for the jury to decide in 403.15d, and from instruction 403.16 – Issues on Crashworthiness and "Enhanced Injury" Claims. However, in the instruction on the risk/benefit affirmative defense in 403.18b, the Court retained the note on use stating that, pending further development in the law, the Committee takes no position on whether the risk/benefit test is an element or an affirmative defense.

In a concurring opinion written to give the Committee guidance, Justice Pariente suggested that "the definitions of manufacturing defect and design defect [in instruction 403.7] should be kept separate in order to avoid confusion." In re Products Liability, 91 So. 3d at 788. Justice Pariente also recommended retaining the current definition of defect until the issue is decided in an actual case and controversy. Id. at 788-89.

Revisions in response to the decision: The Committee made the following revisions to instruction 403.7 and the notes on use in response to the Court's decision:

1. The Committee revised instruction 403.7 to provide separate definitions for manufacturing defect and design defect, similar to former instructions PL 4 and PL 5. Note on use 1 explains that the instruction retains the definition of manufacturing defect found in PL 4, with minor changes to make the instruction more understandable.

2. The Committee revised instruction 403.7 to retain both the consumer expectations and risk/benefit tests to define a design defect, using the language found in former instruction PL 5. The decision itself does not state that the Court is rejecting the risk/benefit test.[6]

The Committee believes that, in light of recent cases, it is premature to delete the risk/benefit test from the definition of strict liability. After the Committee filed its initial report in 2009, two cases from the Third District held that the risk/benefit test applies to design defect cases. See Union Carbide Corp. v.

6 The instructions in the appendix to the decision conflict as to whether the Court intended to eliminate the risk/benefit test as an element of a strict liability claim. On one hand, the Court amended instructions 403.7 and 403.16 to delete the risk/benefit test and then struck through both instructions. The Court also amended instruction 403.15d to delete the risk/benefit test from the definition of strict liability and preliminarily approved this instruction. On the other hand, the Court preliminarily approved instruction 403.18b with the note on use stating that the instructions take no position on whether the risk/benefit test is an element or affirmative defense.

Aubin, 97 So. 3d 886, 897 (Fla. 3d DCA 2012); Agrofollajes, S.A. v. E.I. Du Pont de Nemours & Co., 48 So. 3d 976, 996-97 (Fla. 3d DCA 2010), review denied, 69 So. 3d 277 (Fla. 2011). In 2009, the Committee proposed a note to instruction 403.7 that cited several cases recognizing the consumer expectation test: McConnell v. Union Carbide Corp., 937 So. 2d 148, 151 n.4 (Fla. 4th DCA 2006); Force v. Ford Motor Co., 879 So. 2d 103, 107 (Fla. 5th DCA 2004); Adams v. G. D. Searle & Co., 576 So. 2d 728, 733 (Fla. 2d DCA 1991); Cassisi v. Maytag Co., 396 So. 2d 1140, 1145-46 (Fla. 1st DCA 1981). The Committee updated note on use 3 to include the citations to the Union and Agrofollajes cases applying the risk/benefit test.

3. In response to the comments from members of the public (Ms. Wendy Lumish and Mr. Richard Caldwell), the Committee added two sentences to the notes on use that had been included in the notes to the former PL instructions: (1) warning that the two issue rule may be implicated if both the consumer expectations and the risk/utility test risk are used; and (2) warning of the possibility of an inconsistent verdict if claims of both negligence and design defect are submitted to the jury.

4. The Committee also adopted the suggestion of Ms. Lumish and Mr. Caldwell to delete the first sentence of note 1 ("the claimant is not required to plead or prove whether the defect in the product came from its design or

manufacture"), and delete the citations to Ford Motor Co. v. Hill, 404 So. 2d 1049 (Fla. 1981), and McConnell, 937 So. 2d at 148. This sentence is no longer necessary because the instructions for design and manufacturing defects have been separated.

5. The Committee revised note on use 6 to make clear that a special instruction may be needed when the jury may not understand that, in addition to the designer and manufacturer, other defendants in the chain of distribution can be held strictly liable.

Instruction 403.8 – Strict Liability Failure to Warn

In response to a comment from the public (Ms. Wendy Lumish and Mr. Richard Caldwell), the Committee added a citation to note 1 to include a recent decision, Union Carbide Corp. v. Aubin, 97 So. 3d 886 (Fla. 3d DCA 2012).

Instruction 403.9 – Negligence

The Committee deleted note on use 1 to instruction 403.9 – Negligence. In this instruction and instruction 403.10 – Negligent Failure to Warn, the Court deleted language suggesting that the plaintiff in a negligence case also has to prove that the product was in a defective condition. See In re Products Liability, 91 So. 3d at 796-97. The Committee deleted note on use 1 to conform with these revisions.

Instruction 403.11 – Inference of Product Defect or Negligence

The Committee's 2009 proposal: In instruction 403.11 – Inference of Product Defect or Negligence, the Committee recommended against proposing a standard instruction on inferences. The notes on use explained that no standard instruction is appropriate for: (1) the government rules statute, section 768.1256, Florida Statutes; and (2) the inference of defect created when a product malfunctions during normal operations, which was recognized in Cassisi v. Maytag Co., 396 So. 1140, 1148 (Fla. 1st DCA 1981).

The government rules statute, section 768.1256, creates a rebuttable presumption of negligence or defect when the defendant fails to comply with a government rule that was designed to prevent the type of harm the plaintiff suffered.[7] Conversely, if the defendant complies with a government rule, there is a rebuttable presumption that the product is not defective. Id.

7 Section 768.1256 provides: (1) In a product liability action brought against a manufacturer or seller for harm allegedly caused by a product, **there is a rebuttable presumption that the product is not defective or unreasonably dangerous** and the manufacturer or seller is **not liable if,** at the time the specific unit of the product was sold or delivered to the initial purchaser or user, the aspect of the product that allegedly caused the harm:(a) **Complied with federal or state codes, statutes, rules, regulations, or standards relevant to the event causing the death or injury**;(b) The codes, statutes, rules, regulations, or standards are designed to prevent the type of harm that allegedly occurred; and(c) Compliance with the codes, statutes, rules, regulations, or standards is required as a condition for selling or distributing the product.(2) In a product liability action as described in subsection (1), there is a **rebuttable presumption that the product is defective or unreasonably dangerous** and the manufacturer or seller is liable **if the manufacturer or seller did not comply with the federal or state codes, statutes, rules, regulations, or standards** which:(a) Were relevant to the event causing the death or injury;(b) Are designed to prevent the type of harm that allegedly occurred; and(c) Require compliance as a condition for selling or distributing the product.(Emphasis added).

In December 2008, the Committee published a proposed instruction on the government rules statute, section 768.1256, Florida Statutes. After publication, the Committee decided that the law was too unsettled regarding whether the statute created a burden-shifting presumption or a vanishing presumption. Ultimately, in the 2009 report, the Committee submitted a note on use, explaining "[t]he statute does not state whether the presumption is a burden-shifting or a vanishing presumption." The note explained that, pending further development in the law, the Committee does not recommend a standard instruction on the government rules statute.

The Court's decision: The Court rejected the proposed note on use for instruction 403.11 and referred it back to the Committee for further work. The majority decision and the separate opinions do not discuss the inference instruction. In the appendix to the decision, the Court stated that instruction 403.11 was "(Reserved)."

Revisions in response to the decision: The Committee again recommends against adopting an instruction on inferences for products liability cases. The law remains unsettled regarding whether any instruction is appropriate.

1. The government rules statute, section 768.1256

Since the Committee's original report, no appellate decisions have addressed whether the government rules statute creates a bursting-bubble presumption or a

presumption affecting the burden of proof. See Charles W. Ehrhardt, Ehrhardt's Fla. Evidence, § 301.1 (2012 ed.) (observing that government rules statute does not specify whether it creates bursting-bubble or burden-shifting presumption and "[i]t is not apparent whether these statutory presumptions are established primarily to facilitate the determination of the presumed fact or to implement social policy").

Although there are no decisions directly involving the government rules statute, this Court has discussed jury instructions on presumptions in different contexts. See Univ. Ins. Co. of N. Am. v. Warfel, 82 So. 3d 47, 51-53 (Fla. 2012); Birge v. Charron, 107 So. 3d 350, 359-61 (Fla. 2012). This Court explained that juries do not receive an instruction on presumptions that affect the burden of production, commonly known as a bursting-bubble presumption. Warfel, 82 So. 3d at 54. However, if the presumption is one "affecting the burden of proof," the jury decides whether the conflicting evidence overcomes the presumption. Id. If the legislature intends to create a presumption affecting the burden of proof, it usually does so with express language. Id. at 58-59.

If courts interpret section 768.1256 as a presumption creating a burden of production, no instruction should be given under Warfel or Birge. Because the law remains unsettled on whether an instruction should be given at all, the Committee again recommends including a note on use stating the reasons the Committee declines to propose a government rules instruction. The Committee updated the

note on use to add a citation to Warfel and Birge.

2. Cassisi inferences

The Committee's 2009 proposal: In instruction 403.11, the Committee also declined to propose an instruction regarding the inference of defect created when a product malfunctions during normal operations, as recognized in Cassisi v. Maytag Co., 396 So. 2d 1140, 1148 (Fla. 1st DCA 1981). The note explained that no instruction is appropriate, citing cases including Gencorp, Inc. v. Wolfe, 481 So. 2d 109 (Fla. 1st DCA 1985). A similar note has been in the former PL instructions since 2004.

The Court's decision: This Court did not express any concern about the lack of a Cassisi instruction in the opinion or during oral argument. This note on use has been part of the instructions since 2004. The law has not changed. It remains correct to state in the note that the Committee declines to propose a Cassisi instruction pending further development in Florida law.

Instruction 403.12 – Legal Cause

The Committee corrected typographical errors in the notes on use. The notes on use mistakenly referred to instruction 403.10. These references were corrected to refer to the causation instruction, 403.12.

Instruction 403.13 – Preliminary Issue and
Instruction 403.14 – Burden of Proof on Preliminary Issue

This Court rejected instruction 403.13 – Preliminary Issue, which set forth the preliminary issue to be given when the defendant did not have physical possession of the product. The appendix to the decision states that instruction 403.13 is "[r]eserved." In re Products Liability, 91 So. 3d at 799.

The decision is inconsistent regarding instruction 403.14. The decision "preliminarily approves" instruction 403.14 and includes it in the appendix, but the decision and the Court's referral letter ask the Committee to work further on this instruction. In re Products Liability, 91 So. 3d at 787 & 799. The Committee sought clarification on this issue from the Clerk of the Court, but did not receive a response. The comments during oral argument and the Court's decision do not indicate the type of revisions, if any, intended by the Court. The Committee made a slight revision to instruction 403.14 to make it more consistent with the language regarding burden of proof used throughout the Florida Standard Jury Instructions in Civil Cases.

The Committee republished both of these instructions. The Committee received three comments (from Mr. Don Fountain, Ms. Julie Littky-Rubin, Mr. Todd Stewart, Mr. Theodore Leopold, and Ms. Leslie Kroeger) that these instructions could be read as requiring defendants in strict liability cases to be in the position "to correct" defects. This is inconsistent with Florida law recognizing that strict liability extends to all defendants in the chain of distribution.

The Committee is concerned that instruction 403.13 might be misinterpreted as requiring defendants to be in a position to correct the defect. Although the notes to this instruction state that the Committee intends instruction 403.13 to apply only in the narrow circumstances outlined in Rivera v. Baby Trend, Inc., 914 So. 2d 1102 (Fla. 4th DCA 2005), this may not be sufficient. The Committee is continuing to consider this issue. The Committee recommends that this Court continue to state that instruction 403.13 is "[r]eserved."

Instruction 403.15 – Issues on the Main Claim

The Committee revised instruction 403.15(d) – Issues on Main Claim, to make this instruction consistent with the revisions to instruction 403.7 – Strict Liability. In line with the revisions to instruction 403.7, the Committee divided the instructions on the issues for the jury to decide in a claim for strict liability into two separate paragraphs for manufacturing defects (403.15d) and design defects (403.15e). For the same reasons as the Committee revised instruction 403.7, the Committee included the risk/utility test as a test for a design defect. The new note on use for instruction 403.15 parallels the notes for instruction 403.7.

Instruction 403.16 – Issues on Crashworthiness and "Enhanced Injury" Claims

The Committee's 2009 proposal: The Committee proposed instruction 403.16 – Issues on Crashworthiness and "Enhanced Injury" Claims, to be given

when the plaintiff claimed that the defect enhanced or increased the injury. In December 2009, this Court sought public comment on issues including whether the Committee's proposed instruction 403.16 on crashworthiness "fully and accurately conforms with the principle of law established in D'Amario v. Ford Motor Co., 806 So. 2d 424 (Fla. 2001)." During oral argument, the justices and counsel discussed whether the proposed instruction accurately reflected the D'Amario decision.

Legislative action: In 2011, which was after the Committee submitted its original report and the oral argument, the Legislature amended section 768.81, Florida Statutes. The legislative history stated that the intent of the amendment is to retroactively overrule the decision in D'Amario:

> **Section 2.** The Legislature intends that this act be applied retroactively and overrule D'Amario v. Ford Motor Co., 806 So. 2d 424 (Fla. 2001), which adopted what the Florida Supreme Court acknowledged to be a minority view. That minority view fails to apportion fault for damages consistent with Florida's statutory comparative fault system, codified in s. 768.81, Florida Statutes, and leads to inequitable and unfair results, regardless of the damages sought in the litigation. The Legislature finds that, in a products liability action as defined in this act, fault should be apportioned among all responsible persons.

Ch. 2011–215, §2, Laws of Fla. (2011). As amended, section 768.81(3)(b) now provides:

> **In a products liability action alleging that injuries received**

> **by a claimant in an accident were enhanced by a defective product, the trier of fact shall consider the fault of all persons who contributed to the accident when apportioning fault between or among them. The jury shall be appropriately instructed by the trial judge on the apportionment of fault in products liability actions where there are allegations that the injuries received by the claimant in an accident were enhanced by a defective product.** The rules of evidence apply to these actions.

(Emphasis added).

The Court's decision: The Court rejected instruction 403.16. In the appendix to the decision, the Court deleted the risk/benefit test from instruction 403.16, but did not make other revisions to the crashworthiness instruction. The Court struck through the instruction and referred instruction 403.16 back to the Committee for further consideration. The majority decision does not explain what revisions are needed. In her concurring opinion, Justice Pariente explained "that in light of the legislative changes regarding crashworthiness, Instruction 403.16 must be rejected in its present form." In re Products Liability, 91 So. 3d at 788.

Revisions in response to the decision and section 768.81: The Committee recommends deleting the crashworthiness instruction. Instead of an instruction, the Committee proposes a note on use stating that in light of the 2011 amendment to section 768.81, it is no longer necessary to give a special crashworthiness instruction. The jury should still be given the second bracketed paragraph of instruction 403.2 – Summary of Claims, which explains the nature of an enhanced

injury claim. Although this Court had already preliminarily approved instruction 403.2, the Committee revised the second bracketed paragraph slightly to make the language consistent with section 768.81 and the note on use for instruction 403.16.

The Committee debated whether the amendment to section 768.81 could be applied retroactively to overrule D'Amario. The Legislature expressly stated that it intended retroactive application. However, this leaves the question of whether retroactive application violates due process. The Committee is aware of several trial-level decisions applying the amendment retroactively, but there are no appellate decisions on this issue. The Committee assumes that the statute is constitutional until an appellate decision issues to the contrary.

As amended, section 768.81(3)(b) requires that the jury "**consider the fault of all persons who contributed to the accident when apportioning fault**" and the jury "shall be appropriately instructed by the trial judge **on the apportionment of fault** in products liability actions where there are allegations that the injuries received by the claimant in an accident were enhanced by a defective product."

The Committee agreed that the intent of the statute is to treat defendants incrashworthiness cases like all other defendants for the purposes of apportionmentof fault. For this reason, the jury can be given standard instructions

explaining that an injury can have more than one cause and how to apportion fault between the

defendant, plaintiff and Fabre[8] non-parties. The jury can also be given standard damages instructions explaining how to apportion damages when the injuries have more than one cause. For this reason, the Committee recommends a note on use instead of a special crashworthiness instruction.

The Committee considered the concerns of Ninth Circuit Court Judge John Marshall Kest that the standard causation instruction, 403.12, might need to be revised in crashworthiness cases. Judge Kest expressed concern that the standard causation instructions may not be enough to sufficiently inform jurors that a defect can be the legal cause of enhanced injuries. Jurors could find this subject confusing, because the manufacturer's negligence or fault typically happened long before the crash. The Committee decided that the standard instruction on intervening cause already adequately covers scenarios where the defendant's fault occurred before other causes of the injury.

Another Committee member, Brian J. Baggot, suggested that a special instruction in crashworthiness cases is needed to inform jurors that an enhanced injury is an element of the plaintiff's case. In other words, the plaintiff must show both that the car was defective and that the defect increased or enhanced the plaintiff's injuries. The Committee agreed that the standard instructions on negligence, defect, causation and damages will accurately state the elements of the

8 Fabre v. Marin, 623 So. 2d 1182 (Fla. 1993), receded from on other grounds, Wells v. Tallahassee Mem'l Reg'l Med. Ctr., 659 So. 2d 249 (Fla. 1995).

plaintiff's claims, even when the defect caused an enhanced injury.

Instruction 403.7 – Burden of Proof on Main Claim

The Committee revised this instruction slightly to make it consistent with the other similar instructions in the reorganized Florida Standard Jury Instructions in Civil Cases (for example, negligence instruction 401.21 – Burden of Proof on Main Claim).

Instruction 403.18 – Defense Issues

The Committee made minor revisions to make Instruction 403.18 – Defense Issues consistent with similar instructions in the reorganized Florida Standard Jury Instructions in Civil Cases (for example, negligence instruction 401.22 – Defense Issues).

In the note on use regarding the government rules defense, 403.18c, the Committee added citations to make the note consistent with the note on use to Instruction 403.11 – Inference of Product Defect or Negligence, discussed above.

The Committee corrected a typographical error in note on use for 403.18d.

Instruction 403.19 – Burden of Proof on Defense Issues

The Committee revised this instruction to correct some discrepancies with instructions in the reorganized Florida Standard Jury Instructions in Civil Cases (see negligence instruction 401.23 – Burden of Proof on Defense Issues). In the first and second paragraphs of 403.19, the last lines ask the jury to determine the

percentage of "damages" caused by the defendant or each party. In contrast, the analogous negligence instruction 401.23 asks the jury to apportion "negligence." The Committee believes that it is more accurate and consistent with the negligence instructions to revise instruction 403.19 to ask the jury to apportion "[negligence] [fault] [responsibility]."

In the last note on use, the Committee revised the term "preemptive charge" to use the term "preemptive instructions." This makes the instruction consistent with the analogous negligence instruction 401.23. The Committee also corrected a typographical error in an incorrect cross-reference in the last line of the preemptive instruction note on use.

IV. DISSENTING VIEWS FROM THE COMMITTEE

The Committee voted unanimously to submit these instructions to the Court. There are no dissenting views from the Committee.

V. COMMENTS RECEIVED

In response to the publication of the proposed products liability instructions, the Committee received four comments. These comments are included in Appendix C. The following attorneys submitted comments:

1. Don Fountain and Julie H. Littky-Rubin, Clark, Fountain, La Vista, Prather, Keen & Littky-Rubin (February 21, 2013).

2. Todd Stewart, Law Offices of Todd S. Stewart (February 24, 2013)

3. Wendy F. Lumish with Carlton Fields and J. Richard ("Dick") Caldwell with Rumberger, Kirk & Caldwell (February 28, 2013)

4. Theodore J. Leopold and Leslie M. Kroeger with Leopold Law (March 1, 2013).

The comments adopted by the Committee are discussed above, along with the discussion of the proposed instructions. The remainder of the comments are addressed here:

Instruction 403.7 – Strict Liability and Instruction 403.9 – Negligence

The Committee disagreed with the suggestion from Ms. Lumish and Mr. Caldwell to delete note 5. This note states that when strict liability and negligence claims are tried together, the jury may need to be instructed that a product can be defective even if the defendant exercised all reasonable care. This comment argued that many Florida courts have held that if a jury finds the product is not defective due to its design, then the manufacturer could not have been negligent in designing the product.

Alternatively, Ms. Lumish and Mr. Caldwell suggested adding this language to Instruction 403.9 – Negligence:

> In order to find [Defendant] liable for negligent [design] [manufacture] [importing] [selling] [supplying], you must first find that the [describe product] was in a defective condition, as defined earlier.

The Committee declined to adopt these suggestions. As originally submitted by the Committee, instruction 403.9 stated that: "Negligence is doing something that a reasonably careful [designer] . . . would do under like circumstances, **which results in a product being in an unreasonably dangerous condition**." The Court deleted this bold language. The Court made a similar change to instruction 403.10 – Negligent Failure to Warn, and deleted language that negligence in failing to give appropriate warnings "**make[s] the product unreasonably dangerous**." In light of the Court's revisions, the Committee feels that the Court has rejected this approach.

Instruction 403.10 – Negligent Failure to Warn

This Court preliminarily approved instruction 403.10 – Negligent Failure to Warn. Three comments (from Mr. Fountain, Ms. Littky-Rubin, Mr. Stewart, Mr. Leopold and Ms. Kroeger) suggested revising this instruction to make clear that the defendant has a post-sale duty to warn. These attorneys cited Sta-Rite Indus., Inc. v. Levey, 909 So. 2d 901, 905 (Fla. 3d DCA 2004) (jury question existed on failure to warn claim "in the light of similar severe accidents which occurred both before and after the sale of the pump in question"), and Williams v. Am. Laundry & Mach. Indus., 509 So. 2d 1363, 1365 (Fla. 2d DCA 1987) (declining to reach argument on post-sale duty to warn because statute of repose barred claim). In addition to these cases, the Committee considered High v. Westinghouse Elec.

Corp., 610 So. 2d 1259, 1263 (Fla. 1992), which found the defendant "had a duty to timely notify the entity to whom it sold the electrical transformers . . . once it was advised of the PCB contamination."

The Committee agreed with these comments that under Sta-Rite and High, defendants have a duty to warn of dangers that become known after the sale of the product. Many members of the Committee believe that the instruction, as proposed, already allows jurors to consider evidence of accidents that occurred after the sale of the product. The Committee deferred action on this comment, which it will continue to consider, until after the filing of this report.

Instruction 403.18d – Defense Issues, State-of-the-Art Defense

Three comments (from Mr. Fountain, Ms. Littky-Rubin, Mr. Stewart, Mr. Leopold, and Ms. Kroeger) suggested that instruction on the State-of-the-art Defense, 403.18d, should not be included in instruction 403.18 as a Defense Issue. Although the instruction tracks section 768.1257, Florida Statutes, which uses the term "defense," these attorneys reasoned that this statute actually involves an evidentiary issue. If a defendant prevails on a defense listed in 403.18, then instruction 403.19 – Burden of Proof on Defense Issues, tells the jury to enter judgment for the defendant. These attorneys suggest moving this instruction to make clear that the defendant is not entitled to judgment if it prevails on this issue. They suggest moving this instruction to instruction 403.11 on inferences or

creating a new instruction.

The Committee agrees with these comments that section 768.1257 does not create a complete defense. As suggested in the comments, this instruction deals with an evidentiary issue. The Committee believes that instruction 403.18d accurately paraphrases section 768.1257. The Committee will continue to consider whether this instruction should be moved to another location.

Instruction 403.19 – Burden of Proof on Defense Issues

As preliminarily approved by this Court, instruction 403.19 – Burden of Proof on Defense Issues, asks the jury to determine the percentage of the plaintiff's and defendant's "fault" and write it on the verdict form. Three of the comments (from Mr. Fountain, Ms. Littky-Rubin, Mr. Stewart, Mr. Leopold, and Ms. Kroeger) expressed concern that it is not accurate to use the term "fault" in a products liability case. This is because liability is imposed without regard to fault.

The subcommittee discussed the fact that the Court had already preliminarily approved the use of the term "fault" in this instruction and in instruction 403.17, Burden of Proof on Main Claim. The Committee used the word "fault" as a way to explain to jurors in plain English how to apportion liability between defendants, non-party Fabre defendants, and the plaintiff.

VII. CONCLUSION

WHEREFORE, for the above reasons, the Committee respectfully requests

that the Court approve these instructions for publication and their inclusion in the Standard Jury Instructions (Civil) as new standard jury instructions for product liability cases.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by e-mail this 16th day of April, 2013, to:

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CERTIFICATE OF COMPLIANCE

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

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