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Appendix C: Comments received by Committee

**Report No. 13-01 of the Committee on Standard Jury Instructions (Civil)
Products Liability Instructions**

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February 21, 2013

Via email only

The Honorable James M. Barton II
bartonjm@fljud3.org

Re: Comments on Proposed Amendments to Jury Instructions in Product Liability Cases, Published in the *Florida Bar News*, February 1, 2013

Dear Judge Barton:

Please accept our comments regarding the Committee's Proposed Product Liability Jury Instructions.

We first want to commend the Committee for having the fortitude and stamina to take on such a tremendous and important project. The end result of these substantial efforts—which will no doubt be in place for many, many years and affect countless citizens—have produced an extremely well thought out and balanced framework for dealing with an ever changing area of law, and one that is uniquely affected by case law from Florida and around the country.

Our review of the Proposed Instructions has led us to address four areas of concern:

1. That the legal theory of **post-sale duty to warn** is missing from 403.10;
2. That the preliminary issue instructions contained in 403.13 and 403.14 suggest that liability against a party in the chain of manufacture and distribution presupposes the ability “to correct” defects, which respectfully is not accurate;
3. That the evidentiary presumption contained in §768.1257 (**state of the art defense**) is presented as an actual “defense” (which in reality is not the case, despite the Legislature’s labeling) and should not be included as jury instruction in 403.18(d), which is the section on “Defenses”; and
4. The use of the term “**fault**” found in jury instruction 403.19, when “fault” is not a basis for liability under traditional concepts of strict liability.

We discuss the bases for these concerns in detail below.

1. Florida law recognizes a post-sale duty to warn which should be reflected in 401.10.

In *Sta-Rite industries, Inc. v. Levey*, 909 So. 2d 901, 905 (Fla. 3rd DCA 2004), the Third District wrote that a jury question arose out of the defendant's failure to reasonably warn the purchaser and users of an extreme danger presented by the product, particularly in the light of similar severe accidents "which occurred both before **and after** the sale of the pump in question." See also, *Williams v. American Laundry and Machinery Industries*, 509 So. 2d 1363, 1365 (Fla. 2nd DCA 1987)(where the court acknowledged the plaintiff's argument regarding a post-sale duty to warn, but held that because the statute of repose extinguished any products liability causes of action after 12 years in **that case**, there was no further duty to warn of a defect).

We respectfully submit that the Committee should include a standard instruction regarding a post-sale duty to warn under appropriate circumstances, and in cases where the statute of repose has not expired. We suggest the instruction be made part of 403.10, thereby adding to the end of 403.10: "even if the (defendant) became aware of these risks after the product was sold."

We submit that as part of the comments to 403.10, the Committee could cite to *Williams, supra.*, noting that the "post-sale duty to warn" part of the instruction would not be applicable in the event that the accident occurred outside of the repose period.

2. Instructions 403.13 and 403.14 suggest that all defendants in a product liability case are in "a position to correct defects," which is simply not the case.

The preliminary issue instructions of 403.13 and 403.14 are a bit confusing, and seem to contravene Florida's longstanding legal principle of "strict liability" (responsibility even without fault or an opportunity to "correct" the defect).

Our law has long held that any designer, manufacturer, distributor, seller, wholesaler, retailer, etc., who is engaged within the chain of distribution of a defective product, is liable for injuries caused by defects to the same extent as any other member of the chain of distribution, notwithstanding that the particular participant in the chain of distribution of a **defective product may have had zero input into the product's design or manufacture, and had no knowledge of the defective nature of the product.** Currently, our law allows the imposition of liability against parties, **even though they may have never seen, touched, or tested the product, and had no ability to affect the design.**

Since *West v. Caterpillar*, Florida law has long espoused the policy that the risk of loss can be contractually shifted between those involved with, and engaged in, the chain of distribution of a product. *West* imposed strict liability for losses resulting from a product in a defective condition,

unreasonably dangerous to the user. That kind of liability is not only imposed upon the product's manufacturer and seller, but also upon the product's distributor, assembler, and commercial lessor. *See, e.g., West v. Kawasaki Motors*, 595 So. 2d 92 (Fla. 3rd DCA 1992)(distributor liability); *Cunningham v. Lynch-Davidson Motors, Inc.*, 425 So. 2d 131 (Fla. 1st DCA 1982 (assembler liability); *Samuel Friedland Family Enterprises v. Amoroso*, 630 So. 2d 1067 ((Fla. 1994)(commercial lessor liability).

As a result, those entities are, and should all be equally liable to the plaintiff, rather than forcing the injured plaintiff to bear the burden of his/her injuries alone.

In the real world, indemnity and hold harmless agreements enable participants in the chain of distribution to account for and manage this risk. *See, e.g., American Aerial Lift, Inc. v. Perez*, 629 So. 2d 169 (Fla. 3rd DCA 1993)(noting that parties in the chain of distribution are entitled to an indemnity, ultimately ensuring that the loss is borne by the entity responsible for creating the defect). Thus, management of the risk is simply built into the financial arrangements which accompany the product's development, distribution and sale.

That said, Proposed Instructions 403.13 and 403.14 seem to invite defense attorneys to argue to the jury that the law does not impose liability on those entities **not in a position to correct a defect** or to control the risk of harm after the product is sold.

In other words, these instructions make "fault" a consideration as part of a legal concept that requires no fault.

Further, although 403.13 refers to an "issue for you to decide...", the instruction never identifies what should or must occur if the jury indeed determines that a given defendant was **not** in a position to correct a defect or control the risk of harm after the product is sold.

Again, it appears that the intent of the instruction is to suggest that if the entity was **not** in a position to correct or control the risk--pre or post sale--then the jury may find the entity not liable. That syllogism simply belies Florida's strict liability law, which imposes liability under certain circumstances, notwithstanding an actual finding of "fault."

If so, then including this instruction appears to introduce an issue and create an evidentiary burden on the plaintiff **that does not exist in the law**, *i.e.*, in order to recover a verdict against an entity who is unquestionably engaged in the chain of distribution of a defective product, a plaintiff must prove that that entity was in a position to correct the defect or to control the risk post sale. Our law has never imposed such a requirement, and we are concerned about a standard jury instruction which so suggests.

Even if this issue and instruction were proper, the instruction provides no guidance, nor any standard for determining what showing is required in order to satisfy the element of “being in a position to correct a defect or control the risk of harm after the product is sold.”

We suggest that the Committee remove these sections.

3. *Despite how the Florida Legislature has labeled them, the evidentiary presumptions that exist regarding compliance with government rules and the “state of the art” do not amount to legal “defenses,” which absolve entities from liability, and should not be cast as such.*

While the Florida Legislature did use the term “defense” in §768.1256 (government rules “defense”) and §768.1257 (state of the art “defense”), a review of those sections demonstrates that these are simply matters of evidence, and do not in actuality provide a “defense.”

A “defense” necessarily implies an “affirmative” defense, which ultimately amounts to an absolution of the defendant. *See, e.g., Wausau Ins. Co. v. Haynes*, 683 So. 2d 1123, 1124 (Fla. 4th DCA 1996) (Noting that in ruling on a motion to dismiss, courts must confine themselves to allegations in the complaint and may not consider affirmative defenses “which might absolve the defendant(s) of liability at a motion for summary judgment or at trial.”). As evidenced by the notes to 403.18b, the Committee too views these “defense issues” as “affirmative” defenses, which in turn may absolve defendants from ultimate liability.

Interestingly, the Committee specifically chose **not** to create a “Government Rules Defense” instruction. *See*, 401.18c. While we do not know the reasoning behind this decision, it seems to make sense for the Committee to follow the same reasoning with respect to the purported “state of the art defense.”

There is simply no state of the art “defense” that exists in Florida. There is no law or jury instruction that has ever stood for the proposition that if the jury determines that if a product meets the “state of the art,” that a verdict should be rendered in favor of the defendant, or that a verdict for the plaintiff should be lessened or reduced in some way.

State of the art has always simply been an aspect of evidentiary timing; not a liability or a “defense” issue. In other words, “state of the art” is merely a way for the jury to consider the scientific and technical knowledge and other circumstances that existed at the time of the product’s manufacture, when making its overall determination of defectiveness.

It is undisputed that a product can still be defective, and it would still be entirely proper for the jury to so find, **even if the product was indeed “state of the art.”**

Elevating this timing standard, and labeling it a “defense,” is a misleading misnomer that will cause tremendous confusion, not the least of which will be a push to include this as a separate question on verdict forms. It will also likely lead defense attorneys to file motions for summary judgment and directed verdict, and make arguments to the trial courts that compliance with “state of the art” should somehow entitle them to dismissal from the lawsuit entirely.

Lastly, state of the art is undefined and indeed likely impossible to define in any uniform or repeatable manner. As such elevating this to the level of affirmative “defense” is sure to create inconsistencies in the application of the law, and result in additional appeals.

Our suggestion is that word **defense** be removed from any reference to **state of the art** and that **state of the art** (as well as government rules) be removed from the defense issue section of the instructions. These evidentiary issues are perhaps better left out entirely from these jury instructions, or at the very least, taken from the section on “Defense Issues,” and insert it as a new section after 403.11 (“Inference of Product Defect or Negligence”). Perhaps section 403.11 should be entitled “Evidentiary Issues,” and what is currently 403.11, can become 403.11a. The Committee may then considering a section “403.11b” called “State of the Art,” and can repeat the text currently found in 403.18d, there.

4. *The use of the term “fault” in instruction 403.19 may very well mislead the jury with a misstatement of law suggesting that “fault” is a legal concept governing all products liability cases.*

The Proposed Instruction 403.19 instructs the jury to “decide and write on the verdict form what percentage of the total **fault** of all parties to this action was caused by each of them.”

While “fault” is a negligence concept and does play a role when the plaintiff is alleged to have done something to contribute to his or her own injuries, the use of the term “fault” is still confusing, and potentially misleading. Strict liability is a legal concept that focuses on defects rendering products unreasonably “dangerous,” not on **fault**. Indeed, both the law and these very instructions, make clear that liability for a defective product can and does exist even in the absence of any “fault.”

In fact, in four different places in these instructions [note 5 to instruction 403.7, note 2 to instruction 403.8, note 2 to instruction 403.9, and the note to instruction 403.10], the Committee acknowledges the difference between strict liability and negligence, and states that it “may be necessary to add language to the strict liability instructions to the effect that a product is defective if unreasonably dangerous, **even though the seller has exercised all possible care** in the preparation and sale of the product.”

The Honorable James M. Barton II
February 21, 2013
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In other words, the Committee correctly recognizes that the plaintiff may recover if the jury finds the product is defective, even if the best of care was utilized, state of the art was met or exceeded, and **no party is found to have been at any fault.**

In order to resolve this conflict, we suggest that the instruction be modified by adding the note referenced above to instructions 403.7, 403.8, 403.9 and 403.10, to 403.19. This will inform trial judges and litigants alike that "fault" does not always have a place in these cases, despite the language of the instruction.

Again, we appreciate the Committee's obvious time and great consideration that led to these draft instructions, and hope it will consider our comments and suggestions.

Respectfully submitted,



DON FOUNTAIN



JULIE H. LITTKY-RUBIN

DF/JHL-R/sb/tmw
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February 27, 2013

Via email only

The Honorable James M. Barton II
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**Re: Comments on Proposed Amendments to Jury Instructions in Product Liability Cases
(Florida Bar News, February 1, 2013)**

Dear Judge Barton:

I am writing today to comment on the Committee's Proposed Product Liability Jury Instructions. My colleagues Don Fountain and Julie H. Littky-Rubin have brought these matters to my attention.

While it is a long and argues process and the Committee's efforts are to be applauded, there are a few concerns we have with the current proposals:

1. That the legal theory of **post-sale duty to warn** is missing from 403.10;
2. That the instructions in 403.13 and 403.14 suggest that liability against a party in the chain of manufacture and distribution presupposes the ability "to correct";
3. That the evidentiary presumption contained in §768.1257 (**state of the art defense**) is presented as an actual "defense" and should not be included as jury instruction in 403.18(d); and
4. The use of the term "**fault**" found in jury instruction 403.19, when "fault" is not a basis for liability under traditional concepts of strict liability.

Thank you for your time and consideration.

Very truly yours,

Todd S. Stewart, P.A.

BY: s
TODD S. STEWART

TSS/dd

Board Certified Specialist in Civil Trial Law by the Florida Bar
Board Certified Trial Specialist by the National Board of Trial Advocacy
Board Certified Civil Pretrial Practice Advocate by the National Board of Legal Specialty Certification



To: The Florida Standard Jury Instruction Committee (Civil)

From: Wendy F. Lumish
Richard ("Dick") Caldwell

Date: February 28, 2013

**Re: Comments in Response to Proposed Amendments to Products
Liability Jury Instructions**

The undersigned submit the following comments with respect to the proposed amendments to the products liability jury instructions published February 1, 2013.¹

Notes on Use 1 to 403.7

We agree with the suggested change to eliminate the second sentence of Note 1, but believe the first sentence should be deleted as well.

That sentence provides that “the claimant is not required to plead or prove whether the defect in the product came from its design or manufacture, which cites Ford Motor Co. v. Hill, 404 So. 2d 1049 (Fla. 1981), and McConnell v. Union Carbide Corp., 937 So. 2d 148 (Fla. 4th DCA 2006), First, we submit that it is not the role of the Committee to advise litigants of pleading and proof requirements.

¹ The undersigned were members of the Supreme Court Committee on Standard Jury Instructions from 2001 – 2009 and participated in the oral arguments before the Florida Supreme Court with respect to the earlier version of the proposed instructions.

That Note did not appear in the notes to PL5 and it would appear that it was included in the prior proposal because of the Committee's decision to merge manufacturing and design defect claims into one instruction. Since the two instructions are once again separated, there is no need to include this Note.

Second, we believe the note is not supported by the cited cases. Ford Motor Co. v. Hill, 404 So. 2d 1049 (Fla. 1981), involved a crashworthiness claim (i.e., a claim that an alleged defect did not cause the accident, but rather the defect caused a greater injury than what would have been experienced absent the defect). In Ford Motor Co. v. Evancho, 327 So. 2d 201 (Fla. 1976), the Court had adopted the crashworthiness doctrine in the context of a negligence claim, and the issue in Hill was whether to extend crashworthiness to a strict liability claim. Hill, 404 So. 2d at 1049-50. The Court held that there was no basis to distinguish between a case in which the product causes the primary collision and one in which the product brings about further injury. Id. at 1050-52.

Ford responded that the Court should maintain a distinction between manufacturing defects for which there could be strict liability, and design defects for which a negligence theory should apply. The Court disagreed and found strict liability applies in a design defect case whether based on design or manufacture, and whether based on a defect that caused the accident, or one that caused an

enhanced injury (i.e., a crashworthiness claim). Id. This holding has nothing to do with the requirement of pleading or proof as to these claims.

Nor do we believe McConnell v. Union Carbide Corp., 937 So. 2d 148 (Fla. 4th DCA 2006), resolves this issue. McConnell was an asbestos claim involving strict liability for failure to warn. See id. at 149-51. The defendants objected to the use of PL4 and PL5 claiming that Florida does not recognize a manufacturing or design defect claim for "raw" asbestos incorporated into a manufactured product. Id. at 1049-50. The defendant also argued the plaintiffs had not pled whether the alleged defect was one of design or manufacture and thus PL4 and PL5 should not be used. Id. at 152. The trial court did not give PL4 or PL5 and instead instructed on failure to warn. Id. at 150. The Fourth District reversed holding, inter alia: the argument that PL4 and PL5 were not applicable because of the failure to plead and prove whether the defect came from its design or from its manufacturer is not correct. Id. at 152. Thus, the issue was whether the failure to characterize the defect as manufacturing or design, avoided application of PL4 and PL5. That, in our view, does not support the Note concerning pleading and proof requirements.

Note on Use 5 to 403.7²

Note on Use 5 indicates that in cases involving both negligence and strict liability claims, the jury may need to be instructed that the seller can be strictly

² Because this note is repeated in 403.8, Note 2; 403.9, Note 2 and 403.10, the comments apply to those notes as well.

liable even if it exercised all possible care. While the undersigned agree that there are differences between a strict liability and negligence case, we believe that the difference being "clarified" is not correct.

First, the instruction on strict liability already advises the jury of all the elements of that claim. If a court were to insert the suggested language to the effect that a product may be defective even though the seller exercised all possible care, that would emphasize one party's burden (or perhaps more accurately stated, lack of burden) and, would, in effect be a comment on the evidence. As such, this should not be included.

Second, the Note fails to advise the jury of the critical difference between negligence and strict liability in a design defect case. Specifically, in a design defect case asserting a claim based on negligence, the defendant can only be liable if the jury first finds that the product was defective. The law is well settled that "[a]t the heart of each theory [of product liability] is the requirement that the plaintiff's injury must have been caused by some defect in the product." Royal v. Black & Decker Mfg. Co., 205 So. 2d 307, 309 (Fla. 3d DCA 1968); West v. Caterpillar Tractor Co., 336 So. 2d 80, 86 (Fla. 1976) (quoting Royal). See also Marzullo v. Crosman Corp., 289 F. Supp. 2d 1337, 1342 (M.D. Fla. 2003) (recognizing that in a products liability case, the elements of negligence apply, but

the plaintiff must also prove that the product was defective or unreasonably dangerous).

Applying this requirement, Florida courts have often held that where a jury finds that a product is not defective by virtue of its design, the manufacturer cannot be negligent in so designing the product. For example, in North American Catamaran Racing Association, Inc. v. McCollister, 480 So. 2d 669 (Fla. 5th DCA 1985), the trial court instructed the jury as to both strict liability/design and negligence/design. Id. at 670-71. The jury found that the product was not defective (i.e., defendant was not strictly liable), but found that defendant was negligent. Id. at 671. Because the plaintiff's negligence claim was premised on the theory that the product was negligently designed, the court ruled that a verdict finding no defect, but finding negligence, was fundamentally inconsistent. See id.

Similarly, in Consolidated Aluminum Corp. v. Braun, 447 So. 2d 391 (Fla. 4th DCA 1984), the court rejected a jury determination of negligence where the jury also determined there was no defect in the product. The court concluded that the allegations of negligence were dependent upon proof of a defect. See id. at 392. Therefore, absent a finding of a defect, there could be no negligence. See id.

Other decisions are in accord. See, e.g., Nissan Motor Co. v. Alvarez, 891 So. 2d 4, 6, 8 (Fla. 4th DCA 2004) (fundamentally inconsistent verdict results where jury returns verdict finding that product was not defectively designed, but

that manufacturer was negligent in the design, manufacture, assembly, distribution or sale of the vehicle); Siemens Energy & Automation, Inc. v. Medina, 719 So. 2d 312, 315 (Fla. 3d DCA 1998) ("Because the jury found in its verdict that Siemens did not manufacture a defective product, this precluded any findings of strict liability or negligence based on a defective product"); Ashby Div. of Consol. Aluminum Corp. v. Dobkin, 458 So. 2d 335, 337 (Fla. 3d DCA 1984) (finding verdict inconsistent, reasoning that "[a]bsent proof of a defect, there were no grounds upon which to find defendants negligent").³

In light of this settled law, the jury must be instructed that they must find there was a defect in order to impose liability for negligence in design. This can be accomplished several ways. The preferable way would be to add the following italicized language to 403.9.

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.

Comparable language would be necessary for 403.10 as well.

The alternative would be to add language to Note on Use 5 indicating that in cases in which negligence and strict liability are tried together, the jury must be

³ Indeed, the foregoing decisions were the basis of the current Note on Use related to inconsistent verdicts discussed infra.

instructed that in order to find Defendant liable for negligent design, they must find that there was a defect in design.

As a separate point, the undersigned believe that the Committee should retain the portion of the current Note on Use in PL 5 related to inconsistent verdicts to the effect that:

In cases involving claims of both negligence and defective design, submission of both claims may result in an inconsistent verdict. See, e.g., Consol. Aluminum Corp. v. Braun, 447 So.2d 391 (Fla. 4th DCA 1984); Ashby Div. of Consol. Aluminum Corp. v. Dobkin, 458 So.2d 335 (Fla. 3d DCA 1984). See also Moorman v. American Safety Equip., 594 So. 2d 795 (Fla. 4th DCA 1992); North American Catamaran Racing Ass'n. v. McCollister, 480 So.2d 669 (Fla. 5th DCA 1985).

Objection To Elimination Of Reference To Two Issue Rule

Several years ago, the Committee determined that it was important to alert judges and lawyers that the decision as to whether to use one of two definitions of design defect (risk benefit and consumer expectation) could implicate the two issue rule. Thus, the Committee added a sentence in current Comment 2 to PL5 as follows:

The committee notes, however, that the two issue rule may be implicated if both tests of design defect are used. Zimmer, Inc. v. Birnbaum, 758 So. 2d 714 (Fla. 4th DCA 2000).

This Court agreed and the comments were amended. See In re Standard Jury Instructions-Civil Cases, 872 So. 2d 893, 896-97 (Fla. 2004).

The proposed instruction eliminates that reference, notwithstanding that the law has not changed since 2004. Accordingly, the undersigned believe this comment should be added back into the Notes on Use.

Note on Use 1 to 403.8

Note on Use 1 identifies several cases that set forth the test for strict liability in a failure to warn case, all of which are from the Fourth District. The Third District cited this test in Union Carbide Corp. v. Aubin, 97 So.3d 886, 898 (Fla. 3^d DCA 2012).

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LEOPOLD LAW^{PA}

Leopold Weiss Kroeger Thomas Sobel

March 1, 2013

Via email only

The Honorable James M. Barton II
bartonjm@fljud13.org

Re: Comments on Proposed Amendments to Jury Instructions in Product Liability Cases, Published in the *Florida Bar News*, February 1, 2013

Dear Judge Barton:

Thank you for allowing us the opportunity to provide our comments on the Committee's Proposed Product Liability Jury Instructions. As practitioners in this area, our review of the Proposed Instructions has led us to address four areas of concern:

1. The legal theory of *post-sale duty to warn* is missing from 403.10. In *Sta-Rite Industries, Inc. v. Levey*, 909 So. 2d 901, 905 (Fla. 3rd DCA 2004), the Third District wrote that a jury question arose out of the defendant's failure to reasonably warn the purchaser and users of an extreme danger presented by the product, particularly in the light of similar severe accidents "which occurred both before and after the sale of the pump in question." See also, *Williams v. American Laundry and Machinery Industries*, 509 So. 2d 1363, 1365 (Fla. 2nd DCA 1987) (where the court acknowledged the plaintiff's argument regarding a post-sale duty to warn, but held that the 12-year statute of repose had extinguished any products liability cause of action under the facts of that case). In conformance with Florida law, the Committee should include a standard instruction regarding a post-sale duty to warn under appropriate circumstances, and in cases where the statute of repose has not expired. We suggest the instruction be made part of 403.10, thereby adding to the end of 403.10: "even if the (defendant) became aware of these risks after the product was sold."

2. The preliminary issue instructions contained in 403.13 and 403.14 suggest that liability against a party in the chain of manufacture and distribution presupposes the ability "to correct" defects, which is not an accurate reflection of the law in Florida. Florida law has long held that any designer, manufacturer, distributor, seller, wholesaler, retailer, etc., who is engaged within the chain of distribution of a defective product, is liable for injuries caused by defects to the same extent as any other member of the chain of distribution, notwithstanding that the particular participant in the chain of distribution of a defective product may have had zero input into the product's design or manufacture, and had no knowledge of the defective nature of the product. Since *West v. Caterpillar*, Florida law has long espoused the policy that the risk of loss

can be contractually shifted between those involved with, and engaged in, the chain of distribution of a product. *West* imposed strict liability for losses resulting from a product in a defective condition, unreasonably dangerous to the user. That kind of liability is not only imposed upon the product's manufacturer and seller, but also upon the product's distributor, assembler, and commercial lessor. See, e.g., *West v. Kawasaki Motors*, 595 So. 2d 92 (Fla. 3rd DCA 1992)(distributor liability); *Cunningham v. Lynch-Davidson Motors, Inc.*, 425 So. 2d 131 (Fla. 1st DCA 1982 (assembler liability); *Samuel Friedland Family Enterprises v. Amoroso*, 630 So. 2d 1067 ((Fla. 1994)(commercial lessor liability). As a result, those entities are, and should all be equally liable to the plaintiff, rather than forcing the injured plaintiff to bear the burden of his/her injuries alone. Proposed Instructions 403.13 and 403.14 appear to change the state of Florida law by indicating the law does not impose liability on those entities not in a position to correct a defect or to control the risk of harm after the product is sold by making "fault" a consideration as part of a legal concept that requires no fault. These sections should be eliminated from the proposed jury instructions.

3. The evidentiary presumption contained in §768.1257 (**state of the art defense**) is presented as an actual "defense", although Florida law does not absolve a defendant of liability upon presentation of evidence that its product was state of the art. There is no law or jury instruction that has ever stood for the proposition that if the jury determines that if a product meets the "state of the art," that a verdict should be rendered in favor of the defendant, or that a verdict for the plaintiff should be lessened or reduced in some way. State of the art has always simply been an aspect of evidentiary timing; not a liability or a "defense" issue. In other words, "state of the art" is merely a way for the jury to consider the scientific and technical knowledge and other circumstances that existed at the time of the product's manufacture, when making its overall determination of defectiveness. It is undisputed that a product can still be defective, and it would still be entirely proper for the jury to so find, even if the product was indeed "state of the art." Elevating this timing standard, and labeling it a "defense," is a misleading misnomer that will cause tremendous confusion, not the least of which will be a push to include this as a separate question on verdict forms. It will also likely lead defense attorneys to file motions for summary judgment and directed verdict, and make arguments to the trial courts that compliance with "state of the art" should somehow entitle them to dismissal from the lawsuit entirely. This evidentiary issue should be removed from the proposed jury instructions, or at the very least, taken from the section on "Defense Issues," and insert it as a new section after 403.11 ("Inference of Product Defect or Negligence"). Perhaps section 403.11 should be entitled "Evidentiary Issues," and what is currently 403.11, can become 403.11a. The Committee may then considering a section "403.11b" called "State of the Art," and can repeat the text currently found in 403.18d, there.

The Honorable James M. Barton II
February 21, 2013

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4. The use of the term “fault” found in jury instruction 403.19, when “fault” is not a basis for liability under traditional concepts of strict liability. The Proposed Instruction 403.19 instructs the jury to “decide and write on the verdict form what percentage of the total **fault** of all parties to this action was caused by each of them.” While “fault” is a negligence concept and does play a role when the plaintiff is alleged to have done something to contribute to his or her own injuries, the use of the term “fault” is confusing and misleading in a products liability case in which there is an action for strict liability. Strict liability is a legal concept that focuses on defects rendering products unreasonably “dangerous,” not on fault. Indeed, both the law and Committee’s proposed instructions make clear that liability for a defective product can and does exist even in the absence of any “fault.” To avoid confusing and misleading the jury regarding the need for a determination of a defendant’s fault in a count for strict liability, the proposed instructions should be modified by adding to proposed instruction 403.19 the clarifying note contained that is already contained in instructions 403.7, 403.8, 403.9 and 403.10—that it “may be necessary to add language to the strict liability instructions to the effect that a product is defective if unreasonably dangerous, even though the seller has exercised all possible care in the preparation and sale of the product.” This will inform trial judges and litigants alike that “fault” does not always have a place in these cases, despite the language of the instruction.

We greatly appreciate the Committee’s obvious time and great consideration that led to these draft instructions, and hope you will consider our comments and suggestions.

Respectfully submitted,



THEODORE J. LEOPOLD



LESLIE M. KROEGER

cc: Jodi Jennings, jjennings@flabar.org